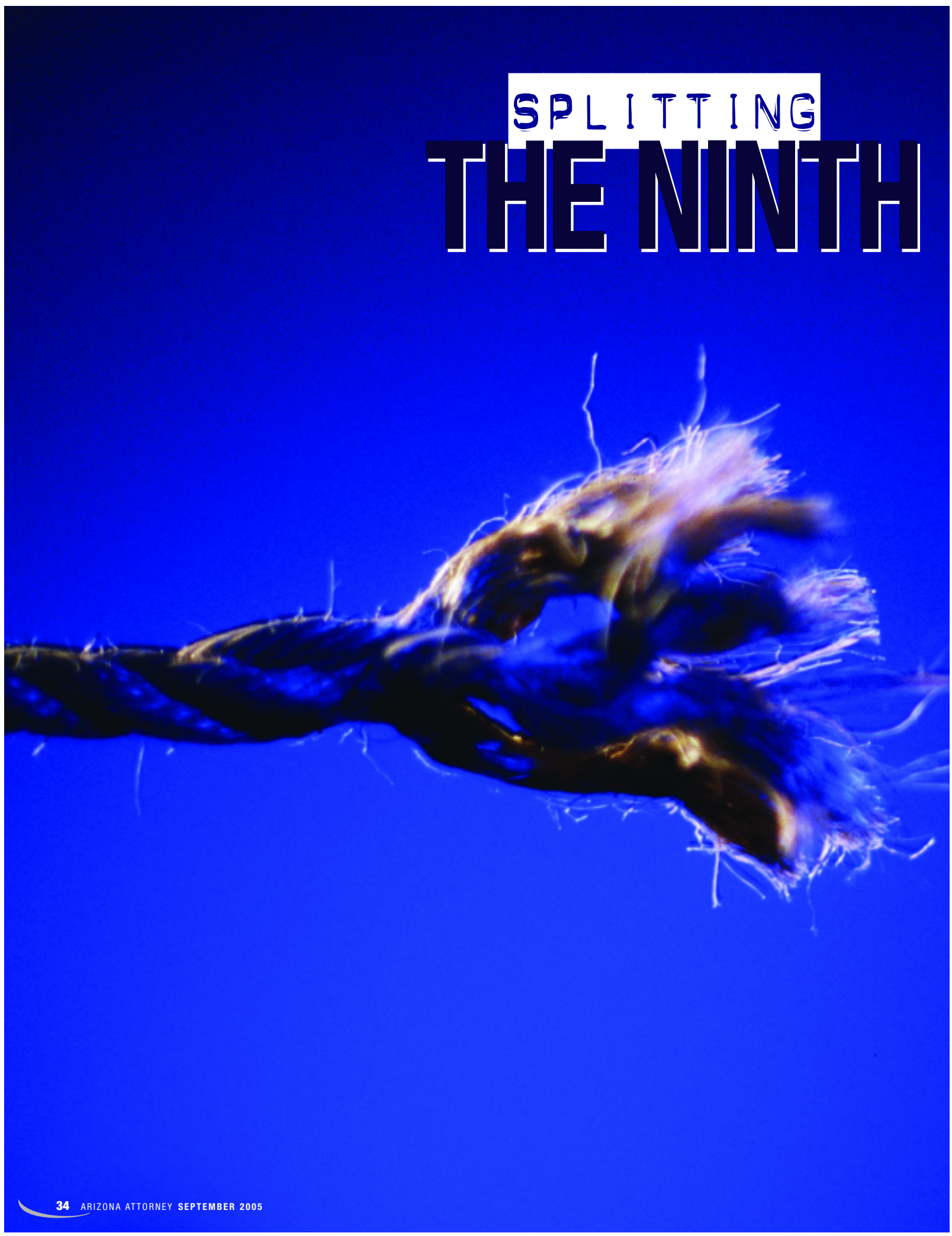
SPLITTING THE NINTH



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CIRCUIT

BY ROXIE BACON

RETAIN THE NINTH CIRCUIT: An Efficient and Excellent Bench

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SOUNDOFF: The State Bar of Arizona has a long history of objecting to proposals to split the Ninth Circuit. But the Bar would like to hear from its members on both sides of the question. To give your input, write to 9thcircuit@azbar.org. And send letters to the editor to Tim.Eigo@staff.azbar.org.

The proposals to carve up the Ninth Circuit suffer from the same problem as carving up the annual turkey: No matter how you slice it, the result is less than the whole.

Breaking up the Court does not save money; it eats it up. It does not foster efficiency but rewards duplications. And it is not necessary in order to cope with an oversized workload or bench, because neither is oversized.

Most important, it retards the administration and delivery of justice, the serious and majestic purpose of our courts. Somehow in the tempest of pork barrels mixed with intransigent ideology—the two real drivers behind the breakup proposals—delivering justice has been pushed aside by the pettiest politics.

What the breakup *would* do is throw "brick and mortar" pork at Arizona, but at the expense of an efficient federal justice system for Arizona's citizens. What it *would* do is isolate Arizona into a geographically stretched group of marginal states with marginal issues, to the obvious detriment of Arizona's non-marginal issues. What it *would* do is separate Arizona from its closest economic neighbor, California, creating highly prejudicial barriers to the growth of Arizona's industries and commerce.

Most alarming, what it *would* do is punish judges for decisions that deviate from positions advanced by a few of the extreme right's elected officials. At its meanest, then, the breakup proposals are really a full-scale attack on judicial independence, fueled by the Pledge of Allegiance decision that infuriated Representative James Sensenbrenner, Chair of the House Judiciary Committee. Apparently, these bully tactics are designed to bring the states within the Ninth Circuit into line, giving them a taste of the lash for not following Sensenbrenner's view of the law.

Arizona is a better state than that, and we

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have a much better federal bench and bar than that. We deserve to continue the Ninth Circuit tradition of excellence that has served us very well from its inception rather than trade down for a marginal and marginalized court whose decisions would be dictated by loud but painfully narrow interests.

The Numbers

It is easy to get caught in the numbers game. Judge Roll's article presents them in grids and tables and narratives. But as we all know, they can be manipulated to show just about anything. What would Judge Roll make of our state system, for example? We have 27 appellate judges and 111 trial court judges, without counting commissioners and justices of the peace, all of whom are administered by the state Supreme Court. Should we break it up as being unwieldy on the basis of numbers alone? Or should we do the obvious; use technology to manage cases and process with maximum efficiency and then enjoy the fruits of a vigorous and interesting docket that allows citizens to advance issues they deem important across the contiguous political bodies.

Ironically, the numbers from the proposed breakups of the Ninth Circuit only emphasize the waste and inequity that would result from any of the pending bills. The current proposals (a three-way split or a two-way split) yield fewer judges to carry the disproportionately heavy caseload in the remaining Ninth Circuit. Fox example, if the Ninth is split in two (S. 1296; H.R. 212), there would be 24 permanent judges and two temporary ones in the new Ninth, which would include California, Hawaii, Guam and the Northern Marianas. This new Ninth would have 74 percent of the judges, but 82 percent of the caseload, whereas the new Twelfth, with 14 judges and comprised of Alaska, Arizona, Idaho, Montana, Nevada, Oregon and Washington, would have only 18 percent of the caseload but 26 percent of the judges.

In a three-way split (S. 1301), the resulting Ninth Circuit would have 60 percent of the judges and 71 percent of the caseload, whereas the new Twelfth Circuit in which Arizona would be placed, along with Idaho, Montana and Nevada, would have eight judgeships, 23 percent of the sitting judges, but only 17 percent of the caseload. And in that three-way split, the new Thirteenth Circuit would have three states, Alaska, Oregon and Washington, with 17 percent of the judgeships but only 12 percent of the workload.

Clearly, the splits do nothing to solve the workload that comes from having the nation's largest population center, California, in the mix. And none of the splits would allow continuation of the current practice of assigning judges throughout the Ninth Circuit to manage workload surges and ebbs quickly and efficiently.

The proposals are not "new math" but bad math, and the resulting inequities would not be isolated to the new Ninth but rather would have a spillover effect to all the Circuits. Justice delayed or unduly burdened in the Ninth Circuit automatically would affect Arizona no matter what circuit Arizona is plopped into because so much of Arizona's commerce and interaction is with California. Separating ourselves artificially from the dominant player does not eliminate the dominant player, but just puts Arizona in a very back room.

The Current Ninth Circuit Is Not Too Big

I assess success in terms of goals. Therefore, before deciding if any circuit is "too big," it is reasonable to ask, "Too big for what?" My answer tracks as follows:

Q: What is the purpose of the Ninth Circuit?

A: To deliver justice.

Q: What is the relationship of size to accomplishing that purpose?

A: None has ever been shown.

That is the fact. There is not a whit of evidence showing that the Ninth Circuit's size is a negative in terms of the circuit's purpose. Even the "White Commission" to which Judge Roll refers repeatedly concluded that size itself is not a critical factor in appellate delay.

The experience around the nation confirms the White Commission finding. All circuits have grown, and will continue to grow, to accommodate population. In fact, since 1960, when no circuit had more than nine judgeships, only the First Circuit remains in single digits. Would Judge Roll pick an arbitrary number of judges and then require a split, regardless of facts and circumstances arguing otherwise? Or would he eschew an automatic indicator in favor of an assessment based on function and purpose, and be open to having the facts demonstrate that "size by itself is not critical."

Although size itself is not the problem, it certainly can be the solution. In the case of the existing Ninth Circuit, and to the annoyance of its critics, its size has allowed it to become a model of efficiency.

The numbers show that the Ninth Circuit is the fastest circuit in the nation in the time taken to decide cases after submission. The implementation of new case management techniques have decreased the time from last briefing to oral argument by 50 percent since 2001. In fact, splitting the Ninth Circuit would increase delay by curtailing or eliminating innovative programs that are too expensive to duplicate in one or two new circuits.

For example, the remarkable body of experienced staff attorneys in the Ninth Circuit slices delays like a team of judicious Samurai. Last year alone, staff attorneys prepared 1,421 habeas petitioners' requests for a Certificate of Appealability, 89 percent of which were denied by panels, terminating 1,265 cases at that stage. Staff attorneys also presented 2,182 merits cases to screening panels, resulting in termination of another 2,029 appeals. To put this sort of efficiency in perspective, the District of Columbia Circuit terminated only 1,155 cases and the First Circuit only 1,643 during the same time period.

The training, experience, tools and resources available from this cadre of experts are far too expensive to duplicate in a split circuit. They demonstrate continuing efficiencies that come from consolidation, as seen in the work of the staff attorney teams, along with the:

- Appellate Commissioner, who resolved 1,125 Criminal Justice Act fee vouchers and heard 4,062 substantive motions;
- Circuit Mediator, who settled 881 appeals out of 977 referred to it, a 90 percent success rate, more than 50 percent greater than any other circuit;
- Bankruptcy Appellate Panel, which resolved 615 appeals; and
- Case Batching, a system that inventories cases by issues, tracking them to

reduce the chance of inconsistent decisions and to leverage precedents.

Among the advantages of the current Ninth Circuit configuration that is crucial to Arizona is the fact that it provides a single body of law for the Pacific Rim economic area, which includes Mexico. That benefit is lost if the circuit is split.

What accompanies a circuit split? Forum shopping, competing or multiple legal teams representing businesses involved in more than one circuit, intercircuit conflict over questions that cover the territory of the new circuits. All of this would drive business away and harm the nation's economy, not just that of Arizona and the West.

Finally, in terms of managing size, I sometimes wonder if sitting judges have any idea what has happened to the world of lawyering since they took the bench. To call a system of 28 judges "huge" when so many law firms are bigger than that, and many have staffs in excess of 1,000 people, with multiple locations around the globe, suggests a parochial view of management entirely out of sync with what successful law firms, and the successful businesses they represent, cope with every day. Globally, business leaders constantly seek to consolidate and grow through acquisitions precisely because size allows them to leverage "back room" operations: technology, staff, budgeting, space and infrastructure. That is the model of the Ninth Circuit, and the model of the future.

Any Split Will Break the Bank

Although Judge Roll is in error in calling the Ninth Circuit "huge," he would be correct in calling the cost of creating a new circuit not just huge but COLOSSOLY GIGANTIC. The estimated cost of creating even one new circuit (and most suggestions end up with two new circuits, so you can double these numbers) is $100 million to $125 million dollars, with an additional $20 million a year in added administrative costs.

The logistics themselves are daunting. Although currently everyone is willing, even happy, to "leave their heart in San Francisco" in order to attend an oral argument, in one proposal, the seat of Arizona's circuit would be Missoula. People have left parkas and sled dogs in Missoula, but few hearts. In another it is Portland, a place not

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obviously linked to the federal issues in Arizona. In another, Phoenix becomes the new circuit head, in a gerrymandered jurisdiction whose only commonality seems to be that all states include the letter "A."

The waste of existing resources is just as stunning. For example, the Sandra Day O'Conner Federal Court building, just built, is instantly too small. If the current non-Arizona Ninth Circuit judges vacated it tomorrow, any proposed new circuit into which Arizona would be dropped would be too big to fit, even without its administrative staff. And of course new circuit court headquarters would have to be built in Portland and Missoula, and perhaps Seattle, at equally staggering expense. Leaving aside the capital investment, transition costs alone would destroy the budgets for the old and new circuits for the next decade.

At a time when we are feeling federal deficits acutely in many critical areas, wondering how we can fund social security or ensure basic medical care for our aging population and also fund a war that is so expensive we cannot provide armored vehicles for our soldiers, throwing buckets of money to appease disgruntled ideologues seems not just short-sighted, but callous.

On a more operational level, there would be no judicial salary increases at any level of the federal system, no funds to keep pace with technological efficiencies, and no funds to make the current courthouses more secure for litigants, attorneys and judges even in the face of increasing violent attacks.

What Do the Judges on the Ninth Circuit and Other Interested Parties Think?

The judges on the Ninth Circuit oppose the division overwhelmingly. Only three of the 24 sitting jurists have voted in favor of the division. All of the Chief Judges for the last 50 years (that's how long this political beast has been rearing its head) have opposed it. Every State Bar in the circuit opposes it. Every Federal Bar in the circuit opposes it. All the large specialty and county bars I contacted in preparing this article oppose it, including the Los Angeles County Bar, San Diego Bar, Seattle Bar and San Francisco Bar. A slew of op-ed opinions oppose it, including the *Sacramento Bee*, the *Seattle Post-Intelligencer*, the *Los Angeles Times* and the *New York Times*.

Perhaps the White Commission, chaired by a Supreme Court Justice and composed of people deeply involved in the federal courts, said it best in 1998: "There is still no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall."

The En Banc Process Is Flexible and Effective

Critics claim that only 11 of the 28 authorized circuit judgeships sit on the limited en banc courts, hence as few as six judges can decide the law of the circuit. What is not widely understood is that all judges of the court participate in the discussion about whether a case should go en banc, and that by statute, it requires the majority vote of active judges for a case to go en banc. The views of all judges are well articulated before the voting begins.

A recent study showed that 33 percent of the en banc decisions were unanimous, and 75 percent of the decisions were rendered by a majority vote of 8 out of the 11 members of the en banc court. More important, only between 20 to 25 cases are taken en banc each year, a fraction of the more than 4,500 cases that are decided on the merits.

It also bears noting that two judges of a three-judge panel bind a circuit in the usual course of decision-making. No critic of the Ninth Circuit is suggesting that rule, ubiquitous in the federal circuits, should be changed.

Furthermore, it is a rule of court that sets the number of judges to serve on the limited en banc court. If it chooses to do so, the court can increase that number through its rulemaking process. Statutory changes are not required. In fact, the court has the issue on its agenda to review precisely to ensure that the court's current rules best serve its constituents.

The existing rules do permit a full court en banc; it has never happened because the judges of the court have accepted the decisions of the limited en banc court and chose not to challenge them further.

So What's This All About, Alfie?

The facts show that there is no identified problem in the administration of the circuit or in its ability to deliver judicial services in a fair, timely and responsive manner. Because the stated motivation is a ruse, it is important to know what is really happening. The driver behind the current attacks to break up the circuit is politics—small and mean politics.

This time the main driver is Representative Sensenbrenner, the Chair of the very powerful House Judiciary Committee. Sensenbrenner took the Ninth Circuit "Pledge of Allegiance" case as a personal affront. He has stated again and again that he will use his personal power in Congress to block "any federal court appointments," not just those in the Ninth Circuit, until the Ninth Circuit is nuked.

He is bold in his agenda. He is all about revenge. In fact, he has expressed remorse that he cannot more directly retaliate against those sitting judges whose opinions do not track his. At an address at Stanford University in May, Sensenbrenner stated that "Judges should be punished in some capacity for behavior that does not rise to the level of impeachable conduct" and added that judges should remember that "tinkering with [federal court] jurisdiction" is an option available to Congress. He did not bother to cast even a thin veil over that threat.

Unfortunately, Sensenbrenner is not alone. In a remarkably candid comment that peels this very political onion to its odiferous core, Sen. Lisa Murkowski (R–Alaska) told us all what really bothers the critics of this Circuit. "You've got a circuit that is spending 85 percent of its time working on immigration stuff, and here comes an issue related to Alaska land and it's [sic] arcane law that they have not had an opportunity to study." Leaving aside the obvious pro-industry bias of her remarks when the federal court should be, above all, objective, and leaving aside the belittling of one of the nation's most perplexing social and legal issues, immigration, she suggests that the Ninth Circuit does not have time to pay attention to its work.

Insulting. And untrue.

Instant communication, automated case management systems, computer-aided legal research, scaleable staffing models, professional cadre of staff attorneys, issue tracking programs that allow all judges to know all other cases or decisions within the circuit

dealing with the same or similar issues, videoconferencing: all keep the court on top of its own cases and the law in other circuits. If one doubts the skill with which information is disseminated not only internally but to the public, take a look at the Ninth Circuit Web site (www.ce9.uscourts.gov), a model of "consumer-friendly" information with links to opinions and substantive law introductions.

Senator Murkowski, you have not a shred of evidence that the Ninth Circuit is dilatory in its decisions or that it is not thoroughly educated about the facts and record of the cases it decides.

No Matter What Congress Does, There Will Still Be a California

Without being too cheeky, what the advocates of splitting the Ninth Circuit really want to do, in descending order of preference, is: (a) Make California go away entirely; (b) Divide it so that its dominance is diluted; (c) Isolate it so that no one else "catches" its profile of dynamism and controversy, or its "blueness."

The primary goal of the proposals, whether two- or three-way splits, is to eliminate California from the political and legal lexicon because it is "too big, too liberal and too messy" for the current conservative ideologues to accept.

These assumptions hold less water than a Phoenix jogger in mid-July.

First, the Ninth Circuit is not a liberal bastion out of touch with the rest of the country, and the Supreme Court statistics prove it.

In 2005, the Ninth Circuit took in 15,392 cases. In 1,007 of those cases, 6.5 percent, the losing side sought Supreme Court review. A total of 94.5 percent of those who lost their appeal chose not to ask the high court to reverse. Of those who did seek review, the Supreme Court granted it in 19 cases, or 1.9 percent. Because it only takes four votes to accept review, the Supreme Court's review rate is itself a statement of agreement with the vast majority of the Ninth Circuit's work. Finally, the Supreme Court reversed the Ninth in 16 cases, or 1/10th of 1 percent of the Ninth's annual caseload. And even if you focus solely on the 1,007 cases in which review was sought, the "reversal"

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rate is about 1.5 percent, meaning that even in the eyes of litigants and the Supreme Court, the Ninth Circuit got it "right" 98.5 percent of the time. Nothing about that profile sounds like a court isolated from the mainstream.

Liberals, whatever that may mean, do not dominate the Ninth Circuit. There are 11 active judges sitting on the court in California, one of whom is originally from Washington state. Three were appointed by Republican presidents. Neither the six non-Republicans nor the three Republicans share a uniform political ideology. In fact, the "Pledge of Allegiance" decision was authored by a Nixon appointee and not overturned but vacated on a procedural point, not the merits. As many a President has found, party affiliation by itself is no predictor of judicial philosophy.

Second, to the extent Representative Sensenbrenner wishes to nudge the Court in a particular direction, his best chance is not in nuking it but in filling its seats. There are currently four vacancies on the Ninth Circuit. Filling them gives this Administration great influence over the Circuit, whereas splitting it would diffuse that same influence. This simple and obvious response, of course, would actually solve the problem.

Alas, keeping the Ninth Circuit as a whipping post serves the true political interests of its critics, and so Sensenbrenner chooses to block the very appointments that could solve his "problem." His failure to do his part in delivering judicial services costs the citizenry, of course. No regular taxpayers in the Ninth Circuit need or want his artificial controversy.

And What About Judicial Independence?

These attacks are not just silly political games that justify our national devotion to Jon Stewart's take on the nation's leaders. Unfortunately, Sensenbrenner and Murkowski's chilling statements are shockingly at odds with a bedrock of our freedoms—a truly independent judiciary. Re-arranging and eliminating judges to punish and isolate those who disagree with an elected official is the stuff of banana republics. They are not the stuff of a democracy founded on free speech and a tripartite system of checks and balances.

Our federal courts are the forum for citizens to bring federal legal disputes to conclusion, guided by judges or justices who enjoy lifetime tenure and whose primary role is to protect the citizenry from government excesses by holding the line on constitutional protections. They also have more mundane tasks, but at their most regal they are the thin but powerful protectors we citizens have against unbridled legislative and executive powers.

The White Commission, oft-quoted by Judge Roll, agreed wholly with this truism:

> There is one principle that we regard as indubitable: It is wrong to realign circuits (or not realign them) and to restructure courts (or leave them alone) because of particular judicial decisions of particular judges. This rule must be faithfully honored for the independence of the judiciary is of constitutional dimension and requires no less.

Seen in this light, the inclusion of

endnotes (pro)

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1. Russell R. Wheeler & Cynthia Harrison, *Creating the Federal Judicial System* 18-20 (3d ed. 2005) (visited July 15, 2005) <www.fjc.gov/public/pdf.nsf/lookup/Creat3rd.pdf/$File/Creat3rd.pdf>.
2. Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* 29 (1998) [hereinafter *White Commission*] (visited July 15, 2005) <www.library.unt.edu/gpo/csaf-ca/final/appstruc.pdf>.
3. Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States*, Mar. 18, 2003, at 18-19 (visited July 15, 2005) <www.uscourts.gov/judconf/marc03proc.pdf>.
4. Administrative Office of the United States Courts, *Reports on Article III Judgeships, Magistrate Judgeships, and Bankruptcy Judgeships* (2004). On file with author.
5. Interview with Diarmuid F. O'Scannlain, Circuit Judge, United States Court of Appeals for the Ninth Circuit (Mar. 3, 2003) (visited July 15, 2005) <http://legalaffairs.org/howappealing/20q>.
6. *See United States v. Barona*, 56 F.3d 1087, 1105 (9th Cir. 1995) (Reinhardt, J., dissenting) ("The majority's cavalier treatment of … the question before us suggests that panel composition, not persuasive legal analysis, has determined the result in this case"); *Garcia v. Spun Steak Co.*, 13 F.3d 296, 301 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc).
7. *Improving the Administration of Justice: A Proposal to Split the Ninth Circuit, Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. 18, 209 (2004) (statement of Hon. Richard Tallman, judge on the Ninth Circuit Court of Appeals).
8. *White Commission*, *supra* note 2, at 47.
9. The Administrative Office of the United States Courts, Table B4, Dec. 2004. On file wih author.
10. Pub. L. No. 95-486, § 6, 92 Stat. 1629 (1978).
11. Circuit Rule 35-3 of the Rules of the United States Court of Appeals for the Ninth Circuit.
12. Interview with Richard A. Posner, Circuit Judge, United States Court of Appeals for the Seventh Circuit (Dec. 1, 2003) [hereinafter Judge Posner, 20 Questions] (visited July 15, 2005) <http://legalaffairs.org/howappealing/20q>.
13. Letter from Justice Sandra Day O'Connor, United States Supreme Court, to Justice Byron R. White, Chair, Commission of Structured Alternatives for the Federal Court of Appeals 2 (June 23, 1998).
14. *E.g., Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003).
15. *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004); *United States v. Doe*, 366 F.3d 1069 (9th Cir. 2004); *Southwest Voter Registration Educ. Project*, 344 F.3d at 914; *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003); *United Food & Comm. Workers Union Local 1036 v. NLRB*, 307 F.3d 760 (9th Cir. 2002).
16. *White Commission*, *supra* note 2, at 35.
17. *Nunes v. Ashcroft*, 375 F.3d 810, 818 (9th Cir. 2004) (Reinhardt, J., dissenting).
18. 328 F.3d 466 (9th Cir. 2003).
19. Letter from Chief Justice William H. Rehnquist, United States Supreme Court, to Justice Byron R. White, Chair, Commission on Structured Alternatives for the Federal Court of Appeals 1 (Oct. 22, 1998).
20. Judge Posner, 20 Questions, *supra* note 12.
21. Brent Kendall, *Divided Judges Argue Whether To Split Circuit,* DAILY JOURNAL (Los Angeles), April 8, 2004, at 1. *See also* Jonathan D. Glater, *Lawmakers Trying Again To Divide Ninth Circuit,* N.Y. TIMES, June 19, 2005, at § 1, p. 12 (quoting Sen. Dianne Feinstein: "If there is a way to reduce the caseload of the Ninth Circuit's judges in a fair and honest manner, … I am open to considerations").
22. Sen. F. James Sensenbrenner, Jr., Zale Lecture in Public Policy, Stanford University (May 9, 2005).
23. S. 878, 108th Cong. (2004).
24. Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 62 F.R.D. 223, 236 (1973).
25. Bill Blum, *The Bottom Line: How Much Will it Cost to Break up the Ninth Circuit?* CAL. LAW., June 2005, at 13.

California, that diverse and colorful neighbor, in our circuit is not a negative, but a benefit. When we are aligned with California, we run with the big dogs: tackling hard issues, examining the next generation of legal questions, enjoying the rich library of precedents, arguing before a most experienced and learned bench. How could we not embrace the heady mixture of scholarship and social dynamism that California brings to the judicial table? Do we really think that Arizona is better served by passing up that intellectual banquet in favor of a light snack in Boise? And surely Idaho would feel the same about us if its federal appellate sweep were limited to just a few small states whose commonality is elusive at best.

Conclusion

True or False:

- ***The Ninth Circuit has more judges than other circuits.***
- ***The Ninth Circuit has more territory than other circuits.***
- ***The Ninth Circuit has more people than other circuits.***
- ***The Ninth Circuit has California.***

… Therefore, we must break up the Ninth Circuit.

If this were a question on the LSAT, few if any would miss the slip in logic. Obviously, breaking up the Ninth Circuit is a solution in search of a problem. If that were all, Judge Roll and I could agree to disagree. But this is a very, very dangerous search. As lawyers especially trained in understanding the precious role an independent judiciary has in our justice system, I think that we must respond. I think that it is our job to reject the expedient political insurgence being made on the Ninth Circuit in favor of retaining a system that works for Arizona, for the communal good of the West, and for the constitutional mandate that separates the powers of the three branches of our government. Nothing less is at stake here, and I hope and trust that we will answer that important call by rejecting the "nuclear option" of destroying our Ninth Circuit, especially when there is no war. AZAT