PRO

SPLITTING THE NINTH

BY HON. JOHN M. ROLL

SPLIT THE NINTH CIRCUIT: It's Time

Whether viewed from the vantage point of population, caseload, number of judges or number of states, the Ninth Circuit dwarfs all other federal circuits. The time for a split has come. Notwithstanding the best efforts of the conscientious judges and circuit executive staff, the Ninth Circuit is too big to function well, and justice suffers accordingly. Currently, Congress is considering various proposals to divide the circuit.

The Ninth Circuit needs more judges. The question, then, is whether to compound existing problems by adding more judges to a circuit that is already vastly disproportionate in size to every other regional circuit court, or to finally split the circuit.

The circuit's incredible size has resulted in several serious problems, many arising from the use of a limited en banc system that is structurally flawed. Good intentions and hard work can't change the circuit's condition. A circuit split is necessary and appropriate; serious consideration should be given to placing California in a stand-alone circuit.

The Incredible Size of the Ninth Circuit

Disproportionate population.

In 1891, when six sparsely populated states were placed in the newly formed Ninth Circuit, the population of the entire country was only 64.4 million.[1] Today, the Ninth Circuit has a population of 58 million. One-fifth of the nation's population lives within the Ninth Circuit (Fig. 1). According to the 2000 census, Nevada and Arizona are the two fastest-growing states in the country, with increases in population of 66.3 percent and 40 percent respectively from 1990 to 2000.

Disproportionate physical size.

The Ninth Circuit is but one of the 12 federal circuits divided based on geography. Nevertheless, it consists of nine states, one territory and one commonwealth. No other circuit has nine states. Five circuits have only three states each. Almost 40

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Hon. John M. Roll is a United States District Judge for the District of Arizona.

The article reflects the personal views of the author. Judge Roll expresses his appreciation to Matthew Bowman and Amy Duncan for their research and editing assistance.

CON

CIRCUIT

BY ROXIE BACON

RETAIN THE NINTH CIRCUIT: An Efficient and Excellent Bench

Roxie Bacon practices with Littler Mendelson Bacon & Dear in Phoenix. She is a past President of the State Bar of Arizona.

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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percent of the nation's land mass is within the Ninth Circuit.

Disproportionate number of judges.
The Ninth Circuit is authorized 28 active circuit judges. The next-largest circuit has 17. Not counting the Ninth Circuit, the average circuit has 12.6 judges (Fig. 2).

In 1998, the Commission on Structural Alternatives for the Federal Courts of Appeal ("White Commission") concluded that "the maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between eleven and seventeen."[2] The Judicial Conference of the United States has requested seven additional active circuit judges for the Ninth Circuit.[3]

The Ninth Circuit requires an extraordinary number of judges to function. As of December 2004, in addition to 28 authorized active circuit judgeships, the circuit had 23 senior circuit judges, 110 authorized active district judges, more than 50 senior district judges, 68 authorized bankruptcy judges, and 94 authorized full-time magistrate judges.[4]

It has been estimated that a court of 50 circuit judges results in 19,600 different three-judge panels.[5] This potential number of three-judge combinations does not include visiting judges who sit with the Ninth Circuit. The enormous number of panel combinations necessarily produces panel-driven results[6] and causes individual circuit judges to go years before sitting with each of the other circuit judges.[7]

The Ninth Circuit's population is 29 million more than the next-largest circuit.

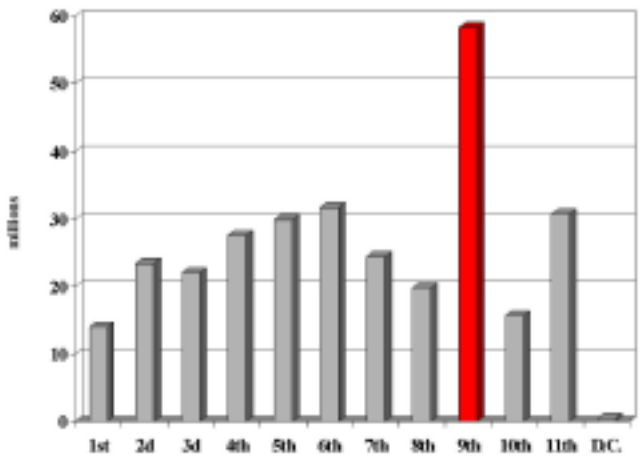

Fig. 1 From: Exh. 9, Appendix to Judge Diarmuid F. O'Scannlain's Testimony before the U.S. Senate Judiciary Subcommittee on Administrative Oversight and the Courts, April 7, 2004 (updated April 18, 2005).

The Ninth Circuit has 12 more authorized judgeships than the next-largest circuit.

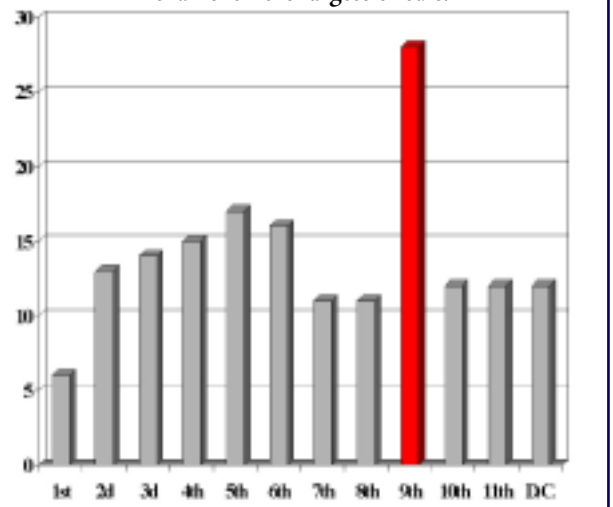

Fig. 2 From: Exh. 4, Appendix to Judge Diarmuid F. O'Scannlain's Testimony before the U.S. Senate Judiciary Subcommittee on Administrative Oversight and the Courts, April 7, 2004 (updated April 18, 2005).

Disproportionate number of cases.
The Ninth Circuit hears 23 percent of all federal circuit appeals. In 2004, 14,842 cases were filed in the Ninth Circuit, whereas 63,634 cases were filed in all circuits combined (Fig. 3). Between 2000 and 2004, the Ninth Circuit's caseload has increased at a rate nearly 12 times faster than the average of the caseloads of all other circuits (Fig. 4). The Ninth Circuit decides so many cases that it is not realistically possible for the circuit judges to read all of the opinions issued by their own court.[8]

Disproportionate time in deciding cases.
According to statistics maintained by the Administrative Office, as of December 2004, the Ninth Circuit is the second-slowest court in deciding cases. Only the Sixth Circuit, with its unique understaffing crisis, is slower. In the Ninth Circuit, the median time from notice of appeal to disposition is 14.3 months. The national average is 10.7 months.[9]

The Incredible Size of the Ninth Circuit Has Necessitated the Use of an Incurably Flawed Limited En Banc Procedure

In every federal circuit except the Ninth Circuit, decisions by three-judge panels are reheard en banc by all active circuit judges. In 1978, Congress authorized circuit courts with more than 15 active circuit judges to hear cases en banc with fewer than all active circuit judges participating.[10] In 1980, the Ninth Circuit became the first, and remains the only, circuit to adopt this limited en banc procedure.[11] The Ninth Circuit alone hears cases en banc with only 11 active judges participating.

Former Chief Judge Richard Posner of the Seventh Circuit has referred to the Ninth Circuit's use of a "bobtailed en banc procedure" as one of the most compelling reasons why a split is required.[12] In 1998, Justice Sandra Day O'Connor wrote to the White Commission pointing out that limited en banc courts "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 other circuits."[13] The Ninth Circuit experience with limited en banc hearings, as shown in this article, illustrates the irreparable flaws of limited en banc courts.

Less than full participation produces odd results.
In the limited en banc procedure of the Ninth Circuit, the 11-judge en banc court consists of 10 active circuit judges drawn to sit with the Chief Judge. Because a minority of active circuit judges drawn by lot hears Ninth Circuit cases en banc, it sometimes

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happens that judges selected to hear the case en banc do not include any of the judges who participated in the panel decision.[14] Furthermore, sometimes unanimous three-judge panels are reversed by unanimous 11-judge en banc courts.[15]

The problem of close en banc votes. Using the limited en banc procedure, a mere six or seven judges often speak for the entire court, thereby deciding cases affecting one-fifth of the population of the United States. In 1998, the White Commission stated, "Very few en banc decisions are closely divided, so it is unlikely a full-court en banc would produce different results."[16] However, since the Commission report was issued, one-third of the cases decided en banc by the Ninth Circuit have been by close votes. From 1999 to June 2005, 114 cases were reheard en banc, and 38 were decided by 6–5 or 7–4 votes. Even Ninth Circuit Judge Stephen Reinhardt, a split opponent, has conceded, "Occasionally, the en banc vote does not reflect the true sentiment of the majority of the court."[17]

Due to the high threshold for rehearings en banc, many deserving cases are denied rehearing. Because a majority of all active Ninth Circuit judges must vote for rehearing en banc, many cases are never reheard despite significant votes for rehearing. In 33 cases from 1999 to June 2005, en banc rehearings were denied despite at least five active circuit judges voting for rehearing. Since 2002, four cases were denied rehearing en banc despite at least 11 active circuit judges voting for rehearing. *Newdow v. U.S. Congress*, the Pledge of Allegiance case, which was decided by a 2–1 panel vote, was not reheard despite at least nine active judges (but less than a majority) voting for rehearing en banc.[18] On any other circuit court, nine active circuit judges would constitute an absolute majority. Not insignificantly, the Supreme Court unanimously vacated the *Newdow* panel decision.

As a result of the unreasonable number of votes required, many of the most important cases recently decided by the Ninth Circuit were never reheard en banc. In addition to *Newdow*, cases involving Afghanistan prisoners held at Guantanamo Bay, the Oregon euthanasia law, medical marijuana and alleged spies suing the CIA for back pay were all decided by three-judge panels and never reviewed en banc.

This, in turn, has resulted in the Supreme Court acting as a de facto en banc court for the Ninth Circuit. Since the October 2000 Supreme Court term, at least 33 Ninth Circuit cases decided by three-judge panels were not reheard en banc but were unanimously reversed by the United States Supreme Court in written opinions. For these cases, the Supreme Court had to correct the panel's errors—errors that should have been addressed by the Ninth Circuit en banc.

It is noteworthy that this year Rep. Mike Simpson (R–Idaho), in addition to introducing alternative proposals to split the Ninth Circuit, has proposed a bill (H.R. 1064) abolishing the limited en banc procedure. If H.R. 1064 is passed, all 28 active authorized Ninth Circuit judges will sit en banc.

The Ninth Circuit had 6,000 more filings in 2004 than the next-busiest circuit.

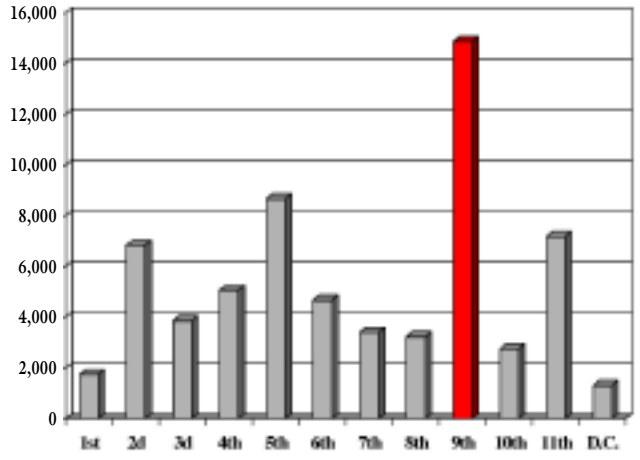

Fig. 3 From: Exh. 12, Appendix to Judge Diarmuid F. O'Scannlain's Testimony before the U.S. Senate Judiciary Subcommittee on Administrative Oversight and the Courts, April 7, 2004 (updated April 18, 2005).

The Ninth Circuit's caseload increased nearly 12 times faster between 2000 and 2004 than did the average of all other circuits.

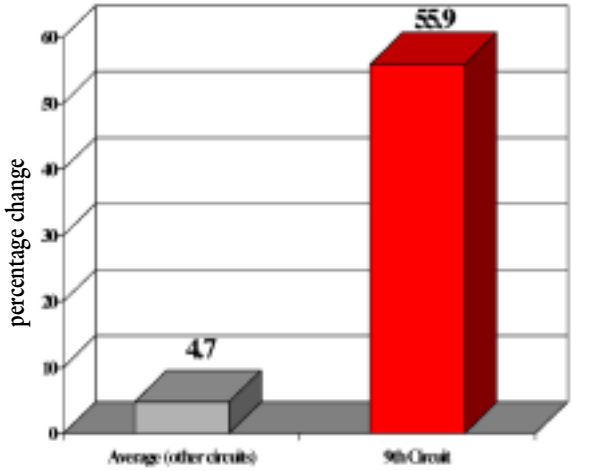

Fig. 4 From: Exh. 15, Appendix to Judge Diarmuid F. O'Scannlain's Testimony before the U.S. Senate Judiciary Subcommittee on Administrative Oversight and the Courts, April 7, 2004 (updated April 18, 2005).

That the Ninth Circuit Functions Badly Is Well Known

Disproportionate size might be overlooked in a circuit that is functioning well. As reflected previously, though, despite the valiant efforts of the Ninth Circuit judges and circuit staff, the Ninth Circuit is not. Prominent judges and legislators, from within and without the Ninth Circuit, have called for a split.

Four members of the U.S. Supreme Court have publicly communicated their belief that a circuit split is necessary. In 1998, Justices O'Connor (the Circuit Justice for the Ninth Circuit), Kennedy (a former Ninth Circuit judge), Scalia and Stevens wrote to the White Commission in support of splitting the Ninth Circuit. In addition, Chief Justice Rehnquist wrote to the commission to express his concern that the size and poor functioning of the circuit worked to erode public confidence in the judiciary.[19]

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Ninth Circuit judges publicly recognizing the necessity for splitting the circuit include Judges Diarmuid F. O'Scannlain, Andrew J. Kleinfeld, Richard C. Tallman, Joseph T. Sneed, Robert R. Beezer, Cynthia Holcomb Hall, Stephen Trott, Ferdinand F. Fernandez and Thomas G. Nelson. In addition, First Circuit Judge Bruce M. Selya, Senior Third Circuit Judge Ruggero J. Aldisert, Fifth Circuit Judge Jerry E. Smith, Seventh Circuit Judge Frank Easterbrook, and Eleventh Circuit Judge Gerald Bard Tjoflat all agree that a circuit split is warranted. In December 2003, Judge Posner said that the Ninth Circuit should be split, stating, "The Ninth Circuit is performing badly, a case reinforced by the impressions that almost everyone has who appears before the Ninth Circuit or reads its opinions."[20]

In April 2004, former District of Arizona Chief Judge William D. Browning (who served as one of the five members of the 1998 White Commission), former Chief District Judge Robert C. Broomfield (who testified against a split in 1998), and I wrote a joint letter to Congress. Judge Browning stated that if the choice is between adding new judges to the existing circuit or splitting the circuit, he now supports a split of the Ninth Circuit. Judge Broomfield (who has changed his view since his 1998 testimony) and I also expressed our support for a split of the circuit.

Senators and representatives from Ninth Circuit states have recognized that the circuit's massive size poses significant problems. Citing the 13 percent increase in the circuit's caseload from 2002 to 2003, Sen. Dianne Feinstein (D–Calif.) has acknowledged the need to take another look at the issue.[21] On June 23, 2005, a two-way split of the Ninth Circuit was proposed (S. 1296) by Senators Ted Stevens (R–Alaska), Lisa Murkowski (R–Alaska), Jon Kyl (R–Ariz.), Larry Craig (R–Idaho), Mike Crapo (R–Idaho), Conrad Burns (R–Mont.), and Gordon Smith (R–Ore.). That same day, Sen. John Ensign (R–Nev.) proposed a three-way split (S. 1301), cosponsored by Senators James Inhofe (R–Okla.), Tom Coburn (R–Okla.), John Cornyn (R–Texas), and Senators Craig and Crapo. Other prominent senators from states outside the Ninth Circuit who support a split include Senators Orrin Hatch (R–Utah) and Jeff Sessions (R–Ala.).

House Judiciary Committee Chairman James Sensenbrenner (R–Wis.) has repeatedly expressed his strong support for a split, stating, "The facts are clear: The Ninth is too big in so many ways."[22] Last October, the House of Representatives passed a bill to divide the Ninth Circuit.[23] As mentioned previously, Representative Simpson has introduced multiple bills to split the circuit, including two in 2005, H.R. 211 and H.R. 212. Rep. Rick Renzi (R–Ariz.) also has led support for a split.

In addition, the U.S. Department of Justice, which opposed a split in 1998, this year announced support for a split, although it takes no position regarding reconfiguration.

Caseloads in the Current and Proposed Circuits

Cases Filed Per Year*	
United States	63,634
D.C. Circuit	1,314
First Circuit	1,737
Second Circuit	6,835
Third Circuit	3,874
Fourth Circuit	5,066
Fifth Circuit	8,678
Sixth Circuit	4,686
Seventh Circuit	3,399
Eighth Circuit	3,247
Ninth Circuit	**14,842****
Tenth Circuit	2,746
Eleventh Circuit	7,176

California-Only Two-Way Split	
New 9th (CA)	**10,348**
New 12th (AZ, ID, MT, NV, AK, HI, OR, WA, Guam, NMI)	4,475

Distribution of Cases Filed in Ninth Circuit Per Year**	
Three-Way Split (H.R. 211)	
New 9th (CA, HI, Guam, NMI)	**10,652**
New 12th (AZ, ID, MT, NV)	2,468
New 13th (AK, OR, WA)	1,703
Two-Way Split (H.R. 212)	
New 9th (AZ, CA, NV)	**12,307**
New 12th (AK, HI, ID, MT, OR, WA, Guam, NMI)	2,516
California-Only Three-Way Split	
New 9th (CA)	**10,348**
New 12th (AZ, ID, MT, NV)	2,468
New 13th (AK, HI, OR, WA, Guam, NMI)	2,007

Fig. 5

* Source: Table B, U.S. Courts of Appeals Statistical Tables, December 2004.

** Source: Ninth Circuit AIMS Database. Due to methodological differences, the Ninth Circuit's AIMS database yielded 14,842 filings for 2004, including 19 appeals of undesignated origin, while the Administrative Office identified 14,876 filings.

The Only Workable Solution Is To Split the Ninth Circuit

One thing is certain—no more studies are needed.

Two congressionally created committees, spanning 25 years, studied whether the Ninth Circuit should be split. In 1973, the Commission on Revision of the Federal Court Appellate System ("Hruska Commission") recommended that the Ninth Circuit be split.[24] At that time, the circuit had 13 active circuit judges. In 1998, though the White Commission did not recommend an outright split, it did recommend that the circuit be subdivided into three semi-autonomous divisions. This rec-

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ommendation was an attempt to implement the White Commission's conclusion, mentioned previously, that the maximum number of judges for a decision-making unit is somewhere between 11 and 17. In the six years since the White Commission made its recommendation, nothing has been done to implement it. In fact, the recommendation was greeted with disapproval by the circuit when it was first announced.

How To Split the Circuit

Proposals under consideration—2005. Congress is currently studying various configurations for a Ninth Circuit split. This is in keeping with its constitutional duty to create such lesser courts as it "may from time to time ordain and establish." U.S. CONST. art. III, § 1.

S. 1301 and H.R. 211 would place Arizona, Nevada, Idaho and Montana in a new Twelfth Circuit; Oregon, Washington and Alaska in a new Thirteenth Circuit; and California, Hawaii, Guam and the Mariana Islands in the Ninth Circuit. The new Twelfth Circuit would approximate the caseload of the Tenth Circuit, with room to grow (Fig. 5).

H.R. 212 would keep Arizona and Nevada in the Ninth Circuit with California and move the other six states to a new Twelfth Circuit. This circuit, based on the heavy caseloads of Arizona, Nevada and California, would carry a staggering 82.9 percent of the current Ninth Circuit caseload (Fig. 5). This configuration would place the states with the first (California), second (Arizona), and fourth (Nevada) largest caseloads in the same circuit. What is currently a problem for nine states would become the problem of Arizona and Nevada. Furthermore, this would continue the woeful underrepresentation of Arizona and the other western states in the U.S. Judicial Conference (and most of its committees), where each circuit is represented.

A different two-way split, S. 1296, is cosponsored by seven senators from the Ninth Circuit. It would place Hawaii, Guam and the Northern Mariana Islands in the new Ninth Circuit along with California. The new Twelfth Circuit would be comprised of Arizona, Alaska, Idaho, Montana, Nevada, Oregon and Washington.

Another proposal yet to be formally introduced but likely to gain attention is a two-way split with California as a stand-alone circuit. Creation of a new Twelfth Circuit from the remaining eight states deserves consideration. Although those states would span a considerable distance, that is a problem that already exists. Much more important, the caseload of this new Twelfth Circuit would be about average in relation to the other circuits. Its caseload would be larger than the First, Third, Seventh, Eighth, Tenth and District of Columbia Circuits (Fig. 5). Equally important, this new circuit would allow these states to be in a circuit with an en banc procedure that is the norm for the rest of the country (i.e., all active circuit judges sitting en banc).

California should be a stand-alone circuit. Grouping Arizona in a new Ninth Circuit with California would certainly disfavor Arizona and would do nothing to evenly distribute the caseload. Dividing California among two circuits would be unprecedented and could cause various complications in interpretation of California state law. With a population of 36 million people, California has an economic, demographic and even ideological diversity unlike that of any other state. Only one other state has more than 20 million people (Texas, with 22.5 million). Even alone as its own circuit, California would become the largest circuit in the country (Figs. 5 & 6).

Cost is not a reason to avoid a split. Notwithstanding the numerous incurable problems arising from the Ninth Circuit's size, some split opponents suggest that deficient justice for nearly one-fourth of all federal appellate litigants must continue because it is too expensive to build new circuit headquarters.[25] However, estimates quoted by split opponents include the costs associated with the creation of seven new judgeships, a necessary cost with or without a split.

In addition, the 230 N. First Avenue Federal Courthouse in Phoenix, currently housing the bankruptcy court and probation, has sufficient space to house the bankruptcy court, a new Circuit Executive's Office, and all other necessary circuit operations, at least for the short term.

California cases overwhelm the Ninth Circuit in a manner drastically different than in more balanced circuits.

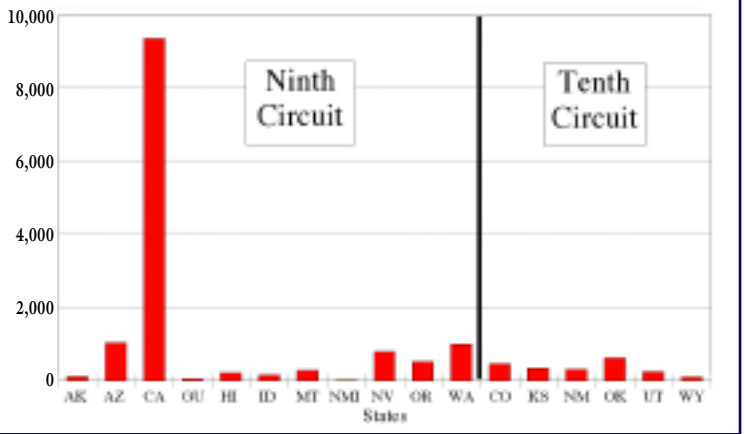

Fig. 6 From: Exh. 20, Appendix to Judge Diarmuid F. O'Scannlain's Testimony before the U.S. Senate Judiciary Subcommittee on Administrative Oversight and the Courts, April 7, 2004 (updated April 18, 2005); Table B3, Judicial Business of the United States Courts 2004, Administrative Office.

Conclusion

Objective information should be the guidepost for any discussion as to whether to split the circuit. There is no justification, historical or otherwise, for the Ninth Circuit to dwarf all of the other federal circuits while continuing to experience unlimited growth. This growth has been accompanied by numerous problems, some of which are irreparable. The effort to split the circuit is not an attack on judicial independence; it is an attempt to return to a federal judiciary that has regional circuits of reasonably comparable size, population and caseload. Split the Ninth Circuit. It's time.

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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.