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Professor Daniel Meador, Executive Director

Commission on Structural Alternatives
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Washington, D.C. 20544

Dear Gentlepeople:

Attached please find a copy of my article *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split* which will be published in the WASHINGTON LAW REVIEW this fall.

The article concludes that the time has come for a sensible split of the Ninth Circuit by fashioning a new Twelfth Circuit from the northwestern states. My conclusion is based both on a survey of the current literature and personal experience. From September 1996 through August 1997, I served as a law clerk to a Ninth Circuit judge and had the opportunity to view the workings of the court very closely. While there is much to say about the Ninth Circuit that is very positive, it does face specific challenges that an appropriate split could ameliorate, including workload, collegiality and regional polarization. Of the many proposed splits one sees bandied about, the "icebox split," which would create a new Twelfth Circuit of Alaska, Idaho, Montana, Oregon and Washington, would best solve the problems described above without adding more.

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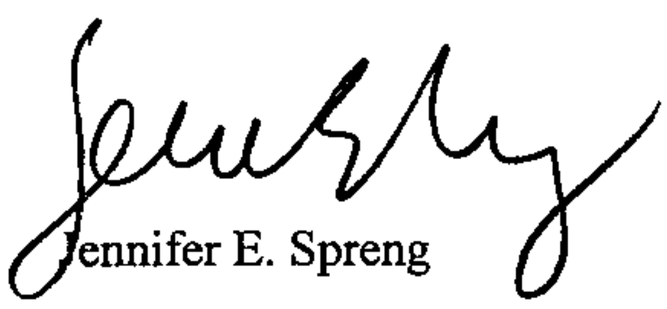
I hope you will find my work useful to you in your deliberations. Thank you for your interest in this matter.

Sincerely,

MOORE, MALONE & SAFREED



Jennifer E. Spreng

JES:cb

Enclosure

# THE ICEBOX COMETH
## A Former Clerk's View of the Proposed Ninth Circuit Split

by Jennifer E. Spreng[1]

Chief Inspector Morse: What are the twin bases for successful detection, Lewis?

Sergeant Lewis: Confession and information, sir.

Chief Inspector Morse: Well done. Now, what we need is information. And who are the best informed people in any [Oxford] college?

(Sergeant Lewis shakes his head)

Chief Inspector Morse: The Scouts, Lewis. They put the drunks to bed; they clean up the vomit; they wake the sober, whether singly or in pairs. They are discrete, maternal, devoted, exploited, and they know everything.[2]

## I. Introduction

Since the early 1980s, Republican members of Congress from the northwestern states have been searching for a way to sever their region from the huge Ninth Circuit Court of Appeals. In the fall of 1997, Congress passed a bill to create a Commission on Structural Alternatives for the Federal Courts of Appeals[3] to study realignment of the appellate courts in the wake of the most concerted Congressional effort to split the huge Ninth Circuit Court of Appeals since the 1970s. Though every Congress in this decade has considered splitting the Ninth Circuit, no such bill had passed either house until the Senate backed a plan to create a Twelfth Circuit of Alaska, Arizona, Hawaii, Idaho, Montana, Oregon, and Washington in an appropriations bill rider in 1997, which would have left California, Guam, Nevada, and the Northern Marianas alone in the Ninth.[4]

Though Congress ultimately created the commission instead of restructuring the Ninth Circuit, the commission's work will be no stalling tactic or whitewash job. In fact, its executive director; University of Virginia Professor Daniel J. Meador is the co-author of a book that twenty years ago endorsed creating the most sensible Twelfth Circuit so far proposed: the "icebox" circuit of Alaska, Idaho, Montana, Oregon, and Washington.[5] Circumstances may have changed,[6] but whatever the commission ultimately concludes, it is apparent that the Ninth Circuit's structure is finally on the table, if not the chopping block.

As a matter of pure Congressional politics, the Ninth Circuit is probably at greatest risk of dismemberment since it took shape in 1891.[7] Slade Gorton of Washington and Conrad Burns of Montana, along with other northwestern Republicans in the Senate have pushed for a split for years, but the recent Republican takeover of the Congress and their own seniority have pushed their concerns on the national agenda.[8] Importantly, the powerful senior Senator from Alaska and appropriations committee chairman, Ted Stevens, grabbed the leadership of the Ninth Circuit split movement after the court issued an opinion that confounded many Alaskans' understanding of natives' claims on the state's land.[9] All this occurred against the backdrop of yet another Supreme Court term in which the high court reversed decisions in more than 96 percent of the Ninth Circuit cases it heard.[10] At one point, split backers were rumored to have an agreement with President Bill Clinton to confirm some of his judicial nominees if he would sign a split bill. The only real question left may be whether the powerful Republican Senators from the Northwest can convince their equally powerful Republican House colleagues from California to go along with a split plan.

Perhaps they can. The Ninth Circuit faces numerous challenges due to its size and extraordinary workload, and some of these challenges have degenerated into real problems. The circuit currently has twenty-one active judges of the twenty-eight authorized by statute, and these are assisted by seventeen senior judges. By contrast, the Fifth Circuit has its full complement of seventeen authorized active judges and a mere four senior judges. The Ninth Circuit's vastness increases workload, because the larger a circuit in population terms, the more cases the circuit will produce that require all of the judges' attention. Too many judges and cases negate economies of scale and create administrative inefficiency. The more judges, the less often each judge sits on a panel with another, making collegiality, and sometimes even civility difficult. Such a large court begins to look and act more like a legislature, a completely different type of governmental body. Finally, the court's jurisdiction sweeps over at least two definable regions, pitting two very different cultural and legal outlooks against each other in what appears to be a battle for domination. The Ninth Circuit displays all of these unattractive attributes, and they all arise from a structural deficiency. In short: "the circuit is too large and has too many cases."[11]

To say that the Ninth Circuit has problems is not to say they are of the judges' making, however. Congress watchers sometimes say that the United States Senate can only operate with some semblance of efficiency because Senators choose not to exercise all the power they have. In the same spirit, what is quite remarkable about the Ninth Circuit is how the judges have papered over their circuit's structural deficiencies with goodwill. Every time a Ninth Circuit judge drafts his own electronic mail to his colleagues instead of having a clerk send out that clerk's own work, he minimizes the "cocoon problem." Every time a judge decides not to call for en banc just because she believes the case is completely wrong, she minimizes the workload

problem. Every time a judge struggles a little longer with the multiple precedents controlling immigration and social security disability issues, he minimizes the consistency problem. Every time a judge makes an extra effort to go out to lunch or dinner with another judge she doesn't know well, she helps solve the collegiality problem. And so on. Unfortunately, there are limits to the structural problems goodwill can mitigate; at some point, there are only structural solutions to structural problems. For that reason, the icebox cometh.

There is one threshold matter to resolve before turning to a more extensive defense of the icebox split. Opponents of the split claim that split backers have the "burden of persuasion" in this debate. Of course, one hopes that the nation's decision on the split will be based on a balancing of costs and benefits; the question is how we identify the costs and benefits and how much they weigh. It is not enough to point to the court's deficiencies; those deficiencies must remediable by creating two smaller circuits. Professor Arthur Hellman, perhaps the top expert on the internal administration of the Ninth Circuit has provided a series of analytical steps for judging the merits of arguments in favor of the split: (1) that serious problems exist that warrant change; (2) that the proposed changes will cure or substantially mitigate the problems; and (3) that the proposed changes are unlikely to have undesirable consequences worse than the problems being remedied.[12] This is a useful set of steps to bear in mind in this discussion, but it is important to keep our eyes on the bottom line: whether the Ninth Circuit has problems we can't live with and whether splitting the circuit would address those problems in a meaningful way.[13] Split backers can carry that burden without difficulty.

In fact, opponents of the split have defined the burden of persuasion exactly backwards. Burdens of persuasion have little meaning in the context of a policy debate in Congress; after all,

we are not in court. Most split opponents underrate the significance of the fact that the elected representatives of the people in a definable group of western states have consistently supported a split in this decade and that their growing interests in a split probably reflect the views of a majority of their citizens. The popularity of a policy alone is no hallmark of its virtue, but the United States is a democracy, and if the people of several western states now want a separate circuit, that support is enough at least to state a prima facie case in favor of a split. It does not matter if their reasons seem "silly." The courts are, in the end of the day, merely another arm of the government, and the government exists for the benefit of people. The real burden is on the opponents of the split: what reasons do they have to persuade us that the circuit these people want is a bad idea and are those reasons more important than those of the split supporters? I do not believe they can succeed in carrying their burden.

Part two of this paper starts by exploring a number of proposals actually on the table, evaluating them based on oft-applied criteria, and concluding that a legislative package of the "icebox" configuration of northwest states, perhaps sweetened with additional judges for the southern states left behind, is intrinsically the most attractive if splitting is to occur. Part three identifies the "real" problems of the Ninth Circuit and shows how the icebox configuration would solve them, carrying the burden split opponents assign to split backers. Part four answers many of the arguments against the split, demonstrating that split backers cannot carry what is actually their burden in the court of public opinion and democracy. The paper concludes that the icebox split is the best way to improve the administration of justice for as many people as possible in the short and medium terms and provides the most flexible base from which additional realignment can occur in the future.

My conclusions will run counter to the work of many top academic commentators. Their impressive and almost-scientific studies of court administration cast doubt on many oft-cited intuitive arguments in favor of splitting the circuit. Our time in history is one in which decisionmakers often put greater stock in scientific explanations of social phenomena than the evidence of our own eyes. But there are more ways to study government institutions than just regression analysis. As many respected political scientists know, one excellent way to understand how a government institution and its constituent members behave is to become part of that institution.[14] What better way is there to become part of the Ninth Circuit, and therefore to understand the issues swirling about the split debate, than to become a Ninth Circuit clerk? After all, it's the staff that "know[s] everything," isn't it? Well, even if that's not *quite* true, comparing the conventional wisdom as stated in the many academic studies of the Ninth Circuit's institutional behavior with a first-hand view of the circuit at work, however narrow that view may be, teaches once again that "things are seldom what they seem" to outside observers.[15]

## II. What's On the Table? The Various Proposed Splits.

The Ninth Circuit currently includes more states than any other of the eleven regional circuits.[16] They are: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Marianas, Oregon, and Washington. Unless the Congress decides to embark on a more extensive reorganization of the appellate courts,[17] the multiple circuits that will result from a Ninth Circuit split or reorganization will include these states in two or more sets. A considerable amount of the opposition to splitting the circuit over the years has centered around specific

configurations for the new Twelfth Circuit. Therefore, it is useful to take a look at some of those proposals to consider a threshold question: would a split be very attractive as a practical matter?

Any modern discussion of federal appellate court structures and internal reforms begins with the mid-1970s work of the Commission on Revision of the Federal Court Appellate System, or the "Hruska Commission," as it was nicknamed after its chairman, Senator Roman Hruska. The Hruska Commission's two reports, one on circuit court boundaries,[18] and the other on internal reforms,[19] cast a long shadow over the legislative debates on court administration that lingers today.[20] The Commission's primary contributions were its proposals that the two largest circuits, the Fifth and the Ninth, be split,[21] numerous judgeships be added,[22] and the criteria it propounded for evaluating future proposed circuit splits:

a. Circuits should include at least three states;

b. No circuit should have only one state;

c. No circuit should be created that would immediately require more than nine active judges;

d. Circuits should contain states with a diversity of population, business and interests, in order to maintain the national character of the court;

e. Realignment should involve as little dislocation of circuit boundaries as possible, with dislocation being justified by other criteria;

f. No circuit should contain noncontiguous states.[23]

Congress initially responded to the two split proposals by permitting circuits with more than fifteen judges to organize themselves into administrative units and to perform their en banc functions with fewer than all their judges, instead of splitting either circuit.[24] In the 1970s, the

Fifth Circuit was experiencing an unprecedented explosion in caseload due mostly to civil rights filings.[25] It followed the mandate of the new law by reorganizing itself into administrative units, but could not bear to sacrifice its full-court en banc procedure for fear of destroying the law of the circuit.[26] Yet, twenty-four and twenty-six judge en banc proceedings simply proved too unwieldy, and the Fifth Circuit's judges asked Congress to split the circuit.[27] Congress did so in 1981, following essentially the blueprint the Hruska Commission had suggested: putting Alabama, Florida and Georgia into a new Eleventh Circuit, and leaving Texas, Louisiana and Mississippi in what became the new Fifth Circuit.[28]

The Ninth Circuit of the 1970s was already showing symptoms of the problems its critics complain of today: excessive reliance on visiting and district judges to fill out panels, inconsistent decisions by different panels, and a breakdown in the en banc process due to disuse, understaffing and delay.[29] Yet instead of making merely tentative attempts at internal reform, the court resisted splitting by enthusiastically reorganizing into three administrative units, implementing numerous efficiency mechanisms, and adopting a limited en banc procedure.[30] The Ninth Circuit contained only thirteen judges when it embarked on this project, however; twenty-eight active judges are now authorized,[31] and twenty-one are currently sitting.[32] It is worth looking again at how the Ninth Circuit might be split, bearing in mind that the Hruska Commission criteria that have been criticized even by the Commission's former deputy Executive Director,[33] though they are still the starting point for this discussion today.[34]

Horsecollar circuit. From the perspective of trying to divide the Ninth Circuit in half, reformers face a practical problem. Approximately 60 percent of the court's caseload comes from California.[35] Therefore, you cannot divide the circuit into two equal parts without dividing

California. Ergo, the proposal divide the circuit by doing the next best thing: isolating California and creating a Twelfth Circuit of "everything else," which surrounds California like a horsecollar.

This proposal is unaesthetically pleasing. Aside from a host of not-well-understood federalism concerns that arise from a one-state circuit,[36] the resulting Twelfth Circuit does not make any sense. Why should Alaska and Arizona, Nevada and Washington be in the same judicial circuit? And the horsecollar configuration does not even have the merit of dividing the circuit in half![37] A horsecollar split would probably do what the Fifth Circuit split did: produce two circuits burdened by size instead of just one.[38]

Stringbean circuit. In 1995, the Senate considered a configuration that became known as the stringbean circuit, in deference to its long skinny shape. The configuration included everything but California, Hawaii and the territories in the Ninth Circuit, Northern Marianas and Guam.[39] Given that Hawaii does not even have an active judge at the moment--and would probably only be entitled to one anyway, the Stringbean Circuit is virtually a one-state circuit. It has all the problems of the horsecollar configuration as well as another one: poor Hawaii, Guam and the Northern Marianas and their 300 1996 filings would be overwhelmed by California's 4,840.

The split proposal that the Senate passed in 1997 has similar problems. It would have left California, Nevada and the islands alone in the new Ninth Circuit, leaving Nevada, instead of Hawaii, at California's mercy.[40] By the Hruska Commission's standards, the 1997 Senate proposal is even worse than the Stringbean proposal, because it would have kept a noncontiguous state, Arizona, in the Twelfth Circuit.[41] If the circuit is to be split, there must be better ways.

Hruska split. Another recent effort to divide the circuit, a 1993 bill introduced by Oregon Representative Michael Kopetski, pilfered the substance of its proposal from the first Hruska Report.[42] That bold blueprint proposed splitting not just the Ninth Circuit, but California as well.[43] The southern and central districts would go with Nevada and Arizona and the northern and eastern districts would go with the northwest states and the islands.[44] This approach would do what the stringbean and horsecollar configurations could not: it would effectively divide the circuit in half.[45]

The Hruska Commission studied the unique situation of splitting one state between two circuits, and concluded that they could be managed.[46] The division of California might be less cumbersome than it seems. Different panels of Ninth Circuit judges decide similar state law cases all the time, with potentially differing results, and there is no en banc or Supreme Court review of diversity decisions as a practical matter.[47] The more sobering thought is how splitting California would influence litigation strategies.[48] The Hruska Commission took a "where there's a will, there's a way," approach to these questions, but there would be an argument for more study before Congress adopted a similar proposal, since the Commission repeatedly suggested new civil rules to solve these problems.[49]

The Hruska split has one merit the horsecollar and stringbean configurations do not; it collects two groups of jurisdictions with roughly similar regional interests: the Pacific Northwest plus northern California, which seem to "go together," and the southwest plus southern California, which also go together. At minimum, the two circuits so constituted would confuse preschool viewers of Sesame Street's "One of These Things Is Not Like the Other," when they could not find the state in each group that did not fit.

Unfortunately, the Hruska split has the same disadvantage as the horsecollar split: instead of solving the problem of one large circuit, it creates two new ones. The Fifth Circuit split created two large circuits with only three states each, so they defy additional splitting to address what is now a serious size problem.[50] Like the new Fifth and Eleventh Circuits, it is difficult to see how the new Ninth and Twelfth circuits could be split a generation from now if one became unmanageably large again. In other words, the Hruska split would probably be the end of the line for circuit splitting in the west; there would be no obvious future stopgap solution available. Nevertheless, the Hruska configuration has sufficient merit that it should not be quickly forgotten.

Icebox circuit. Some commentators faced with the discussion above, have concluded that the Ninth Circuit defies splitting.[51] California's size does seem to get in the way. There is simply no way to divide the Ninth Circuit the same way Congress divided the Fifth--roughly in half--and avoid either splitting a state or creating a one-state circuit. In fact, the Ninth Circuit is so large, even splitting a state does not really solve its "largeness" problem; it just creates two future problems on that score.

But suppose the goal is not to divide the Ninth Circuit in half. Suppose the goal is to create from the morass of the Ninth at least one sensible Twelfth Circuit of more than two continguous states, with growing room, bound together by common regional interests and similar outlooks, but not too homogeneous In other words, suppose the goal is not to solve the "problem," but to minimize it, to isolate it, to maximize the number of citizens for whom it will be a solution, but not to worry if it is not a solution for all, or even most, people in the circuit, while honoring the Hruska Commission's still reasonable criteria for circuit splitting. Suppose

the goal is to design a circuit as if you were designing it from scratch, regardless of what you leave behind.

If that the goal, then there is a simple solution. It is Alaska, Idaho, Montana, Oregon, and Washington.[52] It is the "icebox" circuit, about one-fourth the size of the current Ninth based on filings, judgeships, and population and defining what is already a contiguous, regional bloc.[53] The rest of the old Ninth, including Arizona, Hawaii, Nevada and the territories, would not be so dominated by California as to be a virtual single-state circuit.[54] Those states left with California also boast five active judgeships. Arguably, that area is also a regional bloc.

The remaining Ninth would still dwarf all the other circuits, and so the primary drawback of the proposal is that it is only a partial solution to the size problem. Instead of creating two large circuits, the icebox split would create one slightly small circuit,[55] and one that remains quite large.[56] The "new Ninth" would have a workload per remaining judge so large that it probably could not function without at least some new judges. That does not necessarily mean that the "new Ninth" would quickly begin to take on the problems of the old Ninth, however. A new Ninth Circuit appropriately staffed with approximately eighteen judges in three or four states would more closely resemble the current Fifth Circuit with its seventeen active judges in three states, than the old Ninth with twenty-eight authorized judges, seventeen seniors, and eleven states plus two territories. The icebox split would be a meaningful split even if the new Ninth remained the country's largest circuit.

Further, the icebox split does not close the door on another future stopgap solution. If the Hruska proposal removes the taboo from splitting a state in designing circuit borders, "the rest of the problem" might be solved quite quickly if the requisite political support developed for even

more splitting, either in combination with a more general circuit realignment or not. The "new Ninth" resulting from the icebox split could be divided at the same time or later, with the central and southern districts of California (constituting 34 percent of the current Ninth's filings) in one circuit and Guam, Hawaii, the Northern Marianas, the northern district of California, the eastern district of California, Nevada and Arizona (constituting 43 percent of the current Ninth's filings) in another.[57]

Obviously, this second split is more complicated, raising the state division problem related to the Hruska split and the single-state and federalism problems of the Stringbean and Horsecollar splits, and one does not need to back this split to back the icebox split. Putting another state, such as Nevada, with the two lone California districts might help, but that would create two circuits with fewer than three states, another stumbling block, according to the first Hruska Report. Perhaps the solution to the size problem of the new Ninth Circuit would lie in the current Tenth, by moving one state into one of the two circuits created by the second split in a bit by bit approach to realignment that would not be quite as disruptive as completely redrawing circuit boundaries.[58] Obviously no such "second split" should be attempted without further study, which is one reason the current Commission on Structural Alternatives, and its always-possible successor, have an important role to play beyond designing a future Twelfth Circuit. In any event, since the icebox states also produce fewer filings per judge than the what would be the new Ninth Circuit, a few more judges for the new Ninth would have to be thrown into the mix to keep the southern judges from being deluged with work, as discussed above.[59] Even though the icebox circuit alone is not a complete solution to the current Ninth's size problem, the "new

Ninth" would have a structure amenable to future tinkering, and with a few more judges, could manage quite well without the northwest. At least, we might be halfway home!

## III. The Ninth Circuit's Real Problems Justify the Icebox Split.

The icebox split is a partial solution Ninth Circuit's size problem which would leave an open door to a complete solution that would not completely disrupt circuit boundaries. That statement assumes, however, that the Ninth Circuit's size is, in fact, a problem. Academicians and others interested in court administration have been fascinated over the past twenty years since Congress opened the door to judicial innovation[60] at how creative the Ninth Circuit has been in adapting to the challenges of its extensive land area, large collection of judges and daunting caseload. Their evaluations, that the Ninth Circuit is managing its magnitude well, are well documented elsewhere.[61] The opportunity to observe the Ninth Circuit on a first-hand basis reveals that it does have some specific problems, related to its size, that splitting the circuit could mitigate, including a busyness due to certain categories of work, collegiality, and geographical polarization.

### A. The Icebox Split Would Decrease Workload

Big and busy. You don't have to know much about the Ninth Circuit before you realize one thing: the Ninth Circuit is big. The Ninth Circuit contains more states, covers more territory, boasts more judges, and dispenses justice to more people than any other circuit. If but one of its nine states and two territories was a separate circuit, that state would be the third largest circuit

in the nation. The Ninth's population of 44 million people is at least twice as large as all but one other circuit. That's big.

The Ninth Circuit is also busy. Its 8,415 filings in 1996 were almost 2,000 more than in the next largest circuit, the Fifth. The Ninth has become a model of what can be done--through screening, delegation to staff, limited en banc proceedings, memorandum dispositions, and submission on the briefs--to maximize the efficient use of judicial resources.[62] Academic commentators find the Ninth Circuit's machinations to avoid drowning in this workload fascinating, particularly in light of the fact that it currently has only one more active judge than the Fifth Circuit. That's busy.

So the Ninth Circuit is big and busy. Is that bad?

It probably is. The Ninth Circuit may have led the way in implementing efficiency mechanisms to help it manage its docket, but the circuit's workload still means it is difficult for judges to lavish the attention they might wish on their work. The primary cause is simply that for some time the Ninth Circuit has been trying to do a third more work than the Circuit with virtually the same number of active judges.

Proponents of the circuit split often cite the court's comparatively large size and high workload as an argument in its favor. Critics point out the limits of that argument; at one level, it is pretty obvious that spreading the same number of filings over the same number of judges divided into two circuits still means the same number of judges has to process the same number of cases. What is amazing, however, is the number of well-informed court watchers who seem convinced that splitting the circuit will have virtually no effect on workload.[63] These observers do not completely appreciate the different types of work the court does.

In fact, there are size and workload problems that an appropriate split could mitigate. First, the split could eliminate certain categories of work judges currently do and shorten others. Second, it could help make it more likely that two panels considering the same issue would come to the same result--making results more consistent, and therefore eliminate many of the filings made as a sort of "gamble" on the outcome.[64] Finally, two smaller courts would be easier for practicing lawyers to know, and therefore, easier to predict, which would probably encourage settlement, or at least discourage filings made in ignorance of the law. Therefore, eliminating and shortening tasks, making results more consistent and making the court more predictable would all decrease workload. On this very busy court, more time for relaxed reflection and opinion writing would be quite welcome.

The work judges and their staffs do can be divided into two categories: work whose volume depends on the number of filings per judge and work whose volume depends on the total number of filings, or put differently, the size of the circuit. Most of the workload dependent on filings per judge arises directly or indirectly from garden-variety filings, that is, appeals the judge will hear in a group of three judges sitting either as a screening panel or a normal calendar panel. As long as filings per judge remain the same, the size of the circuit in which they are heard will not appreciably change the per judge workload they create.[65]

Inside the "sausage factory."[66] Since going into private practice, I have learned from those who have not spent time working for appellate courts that most lawyers have almost no idea of what appellate court judges actually do. To remedy that problem: imagine a Ninth Circuit judge's office. He or she has three or four clerks, generally recent law school graduates, and either one or two secretaries. Judges generally sit on seven week-long regular panels a year

and two screening panels. Screening panels resolve truly routine cases and motions, usually about 140 per week.[67] On regular panels, judges hear thirty to thirty-five cases of varying complexity. Each judge's staff prepare bench memoranda on one-third of the cases, and those are distributed to other judges on the panel. Judges will read the cases and prepare for oral argument or for submission on the briefs. They will occasionally exchange additional memoranda on the cases prior to argument, and in a number of cases there are a procedural motions requiring orders or other attention from either judges or staff. Many cases will be argued orally and then submitted for decision. After submission, each judge will prepare either a published opinion or an unpublished memorandum disposition in about a third of the cases, usually the cases in which his office prepared the preliminary bench memorandum. Most judges will dissent or concur separately in a handful of cases. In between these legal activities, administrative and legal staff will assign cases among clerks in the office, keep track of all the internal memoranda and research, type dictation, do necessary research and support tasks to help the judge prepare for cases in which his chambers did not draft the bench memorandum, prepare the judge's calendar materials so that they will be readily available on the bench, make sure those materials are properly mailed and returned to the judge's home chambers, make extensive travel arrangements, ensure that the judge's visiting chambers is properly prepared for her use, and do innumerable other tasks.

These and other similar tasks are probably a full time job by themselves.[68] Assuming the number of judges in the current Ninth Circuit states remains constant, that work would remain no matter whether Congress splits the circuit or not. Assuming also that the number of filings per

capita is equal from state to state, Congress could split the circuit and divide the judges between circuits in proportion to population, and workload from these activities would not change.

Drowning in en bancs. The amount of work associated with many other tasks depends on the size of the circuit. Take en banc calls, for example. A case is considered "en banc worthy" if it creates an inter- or intra-circuit split or is a matter of particular importance,[69] but judges call for en banc rehearing and ultimately decide to hear cases en banc for many reasons, including the simple fact that they disagree with the panel's decision.[70] A bigger circuit is likely to produce more en banc calls than a small circuit simply because it decides more cases.[71] Since each judge is likely to make a few en banc calls a year regardless of the "worthiness" of en banc according to the rules, the more judges, the more en banc calls. Either way, a large circuit with many judges means lots of en bancs.

En banc calls increase work for every judge in the circuit. In the current Ninth, if a judge calls for en banc in a California case, all the active judges from Washington also work up the case in order to decide how to vote and in preparation for possible en banc panel service. It is a different situation if California and Washington are in different circuits. In that case, if a judge from California calls for en banc in a case from California, the judge in Washington does not even know about it. By virtue of being in a different circuit, Washington judges need never work up en banc cases originating in California. This means have less work to do. As long as Washington and California are in two different circuits, they may have the same workload per judge as far as their regular panel work is concerned, if the number of filings per judge remains the same, but their caseload includes only a fraction of the en banc cases. Therefore, if it were possible to split the Ninth Circuit so that half of the filings went to one of the circuits and half the

filings went to the other circuit, one would expect the panel workload of each judge to remain the same, but the en banc workload of each judge to decline by about fifty percent. That would be a measurable change in workload. The question is: how much of a change?

Professor Arthur Hellman, a split critic and student of Ninth Circuit administration who questions the usefulness of the en banc process in the Ninth Circuit, has done research showing that only about one percent of the Ninth Circuit's published opinions are reviewed in an en banc rehearing.[72] It would incorrect to infer from that, however, that en banc calls do not constitute a significant amount of the average judge's workload. Much more work is devoted to deciding whether to call for en banc rehearing and then deciding whether the court should, in fact, rehear the case en banc. By their very nature en bancs are also some of the most difficult cases, requiring more research, more "tough calls," and therefore, more precious judge time. My own informal observations lead me to think that each judge and staff member devotes approximately ten hours a week to en banc work,[73] such as deciding whether to call en banc, drafting memoranda to other judges for and against going en banc, discussing en banc cases in chambers, managing the mountain of e-mail en banc calls produce, voting and maintaining voting records, reading and preparing internal memoranda for the judge to use if chosen for the en banc panel, traveling and hearing oral argument, recovering from that travel and reorienting back to office work, preparing opinions after submission, making suggestions and voting on opinions (over and over sometimes!), and all the research and administrative work necessary to support those activities. That is a significant investment in the en banc process.

Maybe the problem is not the size of the circuit, say some critics. Maybe the whole en banc process is simply more trouble than it is worth.[74] I doubt it. Only one or two percent of all

opinions may provoke an en banc call, but the specter of en banc haunts every panel.[75] Many judges consider "stop clocks,"[76] a means by which an off-panel judge can pressure for changes in an opinion without invoking the formal en banc process, and en banc calls themselves quite embarrassing when their work is the target. Judges self-edit and within panels they edit each other, explicitly to avoid "unnecessary" en banc calls. Opinions that "go too far," are frequently tempered long before they see print by intrapanel work or discussion with off-panel judges. Frankly, defending against an en banc call is enough work to provide a strong incentive for judges to remove provocative dicta and other en banc "flags." In sum, the en banc process is something of an interpersonal stick to keep otherwise quite unconstrained judges in line.[77] Therefore, the importance of the en banc process in maintaining consistent law, but also in getting to the correct result and producing the most useful precedent, goes far beyond the number of times it is specifically invoked.

Of course, the simple fact that the Ninth Circuit hears more cases means that it is going to hear proportionally more hard cases that will interest the entire court, not just a panel.[78] That means that the absolute number of complex, en-banc-worthy cases each judge must consider is greater, increasing proportionally the amount of this type of work Ninth Circuit judges do compared to judges in smaller circuits. Ninth Circuit Judge Jerome Farris has argued that the number of tough cases the Ninth Circuit decides each year explains the court's high reversal rate.[79] That explanation seems improbable,[80] but the large number of tough cases might explain why Ninth Circuit judges feel overworked. Judges in two smaller circuits would not face so many such cases.[81]

A related task whose length depends on the size of the circuit is reviewing slip opinions and attorney-filed suggestions for rehearing en banc.[82] The court issues slip opinions prior to publication in the Federal Reporters and they arrive every day in judges' chambers. Both judges and clerks review them. The same is true of briefs many losing litigants file requesting en banc rehearing of a panel decision. Reviewing slip opinions and requests for en banc rehearing has three purposes: to help judges and clerks keep up with the law of the circuit, to screen opinions in order to make extra-panel suggestions for changes, and to identify possible en banc calls. These are three important aspects both of maintaining consistency in circuit law and of producing good circuit law. Again, the more filings in the circuit, the more slip opinions and en banc rehearing requests judges have to read. Dividing the same number of slip opinions and requests into two circuits will decrease the individual workload for all, because each judge only has to read a fraction of the opinions he read before.[83] It is also possible that better familiarity with the most up-to-date twists and turns in circuit law would eliminate the necessity for some en banc calls and facilitate the research process on routine cases.[84]

Anyway, suppose reviewing suggestions for en banc rehearing and slip opinions takes judges and clerks three to five hours a week each.[85] Add to that *at least* five more hours preparing death penalty cases,[86] and you will see that as many as twenty hours a week are spent on tasks made more time-consuming because the Ninth is a large circuit. If the Ninth Circuit were divided in half, that twenty hours might become ten.

Ten hours makes a lot of difference when a chambers is already choked by its large caseload. Imagine adding a very full day to an already overloaded week. Ten hours is the difference between having time for the mature reflection one hopes to see in the court of last

resort for all but a handful of cases, and a high-stress, almost desperate-to-stay-afloat sort of existence. Ten hours, week in and week out, is enough to encourage even the best of judges to implement dubious efficiency mechanisms, such as relying uncritically on bench memoranda, allowing clerks not only to draft decisions but to draft decisions that are merely warmed-over bench memoranda,[87] declining to participate actively in the en banc process, and overuse of submission on the briefs. Ten hours can be the difference between trying to do good work and trying to survive. If we structure our appellate courts so that that judges' and staffs' mere survival constitutes heroism, then we do not deserve justice.

It does not matter much whether I have over- or underestimated a little in concluding that every Ninth Circuit judge and clerk could save ten hours a week if the circuit was split in half. If I have underestimated, the problem is even more alarming; if I have overestimated, the point still remains that the split will decrease workload enough to be worth considering. It does not matter if one of the two new circuits ends up with more filings per judge than the other; a couple of additional judges on the busier circuit can solve that problem, and should then be part of any split package. Further, since the icebox circuit would be particularly small, time savings of the type described above would be a bonanza for its judges, because they could be expected to save more than half of the time currently spent on these types of tasks. It is simply not true that a circuit split would make no difference to the circuit's "real" problem: workload.

There are other little ways the split can save everyone some time. For example, the Ninth Circuit has too many judges and too many panels hearing cases in too many places and at too many times to ever hold a court meeting while the judges are all on calendar anyway in the same city. That means all the judges have to make additional trips for court meetings several times a

year. A smaller circuit, such as one made up the northwestern states, could save that time, because all the judges could sit on different panels, but in the same city, at the same time, and hold the meeting in the same trip. Two geographically smaller circuits would also decrease judges' travel time to get to their panel calendars and en banc hearings. That may not be meaningful to the army of judges from the Los Angeles area who either walk down the hall, drive across town, or grab a airline shuttle to get to their hearings, but it makes a great deal of difference to judges coming from Fairbanks, Billings, and Boise.[88] Individually, these and other changes might not make much of a difference in an average week--an hour or so--but an hour here, an hour there . . . why all of a sudden you are talking about real time!

Further, general management theory teaches that as organizations increase in size, the administrative burden increases geometrically,[89] and there is no reason to think a court should be different in this regard from any other organization According to Peter Drucker, "[t]he larger any body, physical or social, becomes, the more of its energy will be needed to keep the 'inside,' that is, its own mechanisms, alive and functioning."[90] Size determines the complexity of an organization, but complexity feeds size.[91] It's a vicious circle. As Professors Harold Koontz and Heinz Weihrich put it in practical terms: "[t]he larger the organization, the more decisions to be made, and the more places in which they must be made, the more difficult it is to coordinate them."[92] This is precisely the phenomenon Justice Charles Evans Hughes described when confronted with President Franklin Roosevelt's court-packing plan: "[t]here would be more judges to hear, more judge to confer, more judges to discuss, more judges to be convinced and to decide."[93] Even judges on circuit courts, where only three judges decide each case, have noted similar problems of scale.[94]

Admittedly, much of the Ninth Circuit's administration is done by staff, though as will be discussed later, that is a double-edged sword. The problems of increased administrative complexity due to size taken together are an important reason providing more staff to solve the circuit's workload problem has diminishing marginal returns. In any event, there are some jobs on the court judges simply have to do, and that includes carrying a good bit of the administrative burden. The Chief Judge's job is bigger because the circuit is bigger. The en banc coordinator's job is bigger because the circuit is bigger--there are more en bancs and more judges to speak on each case.[95] The death penalty coordinator's job is bigger because the circuit is bigger--there are more death penalty cases and more judges to coordinate. The judge's conference organizer's job is bigger, because the conference has to be done on such a grand scale. The law clerk orientation chair's job is bigger for the same reason. Staff can help considerably, but judges quite properly do a significant amount of the work. Again, the size of the circuit has increased workload per judge. Filings per judge is just part of the story.

The Fifth and Eleventh Circuits, formerly a combined Fifth Circuit, are examples of an interesting phenomenon worthy of careful academic attention. Before Congress split the Fifth Circuit, it resolved 4,717 appeals per year. In 1995, the two halves of the old Fifth, the new Fifth and Eleventh Circuit, resolved 12,401 appeals with only three additional judges than the old Fifth. Nevertheless, judges on both courts are resisting additions to their ranks, while Ninth Circuit judges are begging Senators to confirm nominees.[96] Part of the reason the Fifth and Eleventh Circuits have absorbed such a huge caseload increase with essentially the same number of judges, according to the Eleventh Circuit's Chief Judge Gerald Bard Tjoflat, is that two smaller courts are more collegial than one big court, and collegiality saves time.[97] In other words

smaller courts are more efficient than one large court, because the judges know each other and get along better, greasing the wheels of productivity as they go. For the same reasons, there may well be limits to the Ninth Circuit's economies of scale. In most institutions, the marginal utility of more manpower does eventually become negative.[98] Judge Tjoflat's personal experience confirms that the same thing can happen on courts. Given that the Ninth Circuit's caseload is not exactly declining, maybe it should try some of the Fifth Circuit's medicine.

Problems of consistency: limited en banc or expanded panel? When the Fifth Circuit's workload spiraled out of control in the late 1970s due to increased population and a bloated civil rights docket, Congress first tried to solve the problem by adding more judges. Two years later, the Fifth Circuit's twenty-six active judges begged Congress to divide the circuit. Maintaining uniformity of the circuit's law was a primary motivation: there were simply too many panels and twenty-six judge en banc courts were too unwieldy in operation to keep the law of the circuit under control.[99]

Chief Judge Gerald Bard Tjoflat, who served on both the old Fifth and the new Eleventh, described the problem to Professor Thomas Baker in terms that make it sound inevitable in large circuits:

> The more judges we create at the appellate level, the larger we make courts of appeals, the more unstable the law becomes. If you have three judges on a court of appeals, the law is stable. It is stable for litigants, lawyers, and district judges. The outcome of a suit, should one be filed, is predictable. When you add the fourth judge to that court, you add some instability to the rule of law in that circuit because another point of view is added to the decision making. When you add the fifth judge, the sixth judge, when you get as large as the old Fifth Circuit was, with twenty-six judges, the law becomes extremely unstable. One of several thousand different panel combinations will decide the case, will interpret the law. Even if the court has a rule, as we did in the old Fifth, that one panel cannot

> overrule another, a court of twenty-six will still produce irreconcilable statements of the law.[100]

In other words, the more judges, the more panel combinations, and the more panel combinations, the greater likelihood that any two panels will produce irreconcilable interpretations of the law.[101]

The Ninth Circuit has the same problem. Survey data indicates that consistency is not viewed as a hallmark of the court's work.[102] The Ninth Circuit's problem has two twists, however. First, with twenty-one active judges but filings that would justify twenty-eight, the Ninth Circuit relies heavily on senior and visiting judges, bringing that many more of Judge Tjoflat's "point[s] of view" into the mix.[103] The second twist is that the Ninth Circuit does not resolve inconsistencies by bringing all the points of view together in the en banc process. The Fifth Circuit found during its twenty-six active judge days that en banc consideration was not much of a solution to consistency problems, because the administrative complexities of convening such a large court--where is there a room big enough?--and of getting the opinions drafted later were impractical; this was one reason the Fifth Circuit judges ultimately asked Congress to split the circuit after first trying to make a go of it as a twenty-six judge court.[104] The Ninth Circuit's relies instead on a "limited en banc" court of only eleven judges.[105] This solution for a (too) large court is only a partial one, however. A limited en banc court is easier to convene when inconsistencies in the law arise, but it adds to the potential for unstability, because it does not bring together all the "point[s] of view" on the court.

Happily for workload concerns,[106] the Ninth Circuit has so far resisted calls for full court en banc.[107] As long as the Ninth Circuit remains understaffed at only twenty-one judges, an eleven-judge en banc court is at least a bare majority of the total. If Congress appoints more

judges,[108] however, the Ninth Circuit's current procedure might degenerate from being a limited en banc to a mere expanded panel.[109] That has disconcerting implications for the legitimacy of en banc, both to litigants and judges. Professor Hellman's research indicates that the tiny group of cases actually decided by an en banc panel may not be what either practitioners or academics think are the most important, but what en banc opinions do provide is the rare opportunity for the court to speak with something of an institutional voice. The smaller the percentage of circuit judges on the en banc court, the less accurate and compelling that voice becomes, and the more difficult reading the court becomes.

An "unknown" bench: problems of predictability. Academic observers laud the Ninth Circuit's many administrative reforms, such as the limited en banc, which make it possible for the judges to process their huge caseload and coordinate the efforts of so many. One disadvantage is that these reforms add an air of mystery to the court; they make the result difficult to predict, because the process is hard to understand.

The Ninth Circuit does not need more mystery; it already has plenty.[110] Surveys and anecdotes are full of complaints that panels considering similar issues often decide the differently and that results are too hard to predict. As Karl Llewellyn explained in THE COMMON LAW TRADITION, lawyers' ability to predict the outcome of appeals, and therefore to determine whether they should even bring appeals in the first place, has much to do with how well the lawyer knows the court, its procedures and the persons who will make the decision.[111] This is the court's "reckonability." The Ninth Circuit is not very reckonable, according to Professor Paul Carrington, because it has so many judges and so many combinations of personalities and philosophies that it is very difficult to "know" the court, or worse, the three-judge interaction of

personalities that will hear your case.[112] Uncertainty has the effect of depressing the value of a case, which effectively robs claimants of their full rights.[113] Professor Carrington has applied Karl Llewellyn's principle of reckonability to the Ninth Circuit and has warned that the size of the court may actually be increasing caseloads, because it discourages settlement.[114] Two smaller courts would be more reckonable to their respective bars than one large court.

Problems of consistency and predictability: points of view and "outlier panels". On every court, there are a few judges with extreme or "outlier" points of view. This can provide a healthy diversity to the court; there is something irritatingly endearing about Judge Z who "just doesn't believe in fee-shifting statutes," for example, which adds a constant, useful reminder, and maybe an institutional check, that there is more than one view on even fairly well-settled matters. Odds are that on a small court only one or two of the judges have outlier views in common, which means that while outlier judges may have the ability to influence the tone of the law of the circuit, they don't ever get much of a chance to change it. Majority rules, tempered by civility to the minority.

On a court as large as the Ninth Circuit, however, three or more judges could be lumped together near one of the ends of the bell curve of judicial philosophies, policy priorities, or political ideologies. Three or more judges is sufficient to make up a panel or at least a majority in a number of panels. The chance of being confronted with a panel "that doesn't believe in fee-shifting statutes," or "who never met a handgun they didn't like" or (as is more often mentioned in connection with the Ninth Circuit), a very liberal or very conservative panel, is therefore greater than on a smaller court. Further, observation of the court suggests that on some matters, the views of the judges are not shaped like a bell curve, but are in fact sharply polarized.[115]

Outlier panels and polarization can cause significant problems with consistency and predictability. If the issue has not been explored previously or is very fact sensitive, lawyers may be unable to rely on clues or general themes from opinions on other subjects to be sure any particular panel will decide the issue any particular way, making the court difficult to predict. If a multiprecedent issue is involved, the panel may simply choose one or the other of the available approaches and not publish, as discussed below, creating both practical consistency and predictability problems.[116] It is understandable why lawyers trying to puzzle out the law of the circuit and conform their arguments to it might grumble that "Las Vegas is the capital of the Ninth Circuit."[117]

Worse, the size of the Ninth Circuit means these idiosyncracies are less likely to be mitigated by institutional constraints. Ninth Circuit panels are not tempered by an institutional voice, for example, because without a full court en banc at least setting a tone, the institution itself never speaks.[118] Nor does even a significant portion of the institution speak on a regular basis. On a six-judge court, or even a ten-judge court, a three-judge panel is a significant part of the court. Therefore, a significant part of the court speaks every time a panel hands down a decision. On an eighteen, or worse, a twenty-eight judge court, an individual three-judge panel is hardly noticeable in the cacophony--except, of course, to the litigants whose fates have been determined by that panel.[119] Panels don't just have autonomy on the Ninth Circuit; they are actually structurally prone to becoming independent operators, because institutional constraints are so weak.[120] A pair of smaller institutions could exert more control over their respective members without changing a single internal procedure.

Workload redux: Rolling the dice on appeal. These problems have a workload component also. Lack of consistency and predictability in a circuit's law encourages appeals to take advantage of the uncertainty.[121] Because there is a good chance of running into an outlier panel or a panel reflective of one of the court's polarizations, even lawyers with weak cases have a strong incentive to "roll the dice" on appeal and hope the random draw of panel judges comes out in their favor. After all, the Ninth is a circuit of judges that Chief Justice William Rehnquist once described as having "a hard time saying 'no' to a litigant with a hardluck story."[122] As the award winning movie *The Shawshank Redemption* pointed out, "hope is a good thing; maybe the best of things," but in real life, it does little to control caseloads.[123]

## B. The Icebox Split Would Facilitate Collegiality

Ninth Circuit Chief Judge Procter Hug, Jr. recently told a symposium at University of Montana School of Law that even during the period when the court grew from thirteen to twenty-eight judges, he had "enjoyed some of the finest professional collegial relationships in my entire life."[124] The Ninth Circuit has been fortunate to have leadership at the top in the collegiality department, particularly during Chief Judge Hug's tenure. Nevertheless, the Hruska Commission predicted as early as the mid-1970s that maintaining collegiality on large circuits would be a challenge.[125] Judge Tjoflat's experience on the larger former Fifth Circuit suggests that the Commission was right.[126] Both Chief Judge Wilkinson and Chief Judge Harry T. Edwards have written that collegiality is probably an inevitable casualty of jumbo circuits.[127] Ninth Circuit Judge Diarmuid O'Scannlain has cited the risk to collegiality as an argument in favor of a Ninth Circuit split.[128] Oral statements from judges are just one type of evidence of

interpersonal relationships between the judges, however, and we need not eavesdrop on internal communications to hear discord in the ranks, because the judges have put quite enough of their differences right in F.3d.

What follows are excerpts from opinions in extremely complicated and highly controversial cases, each of which sent the court into an uproar to a greater or lesser degree. They are not examples of uncollegiality themselves, but rather are tips of the iceberg: evidence of what the judges must think and feel behind the scenes.[129] A full reservoir of collegial capital built up over time will smooth over these rough periods, but the harshness in the Ninth Circuit's recent opinions suggests that its reservoir may be running dry.

Adventures with full court en banc: Compassion in Dying v. Washington.[130] The Ninth Circuit has never voted for a full-court en banc hearing in any case.[131] The most recent attempt was Compassion in Dying v. Washington, a case concerning the constitutionality of a Washington law to ban assisted suicide. *Compassion in Dying* was an "event" for the Ninth Circuit; it pushed the court to the procedural brink, and things understandably became heated along the way.

The case was controversial from the beginning. The subject matter--assisted suicide--is not just a current hot-button issue. In this case, it forced a major constitutional showdown over whether there were unenumerated fundamental rights not yet recognized and how one would determine what they were. When the court announced the three-judge panel chosen randomly to hear the case, attorneys for the groups opposing the ban complained that law would not decide the matter, because Judges John Noonan, Jr. and Diarmuid O'Scannlain, well-known as Roman Catholics, were too biased to decide the case fairly.[132] Of course, the court did not change the

panel, and Noonan and O'Scannlain did form the majority upholding the law. As the Supreme Court would point out later, their decision was correct under the law.[133] Nevertheless, it was not an auspicious beginning either for the court or the legal issues in the case.

The court decided to rehear the case en banc, and some of the limited en banc panel's criticisms had the unfortunate side effect of reinforcing the appellees' criticisms of the three-judge panel. The en banc court compared the panel unfavorably with the district court in its failure to be sufficiently "dispassionate and traditional" in its analysis of the state's interests in preventing assisted suicide.[134] The three-judge panel felt the assisted suicide ban was justifiable, because it protected the poor and minorities from possible exploitation, but the en banc panel responded that "[t]his rationale simply recycles one of the more disingenuous and fallacious arguments raised in opposition to the legalization of abortion. It is equally meretricious here."[135] Another panel conclusion was "ludicrous."[136] The en banc opinion concluded that those opposing physician-assisted suicide "are not free . . . to force their views, their religious convictions, or their philosophies on all the other members of a democratic society . . . ."[137] As luck of the en banc panel draw would have it, none of the three-judge panel members were on the en banc panel to defend their decision or each other.

Apparently a call for full court en banc was made and failed to attract enough votes. Judge O'Scannlain's dissent from this decision hit back hard against the en banc panel's reasoning which had excoriated his own.[138] Casey was "a perniciously thin reed upon which to rest the majority's radical holding"[139]; "the majority draws an absurd parallel" in comparing assisted suicide with abortion,[140]; the en banc panel's holding is "nothing short of pure invention--constitutionally untenable and historically unprecedented."[141]

*Compassion in Dying* was an extremely important case with grave consequences. Understandably, the judges cared a great deal about the outcome,[142] and it was no wonder tempers flared a little. *Compassion in Dying* is not notable for uncollegial rhetoric, however; it is notable because the strong language in it is commonplace.

Coalition for Economic Equity v. Wilson[143]: A Lecture on Stare Decisis. Almost everything about the panel's work on the case *Coalition for Economic Equity v. Wilson* was remarkable, in that it was an important, groundbreaking, affirmative action case. *Coalition* raised the issue of whether a recent California constitutional amendment passed by initiative ("Proposition 209") and prohibiting public race and gender preferences was consistent with the federal constitution. Again, "luck of the draw" produced an amusing twist that must confirm that Ninth Circuit panels are randomly chosen; no one worried about public relations or political correctness on the court would have chosen this panel: Republican judges Diarmuid O'Scannlain, Edward Leavy and Andrew J. Kleinfeld, none of whom are from California, the state where the law under attack in the case originated. Further, the panel took jurisdiction of the case when the district court refused to stay a preliminary injunction barring application of the provision, and the panel was presented with an appeal of the refusal to stay the preliminary injunction while it was sitting as a screening panel, which mostly address truly routine cases.[144] The panel was justified in retaining jurisdiction of the case to decide the appeal of the preliminary injunction on the merits, after having invested considerable judicial resources in the stay issue,[145] but the action did provoke comment.

The panel concluded that Proposition 209 was consistent with the United States Constitution and vacated the preliminary injunction. Apparently someone called for en banc

rehearing of the case and the effort failed.[146] Five judges dissented in a published opinion from that decision.[147] Those judges read the relevant Supreme Court precedents differently from the panel, and concluded that "the panel holds that the measure is constitutional . . . in violation of its duty to follow controlling Supreme Court precedent."[148] Judge Norris' dissent, with which three judges concurred, criticized the panel for "inject[ing] into *Hunter-Seattle* analysis a test that looks to the personal views of individual judges about the relative merits of affirmative action programs and antidiscrimination laws." Certain of the panel's arguments are "remarkable," and the panel "puts its own spin" on others.[149]

Judge Norris then launches into a lecture to his more junior colleagues on the panel that decided *Coalition* about the burdens of stare decisis that they cannot have appreciated. "Faithful adherence to precedent does not always come easily," Judge Norris' dissent states. "We must sometimes implement precedent that comes into conflict with our most deeply held personal convictions," it continues. "It is the responsibility of *all* federal judges, however, to 'struggle to accept [that burden].'"[150] The dissent concludes that "the *Coalition* panel has neglected this duty in favor of a path of conservative judicial activism."

Obviously those who dissented in writing from the decision not to rehear the case en banc disagreed strongly with the panel decision; they would not have written otherwise. The stare decisis section of the opinion can have performed little service other than to vent frustration that the law was being interpreted differently from how they would have done it. Unfortunately, that venting may have had very costly consequences on interpersonal relations between colleagues who will continue to have to work together long after Proposition 209 becomes deeply imbedded in California's constitutional structure.

Someday when the history of the decline in Ninth Circuit collegiality is written, the cases brought by Robert Alton Harris, who in 1992 became the first man to be executed in the Ninth Circuit states in many years, may well loom as a turning point. Ninth Circuit judges issued four stays of Harris' execution, after which the Supreme Court forbade the lower courts from entering any more.[151] One was issued when Harris was already in the gas chamber. Some of the judges seemed to turn on their colleagues who believed the law allowed Harris' execution. In a YALE LAW JOURNAL article Judge Stephen Reinhardt wrote that the panel opinion vacating a district court stay of Harris' execution "was a one-time opinion, good for Robert Alton Harris only. Nevertheless, it accomplished its purpose," making it sound as though, in this and other rhetoric, that the panel members looked forward to Harris' execution.[152] Other judges excoriated the Supreme Court; Judge John Noonan called its stay ban "treason" to the Constitution.[153] It was not a happy moment for the court.

Nor was the case an isolated incident. Every death penalty case is an adventure on the Ninth Circuit. Perhaps the most bizarre episode occurred just last year in Thompson v. Calderon. Two judges apparently missed a court-imposed deadline to call for en banc consideration in Thompson's death penalty habeas appeal perhaps due to an error in their office filing systems or perhaps due to a malfunction in the circuit's email system.[154] We may never know for sure.. The case did ultimately go en banc, "to consider whether to recall the mandate to consider whether the panel decision of our court would result in a fundamental miscarriage of justice."[155] In the opinions the en banc process produced, judges quarreled over three issues. The first was whether the panel made an unprecedented refusal to allow a late en banc call or whether those

wishing to call for en banc failed to follow well-established procedures to get an extension,[156] a spectacle which provoked one judge to reassure the mob that "[n]o one will ever get my vote to execute an innocent man because a judge or lawyer missed a deadline."[157]

The second issue was whether the en banc panel overstepped its own mandate on en banc by deciding the merits of the appeal. Dissenters from the decision to go en banc warned that the en banc court would decide the merits, contrary to their understanding of the en banc order,[158] and the en banc majority ultimately agreed that it had decided the merits of the appeal: appropriately.[159] Two judges then filed orders showing that they too had dissented from the decision to go en banc--after the en banc opinion came down![160]

The final issue was the sticky procedural problem of whether recalling the mandate would give Thompson an unwarranted second bite at the habeas corpus apple under the Antiterrorism and Effective Death Penalty Act of 1996.[161] The legitimacy of taking the case en banc at all had rested on the assumption that Ninth Circuit judges had made procedural errors, and that therefore, the court was not "acting on the basis of Thompson's own petition, but upon our own sua sponte determination to remedy our own errors."[162] A scuffle broke out, however, when Judge Kozinski's dissent quoted liberally from five separate memoranda, circulated on the court's internal electronic mail system,[163] in order to establish that the panel's conduct, the en banc process, and the issuance of the mandate had occurred within the rules and there had been no "errors" to justify recalling the mandate.[164] It was a revealing look at internal workings of the court, particularly when it argued that some statements by members of the majority were perhaps "contrary to the truth."[165] Judge Kozinski's opinion served its purpose, but did so at the expense of breaking an ironclad rule of confidentiality that allows judges to speak freely during

deliberations, a violation of "judicial privilege," if you will. Judge Kozinski did something that simply is not done, and that judges rely on not being done.[166] Yet the primary issue in this case was whether internal procedures had occurred the way the majority said they had. These were issues that judges were not supposed to talk about in public, but in *Thompson*, if you couldn't talk about internal communications, you could not relevantly talk at all. The legitimacy of the enter en banc proceeding rested on the substance of those internal memoranda. History and his colleagues will determine the magnitude of the breach.

Judge Reinhardt fired back furiously that Judge Kozinski's dissent was "an unfortunate document," and that "[p]erhaps to those who read his recent musings in *The New Yorker* magazine regarding his personal experiences in death penalty cases, Judge Kozinski's rambling analysis will come as no surprise."[167] Some of Judge Kozinski's arguments against heightened procedural safeguards in capital cases were "bizarre and horrifying," and "unworthy of any jurist."[168] He contradicted the inferences from the memoranda Judge Kozinski had quoted. He denied that the court operated the way Judge Kozinski's quoted communications suggested. He pointed out that "[t]he reader might be surprised to read, for example, the contents of a communication from Judge K in this case, if I were uncollegial enough to include it in this opinion."[169]

From beginning to end, *Thompson* was an unmitigated disaster for the court. The Supreme Court has since held that the Ninth Circuit abused its discretion when it recalled the mandate in *Thompson*[170]; the Court had granted certiorari almost immediately after the Ninth Circuit's en banc decision came down. Time will tell if the case leaves an interpersonal tangle that is more difficult to put right.

Problems of a decline in collegiality. These cases do not and should not inspire confidence. The price of this sort of behavior is high, and it does not matter whether the Ninth Circuit is much worse than other circuits on the collegiality front for one to conclude that these public displays of distemper are not acceptable in the long run. First, a collegial atmosphere on a court probably improves the quality of its work product, which is better for all who must live under the law that court hands down. Chief Judge Wilkinson has argued that the price of a large circuit is second-rate work limited by strained relationships:

> Collegiality may be the first casualty of expansion on the federal appellate courts. I recognize that to speak of collegiality may have a quaint and antique ring. Collegiality is one of those soft, intangible words which may ring hollow upon the congressional ear. Judges, however, have a deep conviction that a collegial court does a better job.
>
> Of course, I cannot demonstrate empirically that the quality of decisionmaking is better on a circuit court that does not number in the dozens, and I recognize that strained relationships are as possible in smaller bodies as in larger ones. I believe nonetheless that at heart the appellate process is a deliberative process, and that one engages in more fruitful interchanges with colleagues whom one deals with day after day than with judges who are simply faces in the crowd. Collegiality personalizes the judicial process. It contributes to the dialogue and to the mutual accommodations that underlie sound judicial decisions. Smaller courts by and large encourage more substantial investments in relationships and in the reciprocal respect for differing views that lie at the heart of what appellate justice is about.[171]

Second, to the extent that intemperate language degenerates into personal attacks, it makes agreement and trust next time all the more difficult.[172] Further, as Judge Harrison Winter of the Fourth Circuit has pointed out, intemperate language undermines public respect for the judiciary more generally:

> [A] court is a very fragile institution. We couldn't possibly go out and enforce all of our decrees and all of our judgments. We don't have the staff; the marshals could not do it. Our effectiveness depends upon people accepting our judgments and abiding by our decisions willingly. We rely on public confidence and public

> acceptance. When the public sees that we're hurling words that verge on insult, especially on a point about which there can legitimately be an intellectual difference, we destroy the very basis on which we must ultimately depend.[173]

The problems intemperate language create are the problems of a lack of collegiality more generally.

Shortage of "face time": too many judges too far apart. Why is collegiality a challenge on the Ninth Circuit that seems to bubble up at inconvenient moments? A fairly junior judge once told me this story about how collegiality can be born and grow even in the face of strong disagreement. The junior judge was scheduled to serve on a week-long, three-judge panel with a more senior and more influential judge with whom he had two public disagreements, one about a court administration matter and the other about an legal issue under en banc consideration on which the junior judge had taken a leading role on the minority side. The two judges had not sat together on a regular week long calendar in recent memory, and worse, a number of cases they were scheduled to hear raised issues very similar to the en banc issue. Needless to say, the more junior judge was looking forward to the week with some trepidation.

Listening to the more senior judge question attorneys on the first day of argument, the junior judge was struck with disbelief. The senior judge seemed to have modified his view on the en banc issue! It turned out that the senior judge's view was not what the junior judge had understood it to be, and after a week of talking out several cases together, the more junior judge's view became more congruent with his more senior colleague's. When they got back to their chambers, the senior judge joined the more junior judge's separate opinion in the en banc case. Others followed the more senior judge's lead, changing the impact of the ultimate majority opinion. The junior judge and the senior judge continued their disagreements on other matters,

but discovered they could work together more easily on them than before. What made the difference? The junior judge's view was that "face time," or the opportunity to get to know each other better both professionally and personally over the course of a week, had turned the tide.[174]

Everyone talks about how important collegiality is on courts, but it is not easy to attain it. Unlike many employment situations, judges have little ability to choose their colleagues, but are forced frequently to disagree and critique each other's performance. As Chief Judge Richard Posner has put it, "[t]o be an appellate judge is a little like being married in a system of arranged marriage with no divorce."[175] Under those conditions, collegiality and even civility are hard work. D.C. Circuit Judge Patricia Wald has noted that judges would be well advised to make affirmative efforts to stay in touch with their colleagues at a social level in order to get the face time necessary to maintain collegial relations.[176] "Even in the same building, months can go by if one doesn't make a conscious effort to keep in touch socially."[177]

Unlike judges on the D.C. Circuit, Ninth Circuit judges are not all in the same building, so they do not have the luxury of going out to lunch once a week to stay in contact. They are the most far-flung of all appellate courts in the country. Even their "forced" social activities such as Christmas parties, court meetings, and judicial conferences are just a drop in the collegiality bucket. People do not get to know and respect each other in the deeply rooted ways that help them get through tough challenges such as *Compassion in Dying* or *Thompson v. Calderon* over a fifteen-minute cocktail. Calendars and screening panels are the best opportunities for the kind of extensive face time resolving real-life disputes--providing practice, if you will, in relatively low pressure situations--needed to promote the true understanding described above that leads to the genuine collegiality that will stand up when times get tough.[178]

Unfortunately, because there are so many Ninth Circuit judges, it is completely conceivable that years could go by between the time when Judge A had last sat on a calendar or screening panel with Judge B. There are probably a number senior and active judges that the junior judges appointed in the 1990s have never sat with on a regular or screening panel. The problem is made worse by the fact that the Ninth Circuit relies on so many district and other visiting judges to fill out panels. That means that instead of getting face time with two Ninth Circuit colleagues on any given panel, the average panel provides the opportunity to get to know only one other active colleague, and sometimes none. Appointing more judges, the oft-mentioned solution to the Ninth Circuit's ills which would put more active judges on panels,[179] would actually make matters worse, however. It is simply tough to get around to all your colleagues when there are so many of them.[180]

The real problem, therefore, is not that Ninth Circuit judges are unpleasant people or socially awkward or modern Howard-Hughes type hermits. Every Ninth Circuit judge I met while clerking was remarkably charming, devoted to the best aspects of his or her work, and seemed genuinely interested in making the Ninth Circuit a pleasant place to work. The real problem is that there are too many judges too far apart. Even a collection of the most socially adept characters could not overcome that structural problem. Two smaller collections of judges will each be more collegial than one large collection.[181]

The "Cocoon problem" or why adding more staff only makes matters worse. Collegiality problems tend to feed on themselves. Ask the average United States Senator who retired in the 1990s because the institution had lost some of its collegiality and civility[182] why it happened and each will have a number of reasons. Sooner or later, most will eventually get around to the

proliferation of both central and personal staffs. Staff creates a "cocoon" around the Senator, taking over many of the interoffice communications and other tasks that used to be done Senator to Senator and effectively isolating each Senator from his or her colleagues. No longer are Senators' closest and most regular professional interpersonal relationships with their colleagues; instead they are with trusted staff members and advisors.

The same becomes true for many judges, which is part of the reason simply increasing the size of a judge's staff to solve workload problems would ultimately turn out to be a double-edged sword.[183] Judicial staffs cannot expand as quickly as Senate staffs, but the nature of the job of judging, particularly where judges are so physically far removed from each other, is such that judges increasingly lose regular contact with their former colleagues or those relationships become stilted. As a practical matter, some judges may find it hard work to get along with other judges. Judges' staffs, on the other hand, are generally made up of the same types of talented and intriguing people that the judges find interesting; that's one of the reasons the judge hired them. Further, one of the jobs of a judicial staff member is to support and admire the judge you work for. No wonder easy staff relationships eventually the place of the more complicated relationships with colleagues. Staff-judge relationships cannot ultimately be completely fulfilling, however. They are not the relationships of equals. Unlike Senators who must go to fundraisers and elections, some judges may hear the "hard truth" from very few.

As has developed in the Senate, work between chambers on courts of appeals sometimes gets done at a "staff level." Some is informal: Judge X's secretary telephones Judge Y's secretary to mention that a cosmetic change is necessary in Judge Y's most recent opinion, and the change is made, possibly without consulting Judge Y, because Judge Y's secretary "knows how he likes

to handle these matters." Sometimes it is formal: in each three judge panel, one judge's chambers is chosen to write a bench memorandum to be circulated to the other chambers; some judges use them and others rely on their own staff's summaries, some judges take the opportunity to get their views on the case across and others give their clerks a free hand.

As Paul Carrington, Daniel Meador and Maurice Rosenberg warned more than twenty years ago in JUSTICE ON APPEAL, the proliferation of personal and central staff has changed the character of courts.[184] Judges more and more resemble administrators instead of craftsmen, not necessarily with positive results.[185] They allow staff to write more and more of the work that goes out under their names.[186] They also tend to confer more with their staffs rather than with their colleagues and may well have become less receptive to peer argument.[187] They begin to look more like autonomous individuals--lone rangers, if you will--than group members. This kills off the institutional collegiality that has made American appellate courts work for two hundred years.

To varying extents, these are problems all the circuits face. Only changes in workload of a magnitude not contemplated in this article, therefore eliminating the need for three or four clerks and two secretaries, could solve the cocoon problem directly, but adding more staff to solve workload problems would certainly exacerbate it. Splitting the Ninth Circuit into two smaller units could blunt some of the cocoon problem's impact, however. When the professional interpersonal relationships of the judges become less tight, it is natural that staff will wittingly or unwittingly step in to fill the void. This has the circular effect of insulating the judges from each other even more and exacerbating any collegiality problems that already exist. On a smaller court, judges get more face time with each other, and group decisionmaking for the court

therefore becomes easier. The cocoon problem never develops fully, and matters never get worse as a result. It is really a chicken and egg problem, but solving such a problem isn't really about which came first: killing either one kills off the entire chicken-and-egg process.

Almost all circuits have considerable staff; in fact, there are national standards about how many in-chambers staff members (secretaries and law clerks) a judge may have. The Ninth Circuit's problem is worse, however, because it has more central staff. Most of the Ninth Circuit's efficiency reforms that allow it to deal not just with excess workload, but simply with the large caseload that is commensurate with a large court, involve additional staff and additional staff activity on matters that judges would otherwise do themselves. Adding in-chambers staff to address workload issues is also bound to bound to backfire. The United States Congress' experience is that additional staff resulted in more work, not less, because additional staff encouraged new constituent service, oversight projects and legislation.[188] Therefore, the additional central staff hired to help solve the Ninth Circuit's workload problem may have already exacerbated it, and there is no reason to think in-chambers staff would have a different impact. Further, since many judges' administrative responsibilities (such as serving as en banc coordinator) are so extensive, those judges may have the benefit of additional staff resources on a permanent, central or ad hoc basis to help out. All of these differences simply place more people in between judges at every step of the process.

The mini legislature problem. It is easy to look at the number of filings in the Ninth Circuit, compare it to the paltry number of judges, and wish President Clinton and the Congress would figure out how to get more judicial personnel onto the Ninth Circuit, as they recently began to do.[189] Yet maybe the western states should be happy they do not have the judges they

deserve. The Ninth Circuit would have twenty-eight judges if fully staffed. Add to that the Ninth Circuit's senior judges, and you have a larger court than the upper houses of many state legislatures. The Ninth Circuit is not a court; it is a congress.

Congresses are not just large courts, however. Chief Judge Posner and Judge Frank Easterbrook have written of the risk that large courts may begin to resemble legislatures, and the seeds have been sown on the Ninth Circuit.[190] According to Judge Posner, "[p]lurality opinions, concurring opinions, shifting coalitions, frequent overrulings (many not acknowledged as such), inconsistent lines of precedent--in other words, the manifold institutional failings of appellate courts--are . . . the consequences of the fact that a multi-member court is an electoral body; for the theory of public choice teaches that electorates, and legislatures composed of elected representatives, cannot be expected to make rationally consistent decisions."[191]

Unfortunately, to provide specific examples of what I interpret as the seeds of a legislative culture on the Ninth Circuit would require revealing confidential communications, but the mere size of the court is suggestive. So is the fact that so many Ninth Circuit lawyers think that more so than in other circuits, the composition of the panel will determine the outcome of the appeal.[192] Chief Judge Posner explains the phenomenon as follows:

> The model that [assumes legislative behavior in appellate courts] assumes that each judge is an individualist. The judge may consult with his colleagues before making up his mind but once he does make it up he will do everything he can to make the law conform to it. Almost my entire point in this chapter is that federal judges have too individualistic a conception of their role. If judges were more committed (emotionally, not just intellectually) to the idea of collective judicial responsibility; if, reminding themselves that judicial appointment is usually not purely meritocratic, they took themselves and their particular ideas and approaches less seriously; if they were more willing to give ground freely and to search for common ground in the way that a corporate task force might try to

> devise a marketing strategy for one of the corporation's products, then we would have a judicial system that generated less heat than light.[193]

Individualistic, of course, is exactly what Ninth Circuit judges are.[194] They tend to be isolated physically and imbedded in a cocoon by their staffs. And there are so many of them! They are ripe for the mini-legislature problem.

Why would a certain amount of legislative activity be such a bad thing on an appellate court? The desired institutional behavior of courts and congresses are different, as is the behavior of their individual members. Consider the following example. Suppose Judge A states she has decided to vote in favor of en banc in a case she would not normally consider en banc worthy, because Judge B had voted in favor of en banc in a prior case largely on the basis of Judge A's interest in the case, and Judge B was now very insistent that the current case go en banc.[195]

To anyone familiar with the wheeling and dealing that goes on in the average state legislature or the United States Congress, that example is tame. Standard operating procedure is for one legislator to vote for another legislator's bill in return for a yes vote on another bill. That's how deals are made.

Here's the rub: *appellate court decisionmaking is not about making deals.*[196] That is legislative activity. Legislatures operate by constructing and maintaining ever-shifting coalitions so that majorities at any given moment on any given issue may work their wills. Some legislatures make it easier or harder to do that based on their own concerns for minority views, but the point of the process is to varying degrees the same.[197]

These legislative goals simply do not have very much to do with what courts are all about. Figuring out what the law is requires judges to vote on alternate possibilities from time to time, and it certainly requires a great deal of give and take. That has nothing to do, however, with the legislative goal of giving everyone something of what they want in order to the keep the majority together.[198] Federal judges should have no constituencies to please. By definition they have no seats to protect. All the give and take, all of the redrafting, all of the en banc calls: these are efforts to get to the truth of what the law says, to the "correct" result. Statesmanship abounds more than we think in our legislatures, and Congressmen care a great deal about what the "best" policy is, but in the end of the day, their first concern has to be to produce the most popular result.[199] If it ever was, the federal system is no longer a common law system in either the British or American state law sense. Federal judges do not "make" very much law; they take existing law, usually starting with a statute or the United States Constitution, and interpret what it means, relying on their own previous interpretations for guidance. Interpretation in this sense has a creative element, but it is quite limited. There is simply no need for legislative behavior on a United States appeals court.

Some examples suggestive of a tendency on the Ninth Circuit to unhealthy legislative conduct appear right in F.3d. Why, for instance, should publishing dissents to decisions to go en banc, or worse, not to go en banc, have become such a necessity? The decision either to take a case en banc or not should be an institutional decision. Yet, these dissenting opinions look alarmingly like the "minority views" attached to Congressional committee reports.[200] As a political matter, a legislative minority has a constituency to please and the opportunity to get its views into the record does show those groups that the minority was active in the process and will

"live to fight another day."[201] Are the same concerns about constituencies and "fighting another day" relevant or healthy in the judicial world of judges with life-tenure judges supposedly constrained by stare decisis? As a legal matter, what minority views generally succeed in doing is confusing readers into thinking that there is some legal significance in the losing side. Why should judges be interested in confusing the public on the state of the law? Are these the raisons d'etre behind a dissent from a decision not to take a case en banc? They must be intended to flag the case for the Supreme Court. I can think of no other reason, except to kill even more trees than would otherwise be necessary to print the already bloated volumes of Federal Reporter Third.[202]

Most legislatures tend to break down into coalitions.[203] Sometimes these are strongly partisan, such as those operating on a parliamentary basis, and sometimes they are less so, such as the United States Congress. Many observers believe this happens on the Ninth Circuit as well,[204] and to a greater or lesser extent that is fairly obviously true at least in the relatively few matters that break down on a regional or partisan basis. That would be bad enough, but it may be true even more often, however. On a busy court, there is not enough time to have an independent understanding of every issue, so naturally, judges will look for substitutes. One such substitute is a trusted colleague. On a large court, however, where the judges have a much harder time getting to know and trust each other personally, there can be little surprise that judges substitute some of their own understandings of issues for the understandings of judges "who think like I do," and party affiliation is a good way to find those judges.

There is ample circumstantial evidence that this goes on--the only question is its extent. No judge nominated by a Republican president wrote or joined a written dissent from the

decision to rehear the Proposition 209 en banc, and all the members of the unanimous panel who upheld the California ban on public affirmative action were appointed by Republican presidents.[205] All seven judges who wrote or joined a published dissent from the decision to go to en banc rehearing in Thompson v. Calderon, a death penalty case, were Republicans.[206] In a non-en-banc situation, both judges who voted to award extraordinarily high attorneys fees to lawyers litigating a "laughably easy" abortion case, were Democrats, while the dissenting judge was a Republican.[207] Obviously, not all judges vote with members of the own party on every issue, not even all the hot-button issues. Otherwise, who could explain Judge John Noonan's fury over the Robert Alton Harris case. Nor does a mere correlation between party voting indicate any sort of pernicious causation. Not all Republicans believe affirmative action is unconstitutional, and not all Democrats are completely sympathetic to the travails of attorneys fighting restrictions on abortion. Not all of even the "hot-button" issues divide the court or even the rest of the country by party, and the overwhelming majority of cases and decisions have nothing to do with partisan views. There are reasons, however, that outside observers think that the party affiliations of the judges determine many results, as they seem to do in so many high-profile cases. There is certainly plenty of political commentary. [208] To the extent that the fire from which this smoke emanates may spread, the Ninth Circuit has a real problem. The lack of judicial independence it suggests, the breakdown in stare decisis, the implicit confirmation of legal realism: none of these bode well for the Ninth Circuit's image or respect in the public view, and if they are actually descriptive of the institution, it would be alarming. If it walks like a legislature and talks like a legislatures, well, it is a legislature. *Except that it isn't.*

Not only does the Ninth Circuit take on the appearance of a mini-legislature because it is so large and it gives off a partisan stink, it isn't a very good one. Comparing the post-World War II history of the United States Senate, which at least used to pride itself on being one of the world's great deliberative bodies, does not bode well for the Ninth Circuit. Skyrocketing workload requiring extensive delegation to staff, corresponding increases in staff sizes producing the cocoon problem and, ironically, even more legislation (sound familiar?), breakdowns in the highly prized Senate collegiality, increased partisan sensitivities,[209] are all making the United States Senate (to the horror of Senators who thought they were above such crassness), seem quite a lot like the United States House of Representatives, which is a well-oiled machine of majoritarian legislative efficiency by comparison![210]

Happily, the mini-legislature disease on the Ninth Circuit is not very far advanced, but even the slightest development has damaging separation of powers implications. Splitting the circuit would help ameliorate the problem by decreasing the number of judges making decisions together increasing the ease of their doing so, and probably making the two new institutions less reliant on staff to do work judges should be doing. To the extent that the size of the institution encourages legislative-type institutional behaviors, a split can help solve that problem.

### C. The Icebox Split Would Eliminate Damaging Geographic Polarization

Alaska erupted when three Ninth Circuit Californians shocked the state with the conclusion that the native corporation system of the Alaska Native Claims Settlement Act did not eliminate Indian Country in Alaska.[211] Both average Alaskans, and the local lawyers who were instrumental in drafting ANCSA, thought the law had done the exact opposite, and Alaskan

society had been organized for the past 20 years around that assumption. When *Venetie* was followed by three more Californians granting an injunction to halt summer construction on a highway project pending appeal, which had the effect of delaying the project for a year,[212] the powerful Alaska Senators and Congressman lost their tempers and became even more committed to a split that would wrest interpretation of the federal law that is so crucial to Alaska from Californians.

I did not know at the time whether the *Venetie II* decision was correct under federal law, and the Supreme Court has since told us it was not.[213] But at least I've been to Venetie![214] From the perspective of people whose entire society could conceivably be uprooted, for good or ill, the majority opinion is remarkably antiseptic, with no appreciation of the magnitude of what the court has done.[215] As the Fairbanks Daily News-Miner expressed the frustration:

> Right now the judges on this appeals court come to Alaska once a year to hear cases. Or, to be more exact, a three-judge panel comes to Alaska once a year. Under normal circumstances, a judge from the appeals court will come to Alaska about once every 10 years.
>
> Because it is such a rare occurrence, they don't have the time to become informed and knowledgeable about the two major laws that affect Alaska and do not affect the other Western states.[[216]]
>
> The Alaska Native Claims Settlement Act and the Alaska National Interest Land Conservation Act are among the major pieces of legislation approved by Congress in the last 30 years. These laws apply to Alaska, but not to any other state. It's a good bet that the judges making decisions regarding these laws have not read ANCSA and ANILCA or know the legislative history that puts them in context.
>
> They rely on law clerks with little or no knowledge about the background of those laws.[217]

But don't weep too hard for Alaska! Imagine how Idahoans feel: the Ninth Circuit *never* goes there![218] At least the court gets to Billings once in a blue moon.[219] Academicians and commentators like me may look at the data and conclude California is not over represented on

the court, but it doesn't help if you come from a small state which, by virtue of being in the same circuit as California, ends up the forgotten man. As Senator Slade Gorton put it, in the Ninth Circuit, Washington is "the tail on a huge dog."[220] To use another metaphor, it is tough to be a small fish in a very big pond and not feel very helpless. If those states could get out of California's circuit, they would get more respect, simply by becoming a comparatively bigger fish in a smaller pond. In a nutshell, that is the theory driving many split backers.

"Diversity" is at the heart of many of the Ninth Circuit's assumed strengths and weaknesses. Is the Ninth Circuit geographically and culturally diverse, or is it dominated by a pernicious "California influence?" Does the Ninth Circuit bring together the breadth of legal philosophy or is it narrowly ideological? Those who idealize the Ninth Circuit's supposed diversity are, at least with the current complement of judges, making a mountain out of a molehill. Those who claim California (read: "liberal") judges are poisoning the court's jurisprudence do the same thing.[221] The better conclusion is that the Ninth Circuit is not diverse, but it is polarized, and that polarization correlates with a sensible circuit split.

The first myth dispelled: it is not true that the California judges are particularly "liberal," if that is even a useful way to think about judges' views.[222] Consider, for instance, the party affiliation of the various judges' appointing presidents.[223] Of the Ninth Circuit's nineteen senior and active judges from California, eight were appointed by Democrats[224] and nine by Republicans.[225] More relevantly, four active judges were appointed by Democrats[226] and four were appointed by Republicans.[227] Further, the most senior of these were appointed by Democratic presidents, though the Senate may yet confirm more of President Clinton's

nominees.[228] In other words, as time passes, if no more judges are added to the court, the balance would shift decisively to the Republicans.

One of the reasons California had long seemed liberal is that the court added ten judges during Jimmy Carter's presidency, and seven of those went to California. The ideological effect of that increase, real or merely perceived, will soon be part of history, as all but two of the Carter Californians have taken senior status and the seniors are likely to have continually diminished case loads as many have now become very senior. The future ideological makeup of the California contingent will depend much more on who the voters choose for president and the Senate majority in 2000.[229]

Another myth is that California judges somehow dominate the court. "Domination" is difficult to define, but what can be said is that California judges are not statistically over represented in the Ninth Circuit's judging corps. More than half of the court's filings come from California, but fewer than half of the active judges and total judges hail from the state. Due to the Carter judges phenomenon, for many years California had the active judges with the most seniority, held the chief judge's office for what must have seemed an eternity, and the influence of its senior judges, given their institutional knowledge, is still significant.[230] Nevertheless, the Chief Judgeship has since passed to a Nevadan, en banc and court administration matters are limited to active judge participation, and as the junior judges gain seniority and its accompanying confidence with time, the institutional leadership of now very-senior Carter Californians will wane.[231]

A final myth is that the Ninth Circuit's judging corps is richly diverse, bringing an impressive range of backgrounds and viewpoints to the court. It is unclear what people lauding

this aspect of the Ninth Circuit's perceived diversity are referring to. In this multi-racial region, only two of the court's active judges is a member of a racial minority.[232] Only five are women, and two of these are the most junior judges on the court.[233] There is not much diversity between Los Angeles and Phoenix, Portland and Seattle. None of the judges came from or now maintains chambers in what might be called a "rural" area; only two maintain chambers in population centers of less 100,000 people.[234] Former judges are greatly over represented on the court compared to their incidence in the legal community as a whole, while small firm and solo practitioners are quite under represented.[235]

What diversity there is on the Ninth Circuit appears to be largely geographical. Each state in the court has at least one judge.[236] Aside from California's seventeen judges, the other twenty-one come from the following cities:

| | Total | Actives |
|---|---|---|
| Seattle | 5 | 2 |
| Portland | 4 | 2 |
| Phoenix | 4 | 3 |
| Reno | 2 | 2 |
| Boise | 2 | 2 |
| Las Vegas | 1 | 0 |
| Fairbanks | 1 | 1 |
| Honolulu | 1 | 0 |
| Billings | 1 | 1 |

Though not perfect, the distribution is reasonable.

And what of those California judges? They are not so geographically diverse. Their state is huge, but their seventeen judges maintain chambers in just three metropolitan areas, with twelve in the Los Angeles/Pasadena metro area alone. The little News-Miner may have called it just right: maybe it isn't California that dominates the court; maybe it's Los Angeles.[237]

What characterizes the Ninth Circuit is not diversity; it's polarization. Take a look at the active judges from the southern part of the circuit. They include the following:

Los Angeles metro area: Pregerson, Reinhardt, Kozinski, Fernandez, Rymer, Tashima
San Francisco: Browning
Phoenix: Schroeder, Hawkins, Silverman
San Diego: Thompson
Reno: Hug (chief judge), Brunetti

Compare these to the active judges from the northwest:

Seattle: Fletcher, McKeown
Portland: O'Scannlain, Graber
Boise: Trott, Nelson (TG)
Billings: Thomas
Fairbanks: Kleinfeld

One difference between the two lists is the sizes of the cities listed. In the northwest states, only Seattle counts as a "big" city by national standards, and by California standards, it is pretty small.[238] Most of the northwestern judges primarily practiced law during their former careers, and all but the Seattle judges (Judge Betty Fletcher and Judge Margaret McKeown), Judge Susan Graber and Judge Stephen Trott did so in medium to small sized firms, which means all the rest struggled to meet the proverbial payroll, just like any other small businessperson in town. Judges Thomas G. Nelson, Andrew J. Kleinfeld and Sidney Thomas were all general practitioners; Judge Trott a prosecutor; Judge O'Scannlain primarily represented utilities firms; Judge Fletcher and Judge McKeown did large firm practice; Judge Graber spent most of her career on the appellate bench, and Judge Kleinfeld was a federal district judge for several years. Like most small city lawyers, they got to know the local courtrooms well. The northwestern judges became not just community, but statewide leaders: important figures in town.[239] Frankly, these are the profiles you would expect of northwestern judges, given the types

of communities from which they come: small city types, community leaders, legal generalists, small businesspeople. Mixing the smaller city private practitioners with the handful of other backgrounds creates an attractively diverse and comparatively representative bench.

That is not the profile in the southern part of the circuit. Ten of the south's thirteen active judges maintain chambers in three of the nation's largest metropolitan areas, Los Angeles, San Francisco, and Phoenix, even though there are plenty of smaller communities in that part of the circuit. Too be sure, many of the judges in the southern part of the circuit practiced law, but they logged more time on average in large firms or in government service, with the difference in the culture of law practice that implies.[240] Many, such as Judges Pregerson, Fernandez, Rymer, Tashima and Silverman were judges at either the state or federal levels for many years before joining the Ninth Circuit,[241] and others, such as Judges Browning and Schroeder, spent lengthy periods in government service.[242] There are more national law schools in the south, from which top academics can attract the attention necessary to be picked for the court.[243] With a few exceptions, on the other hand, southern judges' biographies lack the mainstream city and statewide professional and public leadership experiences that are de rigeur for their northern colleagues,[244] but of course, that is to be expected. Ninth Circuit judges in the northwest may be big fish in their local communities, but no matter how big a fish you are, it is tough to be a big fish in Los Angeles, let alone California. Big fish in Los Angeles want to be governor or president, not Ninth Circuit judges. Unlike many of their northern colleagues, most of the southern Ninth Circuit judges are anonymous in the California cities whence they come.

Who knows what are the ideal important qualifications for the job of Ninth Circuit judge? It is impossible to say whether the northwestern or southwestern profile is preferable. It is a

matter of taste. All this discussion suggests that the communities, and specifically the legal communities from which the two regions' judges come, are different.

Why the two legal communities are different is worthy of attention. Obviously, these two groups of judges are not internally homogeneous. The Reno judges, for example, would fit better with the Boise or Portland judges than the army from Los Angeles. The point, however, is that there are more cultural differences between the north and the south as well as the northern judges and southern judges than a few feet of snow or a grove of palm trees. The differences probably have more to do with the make-up of the groups from which judges are picked in these geographical areas, and is therefore not a mere accident of court's current composition, because the groups from which these judges are picked reflect enduring differences in the regions' legal culture.[245] What attracts attention in the two regions is different and as a result the circuit's southern judges are more likely to be big-city, big-institution judges, while northern judges are not.[246] In any event, this is not diversity; it is polarization, and it is probably a fact of life in this huge circuit where the largest communities are in the south.[247]

Regional polarization is not one of the Ninth Circuit's healthier attributes, particularly since at the present moment it has the unhappy accident of correlating with party backgrounds as well, thereby taking on an ideological taint.[248] It is not good when an "us against them" mentality emerges among the citizens of those states, even if the judges themselves do not necessarily view it that way. It is worse when that mentality is reinforced by the culture of the court. The perceived, or possibly even real, specter of a powerful region dictating to a "misunderstood minority" breeds a distressing discontent which, if unchecked, could be damning to the court's legitimacy.

Many court watchers have taken Senators Burns' and Gorton's comments that they want out from under the thumb of California judges whose thinking is "a little bit different"[249] and assumed that those Senators' only thought is to be in a circuit with judges who conform with the northwest's views on the death penalty, gun control and the environment.[250] While that characterization may speak for some split backers, it is an unfairly narrow characterization of complicated impressions that manifest themselves in California domination rhetoric. In the first place, northwestern opinion is not exactly lockstep on these issues; nor is southwestern opinion.[251] In the second place, Burns' and Gorton's concerns ring true: in a region where federal law has a particularly profound effect on people's daily lives, a federal court culture demonstrably different from and sometimes at odds with theirs has the power to overwhelm them at any time with the stroke of a pen. The concern may look narrowly political, but it has broader roots, and even if those roots turn out not to be planted in fertile soil, the flowers that grow from them are not pretty.

Moreover, geographical polarization suggests that severing the icebox states from the Ninth Circuit would have more than a mere "political" effect on outcomes. Only in law review articles does the legal culture of which the judge was a part while practicing not affect a judge's view of a case, particularly if the judge is "of" the local community, as most of the Ninth Circuit's judges are.[252] Other items on a judge's resume count too; Judge Stephen Trott's firm lecture to prosecutors about the dangers of using paid confidential informants as undercover agents sends a particularly strong message both to practitioners and other judges, precisely because he spent a long and successful career as a prosecutor himself before going on the bench, and it is a good example of how legal culture and a judge's background can influence opinions in

a constructive way.[253] In so many cases ideas about standards of review, trust in district judges, faith in the adversary process, and concreteness versus abstraction in the law have as much to do with outcomes as how a judge parses a statute or synthesizes several cases. These differences in philosophy are related to differences in backgrounds.

An example of the differences background can make may be the court's en banc decision in *United States v. Perez*.[254] All eleven judges agreed that the plain error in this criminal case was one that the court should not correct, but they divided six to five over why. The majority struggled with the jurisprudential difference between "waived" and "forfeited" error in recent Supreme Court precedent.[255] The concurring minority made an impassioned plea for the court to allow "defense counsel leeway to manage their cases as they and their clients think best," within the moral constraint that "it is wrong for the defense to ask a trial judge to do something, and then ask an appellate court to reverse because the trial judge did what was requested."[256]

The majority opinion by Judge A. Wallace Tashima analyzes the case in this tone:

> In *Olano*, the [Supreme] Court provides an extensive framework for plain error review. *Olano* does not, however, specifically address the concept of invited error. From this omission, the panel concluded that plain error review is appropriate for invited errors . . . . Although *Olano* does not directly address so-called "invited error," it certainly addresses the difference between forfeited and waived rights. Accordingly, we cannot agree that *Olano* completely overruled our invited error doctrine. Instead we must reformulate that doctrine to conform to *Olano*'s discussion of waiver and forfeiture. . . .
>
> Until now, our invited error doctrine has focused solely on whether the defendant induced or caused the error. We now recognize, however, that we must also consider whether the defendant intentionally relinquished or abandoned a known right. If the defendant has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable.[257]

Contrast the style and emphasis with this from the concurrence by Judge Andrew J. Kleinfeld:

Lawyers do not research every possible issue of law in every case. Nor should they. A lawyer necessarily and properly exercises professional judgment about how to allocate the limited time for preparation in a way likely to produce the most benefit for the client. These time allocation decisions are by logical necessity made in partial or complete ignorance of what would be accomplished if time were allocated differently. Sometimes researching the law is a waste of time, while finding and talking to a witness would produce a defense bonanza. Often there is not enough time to do both the maximum possible extent. Experienced lawyers usually know what they are doing and are acting wisely for their clients when they make their decisions about what to do, and what need not be done, to prepare the case.[258]

Which of these styles you prefer is largely a matter of taste, but not surprisingly, all the members of the concurring minority had spent long careers in the general practice of law, clocking many hours in local courtrooms on the other side of the bench.[259] All but one practiced in the some of the smallest communities represented on the court. Within the majority were two judges who had each spent thirty-five years on the appellate bench[260]; two others who had spent eighteen years as Ninth Circuit judges, one of whom was a big firm lawyer before going on the bench[261]; two long-time trial judges[262]; and a lifelong academician.[263] All but one of the majority are from the largest cities in the circuit.[264] One case doth not broad principles make, but it seems foolhardy to suggest that to the extent that background and attitudes correlate, such differences could not produce opinions of a different tone, if not a different result, perhaps more appropriate to the regions they govern.

Split critics argue that dividing the circuit to isolate these two attitudes in different circuits would do violence to the federalizing aspect of the circuit courts. Circuit reorganization is about making trade offs, however, and the relative merits of "federalization" maintained by a bloated circuit court of appeals are elusive in this case. First, with the icebox scheme, each of the new circuits would have more than three states; the several eastern circuits with only three states

seem to have managed rippingly without more, and these circuits seem to have maintained a sufficiently consistent intercircuit law to support commerce and region-wide activity.[265] Second, federalization is not the concern it was when the only federal presence for miles around might be a post office. Federal institutions, with their ubiquitous local offices, abound. We now look to Washington to solve so many of our problems, and Congress has responded with innumerable federal laws.[266] We are closer and more connected than ever before. In fact, the trend is such that it is arguably more federalism, as opposed to federalization, that we need. Finally, the icebox split is not a proposal to create the federalization proponents' nightmare--twenty circuits with only nine or ten judges each[267]; all the Ninth Circuit split would actually do is increase the number of regional circuits from eleven to twelve. It is hard to see the damage to federalization in this scenario.

Further, while the northern states have good reason to take a special interest in federal law, as it has such a huge impact on their daily lives and the fabric of their societies, they do not all have the same concerns. Yuppies in Seattle, Mormons in Idaho, struggling logging communities in eastern Oregon, native corporations in Alaska, ranchers in Montana: only those who for whom all of these groups are foreign could see them as monolithic or homogeneous, either culturally or in their legal concerns. The Twelfth Circuit would still make a significant contribution as a unifying force; and maybe a bigger one than the current Ninth Circuit because the Twelfth would not have the stigma of being "California's court."

"Federalization" seems like a noble value in high-minded public policy debates, but it can be quite destructive to national loyalties when one region begins to chafe under a yoke tightened by another. In fact, the split might have a hitherto undiscussed positive effect on Californians

and California judges in particular. A court of two regions has the potentially of domination, or perceived domination by one over the other that can work both ways. Californians and California judges may have some of the same domination concerns about northwestern judges that the northwestern Senators express about Californians. If federalization comes at the price of suspicion and perceived domination of one group by another, on either side, the marginal value of the federalization achievable by keeping the Ninth Circuit together may not be worth it.

Moreover, those who fear the split because it will change their preferred interpretations of federal law[268] should take heart, and to those who back the split in order to make federal law conform with local preferences, I say: look again. History teaches that federal judges are perfectly capable of determining and enforcing whatever the true spirit of federal law, the message of the entire nation, whatever it may be, even when that spirit does not comport with their neighbors' political hopes.[269] How else could the Fourth and the old Fifth Circuit have become such leaders in civil rights law? Those efforts in the southeast were touch and go during the 1950s, 60s and 70s, but they would not have been any easier if judges from Massachusetts or New York had been brought in to adjudicate civil rights disputes. Yet, that is precisely what the Ninth Circuit does when it sends three Californians to interpret ANCSA for Alaskans or three northwesterners to measure Proposition 209 against the Constitution for Californians. Many more like the ANCSA episode and the Ninth Circuit's "federalizing" influence will not be able to repair the damage.

Federalization is a useful value and an important purpose for the federal courts, but it is unclear how much it is worth in light of the many other concerns about the court's current size and structure. Arguments about diversity and federalization are at best of minimal concern, and

at worst are complete red herrings. The current Ninth Circuit is marked more by polarization than by diversity, anyway, and it makes sense to isolate the poles so they quit bumping heads. The icebox split would also retain ample federalizing influence over the region by reinforcing confidence in the institution of the federal courts.[270]

## IV. Other Arguments Against the Split Are Unpersuasive

The best defense is the best offence. Most of the best arguments against the split lose their force when one grasps a good understanding of the Ninth Circuit's problems and their relationship to the circuit's size and composition. Nevertheless, in the spirit of the wise politician's motto, "leave no shot unanswered,"[271] there is value in examining the few remaining arguments against splitting the circuit, because they are plainly insufficient to persuade objective observers.

The split is merely a politically motivated attempt to change the law in the Northwest. Everything Congress does is "politically motivated." That is the way the system works. Instead of worrying too much about why politicians do things, maybe the rest of the legal community should figure out whether the split would otherwise be a good idea, so we can take advantage of the political climate if it is. At that level, this "political motivation" argument does not seem very serious.

Perhaps some northwestern lawmakers want a Twelfth Circuit that will interpret the law differently than the current Ninth Circuit. Why this is viewed as so horrible is not facially evident. There is very little federal common law; most federal law is statutory; and Congress

wrote the statutes! That Congress should take some interest in how judges interpret their work product is certainly not surprising. On the one hand, if Congress wants to use a tool with the precision and efficiency of a meat cleaver to change how its statutes are interpreted, well, this is one of the tools the Constitution provides.[272] Nevertheless, we instinctively recoil at the notion of Congress controlling the outcomes of court cases by tinkering with circuit boundaries. It flies in the face of our notions of an independent judiciary.

The "politicization" criticism has merit only if the new Twelfth Circuit actually would interpret the law differently from the old Ninth. If true, it probably reflects underlying jurisprudential differences among substantial groups of judges masked by an accident of geography. That seems unlikely, but if it is true, then maintenance of the status quo is simply a choice favoring legal predictability instead of the occasional uncertainty, in terms of circuit splits, necessary to ensure "correct" results. Predictability is an important value, but maybe one of the reasons Congress is increasingly interested in splitting the circuit is that it thinks the Ninth Circuit is getting it predictably wrong.[273] Unlike the circuit courts, the Supreme Court is not exactly overworked.[274] If the split would create additional intercircuit conflicts, perhaps the Supreme Court needs to take these cases and resolve the differences, the Congress needs to amend the law to be more clear, or the circuits need to struggle with these issues longer themselves.[275] In any event, exposing differences is hardly a bad thing in principle.[276]

My own view is that this discussion is academic; splitting the circuit would not change the law much, and therefore, this reason for opposing the split is a red herring. The judges do agree on most cases. There are fewer controversies on the court than one might think.

Split opponents believe they have the moral high ground, but they forget that trying to control the state of the law by controlling circuit boundaries is judicial gerrymandering whether you are trying to change those boundaries or whether you are trying to hang onto the status quo. It is not surprising that issue-oriented groups, such as environmentalists, are in the forefront of the opposition to splitting the Ninth Circuit. From the perspective those who believe the fate of the spotted owl in Oregon or Indian country in Alaska lies in the hands of judges from California and Arizona, those states must be kept together in one circuit at all costs.[277] Nevertheless, more detached observers must conclude that there is a poverty to a debate over circuit splitting driven by the bottom line in a few cases. In that debate, neither side has the market cornered on integrity.

The icebox split will simply leave a large circuit with plenty of the same problems it purports to solve. This is a fair criticism. The icebox circuit is not a complete solution to the Ninth Circuit's ills. It can't be; there are some problems the Ninth Circuit faces, such as overwhelming filings, that a split just can't solve (though to the extent that predictability would discourage some filings, a split might make a difference). Further, the Ninth Circuit that will remain after the northwestern states are cut away will be very large, and if fully staffing it becomes part of the deal that produces the split, it could quickly grow in judgeships to the approximate size of the understaffed current Ninth. All the old problems of workload, collegiality, and maybe even polarization of all types will be back in force.

A complete solution may not be necessary right now, however. Merely delaying a crisis can sometimes avert it. Who knows what ten or twenty years will bring to the United States courts? The entire supply or demand curve for justice may shift. We may have a national court

of appeals. Congress may pass new laws limiting the federal courts' substantive jurisdiction. Congress may also develop a taste for splitting states to split circuits, and carve up the new Ninth as it did the old. Twenty years from now, the "litigious society" may be a thing of the past, and young lawyers like me may be standing in bread lines. It would be silly to split the Ninth Circuit if that can only be a short-term solution, but if it would improve the administration of justice in the northwestern states now, it is sensible to split the circuit if that would not do damage to the possibility of a more extensive solution later. The icebox split achieves that goal.

Why not just wait for the more extensive solution, especially if that solution involves amalgamation of the courts of appeals or division of judges on some other basis, such as into subject matter panels? As a practical political matter, the Congress has no stomach for nationwide realignment of the circuits or some other global solution.[278] Even if that would be the best thing for our appellate court system, it isn't going to happen any time soon.

Nor is it clear that a global suggestion is necessary. For twenty years study commissions and jurists have warned that the sky is falling on our circuit courts of appeals, yet they have survived remarkably well.[279] If there are problems in the northwest states that a sensible split could solve, however, that is another matter, and those states deserve at least a partial answer sometime in our lifetimes. Perhaps the icebox circuit is it. Putting those problems on hold until the elusive day when the need for a global solution is apparent, and the entire nation can agree on one is unfair. Further, the idea that we should try every other possible idea for reform before splitting the circuit sounds too much like a "save the Ninth at all costs" sort of argument that lacks persuasive force.[280]

One of the hardest things about making any decision is that no matter how careful you are to "keep your options open," you necessarily close some doors behind yourself. The icebox split has the merit of keeping the door open to other splits or realignments in the future, because the icebox circuit is the type of circuit structure one might choose if one were starting from scratch. At some point, however, any change in circuit boundaries closes or partially closes the door to some other change. Closing the door on amalgamation is not much of a price to pay for a sensible circuit now. Amalgamation would exacerbate many of the problems discussed in this paper. At some point, the Congress needs to decide that certain types of answers--amalgamation for example--are no answers, at least in the near term. If splitting the Ninth Circuit is a step toward making that choice, then Congress should split the circuit by all means.

Ninth Circuit judges and the Ninth Circuit bar oppose splitting the circuit. Until recently, it is true that Ninth Circuit judges were unwilling to back a split publically.[281] Perhaps there is concern that supporting the split is an implicit criticism of a past or the sitting Chief Judge.[282] In any event, those days are over. Judges Diarmuid O'Scannlain,[283] Andrew J. Kleinfeld,[284] and Sidney Thomas,[285] have all gone on the record at one time or another as either favoring, or not opposing, a sensible split.

Further, stating that the Ninth Circuit bar opposes the split[286] minimizes the amount of support that exists for the project. Ninth Circuit lawyers are notorious for speaking privately about their dissatisfaction with the circuit, but refusing to go on record with those thoughts.[287] Legal uncertainty also encourages litigation, which is sometimes good for attorneys, but is almost never good for the their clients.[288] Interestingly, the state attorneys general of seven of the states in the Ninth Circuit back the split.[289]

Jurists outside the Ninth Circuit seem to back a sensible split. Former Supreme Court Chief Justice Warren Burger has urged Congress to split the circuit, because he believes the limited en banc procedure is fundamentally flawed.[290] Current Supreme Court Justice Anthony Kennedy, a former Ninth Circuit judge, told Congress in April 1997 that the court is "too large to have the discipline and control that's necessary for an effective circuit."[291] Leaders of other appellate courts disagree that the usual Ninth Circuit judge's proposed panacea for the court's ills--more judges--will help solve the circuit's problems.[292]

Most importantly, most of the elected representatives in the northwest states support the split. In fact, it sometimes seems that the primary opposition to the split comes from California judges and Congressmen.[293] That is understandable, but it is not a reason for anyone else to oppose the split.

The size of the Ninth Circuit permits useful experimentation with the administrative techniques for large circuits. Our circuit courts of appeals are growing by historical standards and the size of the Ninth Circuit has served a useful purpose in the past twenty years by providing a forum in which many efficiency techniques in court administration were tried, and in many cases, shown to work. The information thus gleaned will be useful in the future, and at one level, it will be unfortunate to lose this forum for experimentation.[294]

Policymakers have to put things in perspective, however. Is the opportunity for experimentation in the Ninth Circuit more important than the administration of justice and the legitimacy of the United States courts in the northwest? Surely not. Further, the Ninth Circuit that will remain after the split is not exactly miniature. There will still be room to use the Ninth Circuit as a laboratory for future innovation.

The start up costs could be considerable, including money for new buildings. Let it never be said that I looked cavalierly at a potential $60 million bill to the taxpayers, which is the amount some estimates suggest would be needed in start-up costs for a new Twelfth Circuit.[295] If the problems outlined above with the current Ninth Circuit are real, and a new Twelfth Circuit of the icebox states is the solution, then let us also hope that Congress will not balk solely due to the cost, being "pennywise, but pound foolish."

Circuit courts take on institutional characters. Perhaps the Twelfth Circuit's institutional character should be "the cost-efficient circuit." Eventually, most who oppose the circuit split raise issues such as new buildings, new staff and staff training as high costs of splitting the circuit. It is possible to minimize those costs. The new Twelfth would be a relatively small circuit of less than ten judges, so even if all the judges were sitting on various panels at once with a couple of seniors, the maximum number of panels that could sit at a time would probably be four. Therefore, if the court divided its sittings between Portland and Seattle, which already host Ninth Circuit panels on a regular basis, with the occasional sitting elsewhere, the court would have plenty of courtrooms and visiting office space for judges. Huge new courthouses are unnecessary.

As for central staff, even if no staff came from the old Ninth because the Congress chose to fully staff the new Ninth, the necessary staff resources to support an eight or nine judge circuit would be relatively small. Further, less staff might be necessary on a per capita basis as well. After all, filings per judge are fewer in the icebox states than in the southern states. The sizable staff devoted to monitoring inconsistencies between panels would be partially expendable, because the volume problems that produce those inconsistency concerns would not exist. Many

administrative jobs would be less complex because there would be fewer people to coordinate. Currently the Ninth Circuit's legal and administrative staff is organized into departments such as death penalties, motions and screening, and inventory, with deputy clerks or other high level managers overseeing those operations. There are other departments, such as the circuit executive's office, that are made necessary due to the circuit's size and workload. Those departments are large on the Ninth Circuit due to its size, and managers supervise many employees. It is conceivable that the Twelfth Circuit could cut out a layer of management or whole sections of staff that the current Ninth could not survive without.[296]

Nevertheless, some central staff would be necessary, and they need appropriate places to work. Though the federal government generally prefers to build its own buildings specific to its needs rather than to rent existing office space, the latter would be a good option at least in the short term. The current Ninth Circuit rents several floors of office space in downtown Seattle near the federal courthouse for visiting judge chambers. Perhaps some of this space could be remodeled on a more permanent basis for central staff use. Federal government office space is also currently vacant in Portland. Other federal court resources could be reshuffled. The point is simple: if there is a will, there is a way, and at least in the short run, creating the Twelfth Circuit does not need to bust the budget.

## V.Conclusion.

Hopefully, when the Commission on Structural Alternatives for the Federal Courts of Appeals reports to Congress later this year, it will address the many positive aspects of creating

the "icebox circuit" of Alaska, Idaho, Montana, Oregon and Washington. Splitting the Ninth Circuit by creating the icebox circuit would significantly decrease workload and administrative burdens in both courts, and could also be expected to have a substantial positive effect on collegiality in both circuits and would eliminate the geographical polarization currently marring the Ninth Circuit's work. The icebox split is the best available intermediate term solution to the Ninth Circuit's ills. For that reason, the icebox cometh.

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One final caveat is needed. This article is not intended to reveal any confidential communication to which I had access while I clerked for the Ninth Circuit. If it did, such a revelation would be improper and unnecessary. I have gone to some effort to make sure I have not made that mistake. If I have unwittingly, I hope the parties involved and the court will accept my sincerest apologies.

2.*The Last Enemy*, a BBC television movie starring John Thaw and based on characters created by novelist Colin Dexter.

3.Chief Justice William Rehnquist appointed the Commission's members, which include former Supreme Court Justice Byron White, Sixth Circuit Judge Gilbert S. Merritt, Ninth Circuit Judge Pamela Rymer, United States District Court Judge from Arizona William Browning, and former American Bar Association President N. Lee Cooper. *Panel chosen to study federal appeals court system*, Assoc. Press, Dec. 19, 1997.

4.*See* Carl Tobias, *'Judicial gerrymandering' would split the 9th Circuit*, SAN FRAN. EXAMINER, Aug 11, 1997, at A13. The House ultimately killed the idea for 1997, and the two houses of

Congress compromised on a scheme to create the Commission instead.

5.PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 203 (1976).

6.In 1975, the Commission on Revision of the Federal Court Appellate System ("Hruska Commission") claimed that an appellate court might not be able to function with more than nine judges. Clearly, that view turned out to be wrong. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 57-58 (1975) (*hereinafter Hruska Report II*), also cited as 67 F.R.D. 195 (1975).

7.Alaska, Arizona, Hawaii and Guam were added later. *See* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 76 (1994).

8.*See, e.g.*, Ann Donnelly, *Fairness Demands Split of Ninth Circuit Appeals Court*, THE COLUMBIAN, Aug. 3, 1997.

9.State of Alaska v. Native Village of Venetie, 101 F.3d 1286 (9th Cir. 1996) prompted both Stevens and Energy Committee Chairman Frank Murkowski to take on a higher profile in the split debate. Prior to *Venetie*, both Senators supported the split, but Burns and Gorton took the lead. Stevens' interest is critical, because his role as Senate Appropriations Committee chairman gives split backers the opportunity to trade for a vote with every Senator who wants spending in his state. In fact, Stevens pushed the split package through as a rider to one of his committee's bills. David Whitney, *9th Circuit Split Clears Roadblock*, ANCH. DAILY NEWS, Jul. 25, 1997, at A1.

10.The Ninth has had a disproportionately high reversal rate for almost fifteen years with only a brief respite in the early 1990s. William Carlsen, *Frontier Justice*, SAN. FRAN. CHRON., Oct. 6, 1996. The Supreme Court reversed only two-thirds of all the cases it heard in 1996-97. Bob Egelko, *Senate Short-Circuits 9th With Vote to Split Court*, Seattle Post Intell., Aug. 18, 1997, at B1.

11.Ann Donnelly, *Fairness Demands Split of Ninth Circuit Appeals Court*, THE COLUMBIAN, Aug. 3, 1997 (quoting Ninth Circuit Judge Andrew J. Kleinfeld).

12.Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 Mont. L. Rev. 261, 263 (1996).

13.To take what I believe to be a relevant example, there is some evidence in published opinions that the Ninth Circuit is currently having collegiality problems. *See infra* sec. III.B. Those problems may or may not be worse than in other circuits, but that is no reason for us not to decide we are going to improve matters in the Ninth Circuit if that can be done by splitting the circuit without too much excess disruption. It is also reasonable to conclude that due to the size of the court, it will be much more difficult to overcome those problems within the current

structure or that they may become intractably worse in the future due to the circuit's size. In other words, structural considerations may or may not have caused the problem, but they have made collegiality problems extremely difficult to solve. There is also good reason to think that splitting the circuit, which is already a statistical outlier from a size perspective, might mitigate or solve the problem. I find it irrelevant that some other smaller circuit may have a collegiality problem as well, for perhaps completely different reasons. Maybe the judges on the smaller circuit are simply hard to get along with. A different solution, or perhaps no solution, should be addressed to that problem.

14.*See, e.g.*, RICHARD FENNO, THE MAKING OF A SENATOR: DAN QUAYLE ix (1989). This book was part of a major project by University of Rochester Professor Richard Fenno, to describe and account for the relationship between a Senator's work at home, campaigning, and his work in Washington, governing. Fenno explains:

> My vantage point has been the view "over the shoulder" of Senator Quayle and his staff. My perspective has been their perspective. I have not tried to watch or talk to other relevant actors in the events described herein--although I have come across some of them in the normal course of my research. And I have relied, at several points, on the accounts and judgments of interested political reporters--the media scorekeepers.

My vantage point is Fenno's, with a twist. Not only did I look over the shoulder, literally as well as figuratively, of a relevant actor on the Ninth Circuit--Judge Andrew J. Kleinfeld--but I actually became part of the court administration process as his elbow clerk.

Having said that, one caveat is appropriate. I have worked hard to avoid allowing my general observations about how the Ninth Circuit or a judge's chambers operates to degenerate into simply being descriptions of how Judge Kleinfeld's chambers operates. One thing I have learned in my observations of the court at work is that *every judge is different*. Generalizations are actually quite difficult to make for that very reason. In a number of cases, my experience as a clerk for Judge Kleinfeld was different from what I believe to be the average experience for clerks (which no clerk may ever actually experience!) and in other cases, our chambers was smack in the middle of the mainstream. Clerks share insights about their chambers and the clerking experience, I observed the work that came into our office from other chambers, and I had the opportunity to soak in the culture of the court. Obviously, my personal experience plays a role in my views, but those other opportunities do so as well.

15.GILBERT & SULLIVAN, HMS PINAFORE.

16.The District of Columbia Circuit and the Federal Circuit are more like the subject matter circuits Professor Daniel Meador has proposed. Daniel Meador, *The Tower of Babel*, *in* ARTHUR HELLMAN, ED., RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS, 200-01 (1990).

17.There are good reasons not to reorganize the federal courts beyond dividing the Ninth Circuit, as the Hruska Commission realized. The Fifth Circuit split of 1981 proved that it is possible to preserve the stability of stare decisis, even when a circuit splits, *see* BAKER, *supra* note ____, at 68-69, but that would be much more difficult if the Congress reorganizes all the circuit borders. Further, the Hruska Commission found loyalty with the judiciary and the bar for the current circuits. *Hruska Report I*, *supra* note ____, at 228. As a practical matter, Congress has never seriously considered a complete reorganization of the circuits and is unlikely to embark on that sea in the near future. *See* BAKER, *supra* note ____, at 216-18; Conrad Burns, *Dividing The Ninth Circuit Court of Appeals: A Proposition Long Overdue*, 57 MONT. L. REV. 245, 259 (1996).

18.Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits" Alternative Proposals*, 62 F.R.D. 223 (1973) (*hereinafter Hruska Report I*).

19.*Hruska Report II*, 67 F.R.D. 195 (1975).

20.Many government and private studies of the federal courts followed those of the Hruska Commission, but none matches it for the fertility of the ground it broke in the court administration debate, the number of recommendations implemented, and the prescience of its warnings. For a summary of these efforts, see BAKER, *supra* note ____, at 32-43. Baker says that not many of the Hruska Commission's recommendations were in fact implemented, but the Commission did better than those that followed: the Fifth Circuit was ultimately split, in the formulation the Hruska Commission had proposed; many of its efficiency proposals were tried and Congress adopted the Commission's primary strategy of adding judges to cope with workload; and all split proposals are still judged first by the Hruska Commission's criteria.

21.*Hruska Report I*, *supra* note ____. at 230-37. Several giants of the legal academy endorsed the Hruska Commission's circuit splitting proposals. CARRINGTON, ET. AL., *supra* note ____, at 202-03.

22.*Hruska Report I*, *supra* note ____, at 230.

23.*Hruska Report I*, *supra* note ____, at 235.

24.Pub. L. 95-486, § 6, Oct. 20, 1978, 92 Stat. 1633:

> Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.

25.BAKER, *supra* note ____, at 59-60.

26.BAKER, *supra* note ____. at 62-63. Interestingly, the Fifth Circuit rejected a limited en banc procedure partly because the law of the circuit would be held hostage to the luck of the draw.

27.BAKER, *supra* note ____, at 64.

28.Pub. L. 96-452 § 5 (1981); *Hruska Report I, supra* note ____, at 233..

29.*Hruska Report I, supra* note ____, at 235.

30.BAKER, *supra* note ____, at 78-83.

31.28 U.S.C. § 44.

32.Congress had not confirmed any of President Clinton's appointments since the Honorable A. Wallace Tashima and the Honorable Sidney R. Thomas on January 4, 1996 until early 1998. Active manpower on the court had dropped to eighteen judges. The Honorable Barry G. Silverman was commissioned on February 6, 1998, the Honorable Susan P. Graber on April 1, 1998, and the Honorable M. Margaret McKewon on April 8, 1998. The Ninth Circuit still remains below statutorily authorized full strength, and many Ninth Circuit judges write openly of needing as many as thirty-eight judges. By contrast, the Fifth Circuit has its full compliment of seventeen authorized active judges.

33.Hellman, *Dividing the Ninth Circuit, supra* note ___, at 262. Professor Hellman argues that

> [L]ittle weight should be given to the 1973 report of the Commission on Revision of the Federal Court Appellate System (Hruska Commission), which recommended that the Ninth Circuit be divided into two new circuits. That recommendation has been outdistanced by events, and it cannot persuasively be invoked in support of the current legislation.

Professor Hellman's disclaimer is not itself particularly persuasive. He refers in particular to the Commission's recommendation that each circuit include no more than nine judges, which is obviously now unrealistic (and therefore, deserves no more discussion), and its ban on one-state circuits, which is not relevant in the icebox circuit debate. *Id.* at 264-67. Professor Hellman goes on to point out that more recent studies disapprove of circuit splitting, but their reasons are consistent with the Hruska Commission's general criteria; he cites specifically more recent reports' concerns with disrupting precedent and administration, which the Hruska criteria mention, as well as the need for solid evidence of judicial dysfunction to justify circuit splitting, which is just a different way of saying the benefits of a split must outweigh the considerable costs. *Id.* But no one is arguing with that. Perhaps Professor Hellman doth protest too much.

34.*E.g.*, BAKER, *supra* note ____, at 77-78.

35.Diarmuid O'Scannlain, *A Ninth Circuit Split Study Commission; Now What?*, 57 MONT. L. REV. 313, 318 (1996).

36.Others include a lack of diversity among the judges and the fact that since Senators from the state where a judgeship is being filled, a single long-serving Senator could essentially pack a court. *See also*, *Hruska Report I*, *supra* note ____, at 237.

37.This is one of the reasons that made the Hruska Commission reject such a split, aside from the fact that it would create a one-state circuit. *Hruska Report I*, *supra* note ____, at 237.

38.BAKER, *supra* note ___, at 70-71.

39.Burns, *supra* note ____, at 249.

40.At least in the short term, Nevada has two active judges, including the Chief Judge, Procter Hug, Jr.

41.The problem is that no state wants to stay with California if it doesn't have lots of company, and Arizona is not different. Arizona probably ended up in the proposed Twelfth Circuit because it was the only way the split backers could get Arizona's Senators to go along, and they must have needed that support. *See* Tobias, *Judicial Gerrymandering*, *supra* note ____. It is unlikely that northwestern Republicans viewed southern Arizona, with its two active judges appointed by Democratic presidents (including the one who would be Chief Judge, Mary Schroeder), as an ideal addition to their new circuit. From this perspective, it is not surprising that the Congress ultimately decided not to split the circuit this way; it is clearly not the best approach from a northwestern political perspective or a nonpartisan practical perspective.

42.Burns, *supra* note ___, at 247-48.

43.*Hruska Report I*, *supra* note ___, at 236.

44.*Id.*

45.O'Scannlain, *Study Commission*, *supra* note ____, at 321. It was not a fifty-fifty split in 1974, however. *Hruska Report I*, *supra* note ___, at 236.

46.*Hruska Report I*, *supra* note ____, at 238-40.

47.Diversity cases never go en banc on state law issues; the job of a federal court in a diversity case is not to make law but to apply what state law it can find. *See* Erie v. Tompkins, 304 U.S. 64 (1938). The Supreme Court will also not give litigants a third bite at the apple in diversity cases. Bishop v. Woods, 426 U.S. 341 (1976).

48.*See* Arthur Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. Pa. L. Rev. 1188 (1974).

49.*Hruska Report I, supra* note ____, at 239.

50.The new Fifth Circuit's filings caught up to the number that had constituted crisis proportions prior to the split in only five years. The situation has reached emergency proportions in both circuits, though the Eleventh has petitioned Congress not to add more circuit judgeships in order to preserve collegiality. Baker, *supra* note ___, at 70-71.

51.Actually, some are more artful. Professor Carl Tobias has written that "[m]y effort to identify a practicable realignment indicates that the court resists workable *bifurcation.*" Tobias, *supra* note ____, at 599. Bifurcation is not the same as splitting a circuit, because bifurcation implies dividing the circuit into two fairly equal parts. I agree with Professor Tobias that bifurcating the Ninth Circuit probably creates more problems than it solves in our present mindsets concerning circuit structure and size. There is no reason, however, that we must divide the Ninth Circuit in half, nor that we must divide it into only two parts. One of the merits of the icebox split is that it creates at least one sensible circuit while leaving a second circuit large enough to be sensibly split again at the appropriate time in the future. Professor Tobias makes circuit splitting sound much harder than it really is.

52.Some believe Hawaii should be part of this circuit as well. That might actually be a good idea; any circuit with Alaska and or Hawaii is going to be a large one geographically, so there is an argument for keeping that problem isolated in one circuit.

53.Arguably Montana is slightly outside that bloc, but nothing in life is ever perfect.

54.These states would make up slightly more than one-fifth of the circuit's total workload. *See*O'Scannlain, *Study Commission, supra* note ____, at 321.

55.If the icebox circuit received no more judges, it would have eight actives, including the two recent Clinton appointees, which is two more than the First Circuit, the only circuit now with a single-digit complement of judges. The Hruska Commission specifically rejected this configuration in its first report, *Hruska Report I, supra* note ____, at 242, but circumstances have changed since then. The icebox states included only 17 percent of the total Ninth Circuit filings in 1974; the proportion is approximately 23 percent now, which is a significant change. *Id.*; O'Scannlain, *Study Commission, supra* note ___, at 321. The Hruska Commission specifically noted that if the filings from the icebox states significantly increased, a separate circuit would be appropriate. *Hruska Report I, supra* note ___, at 242. Moreover, if the icebox configuration were modified to include Hawaii, the court would arguably be entitled to nine active judges making it significantly larger than the First Circuit.

56.The "new Ninth" would have thirteen judges, but this number is probably insufficient to manage the caseload that remains as filings per judge is larger in what would be the new Ninth than in the new Twelfth.

57.*See* Diarmuid O'Scannlain, *A Ninth Circuit Split Study Commission: Now What?*, 57 MONT. L. REV. 313, 320 (1996). I should note that Judge O'Scannlain has not endorsed this approach. Aside from whatever his opinion of the proposal's merits may be, it is probably indelicate for him to endorse any plan that would facilitate creation of the icebox Twelfth Circuit, as he would be the Chief Judge of such a circuit if it is created soon, he being the most senior active judge under age sixty-five who has not previously served as a chief judge. 28 U.S.C. § 45.

58.The Tenth Circuit is generally viewed as overstaffed with judges, and perhaps one of its states could use more business.

59.It would no doubt be another sore point with northwesterners if they knew that their judges are overworked so that they can help process California's appellate filings.

60.Pub. L. 85-486, § 6, Oct. 20, 1978, 92 Stat. 1633.

61.*E.g.*, Hellman, ed., *supra* note ___. Most of the essays in this book are positive, though others raise questions about whether the Ninth Circuit should remain as one unit.

62.In fact, one argument against splitting the circuit is that students of judicial administration will lose their laboratory of judicial efficiency studies. *E.g.*, Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 S.M.U. L. REV. 583 (1997). They need not fear--the Fifth Circuit and the new Ninth will soon do as well.

63.*E.g.* Baker, *supra* note ____, at 89-90; Tobias, *supra* note ___, at 591.

64.Critics will point out quite correctly that the number of gambles-on-appeal is not documented, leading, of course, to the question of whether it happens at all. As Professor Carrington has pointed out, however, it would be more surprising if it *didn't* happen: "what the present system dictates is that at the very end of almost every case, there is a final roll of dice to see whose mind will be applied to characterizing the facts and apply an often opaque legal text to those facts." Carrington, *supra* note ___, at 210.

66.This statement assumes that per capita filings per state do not vary significantly and does not take certain other size related problems such as administration and collegiality into account.

66.*See* J. Harvie Wilkinson, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1170 (1994).

67.In fact, a judge on a screening panel may send a case to a regular panel on the theory that it cannot be resolved in a matter of minutes.

68.My observation is that it takes two to three full workdays for a trained clerk to produce the average bench memorandum; if each chambers writes ten bench memoranda, it will take twenty to thirty days of clerk time to do so. When I say "full" workdays, moreover, I am not referring to a mere eight-hour day, however.

69.*See generally* Fed. R. App. P. 35; 9th Cir. Rule 35-1.

70.Hellman, *supra* note ____, at 74-75.

71.Adding more judges wouldn't change this; in fact, adding more judges might increase the number of en banc calls per judge due to the consistency problems discussed *infra*, and simply because there would be more judges to make the occasional en banc call simply because the judge involved disagrees vehemently with the outcome.

72.Hellman, *supra* note ____, at 74-78.

73.Everyone connected or formerly connected with the Ninth Circuit by whom I run this number initially questions it. I find universal agreement that the investment in the en banc process is large, but I hear two criticisms: (1) that it is more time than clerks spent; and (2) clerks spend ten hours a week, but judges don't. I think that neither clerks nor judges realize how much time they spend on en banc related matters. My view may be colored by the fact that I worked for a more junior judge, and junior judges are more frequently assigned en banc opinions and therefore structurally have more work to do on en banc projects, but I am not sure. An important thing to remember is that *every judge is different*. It is obvious that some judges, and therefore their staffs, participate more actively in the en banc process–calling for en banc and circulating memos--than others. Occasionally a judge will become deeply involved with an en banc project that consumes an immense amount of time, even though that judge would not ordinarily put so much time into en banc work. Every time a judge has to sit on an en banc panel that probably consumes at least one day traveling and hearing argument, and another day preparing for the argument. Upon hearing this, many who questioned ten hours for judges find themselves agreeing with it. Ten hours is an average for the court. Obviously, experiences will differ.

Adding judges can relieve some of the burden of actually sitting on en banc panels. My suspicion, however, is that such relief is offset by additional judges who increase the number of en banc calls. Technically, there are rules about what cases are en banc worthy (matters of particular importance, inter- and intra-circuit conflicts), but a significant number of en banc calls come from judges who simply think the panel opinion is dead wrong. These are not necessarily high-profile cases an off-panel judge would pick out from her stack of slip opinions, either. The larger the court's caseload, and/or the more judges on the court, then the more en banc calls there will be. More en banc calls increase workload to some degree, regardless of the number of judges on the court available to sit on en banc panels.

74.*E.g.*, Arthur Hellman, *Maintaining Consistency in the Law of the Large Circuit*, *in* ARTHUR HELLMAN, ED., RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 74 (1990).

75.For a discussion of this alternate view that is more consistent with my observations see *id.* at 74, 77-78.

76."Stopping the clock" is a way that an off-panel judge asks the panel to give him or her more time to consider calling for en banc rehearing. Usually a memorandum requesting a stop clock is accompanying by suggestions for changing the opinion--perhaps even its outcome--which if made will eliminate the need the off-panel judge sees for en banc rehearing.

77.After all, if a judge has already decided to buck stare decisis or throw in some questionable dicta, that judge has clearly not been constrained by the normal jurisprudential means. There are so many ways to distinguish precedent without running afoul of stare decisis. Professor Hellman suggests that it is "ludicrous" to think that the specter of en banc could cause a life-tenured judge to decide a case in a different way from the one his own reading of the law demands. HELLMAN, *supra* note ____, at 77. All I can say is that this is not consistent with my observation of judges at work. A judge is not deaf to reason; she may conclude her reading of the law is wrong or would benefit from fuller development. Appellate judges may not be overly concerned about job security, but they do value the high opinion of their peers. Some judges, such as Judge Stephen Reinhardt feel they can best maintain their integrity and the respect of others they value by taking on higher authorities, David M. O'Brien, *Reinhardt and the Supreme Court: This Time, It's Personal*, but Judge Reinhardt's approach is not representative of Ninth Circuit judges on this point in my view.

78.*See* Jerome Farris, *The Ninth Circuit--Most Maligned Circuit in the Country--Fact or Fiction?*, 58 OHIO ST. L.J. 1465, 1470-71 (1997).

79.*Id.* at 1470-71.

80.For example, the Ninth Circuit was equally large in the late 1980s and early 90s, but the reversal rate declined considerably then.

81.One fair criticism of this discussion is that on a smaller court, judges would have to sit on a greater percentage of en banc panels. That would that would increase workload. I suspect, however, that sitting on a greater percentage of en banc panels is a minor offset to the considerable gains to be had from decreasing the size of the circuit and therefore cutting the number of en bancs to be heard. There are two reasons for my suspicion. First, very few cases are actually heard en banc, but many suggestions for rehearing en banc are made by the parties, many stop-clocks are requested, and many en banc calls are made and debated. Those burdens are substantially greater on a large circuit. Second, I suspect it is true that a certain number of en banc calls are made by each judge; adding judges increases en banc calls, even if the number of en-banc-worthy cases does not increase.

82.Ninth Circuit judges can, and do, limit the amount of "new law" in the circuit by writing as many unpublished memorandum dispositions as possible. This is just another example of trying to keep the lid on the problem, however. Some dispositions simply must be published and it would be a dereliction of judicial duty to do otherwise. The Ninth Circuit's rules require publication only if it:

(a) Establishes, alters, modifies or clarifies a rule of law, or
(b) Calls attention to a rule of law which appears to have been generally overlooked, or
(c) Criticizes existing law, or
(d) Involves a legal or factual issue of unique interest or substantial public importance, or
(e) Is a disposition of a case in which there is a published opinion bya lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or
(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or
(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

Ninth Cir. R. 36-2.

83.Tjoflat, *supra* note ____, at 72.

84.*See* Diarmuid O'Scannlain, *A Ninth Circuit Split is Inevitable, but not Imminent*, 56 Ohio St. L.J. 947, 948 (1995). This benefit is more meaningful to judges than clerks, because most clerks don't stay around long enough to benefit from institutional knowledge and awareness. On the other hand, if a judge organizes his office so that he or she reviews cases and gives instructions to clerks based on his own intuitive feel for the case, a solid sense of the broad outline of circuit law can save everyone a great deal of time and effort. *Contra* Meador, *Tower of Babel*, *supra* note ____, at 197 (Ninth Circuit may prove wrong the rule of thumb that an appellate court is too large if its judges cannot read all its own opinions).

85.This is not nearly enough time to read all the opinions but does permit an intense "flip-through." According to Chief Judge J. Harvie Wilkinson of the Fourth Circuit Court of Appeals, it takes at least an hour each day for judges on his court to read slip opinions, Wilkinson, *supra* note ____, at 1177..

86.It is clear that some judges lavish care on all death penalty cases (probably on the assumption that they, if no one else does so, will make an en banc call as a matter of course), which would increase the workload their chambers face as a result, and therefore an estimate of an average is difficult to make. This is not to say that some judges do not care about death penalties, however. All judges take them seriously, but many only work up the cases where they are assigned either to the three-judge or en banc panel. Because many en banc proceedings in collateral (habeas corpus) death penalty cases occur under immense time-pressure right before an execution, this is the one situation in which judges learn in advance of the en banc call who will sit on the en banc panel. Ninth Cir. R. 22-3(b). As a result, the judges may be able to spend weeks or even months poring over briefs and record prior to voting. Often the one copy of the record is passed from

judge to judge as the execution date approaches. Even these efforts do not completely succeed in making the death penalty process run smoothly so that judges may make well-reasoned, well-informed decisions in these very important cases. *See, e.g.*, Alex Kozinski, *Tinkering with Death*, NEW YORKER, Feb. 10, 1997, at 48; Stephen Reinhardt, *The Supreme Court, The Death Penalty, and the* Harris *Case*, 102 YALE L.J. 205, 216-18 (1992). Many death penalty cases provoke court-wide discussion and debate long before decisions come down or certain relevant filings are made.

87.More frequently than is quite comfortable, one finds Ninth Circuit *opinions* (as opposed to unpublished memorandum dispositions) that are obviously warmed over bench memoranda. Not all judges do this–some even write all their own opinions–but that decision involves a tradeoff. The workload is sufficiently large that corners must be cut somewhere, and judges who write all their own work may have a hard time keeping their dockets current.

Law-clerk written opinions have several disadvantages. Aside from the obvious fact that no clerk was appointed by the president and confirmed by the Senate, and therefore, has no business writing law for the nation, what clerk written opinions mean for precedential value and stare decisis in the long run I cannot imagine. As Chief Judge Richard Posner of the Seventh Circuit Court of Appeals has explained, "[t]he more apparent that an opinion is the work of the law clerk, the less attention judges and lawyers will pay to the broad holding. This will reduce the authority of judicial dcisions as sources of legal guidance and will increase uncertainty and with it litigation. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 149 (1996). Per curium decisions, written by staff attorneys and signed by the judges, are not taken as seriously as opinions obviously authored by a particular judge. Is a clerk-written opinion equally persuasive as one that is obviously judge written? It is certainly easy to tell the difference, even though they are apparently signed by a judge. *See* POSNER, *supra* at 145-55. Clerk-written opinions necessarily lack the confidence and frequently the gravitas of judge-written work. Clerk-written work often attempts to reason backwards to a proposition by eliminating all other possible results, while judge- written work starts by directly establishing the veracity of the proposition at hand. Chief Judge Posner has also noted that law clerk-written opinions have an almost ostentatious reliance on footnotes, secondary sources and other hallmarks of legal scholarship. *Id.* at 148-49, 153.

88.It actually makes a big difference to Los Angeles judges as well. If you are a judge on calendar sitting in a city not your own, you not only lose the travel time to get there, but you face the inefficiencies of working out of an office that is not your own and the irritations (and time killers) of living out of a suitcase away from home for a week. Judges from everywhere except Los Angeles and San Francisco face this for most of not all of their calendars. The plurality of judges are from Los Angeles, however, and they would be a majority in a new Ninth Circuit. These judges would almost never have to travel in a new circuit, though they do frequently travel to San Francisco and Seattle in the current Ninth. They could save travel time in the new Ninth if the court decided to center its calendar operations in Pasadena. There would be good reasons for such a switch, despite the fact that San Francisco is the circuit's current administrative headquarters.

89.PETER F. DRUCKER, MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES 638-40 (1974); *see also* C.E. FERGUSON, MICROECONOMIC THEORY 182-83 (1966). Problems of management coordination and control, which are likely to develop in large organizations, create diseconomies of scale. PAUL G. KEAT & PHILIP K. Y. YOUNG, MANAGERIAL ECONOMICS: ECONOMIC TOOLS FOR TODAY'S DECISION MAKERS 330 (2d. ed. 1996).

90.DRUCKER, *supra* note ___, at 639.

91.*Id.*

92.HAROLD KOONTZ & HEINZ WEIHRICH, MANAGEMENT 226 (9th. ed. 1988).

93.*Quoted in* Gerald Bard Tjoflat, *More Judges, Less Justice*, ABA JOURNAL, July 1993, at 71.

94.*Id.*; *see also infra* notes and text at ____-____.

95.Even though en banc courts have only eleven members, all the judges participate in the process of deciding whether to take the case to en banc rehearing.

96.BAKER, *supra* note ____, at 70-71.

97.Tjoflat, *supra* note ____, at 70.

98.*See, e.g.*, KEAT & YOUNG, *supra* note ____, at 330.

99.*See generally* BAKER, *supra* note ____, at 62-68.

100.*Id.* at 66-67 (quoting from personal interview with Gerald Bard Tjoflat).

101.*See* Wilkinson, *supra* note ____, at 1173, 1176-77.

102.Meador, *supra* note ____, at 196. Surveys do come out on both sides, *see* BAKER, *supra* note ____, at 92, but what can be said is that they do indicate a disturbing amount of dissatisfaction with the court's consistency.

103.Many Ninth Circuit senior judges, of course, are as well-known to the Ninth Circuit bar as active judges, but visiting seniors and district judges are not. Those judges may only sit with the circuit once or twice a year, which means it may take between five and ten visiting judges to make up the calendar work of an active judge (a visiting judge under the rules cannot do the court's en banc or death penalty work). Therefore, the court may need as many five or ten more "points of view" to make up for the one point of view lost due to the lack of an active judge.

By the way, frequent use of visiting and even senior judges also--you guessed it--increases workload! Visiting judges are anxious to learn and were able to catch on quickly to many of the arcane procedural rules and informal practices of our court (the way memorandum dispositions are written, the protocol of letting writing judges vote first on petitions for rehearing,

etc.) that had taken me much of the year to figure out. Nevertheless, active judges' chambers spend considerable time educating the visiting chambers to help them get up to speed. Active judges are also hesitant to allow visiting judges to write the most controversial opinions, feeling, quite properly, that if there are to be major changes or developments in the law of the circuit, a Ninth Circuit judge should make that statement. That just means, however, the clerks of active Ninth Circuit judges get all the hard bench memoranda and the active Ninth Circuit judges have to write all the hard opinions, with all the implications for workload that implies. There is no rule on this, of course, but it is pretty clear that this is how opinions get assigned. Further, since nonactive judges are not supposed to participate in the en banc process, *see* 28 U.S.C. § 46, the active judges on the panel are left with the responsibility of defending the panel's work later on.

104.*See* text and notes *supra* at ____-____; BAKER, *supra* note ____, at 62-64.

105.9th Cir. R. 35-3 states "[t]he en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court." Congress authorized limited en banc courts in 1978, but the Ninth Circuit is the only court to take Congress up on the offer. Pub. L. 95-486, § 6, Oct. 20, 1978, 92 Stat. 1633; Hellman, *Maintaining Consistency*, *supra* note ____, at 62-70.

106.Though not necessarily for outcomes. Bear in mind that the Supreme Court took certiorari in three Ninth Circuit en banc cases in the October 1996 term and reversed them all. *See* California v. Roy, ____ U.S. ____, 117 S. Ct. 337 (1996), Washington v. Glucksberg, ____ S. Ct. ____, 1997 WL 34894 (1997), Arizonans for Official English, ____ U.S. ____ (1997). They implicitly overruled at least one more: U.S. v. Keys, 95 F.3d 874 (9th Cir. 1996) in Johnson v. U.S., 117 S. Ct. 1544 (1997). There are limits to how far this data can be taken; aside from the fact that four cases are probably not statistically significant, one still might argue that this record is a serious indictment of the en banc process--especially since in at least two of those cases the panel "got it right" in the first place. *See Compassion in Dying*, 49 F.3d 586 (9th Cir. 1995); *Keys*, 67 F.3d 801 (9th Cir. 1995). Further, these were all tough cases, on which even the most finely tuned legal minds could differ. *See* Jerome Ferris, *The Ninth Circuit--Most Maligned Circuit in the Country--Fact or Fiction?* 58 OHIO ST. L.J. 1465, 1469-70 (1997). Nevertheless, the Ninth Circuit's reversal rate is by leaps and bounds the worst in the nation.. *Id.* at1465.

107.The Ninth Circuit has apparently voted three times to consider full court en banc. The cases are Compassion in Dying v. Washington, 85 F.2d 1440 (9th Cir, 1996), Campbell v. Wood, 20 F.3d 1050 (9th Cir. 1994), United States v. Penn, 647 F.2d 876 (9th Cir. 1980).

108.Though the Senate had apparently turned off the spigot of Ninth Circuit confirmations for 1996 and 1997, the confirmation process is moving again. By the time this article appears in print, University of California at Berkeley professor William Fletcher and Washington Supreme Court Chief Justice Barbara Durham will probably both have been confirmed as Ninth Circuit judges.

109.As mentioned in the main text, if the Ninth Circuit's size ever increased such that eleven judges was no longer a majority of the total, the en banc process would essentially degenerate from a limited en banc to an expanded panel process. Changes, such as full court or "fuller court" en banc might follow, adding to total workload, would follow.

110.Paul D. Carrington, *An Unknown Court: Appellate Caseload and the "Reckonability" of the Law of the Circuit*, *in* ARTHUR HELLMAN, ED., RESTRUCTURING JUSTICE 206, 210 (1990).

111.KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS, 18, 34-35 (1960).

112.Carrington, *Unknown Court*, *supra* note ____, at 210. Knowing the panel is even more difficult, because panel composition is not made public until only days prior to argument.

113.Tjoflat, *supra* note ___, at 72-73.

114.Carrington, *Unknown Bench*, *supra* note ____, at 206-11; PAUL CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 154 (1976).

115.What appears as a polarization on the Ninth Circuit would be an outlier judge on a smaller court, because the Ninth Circuit is so large. Polarization does not mean the Ninth Circuit is split evenly on a matter. If six judges on the court think invited error doctrine no longer exists in the circuit, for example, they may make up only one-third of the circuit, but they can publish a lot of opinions on the matter and control an en banc panel, though not many other circuits would agree. *See* United States v. Perez, 116 F.3d 840 (9th Cir. 1997); *cf.* United States v. Griffin, 84 F.3d 912, 923-24 (7th Cir. 1996), United States v. Mitchell, 85 F.3d 800 (1st Cir. 1996), United States v. Balter, 91 F.3d 427, 434 (3d Cir. 1996), United States v. Tandon, 111 F.3d 482, 487-89 (6th Cir. 1997), United States v. Hardwell, 80 F.3d 1471, 1487 (10th Cir. 1996). A third of a six-judge court, such as the first circuit, could barely control a panel, but a third of an eighteen-judge court, or even a twenty-eight-judge court with a limited en banc process, can control many panels and en bancs.

116.Tjoflat, *supra* note ____, at 72.

117.Carrington, *supra* note ____, at 210; *see also* BAKER, *supra* note ____, at 91-92. Professor Hellman has done a useful study indicating that there are many fewer decisional inconsistencies than all the carping from lawyers might suggest. The study has several weaknesses however. First, is that it analyzes only published work. Since at least seventy-five percent of the court's decisions are unpublished, concentrating on only published work may hide the extent of the consistency problem, despite the fact that unpublished decisions are often made on the "easiest" cases, because issuing an unpublished opinion also allows a panel to hide inconsistency. This would explain why the Ninth Circuit appears relatively consistent in F.3d but lawyers don't see it that way. The average attorney trying to figure out not just what the law says, but also how his or her case will actually be decided, is going to be paying attention to what the court does with

memorandum dispositions. Unfortunately, they are all over the map. Second, due to the practical difficulties of conducting such a study, Professor Hellman leaves out many of the classes of decisional disharmony, such as conflicting dicta, which does bear on the outcomes of future cases. One would see much more decisional disharmony if one applied a less exacting standard for inconsistency, such as Professor Meador's test that if the same judges on the same day would no have handed down two arguably inconsistent decisions, there is inconsistency. Daniel J. Meador, *Struggling Against the Tower of Babel*, *in* ARTHUR HELLMAN, RESTRUCTURING JUSTICE, 195, 200 (1990).

118.Tjoflat, *supra* note ____, at 71.

119.Worse, there are very few three-judge panels of active judges, because so many Ninth Circuit panels include at least one senior or visiting judge.

120.As Judge Wilkinson puts it: "[a]s the number of judges rolls ever upward, the law of the circuit will become more nebulous and less distinct. Indeed, it is likely that the law of the circuit will be replaced by the law of the panel." Wilkinson, *supra* note ____, at 1176.

121.*See* Wilkinson, *supra* note ____, at 1175; Tjoflat, *supra* note ___, at 71.

122.James B. Stewart, *Judicial Mavericks: Ninth Circuit's Judges Frequently Run Afoul of the Supreme Court*, WALL ST. J., Dec. 19, 1984.

123.*The Shawshank Redemption* (Castle Rock Entertainment 1994).

124.Procter Hug, Jr., *The Ninth Circuit Should Not Be Split*, 57 MONT. L. REV. 291, 199 (1996).

125.Hruska Commission, Structure and Internal Procedures, *supra* note ____, at 57.

126.Tjoflat, *supra* note ____, at

127.Wilkinson, *supra* note ____, at 1173; Tjoflat, *supra* note ____, at 70 (quoting Judge Harry T. Edwards).

128.
*E.g.*, Diarmuid O'Scannlain, *A Ninth Circuit Split is Inevitable, But Not Imminent*, 56 OHIO ST. L.J. 947, 948 (1995).

129.The mere fact that a judge uses strong language in an opinion is not necessarily wrong. Some judges who are quick to jump into the fray are some of the most outstanding jurists in the country, and their unwillingness to sugar-coat matters is evidence of their seriousness. On the other hand, strong language also means that judges are being pushed very hard, and the institutional check of collegiality is not functioning to hold them back at some crucial times. Things are being said publically that judges may find very difficult to forgive later, however justifiable. Ask yourself how quickly you would recover from some of the rhetoric from Ninth

Circuit opinions being directed at work or views of which you were proud, in some cases by people you don't like very much, and then ask yourself what the collegiality situation must be like. *See* Collins J. Seitz, *Collegiality and the court of appeals*, 75 JUDICATURE, June-July 1991, at 27.

130.79 F.3d 790 (1996).

131.*Compassion in Dying*, 85 F.3d 1440, 1441 (9th Cir. 1996) (O'Scannlain, J., dissenting from decision not to rehear case by a full court en banc).

132.The appellants' legal case was based substantially on abortion rights cases, and the appellants noted that Judge Noonan has written numerous articles and books criticizing those cases. Not long afterwards, Judge Noonan published a one-judge order in a different case explaining what should have been unnecessary in the 1990s--that Roman Catholic judges are competent to decide cases about or related to abortion issues. Feminist Women's Health Ctr. v. Codispoti, 69 F.3d 399 (9th Cir. 1995) (Noonan, J.).

133.Washington v. Glucksberg, 117 S. Ct. 2258 (1997). In another twist of fate, Washington state actually had one of its judges on the panel, Eugene Wright, and he dissented from the panel's decision.

134.*Compassion in Dying*, 79 F.3d at 817 (en banc decision).

135.*Compassion in Dying*, 79 F.3d at 825 (en banc decision) (footnotes omitted).

136.*Id.*

137.*Compassion in Dying*, 79 F.3d at 839.

138.Judge John Noonan wrote the panel opinion and Judge O'Scannlain joined it.

139.*Compassion in Dying*, 85 F.3d at 1443-44 (O'Scannlain, J., dissenting).

140.*Id.* at 1444.

141.*Id.* at 1446.

142.For example, the en banc majority devoted almost fifty F.3d pages to the decision, and dissents added twenty more.

143.122 F.3d 692 (9th Cir. 1997).

144.The Ninth Circuit hears preliminary injunctions in screening panels, regardless of their importance, because preliminary injunctions are especially time sensitive.

145.Gregorio T. v. Wilson, 54 F.3d 599 (9th Cir. 1995); 28 U.S.C. § 1957; Ninth Cir. R. 3-3.

146.*Coalition for Economic Equity*, 122 F.3d 711 (1997) (order rejecting suggestion for rehearing en banc).

147.The fact that five judges dissented in a published opinion says nothing of how many voted for or against en banc rehearing. These five either wrote or joined a written dissent, but judges regularly vote against rehearing a case en banc without publishing an opinion later to explain why.

148.*Coalition for Economic Equity*, 122 F.3d at 713 (Norris, J., dissenting from the decision not to rehear the case en banc); *see also Coalition for Economic Equity*, 122 F.3d at 717 (Hawkins, J., dissenting from the decision not to rehear the case en banc) (noting that while the panel may well have correctly predicted the direction of Supreme Court decisionmaking, controlling precedent at the time of the decision required the opposite result).

149.*Coalition for Economic Equity*, 122 F.3d at 716. Ninth Circuit dissents are full of phrases such as "this remarkable argument" or "that novel approach," some others of which I quoted liberally above. Possibly the writers forget what they sound like to the judges who crafted the "remarkable" or "ludicrous" language under attack. Perhaps the writers' ears become dulled; they have said and heard them so often themselves. In any event, the arguments so called are rarely remarkable; for the most part, they are simply the opposite side of the jurisprudential coin. As Justice Ginsberg has written, "one must be sensitive to the sensibilities and mindsets of one's colleagues which may mean avoiding certain arguments and authorities, even certain words" such as "folly," "ludicrous," "outrageous," words which frequently show up in dissenting opinions. Ruth Bader Ginsberg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1194-95 (1992); *see* Collins J. Seitz, *Collegiality and the court of appeals*, 75 JUDICATURE, June-July 1991 at 26; POSNER, *supra* note ____, at 353-54.

150.*Coalition for Economic Equity*, 122 F.3d at 717 (citations omitted).

151.*See* Stephen Reinhardt, *The Supreme Court, The Death Penalty, and The* Harris *Case*, 102 YALE L.J. 205, 209-14 (1992).

152.*Id.* at 208.

153.*See* William Carlsen, *Frontier Justice: The Ninth Circuit Court of Appeals is second to one*, SAN FRAN CHRON., Oct. 6, 1996.

154.Slip op. at 10209. This is what Judge Reinhardt implies in his concurrence. I do not know and since no one conclusively says one way or the other in print, I could not say if I did know.

155.Thompson v. Calderon, order taking case en banc. Slip op. at 9797.

156.*Thompson*, slip. op. at 10220-21 (Hall, J., dissenting), *Thompson*, slip op. at 10223-31 (Kozinski, J., dissenting).

157.*Thompson*, slip op. at 10235 (Kleinfeld, J., dissenting).

158.Thompson v. Calderon, slip op. at 9798 (Beezer, J., dissenting, from decision to rehear case en banc).

159.*Thompson*, slip op. at 10186-88.

160.Thompson v. Calderon, slip op. at 9802 (order of Fernandez, J.) and Thompson v. Calderon, slip op. at 9803 (order by Rymer, J.).

161.*Thompson*, slip op. at 10218-20 (Hall, J., dissenting).

162.*Thompson*, slip op. at 10182.

163.The court communicates almost exclusively by electronic mail. E-mail is quicker than regular mail, less laborious than fax machines, and has the benefit of allowing all judges involved in a matter to be informed on all issues. Judges may occasionally call each other on the phone, but this should occur rarely where court business is at issue.

164.*Thompson*, slip op. at 10184.

165.*Thompson*, slip op. at 10227 n.3 (Kozinski, J., dissenting).

166.Judge Kozinski clearly felt provoked to reveal internal communications by what he believes was a breach of greater magnitude by the majority on the en banc panel, and it is notable that he did attract a second judge highly respected for collegiality to join his opinion. The opinions in *Thompson* are not examples of "uncollegiality" themselves, but rather are evidence of deeper, disconcerting rifts on the court.

167.*Thompson*, slip op. at 10207 (Reinhardt, J., concurring). Judge Reinhardt was referring to Alex Kozinski, *Tinkering With Death*, NEW YORKER, Feb. 10, 1997, at 48.

168.*Thompson*, slip op. at 10207 (Reinhardt, J., dissenting).

169.*Thompson*, slip op. at 10212 n.3 (Reinhardt, J., dissenting).

170.Calderon v. Thompson, ____ U.S. ____ (1998).

171.Wilkinson, *supra* note ____, at 1173-74.

172.Harrison Winter, *Goodwill and Dedication*, *in* CYNTHIA HARRISON & RUSSELL R. WHEELER, EDS., THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY 169 (1989).

173.*Id.*; *see also* Ginsburg, *supra* note ____, at 1194, Seitz, *supra* note ____, at 27.

174.*See also* Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1498 (1995) ("[c]ollegiality results from familiarity and from working closely with other members of the court; these work experiences will necessarily decline as the court's size expands")

175.POSNER, *supra* note ____, at 355.

176.Patricia Wald, *Calendars, Collegiality, and Other Intangibles on the Courts of Appeals*, *in* Harrison & Wheeler, *supra* note ____, at 181.

177.*Id.*

178.Jones, *supra* note ___, at 1498. Unfortunately, each Ninth Circuit judge sits on only seven regular panels and two screening panels per year, and often those screening panels are conducted via conference calls.

179.It is the solution many Ninth Circuit judges prefer. *E.g.* Stephen Reinhardt, *A Plea to Save the Federal Courts: Too Few Judges, Too Many Cases*, ABA J. Jan. 1993 at 52; Procter Hug, Jr., *The Ninth Circuit Should Not Be Split*, 57 MONT. L. REV. 291, 292 (1996). In 1998, the Senate has confirmed three new Ninth Circuit judges.

180.Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 S.M.U.L. REV. 583, 590 (1995).

181.*See* Wilkinson, *supra* note ____, at 1174; Jones, *supra* note ____, at 1498.

182.Collegiality, civility, courtesy: these are some of the proudest hallmarks of the United States Senate, and their degeneration is disappointing. *See generally*, Norman Ornstein, et al, *The Contemporary Senate*, *in* LAWRENCE DODD & BRUCE I. OPPENHEIMER, CONGRESS RECONSIDERED 16-18 (1981).

183.The other reason is one alluded to earlier, the inefficiencies of increased bureaucratization on the court. *See* notes and text *supra* at ____-____.

184.Carrington, et al, *supra* note ____, at 45-46, POSNER, *supra* note ___, at 141, 145; *see* also Lauren K. Roebel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U.L. Rev. 3, 42-43 (1990).

185.*Id.*;

186.POSNER, *supra* note ___, at 143; Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 TEX. L. REV. 1505, 1511 (1995); Owen Fiss, *the Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1446 (1983); Wade McCree,

*Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 787 (1981).

187.*See* Carrington, et al, *supra* note ____, at 45.

188.*E.g.*, CONGRESSIONAL QUARTERLY, INC., HOW CONGRESS WORKS 106 (1983); MARK BISNOW, IN THE SHADOW OF THE DOME: CHRONICLES OF A CAPITAL HILL AIDE 309 (1990).

189.This has actually occurred. After a dry spell of two years, Congress confirmed three Ninth circuit appointees in the first four months of 1998.

190.*See* POSNER, *supra* note ____, at 364-69.

191.POSNER, *supra* note ___, at 364-65.

192.POSNER, *supra* note ____, at 137; *see also* notes and text at ____-____.

193.POSNER, *supra* note ____, at 365-66.

194.*See* Carlsen, *supra* note ____.

195.Such an example is plausible, but has not, to my knowledge, ever occurred.

196.And neither, by the way, is my example. After all, Judge A did not promise a vote on Judge B's pet en banc in order to get Judge B's vote on his own en banc. Were the case slightly different, I would be arguing that Judge A should be commended for his zealous collegiality in terms of the respect he is showing publically for Judge B's good judgment. There is a fine line between the two, however.

197.Compare, for example, the United States House of Representatives and the United States Senate. The cloture rule in the Senate means that body effectively has a 60 percent voting rule on many issues, *see* U.S. Senate, Committee on Rules & Administration, Senate Manual, Doc. no. 101-1, Standing Rule no. 22.2 (1989) (a current version should be cited if possible), while the House follows majority rule both de jure and de facto. Due to a variety of rules, most Senate work must be done in practice by unananimous consent, which allows one Senator to hold up the process for a very long time. *See generally*, Walter J. Oleszek, *Legislative Procedures and Congressional Policymaking: A Bicameral Perspective*, *IN* CHRISTOPHER J. DEERING, ED., CONGRESSIONAL POLITICS 176-77, 183-88 (1989). An example is Senator Conrad Burns' decision to place a "hold" on all nominees to the Ninth Circuit until the Congress splits the circuit. Burns, *supra* note ____, at 248. The House on the other hand, has a committee which establishes temporary rules for the consideration of each bill, which must be passed by a majority to go into effect; in other words, House business is conducted on terms acceptable to a majority of members, but not necessarily all. Oleszek, *supra* note ____, at 178-83. The Senate is well understood to be a legislative body concerned with the rights and views of the minority, while the House is one set up so that the majority existing at any given moment has complete power to

work its will. *Id.* at 176-77.

198.*Cf.* BARBARA SINCLAIR, MAJORITY LEADERSHIP IN THE U.S. HOUSE 128-29 (1983).

199.One hopes that most often the happy result will be that the "best" policy will be the most popular, and of course, one of the ways one can built a coalition for the "best" policy, is to convince constituents to like it, which in turn, motivates their elected representatives to vote for it.

200.So do separate opinions to panel decisions of all kinds, according to Chief Judge Posner, POSNER, *supra* note ____, at 364, but there is a stronger argument for them in those cases.

201.For example, a dissent to a decision concerning en banc has the merit of partially pulling back the shroud what could otherwise not be revealed under the rules: who voted how. Obviously, a judge probably has the right to announce his vote, though it is not easy to see why one should wish to do so. Judges have no constituencies to whom they must announce their views so formally (except for Supreme Court judge-pickers, perhaps), and most law reviews would drool to have a circuit-judge written article, if the judge in question feels the need to bare his or her soul. The real problem is that by revealing his or her own vote, the judge in question unwittingly indicates how others may have voted. Consider *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1991), in which a Ninth Circuit panel decided that a provision of the California Constitution banning certain forms of affirmative action was constitutional and otherwise consistent with federal law. We now know that en banc was called and the en banc call failed, because five judges wrote or joined published dissents from the decision not to go en banc. In order to avoid en banc, at least ten judges had to vote against the procedure, and a maximum of nine could have voted in favor. Due to three dissents from the decision not to go en banc, we now know that five of the maximum of nine were Judges Schroeder, Norris, Pregerson, Tashima, and Hawkins. Where does that leave the silent judges, who chose, for whatever reason, to write nothing. Though we cannot be sure how any of them voted, we certainly have much more information than we did when all we knew was that the case did not get reheard en banc.

202.There is one, I suppose: helping lawyers know how to apply the en banc rules (or not, as the case generally is) so they can better sense where a suggestion for rehearing en banc would be useful. Dissents from decisions not to go en banc have almost no utility in achieving that goal, however. Where the dissent addresses the en banc rules, the dissenting judge's interpretation is, after all, the one that did not carry the day. *See* Compassion in Dying v. State of Wash., 85 F.3d 1440, 1441-42 (O'Scannlain, J., dissenting from decision not to go to a full-court en banc); Coalition for Economic Equity, 122 F.3d at 711 (Schroeder, J., dissenting from decision not to take case en banc). Second, most such dissents are devoted not to whether a case is appropriate for en banc rehearing under the rules, but to criticizing the panel's decision, often written by judges who were not privy to the briefs, the oral argument, or the judges conference afterwards.

203.For a discussion of coalition behavior in the United States Congress, see Patricia A. Hurley, *Parties and Coalitions in Congress*, *in* DEERING, *supra* note ____, at 113-34, and the

unfortunately titled, but fascinating and useful book by WILLIAM F. CONNELLY, JR. & JOHN J. PITNEY, JR., CONGRESS' PERMANENT MINORITY: REPUBLICANS IN THE U.S. HOUSE 19-36 (1994) for an explanation of the informal and intraparty coalitions that also play a significant role in formulating policy.

204.*E.g.*, POSNER, *supra* note ____, at 137.

205.*Coalition for Economic Equity*, 122 F.3d at 696 (O'Scannlain, J., Leavy, J., & Kleinfeld, J.).

206.*Thompson*, slip op. at 9797-9803.

207.Guam Society of Obstetricians and Gynecologists v. Ada, slip op. at 14557 (Pregerson and Hawkins, JJ. affirming, Kozinski, J., dissenting).

208.A Ninth Circuit en banc court has commented that "we would be inclined to agree that the country's refusal to provide universal health care, and the concomitant suffering so many Americans are forced to undergo, demonstrates a serious flaw in our national values." *Compassion in Dying*, 79 F.3d at 826.

209.*See generally* CONGRESSIONAL QUARTERLY, INC., HOW CONGRESS WORKS 105-08, 124-30; Olezsek, *supra* note ____, at 177; BISNOW, *supra* note ____, at 309.

210.*See* Olezsek, *supra* note ___, at 176-77. The bizarre institutional snobbery and jealousy of the two Houses of Congress are famous and fascinating to Congress watchers.

211.State of Alaska v. Native Village of Venetie, 101 F.3d 1286 (9th Cir. 1996).

212.Alaska Center for the Environment v. Armbrister, 1997 WL 768914 at **3 (9th Cir. 1997). The panel ultimately permitted the Federal Highway Administration to construct the highway, but the opinion came down only in September 2, 1997. Even though construction halted only for a few months, that is most of the Alaskan building season. It is understandable, as a result, that Alaskans feel misunderstood by their Ninth Circuit judges. *See, e.g.*, David Whitney, *House OKs Study of Ninth Circuit Split*, ANCH. DAILY NEWS, June 4, 1997 at B1.

213.The opinion was unanimous.

214.In the interests of full disclosure, I should probably note that I was there for a total of about two minutes on a bush mail flight north of the Arctic Circle.

215.This did not go unnoticed by the concurring judge:

> We have been asked to confuse matters by applying out-of-date theories to a truly new concept of Indian relationships and sovereignty. We have been asked to blow up a blizzard of litigation throughout the State of Alaska as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country. There are hundreds of

> tribes, and the litigation permutations are as vast as the capacity of fine human minds can make them. They can include claims to freedom from state taxation and regulation, claims to regulate and tax for tribal purposes, assertion of sovereignty over vast areas of Alaska, and even assertions that tribes can regulate and tax the various corporations created to hold ANCSA land. The latter assertion would give the tribes the power to control, regulate, and tax those corporations out of existence and would provide a fruitful area for intertribal conflict. This is no imaginative parade of horribles. In the cases before us today, one tribe, Kluti Kaah, seeks sovereignty over a piece of the State of Alaska about as large as the State of Delaware. Furthermore, both Kluti Kaah and Venetie assured us at argument that tribes, as they see it, do have the power to tax and regulate the myriad of private corporations which received land under ANCSA.

*Venetie* (Fernandez, J., concurring).

216.To be completely accurate, one should note that the Ninth Circuit hears Alaska cases in other cities on a more regular basis. *Venetie* in fact, was heard in Seattle.

217.*Twelfth court warranted*, Fairbanks Daily News-Miner, Jul. 15, 1997 at a-4. Worse, they come to Alaska in July. If you haven't been to Alaska when it is 30 below, you haven't been to Alaska.

218."Never" is too strong a word. The Ninth Circuit did sit there to mark the 100th anniversary of Idaho's statehood.

219.A panel sat in Billings once during my tenure with the court.

220.William Carlsen, *Frontier Justice: The Ninth Circuit Court of Appeals is second to none*, San Fran. Chron., Oct. 6, 1996, at 1Z7.

221.The court's most outspoken "liberal," Stephen Reinhardt, is indeed a Californian, but so is the court's most well-known "conservative," Alex Kozinski.

222.Very few legal issues turn on party loyalties or political ideologies. More turn on "legal philosophies": the degree of deference to be shown to factfinders and district court judges, the value of legislative history, the role of dicta, rules versus balancing tests. Admittedly, the adherents of the various sides of these jurisprudential debates often correlate with political ideologies, but that is not always true.

223.Of course, there are limits to using the party of the appointing president as a benchmark for ideology. "Conservatism" is not what it was when Richard Nixon was appointing judges, nor is it clear that he gave much consideration to ideologies anyway. Further, John F. Kennedy's and Jimmy Carter's nominees are not uniformly "liberals."

224.Judges James R. Browning, Harry Pregerson, Stephen Reinhardt, A. Wallace Tashima, Arthur Alarcon, Warren Ferguson, Dorothy Nelson, and Robert Boochever (who maintained chambers in Alaska as an active judge).

225.Judges Alex Kozinski, David Thompson, Ferdinand Fernandez, Pamela Rymer, Alfred T. Goodwin, Clifford Wallace, Joseph T. Sneed, Cynthia Holcomb Hall, and John Noonan.

226.Judges James R. Browning, Harry Pregerson, Stephen Reinhardt, and A. Wallace Tashima.

227.Judges Alex Kozinski, David Thompson, Ferdinand Fernandez, and Pamela Rymer.

228.Berkeley law professor William Fletcher is one whose confirmation appears certain.

229.If the voters choose the same party to run both the White House and the Senate and nothing else changes, that party would take long-term dominance on the Ninth Circuit, as the circuit is owed so many judges, and the party would likely take advantage of having almost free reign to shape this large court. Further, most would go to California, as the state is now underrepresented in terms of both population and caseload.

230.Three former chief judges still on the court are from California; one of whom is still active.

231.The administrative leadership of the court has already shifted to non-Californians. Nevadan Procter Hug, Jr. is the Chief Judge; Judge Patricia Schroeder will be the next Chief Judge assuming she continues to serve on the court and realignment does not move her to another circuit; and many other inernal leadership posts have shifted to non-Californians.

232.The Honorable Ferdinand Fernandez and the Honorable A. Wallace Tashima. None of the active judges are black or Latino.

233.Judges Patricia Schroeder, Betty Fletcher, Pamela Rymer, Susan Graber, and Margaret McKeown.

234.The Honorable Andrew J. Kleinfeld of Fairbanks, Alaska and the Honorable Sidney Thomas of Billings, Montana.

235.For example, seven of the court's twenty-one active judges are former judges, obviously disproportional compared to the bar as a whole.

236.Only Hawaii lacks an active judge.

237.*Twelfth court warranted*, *supra* note ____.

238.Seattle is no more than a regional legal center, and its importance as a population and cultural center may well be a passing fad.

241.Judges T.G. Nelson and Kleinfeld are both former state bar presidents, for example. Judge Fletcher is a former Seattle/King County bar president and Washington state bar governor. Only Judge Trott did not spend most of his career in the town where he now maintains his chambers. Prior to going on the bench, Judge Trott served as a U.S. Attorney in California.

240.Big firm lawyers do not regularly bicker over a few dollars of child support, nor do they negotiate many drunk driving pleas. Moreover, large law firms are by definition large institutions, and therefore more bureaucratic.

241.By contrast, only judge Andrew J. Kleinfeld and Judge Susan Graber from the northwest were judges prior to joining the Ninth Circuit, and Judge Kleinfeld's tenure as a United States district judge was considerably shorter than the period he spent as a private practitioner.

242.Among the northwest Judges, Judge Stephen Trott was a prosecutor, and Judge Diarmuid O'Scannlain spent a few years in government positions.

243.The court's academics are now senior judges, but if Professor William Fletcher from Berkeley is confirmed, he would be the court's most recent active academic.

244.This is not to say that the southern judges are not involved in their local communities and in state and national legal organizations. Far from it. There is a difference between being a state bar president, however, and holding a leadership position in a less prominent and more specialized group. Both are important, but they must have a different impact on the holder's view of himself and his role in the community.

245.Where, for example, are the big firm lawyers in Idaho, Montana, and Alaska needed to diversify the backgrounds of the northern judges?

246.Almost any lawyer politically active in the correct party who is also well respected for cerebriality, has had a highly decorated career in one of a variety of acceptable career paths, and is over age forty is a realistic candidate for Ninth Circuit service. Given the number of possible candidates, I suspect that it is difficult to hone the potential judge list from California to a manageable size, which is probably why there are so many former state and federal judges on the court; that is an easy way to distinguish oneself as a potentially good judge is to have been one already. By contrast, it is fairly obvious how the president's judge pickers identify candidates from the northern states: they look at lists of the most well respected lawyers in the one or two largest cities in the state in question, then eliminate those who are not active in the correct party.

247.The largest cities are in the south, so the differences in the available judge candidates are different in the south than the north.

248.Seven of President Carter's thirteen appointments went to California, so until very recently, California simply has not been in line for many new judges. (Judge Boochever, a Carter appointee from Alaska, moved to California for medical reasons upon taking senior status,

adding to the California contingent, and giving Alaska Senators a compelling argument for a new judge in their state during the Bush administration). Republican presidents had the opportunity to make most of the Northwest's appointments, though President Clinton has recently made two. Bear in mind that the Northwest's judges would have been fairly "conservative" regardless of which president made the appointments, because a state's senior Senator plays a large role in choosing judges from his state, and the senior Senators from the northwest have mostly been Republicans during this period. Ideological polarization does not necessarily correlate with geography, however.

249.Roy L. Brooks, *Reforming the judiciary: Should federal courts more reflect regional interests?* SAN DIEGO UNION-TRIBUNE, Nov. 19, 1995.

250.Roy Brooks, *Reforming the judiciary. Should federal courts more reflect regional interests*, SAN DIEGO UNION-TRIBUNE, Nov. 19, 1995, at G3.

251.*Compare*, *e.g.*, Compassion in Dying v. Washington, 79 F.3d 790, 837-38 (9th Cir. 1996) (en banc) *with* Lee v. Oregon.

252.A few aren't. Judge Stephen Trott is not an Idahoan and Judge Robert Boochever is not a Californian.

253.United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993). It is much harder for prosecutors to argue to judges who might otherwise have little knowledge of these things, that it isn't possible to get a conviction without paid confidential informants in light of this opinion.

254.116 F.3d 840 (1996).

255.*Perez*, 116 F.3d at 845-46. I happen to find those sorts of ivory tower debates intellectually stimulating, but I think two things are true of *Perez*: (1) the majority's opinion probably isn't very helpful to either practicing attorneys or district judges, and (2) that is partly because the court got the relevant distinction wrong.

256.*Perez*, 116 F.3d at 851-53 (Kleinfeld, J., concurring).

257.*Perez*, 116 F.3d at 845.

258.*Perez*, 116 F.3d at 851 (Kleinfeld, J., concurring).

259.They are Judges Andrew J. Kleinfeld (Fairbanks), Procter Hug, Jr. (Reno), David Thompson, (San Diego), Stephen Trott (Boise), and Thomas G. Nelson (Boise).

260.Judges James R. Browning and Edward Leavy.

261.Judges Harry Pregerson and Betty B. Fletcher.

262.Judges Harry Pregerson and A. Wallace Tashima.

263.Judge John T. Noonan .

264.These differences are not completely regional; all the concurring judges are not from the northwest, and all the judges in the majority are not from the southern part of the circuit. In fact, in the spirit of our current fascination with diversity, it is a relief to discover that this attitudinal polarization does not completely correlate with geography.

265.Burns, *supra* note ___, at 254.

266.On this point and its impact on the federal judiciary, see generally Wilkinson, *supra* note ____, at 1149-57.

267.*E.g.*, Tobias, *supra* note ____ at 591 & n.64; BAKER, *supra* note ____, at 72-73.

268.*E.g.*, Carl Tobias, *The Proposal to Split the Ninth Circuit*, 20 HARV. ENVT'L L. REV. 547 (1996).

269.*See, e.g.*, J. HARVIE WILKINSON, FROM *BROWN* TO *BAAKE*: THE SUPREME COURT AND SCHOOL INTEGRATION (1979); J.B. PELTASON, FIFTY-EIGHT LONELY MEN (1961).

270.Unlike many of the other split structures proposed, the icebox split has the merit of maintaining a federalizing influence in the new Ninth as well, with three states serving as a counterweight to California.

271.CHRISTOPHER MATTHEWS, HARDBALL (1990).

272.Would it be better if Congress shut off the appropriations faucet to the United States courts? Would it be better if the executive branch refused to enforce court decisions? Of course not. If the Congress is really concerned with how the Ninth Circuit interprets its decisions it can do any of the following: it can amend the statutes, which the Ninth Circuit might still interpret "incorrectly"; it can alter the structure or jurisdiction of the court to force out decisions more of the Congress' liking; it can refuse to confirm nominees viewed as "untrustworthy," or it can take one of the even more invasive means described above. Splitting the circuit does not sound very intrusive in that context.

273.The reversal rate does not inspire confidence. Carlsen, *supra* note ____.

274.*See* POSNER, *supra* note ____, at 141-42.

275.It is not enough to argue that the Supreme Court will not take so many cases. Perhaps the Supreme Court needs to see these intercircuit conflicts in sharper relief. Further, even if the Supreme Court does not want to take on more work, that is not a reason to subject the people of the potential Twelfth Circuit states to less satisfactory jurisprudence and judicial administration.

276.In fact, a 1986 New York University study argued persuasively that deep intercircuit conflict was useful for the purpose of framing issues for the Supreme Court to solve once and for all for the whole country. Seth Estreicher & John Sexton, *Redefining the Supreme Court's Role: The Federal Judicial Process* (1986).

258.*See* Tobias, *Proposal to Split*, 20 HARV. ENVT'L L. REV. 547.

278.The Federal Courts Study Committee released a report in 1990 recommending a number of alternate structural changes to the appellate courts including complete realignment into smaller circuits, a national court of appeals, subject matter courts, a centralized court of appeals, and consolidations of the current circuits, *see* BAKER, *supra* note ____, at 42-43; Joseph Weis, Jr., *Disconnecting the Overloaded Circuits--A Plug for a Unified Court of Appeals*, 39 ST. LOUIS U.L.J. 455 (1995), but none of these proposals went anywhere in Congress.

279.BAKER, *supra* note ____, at 32-43.

280.Chief Judge Hug has argued that the Congress should consider changing the jurisdiction of the federal courts or just the appellate courts to stem the tide of filings. Procter Hug, Jr., *The Ninth Circuit Should Not Be Split*, 57 MONT. L. REV. 291, 293 (1996). Chief Judge Hug's ideas make a lot of sense, but they must be viewed as more intrusive than splitting the Ninth Circuit. A split should probably be tried first.

281.In fact, Senator Gorton stated of one of his split bills that "this bill has been taken personally by the Ninth Circuit hierarchy--God bless their souls--who has set out to defeat this bill and protect their power base." Quoted in Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1356, 1375 (1995).

282.Senator Burns takes an ungenerous view, claiming split opposition "curries favor" with the Chief Judge. Burns, *supra* note ____, at 256 n.45.

283.Diarmuid O'Scannlain, *A Ninth Circuit Split Is Inevitable*, 56 OHIO ST. L.J. 947, 948 (1995) ("[t]hat choice is, essentially, whether to encourage further growth of the Ninth Circuit, impliedly promoting an amalgamation of the circuits into a lesser number of circuits with larger courts of appeals, or to continue to restructure circuits into more manageable regional entities . . . . I support the latter option").

284.Ann Donnelly, *Fairness Demands Split of Ninth Circuit Appeals Court,* THE COLUMBIAN, Aug. 3, 1997 ("we have become a laughingstock. It's not because we have bad judges; it's because the circuit is too large and has too many cases").

285.*Prospective Judge Endorses Splitting 9th Circuit*, Assoc. Press Pol. Serv., June 29, 1995 ("[i]n the past I've served on a Montana State Bar committee examining the question . . . . At that time, in 1989, I was in the minority in being in favor of splitting the circuits"). It is possible that since he began serving on the court, Judge Thomas' position has changed.

286.*See, e.g.*, Procter Hug, Jr., *The Ninth Circuit Functions Well and Should Not Be Divided,* Ninth Circuit document, www.ce9.uscourts.gov/web/OCE at 5 (1998).

287.POSNER, *supra* note ___, at 137; Carrington, Unknown Court, supra note ____, at 210.

288.Burns, *supra* note ____, at 256.

289.Burns, *supra* note ____, at 256.

290.BAKER, *supra* note ____, at 80.

291.Dave Hogan, *Will the Ninth Circuit Remain Unbroken?* OREGONIAN, Aug. 17, 1997 at A1.

292.*See, e.g.*, Tjoflat, *supra* note ____, at 70 (former Eleventh Circuit Chief Judge); Wilkinson, *supra* note ____, at 1164-78 (current Fourth Circuit Chief Judge); POSNER, *supra* note ____, at 124-59 (current Seventh Circuit Chief Judge).

293.*E.g.*, Whitney, *supra* note ____.

294.Tobias, *Why Congress Should Not Split*, *supra* note ____, at 594.

295.Burns, *supra* note ____, at 255.

296.Recall DRUCKER, *supra* note ____, at 638-40.