United States Senate
Committee on the Judiciary

Hearing on:
Examining the Proposal To Restructure the Ninth Circuit
Wednesday, September 20, 2006, 2:00 P.M.
Dirksen Senate Office Building Room 226
Washington, D.C.

Written Testimony of
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INTRODUCTION

It is an honor and a privilege to be invited to testify before this esteemed Committee.

I enthusiastically support S. 1845, which provides for a two-way split of the Ninth Circuit. The Ninth Circuit, whether viewed from the vantage point of population, number of states, number of judges, or caseload, has proved simply too large to function properly. All nine states of the Ninth Circuit would benefit by S. 1845, and the administration of justice would be well served.

S. 1845

The Ninth Circuit's boundaries have not been reduced for the past 115 years.

S. 1845 would divide the Ninth Circuit into two new circuits. The new Ninth Circuit would consist of California, Hawaii, Guam, and the Mariana Islands. The new Twelfth Circuit would be made up of the remaining seven states of the current Ninth Circuit (Arizona, Nevada, Idaho, Montana, Oregon, Washington, and Alaska). (Attachment A).

Objective analysis demonstrates the compelling need for a split of the Ninth Circuit.

CASELOAD

The most recent statistics (through June 30, 2006) show that the Ninth Circuit has 17,520 appeals pending. This represents 30% of all pending federal appeals. (Attachment B). This caseload is almost five times the average pending caseload for the other 11 circuits.

On July 16, 1999, Ninth Circuit Judge Pamela Ann Rymer told a subcommittee of this Committee that "the court's output is too large to read, let alone for each judge personally to keep abreast of, think about, digest or influence" with a resulting toll, over time, "on coherence and consistency, predictability, and accountability."[1] Since Judge Rymer offered this testimony, the Ninth Circuit's caseload has doubled.

As of March 31, 2006, the Ninth Circuit ranked first in filings with 6,600 more filings than the closest circuit; as of June 30, 2006, it ranked first by 6,346 filings.

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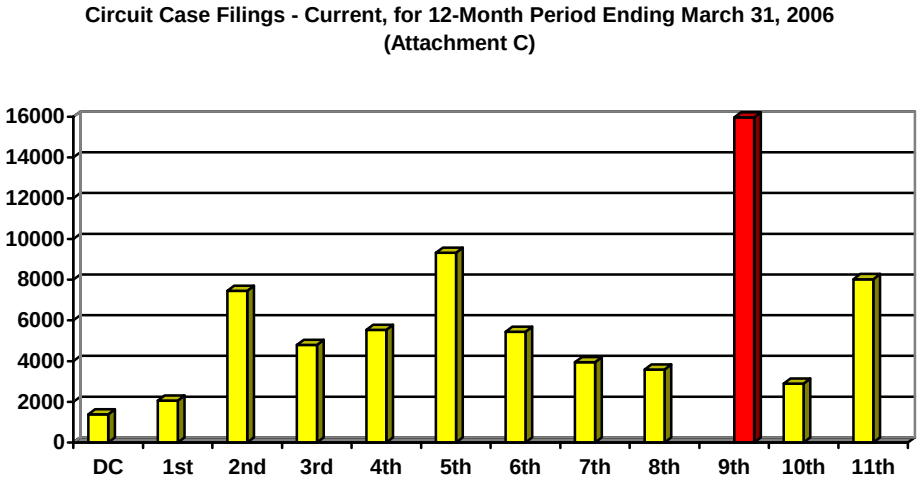
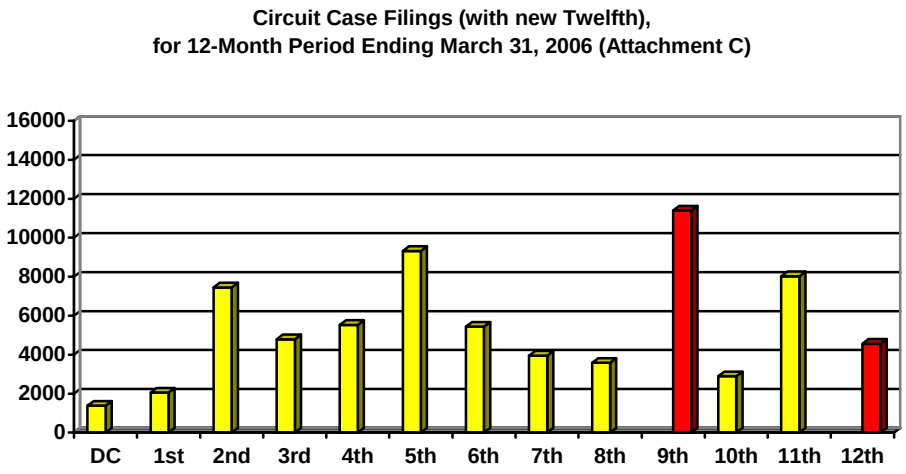
[1] *Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and the Ninth Circuit Reorganization Act: Hearing on S. 253 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 60 (July 16, 1999) [hereinafter 1999 Senate Subcomm. Hearing] (statement of Hon. Pamela Ann Rymer, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, and Member, Commission on Structural Alternatives for the Federal Courts of Appeals).



Circuit	Filings
D.C	1,380
1st	2,055
2nd	7,453
3rd	4,787
4th	5,527
5th	9,326
6th	5,441
7th	3,951
8th	3,584
9th	15,967
10th	2,894
11th	8,024

If the Ninth Circuit is divided pursuant to S. 1845, the new Ninth Circuit will continue to have the largest caseload in the nation and the new Twelfth Circuit will have a caseload larger than five other circuits (D.C., First, Seventh, Eighth, and Tenth Circuits). (Attachment C).



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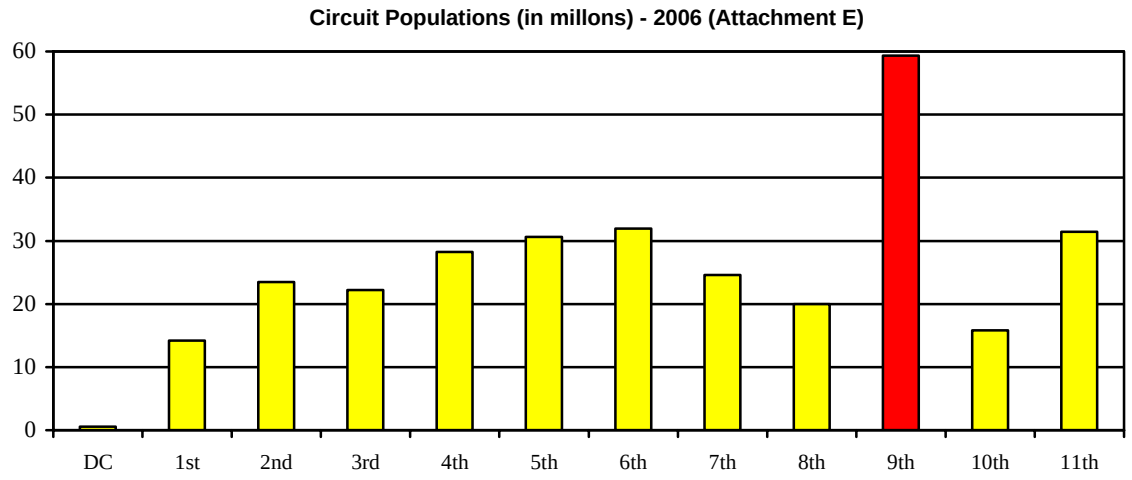
11th	8,024
12th**	4,565

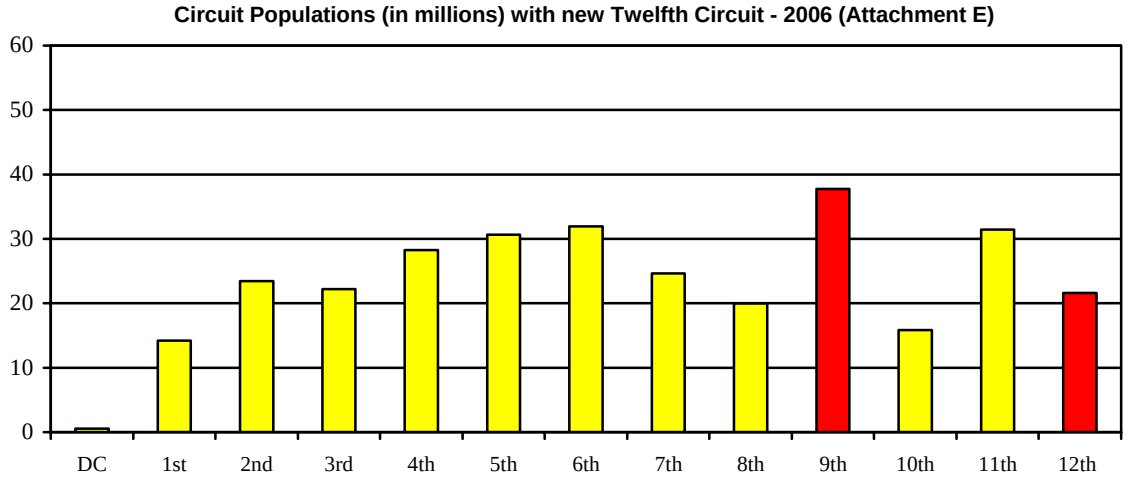
S.1845, in addition to dividing the highest caseload in the country between two circuits, would also reduce the caseload per judge. The Ninth Circuit currently has the third highest number of cases per active judge (570 cases) and, with the addition of seven new judgeships, would drop to the fourth highest (518 cases). The new Ninth Circuit would also benefit from the assistance of 13 senior circuit judges. The caseload per judge of the new Twelfth Circuit would be seventh of the 13 circuits. (Attachment D).

POPULATION

In 1891, when the Ninth Circuit was created by the Evarts Act, six million people inhabited the area that now comprises the Ninth Circuit.[2] Today, nearly 60 million people reside within the Ninth Circuit. This is 27 million more than the next largest circuit. Not counting the Ninth Circuit, the average federal geographical circuit has a population of 22.1 million people. (Attachment E).



The new Twelfth Circuit, as proposed in S. 1845, would have a population of 21.3 million people.



Because very few cases receive further review, nearly every Ninth Circuit case is decided by a three-judge panel; that panel decides the law for nearly 60 million people.

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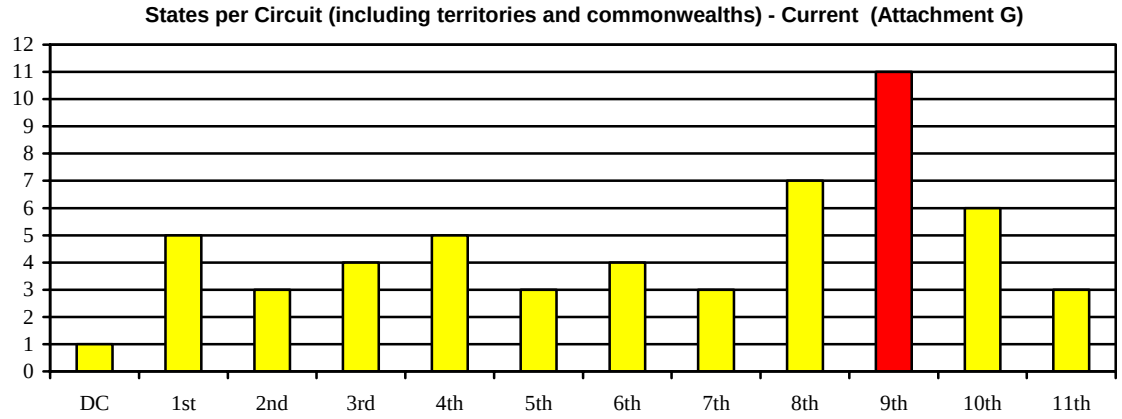
[2] U.S. Census Bureau, Dep't of Com., Thirteenth Census of the United States Taken in the Year 1910 vol. 1, ch. 2, at 30, *available at* http://www2.census.gov/prod2/decennial/documents/36894832v1ch02.pdf

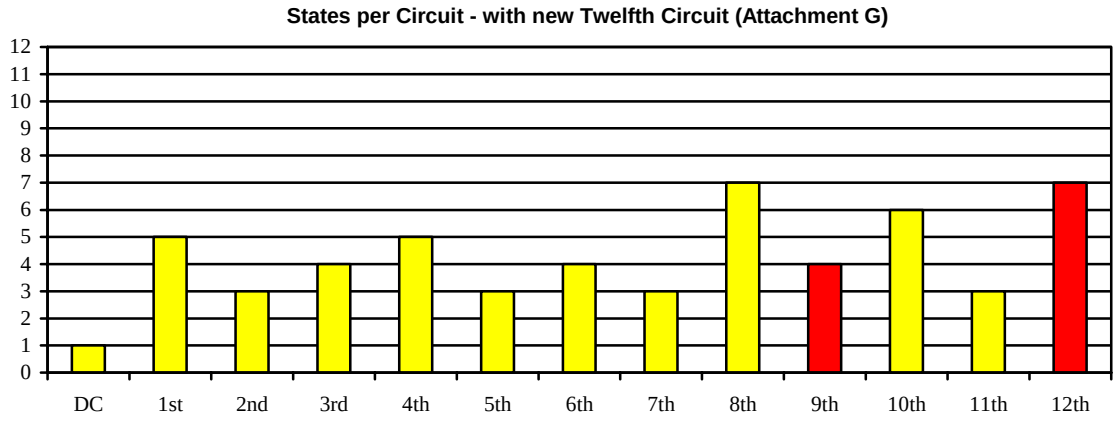
In 1998, Justice Anthony M. Kennedy, who sat on the Ninth Circuit before being appointed to the Supreme Court, wrote to the Commission on Structural Alternatives for the Federal Courts of Appeals ("White Commission") in support of a circuit split. Justice Kennedy said that any circuit claiming the right "to bind nearly one fifth of the people of the United States by decisions of its three-judge panel . . . must meet a heavy burden of persuasion." (Attachment F, at 2).

NUMBER OF STATES

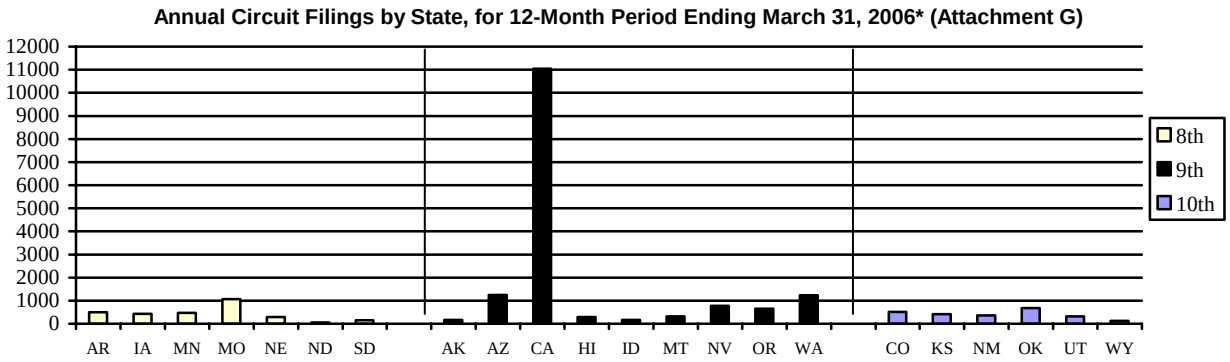
The current Ninth Circuit consists of nine states, a commonwealth, and a territory. Excluding the Ninth Circuit, the average circuit has fewer than four states. The nine states of the Ninth Circuit include the most populous state in the country (California) and the two fastest growing states (Nevada and Arizona).



The new Twelfth Circuit, consisting of seven states, would be tied with the Eighth Circuit for the most states within a circuit.



The dramatic disproportionality of joining California with eight other states in a single circuit is demonstrated when the filings of the individual Ninth Circuit states are compared to those of the Eighth Circuit's seven states and the Tenth Circuit's six states. (Attachment G).



Clearly, the seven states of the new Twelfth Circuit would have a caseload significantly larger than either the Eighth or Tenth Circuit. There is no justification for continuing to tether these seven states to California.

NUMBER OF JUDGES

The Ninth Circuit has 28 authorized active circuit judgeships and 23 senior circuit judges. It has requested and is clearly in need of seven more active circuit judgeships, which would result in the Ninth Circuit having a staggering total of 35 active circuit judges.

In 1999, Judge Rymer observed that "[t]wo-thirds of the circuit judges throughout the country (including one-third of my colleagues on the Court of Appeals for the Ninth Circuit) believe that the maximum number of judges for an appellate court to function well lies somewhere between eleven and seventeen. Beyond this range there are too many judges . . . ."[3]

The next largest circuit has 17 authorized active circuit judgeships.

The other circuits average less than 14 active circuit judges.

Justice Byron R. White, Chair of the White Commission, in a 1999 statement to a subcommittee of the House Judiciary Committee, stated that although the Commission "found no administrative malfunctions in the Ninth Circuit sufficient to call for a division or realignment of the circuit," the Ninth Circuit Court of Appeals "presents a different picture. The Court has 28 authorized judgeships and has requested more; it will undoubtedly need still more judges in the years ahead. From its study, the Commission concluded that an appellate court of that size, attempting to function as a single decisional entity, encounters special difficulties that will worsen with continued growth."[4]

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[3] Hon. Pamela Ann Rymer, *How Big Is Too Big?*, 15 J.L. & Pol. 383, 384 (1999).

[4] *Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. app. at 220 (July 22, 1999) [hereinafter 1999 House Subcomm. Hearing] (prepared statement of Hon. Byron R. White, Chair, White Commission).

Ninth Circuit Judge Diarmuid F. O'Scannlain has estimated that a court of 50 circuit judges, active and senior, results in 19,600 possible three-judge panel combinations.

"MINI-EN BANC" PROCEDURE

Because it has so many judges, since 1980 the Ninth Circuit has chosen (with congressional authorization) to hear cases en banc with fewer than all active circuit judges. It is the only circuit court of appeals to do so.

Since adopting the "mini-en banc" procedure, the Ninth Circuit has never conducted a full en banc hearing with all active circuit judges participating.

Until this year, mini-en banc panels in the Ninth Circuit consisted of 11 active judges; as of January 2006, 15 active circuit judges now sit on mini-en banc panels.

Enactment of S. 1845 would enable the seven states of the new Twelfth Circuit to experience the benefits of full en banc review of cases which are now enjoyed by all other circuits except the current Ninth Circuit.

The new Ninth Circuit may choose to continue conducting mini-en banc hearings, particularly with the addition of seven new judges. However, under S. 1845, these mini-en banc panels would consist of 15 of the court's 22 active judges—more than two thirds of the court. If the Ninth Circuit remains structurally unchanged and the seven requested judgeships are authorized, a significantly lower proportion—less than half—of active circuit judges will participate in mini-en banc hearings.

ADVERSE CONSEQUENCES OF NINTH CIRCUIT'S DISPROPORTIONATE SIZE

The Ninth Circuit's enormously disproportionate size has resulted in several serious and adverse consequences. A non-exhaustive summary of these consequences is set forth below.

a. Structurally flawed "mini-en banc" procedure

Widespread criticism of mini-en banc procedure by Supreme Court Justices and others

As described above, the Ninth Circuit is the only circuit to hold all "en banc" hearings with fewer than all active circuit judges.

Judge Rymer, who served as one of five members of the White Commission, has said, a "'limited' en banc is an oxymoron, because 'en banc' means 'full bench.'"[5]

[5] Hon. Pamela Ann Rymer, *The 'Limited' En banc: Half Full, or Half Empty?*, 48 Ariz. L. Rev. 317, 317 (2006).

In 1998, Supreme Court Justice Sandra Day O'Connor was one of four justices to write to the White Commission in support of a Ninth Circuit split (the other Justices were Anthony M. Kennedy, Antonin Scalia, and John Paul Stevens). In her letter, Justice O'Connor said that the Ninth Circuit's mini-en banc hearings "cannot serve the purposes of en banc hearings as effectively as do the en banc panels consisting of all active judges that are used in the other circuits." (Attachment H, at 2). Justices Kennedy and Scalia, in their letters, also referred to the Ninth Circuit's mini-en banc process.[6]

In December 2003, former Seventh Circuit Chief Judge Richard A. Posner criticized what he referred to as the Ninth Circuit's "bob-tailed en banc procedure."[7]

This year, the Ninth Circuit increased the number of active circuit judges participating in its mini-en banc hearings from 11 to 15. The addition of four judges is cosmetic only. When the Ninth Circuit is at full strength, this will still result in only 15 of 28 active judges of the court participating in en banc reviews. Judge Rymer has pointed out that "the limited en banc means that the views of off-panel judges are not necessarily known or taken into account in the collaborative effort to craft an opinion."[8]

15 votes required for mini-en banc rehearing

In order for a case to be reheard en banc, a majority of the active circuit judges must vote in favor of rehearing. In the Ninth Circuit, when the Court is at full strength, at least 15 judges must vote for rehearing en banc. This is more judges than sit on most of the other circuit courts. Since the White Report was issued in 1998, six or more Ninth Circuit judges have unsuccessfully voted for rehearing en banc 34 times. (Attachment I). The Supreme Court granted review in nine of these 34 cases; seven were reversed and two are still pending. (Attachment I).

In one recent case in which a three-judge panel reached a conclusion contrary to that arrived at by five other circuits, nine active Ninth Circuit judges unsuccessfully voted for rehearing en banc.[9] In another recent case, on two occasions en banc review was denied and both times the Supreme Court granted review.[10]

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6 *See* Attachment F (Justice Anthony M. Kennedy Letter to White Commission - Aug. 17, 1998); Letter from Justice Antonin Scalia, to Hon. Byron R. White, Chair, White Commission (Aug. 21, 1998), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/Scalia1.pdf.

7 Interview by Howard Bashman with Hon. Richard A. Posner, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, How Appealing's 20 Questions Site (Dec. 1, 2003) at Question 9, http://20qappellateblog.blogspot.com/2003_12_01_20q-appellateblog_archive.html#107025481874565902 [hereinafter Posner Interview].

8 Hon. Pamela Ann Rymer, *supra* note 5, at 323.

9 *Bockting v. Bayer*, 418 F.3d 1055 (9th Cir. 2005).

10 *Belmontes v. Woodford*, 359 F.3d 1079 (9th Cir. 2004) (denying en banc review), *vacated sub nom. Brown v. Belmontes*, 544 U.S. 945 (2005), *en banc reh'g denied*, 427 F.3d 663 (9th Cir. 2005), *cert. granted sub nom. Ornaski v. Belmontes*, 126 S.Ct. 1909 (2006).

Finally, as Judge Rymer has pointed out, even if a majority of active circuit judges vote to rehear a case "limited en banc," since not all active circuit judges will be drawn to hear the case en banc, there is no assurance that all of the active circuit judges who vote for en banc review will be selected to hear the case.[11]

Close votes are now common in mini-en banc rehearings

When the White Report was issued in December 1998, the White Commission stated that the Ninth Circuit's mini-en banc procedure was not problematic because the mini-en banc votes were seldom close.[12] This is no longer true. Since 1998, 33% (42 of 127) of the Ninth Circuit's mini-en banc rulings have been by 6-5 or 7-4 votes. (Attachment J).

Beginning in 2006, the Ninth Circuit now has 15 active circuit judges participate in mini-en banc hearings. However, this does nothing to change the fact that far fewer than all active circuit judges will continue to participate in the Ninth Circuit's unique en banc procedure. The only likely change will be close votes of 8-7 or 9-6, with eight or nine judges speaking for a court of 28. It is both counter-intuitive and speculative for split opponents to argue that in the 42 cases with close votes, participation by the other active circuit judges would have made no difference.

Three-judge panel members frequently are not picked for mini-en banc hearings

Since the mini-en banc panels do not include all active circuit judges, there have been occasions when none of the three-judge panel members who decided a case were picked to hear the case en banc. In one highly publicized case, a unanimous three-judge panel was unanimously reversed 11-0 by a mini-en banc court. None of the three judges who participated in the panel decision were selected to rehear the case en banc.[13]

Judge Rymer has pointed out that when no panel member is drawn to hear the case on "limited en banc" (something that occurred in 22 of 95 limited en banc cases between 1999-2005), the limited en banc panel "lacks the benefit of input from colleagues who are well-versed in the record and law applicable to the case, and whose work would bring a different perspective to en banc deliberations."[14]

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[11] Hon. Pamela Ann Rymer, *supra* note 5, at 321.

[12] Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 35 (1998), *available at* http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf [hereinafter White Report].

[13] *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir.), *reh. en banc*, 344 F.3d 914 (9th Cir. 2003) (addressing the California gubernatorial recall procedure).

[14] Hon. Pamela Ann Rymer, *supra* note 5, at 323.

b. Most reversed circuit

The Ninth Circuit is the most reversed circuit. (Attachment K). Even more extraordinary, however, is the fact that since the White Report was issued in 1998, the Ninth Circuit has been reversed at least 62 times *unanimously*, i.e., with no dissent. No other circuit is close to having so many unanimous reversals. In only two of these 62 cases had the Ninth Circuit heard the matter en banc; the other 60 unanimous reversals were of three-judge panel decisions.

In effect, the Supreme Court is performing a review of Ninth Circuit panel decisions that should be addressed by the Ninth Circuit in full en banc hearings.

In the Supreme Court term recently completed, 18 Ninth Circuit cases were reviewed and 15 were reversed—most of them unanimously. (Attachment K).

c. Slowest circuit in decisional time

The Ninth Circuit is the slowest circuit in decisional time when measured from the time of filing of notice of appeal to disposition. As of June 30, 2006, the Ninth Circuit takes 16.3 months per case. The Ninth Circuit is more than two months slower than the next slowest circuit and four months slower than the average circuit. (Attachment L). The Ninth Circuit now takes two months longer per case than it did when the White Report was issued in 1998.[15]

d. Under-representation in Judicial Conference

Every circuit is entitled to two representatives to the U.S. Judicial Conference, the policy-making body for the federal courts. Nine states with a combined population of nearly 60 million people and accounting for 30% of all pending federal appeals should have 2-3 times the Judicial Conference representation received by the current Ninth Circuit.

Splitting the Ninth Circuit would give better representation to all nine states.

THE REASONS OFFERED BY SPLIT OPPONENTS CANNOT WITHSTAND SCRUTINY

In 1998, Justice Kennedy wrote that split opponents bear a "heavy burden of persuasion . . . ." (Attachment F, at 2). Split opponents woefully fail to meet this burden.

a. "It would cost too much."

Despite claims to the contrary, a circuit split would not "break the bank." Existing facilities requiring modest modifications with relatively small price tags would meet the

[15] White Report, *supra* note 12, at 32.

immediate needs for a new Twelfth Circuit headquarters in Phoenix, Arizona.[16]

It has been suggested that the immediate cost of a split of the Ninth Circuit is $100 to $125 million for a new circuit headquarters in Phoenix. However, closer analysis shows that either of two Phoenix locations, the Sandra Day O'Connor U.S. Courthouse at 401 W. Washington ("401") or the 230 N. 1st Ave U.S. Courthouse ("230"), have adequate space to fully serve as a circuit headquarters for the midterm.

Attached to my written testimony are executive summaries, courthouse floor plans and conceptual estimates developed by HBJL Collaborative, LLC ("HBJL") and a letter from former Chief Judge Robert C. Broomfield. (Attachment M).

As reflected in the executive summaries, 401 can initially house a new Twelfth Circuit headquarters at a cost of approximately $5,821,282.76 and 230 can initially house the headquarters at a cost of $9,683,697.29. Judge Broomfield concurs with HBJL's conclusion that adequate space exists at both 401 and 230. Judge Broomfield has authorized me to inform this Committee that he stands by the statements and conclusions contained in his letter of Oct. 19, 2005.

Judge Broomfield's evaluation of the HBJL analysis is deserving of great weight because of his extraordinary credentials both as a district judge and as an individual with expansive knowledge of building and space requirements for federal courthouses.

Judge Broomfield has been a judge for 35 years, including 14 years on the Superior Court of Arizona in Maricopa county and nearly 21 years on the U.S. District Court in Arizona. While serving on the Superior Court (then one of the nation's largest general jurisdiction trial courts), Judge Broomfield was its presiding judge for 11 years. On the U.S. District Court, he served as chief judge for over five years. He has been involved in the planning, design, and oversight of the construction of several state and federal courthouses.

Judge Broomfield served on the Space and Facilities Committee of the U.S. Judicial Conference from 1987-95 and served as chair from 1989-95. During his term as chair, the Judicial Conference directed that the Space and Facilities Committee be combined with the then-Committee on Security, which resulted in a new Committee on Security, Space, and Facilities. Recently, the Judicial Conference split that committee into its original committees. The U.S. Courts Design Guide was formulated during Judge Broomfield's tenure on the Space and Facilities Committee.

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[16] *Revisiting Proposals to Split the 9th Circuit: An Inevitable Solution to a Growing Problem: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 109 Cong. 126-27 (Oct. 26, 2005) [hereinafter 2005 Senate Subcomm. Hearing] (prepared statement of Hon. John M. Roll, District Judge, U.S. District Court for the District of Arizona).

In addition, in 1997 Judge Broomfield was appointed to the Judiciary's Budget Committee and chaired its Economy Subcommittee for several years. The Budget Committee interrelates with the Appropriations Committees of the Senate and the House. The Economy Subcommittee seeks better and more economical ways of carrying out the constitutional and statutory obligations of the judiciary and its component parts. As the HBJL attachments and Judge Broomfield's letter reflect, a Twelfth Circuit headquarters can be attained in Phoenix now without a new circuit headquarters building.

In the past, the cost of additional circuit judgeships was sometimes included as a significant part of the cost of a circuit split. However, the reality is that seven new judgeships are needed, with or without a circuit split.

b. "The Ninth Circuit doesn't want a split."

Initially, it should be noted that a significant number of Ninth Circuit judges support a split of the circuit. Ninth Circuit Judges Diarmuid F. O'Scannlain, Richard C. Tallman, and Andrew J. Kleinfeld testified last year in support of a split of the Ninth Circuit.[17]

The fact that a strong majority of Ninth Circuit judges opposes a split of the circuit (33 of 47 Ninth Circuit judges recently co-authored a Federalist Society magazine piece in opposition of a split) should not be given undue weight.

In expressing her support of a circuit split to the White Commission in 1998, Justice O'Connor said that "[i]t is human nature that no circuit is readily amenable to changes in boundary or personnel" and observed that "it is unrealistic to expect much sentiment for change from within any circuit." (Attachment H, at 2).

Despite this institutional bias against change referred to by Justice O'Connor, 24 federal judges who sit in the Ninth Circuit recently signed a letter sent to this Committee in support of S. 1845. (Attachment N).

Judge Rymer, shortly after the White Commission issued its report, wrote that "many circuit judges, lawyers who practice within the [Ninth Circuit], and a majority of justices on the United States Supreme Court question how well the court of appeals performs its adjudicative functions."[18]

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[17] 2005 Senate Subcomm. Hearing, *supra* note 16, at 13, 89 (oral and prepared statements of Hon. Diarmuid F. O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* at 15, 149 (oral and prepared statements of Hon. Richard C. Tallman, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* at 36, 57 (oral and prepared statements of Hon. Andrew J. Kleinfeld, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

[18] Hon. Pamela Ann Rymer, *supra* note 3, at 386.

c. "There is a need for a unified law of the west."

Although split opponents have argued that the law of the west should be decided by a single circuit, no other circuit spans an entire border or coast. The eastern seaboard, for example, is subdivided into five circuits.

d. "California can't be separated from Arizona, Seattle from San Francisco, etc."

Split opponents argue that because of close historic and economic ties, Arizona and California must remain in the same circuit. However, on the east coast, New Jersey and New York are in different circuits, as are Massachusetts and Connecticut, Delaware and Maryland, and South Carolina and Georgia. Without any apparent difficulty, intellectual property cases as well as maritime law cases are distributed among multiple circuits on the eastern seaboard.

e. "California and Arizona are border courts and shouldn't be separated."

Split opponents argue that the Ninth Circuit should not be split because two of the five southwest border districts are in the Ninth Circuit. However, the five southwest border districts are already separated into three circuits—the Ninth (S.D. Cal. and D. Ariz.), Fifth (S.D. Tex. and W.D. Tex.) and Tenth (D. N.M) Circuits.

f. "As a result of technological advances and creative case processing, the Ninth Circuit is able to cope with its large number of judges and vast caseload."

Split opponents argue that as a result of technological advances (e-mail, teleconferences, blackberries, etc.), and creative case processing techniques (such as the widespread use of screening panels, commissioners, and staff attorneys), the Ninth Circuit is able to cope with its vast caseload and disproportionate number of judges.

Ninth Circuit Judge O'Scannlain, however, recently questioned whether such shortcuts may ultimately deprive litigants of Article III review of their cases. (Attachment O, at 11).

g. "Rather than reduce the size of the Ninth Circuit, other circuits should be bigger."

Some Ninth Circuit judges have argued that other federal circuits should be consolidated and have larger caseloads so as to follow the lead of the Ninth Circuit. However, no other circuit has expressed an interest in becoming more like the Ninth Circuit.

Seventh Circuit Judge Posner has said: "The Ninth Circuit is performing badly, a case reinforced by the impressions that almost everyone has who appears before the Ninth Circuit or reads its opinions."[19]

In 1999, former Chief Judge William D. Browning, who served as one of the five members of the White Commission, testified before a subcommittee of this Committee regarding the White Report. He said that he repeatedly asked split opponents, "when will the Ninth Circuit be too big?" but was never given an answer by split opponents.[20] In 2004, he submitted a letter to that subcommittee urging that if more judges are added to the Ninth Circuit, it should be divided. (Attachment P).

How big *is* too big? When the White Report was issued, the Ninth Circuit's caseload was about 8,500 cases (of a national total of 52,271) and it had a population of 51,450,000 people (of a national total of over 271 million). In the interim, the Ninth Circuit's caseload has doubled (17,520 pending cases as of June 30, 2006) and the population has increased by 8 million people.

h. "The Ninth Circuit is a national beacon and cutting-edge innovator."

Although the Ninth Circuit sometimes depicts itself as a national beacon for the other federal courts and a cutting edge innovator, it is actually just one of 12 regional circuit courts. It is not entitled to a position of preeminence over all other circuits.

i. "More studies are needed."

Some split opponents have urged that more hearings and studies are required.

Whether to divide the Ninth Circuit has been the subject of many hearings, the most recent having been held on October 26, 2005, by a subcommittee of this Committee.

In a little more than three decades, two national commissions, the Hruska Commission (1973) and the White Commission (1998), studied the Ninth Circuit and made recommendations. The Hruska Commission recommended that both the Fifth and Ninth Circuits be divided. In 1998, the White Commission recommended what has been described as a "de facto split" of the Ninth Circuit, proposing that the Ninth Circuit be subdivided into three semi-autonomous divisions. Prior to issuance of the White Report, the White Commission held several hearings in the Ninth Circuit.

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[19] Posner Interview, *supra* note 7, at Question 9.

[20] 1999 Senate Subcomm. Hearing, *supra* note 1, at 127 (statement of Hon. William D. Browning, Senior District Judge, U.S. District Court for the District of Arizona, and Member, White Commission).

No further studies or hearings are warranted; they would only delay the necessary and the inevitable.

j. "The White Commission's recommendations are an attractive alternative to a circuit split."

The five members of the White Commission included Justice Byron R. White and two judges who sit in the Ninth Circuit—Ninth Circuit Judge Pamela Ann Rymer and former Chief Judge William D. Browning (D. Ariz.). The Commission unanimously concluded that the adjudicative (but not the administrative) functioning of the Ninth Circuit was seriously flawed and required structural changes.

Judge Rymer strongly supports the recommendations of the White Commission as the appropriate solution to the Ninth Circuit's adjudicative ills. In testifying in support of the White Commission's recommendations, Judge Rymer said that "the Court of Appeals for the Ninth Circuit is broke and should be fixed but cannot be fixed without structural change."[21]

In 1998, nearly eight years ago, the White Commission recommended that the Ninth Circuit be subdivided into three semi-autonomous divisions.[22] One crucial goal of the White Commission was to obtain decisional units of 11-17 active circuit judges with each division having full en banc hearings. To this end, the White Commission proposed that appeals in each division be heard by three-judge panels, and that full divisional en banc review of the panel decisions be heard as necessary. The decisions of any division were not to be binding on the other two divisions. Finally, and only in the event of intracircuit "substantial and square conflict," a limited en banc panel (consisting of the Chief Judge of the Ninth Circuit and four active circuit judges from each of the three semi-autonomous divisions) would entertain further review.[23] The White Commission recommended these changes because, from an adjudicative standpoint, the Ninth Circuit is "broke" and needs to be "fixed;" "structural change" is required.[24]

At the time the White Report was issued, then-Ninth Circuit Chief Judge Proctor Hug, Jr., wrote that the White Commission's proposal would cause the law of the Ninth Circuit to "steadily drift apart." He said that the White Report recommended, in effect, a "de facto split."[25] (Attachment Q).

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21 1999 Senate Subcomm. Hearing, *supra* note 1, at 60 (statement of Hon. Pamela Ann Rymer).

22 White Report, *supra* note 12, at 44.

23 Hon. Pamela Ann Rymer, *supra* note 3, at 383; White Report, *supra* note 12, at 45.

24 1999 Senate Subcomm. Hearing, *supra* note 1, at 60 (1999) (statement of Hon. Pamela Ann Rymer).

25 Hon. Proctor Hug, Jr., *Potential Effects of the White Commission's Recommendations on the Operation of the Ninth Circuit*, 34 U.C. Davis. L. Rev. 325, 330 (2000).

At a House subcommittee hearing, Chief Judge Hug testified against the White Report's recommendations. There he said, "[m]y view that the disadvantages far outweigh any advantages of the proposed restructurings is shared by a great majority of the judges on the Ninth Circuit Court of Appeals . . . ."[26]

Chief Judge Hug dismissed the White Commission's recommendations as "radical," "untested," and "flawed," providing for a divisional approach that "abrogates circuit-wide stare decisis," jeopardizing "uniformity, coherence, and predictability."[27]

The American Bar Association and the Federal Bar Association opposed the White Commission's recommendation of three semi-autonomous divisions.[28]

The White Commission's recommendations represent a valiant, extraordinary and unprecedented effort to prevent the division of a circuit that has simply grown to unworkable dimensions from an adjudicative standpoint.

The White Report was vehemently rejected in 1999 by today's split opponents. Since the White Report was issued, the population in the nine states of the Ninth Circuit has increased by eight million people and the caseload has doubled. Even assuming that today's split opponents believe the White Report's key recommendations are now appropriate (i.e., three semi-autonomous divisions with full divisional en banc review, nonbinding interdivisional caselaw, and circuit-wide limited en banc restricted to "substantial and square conflicts"), the split proposed in S. 1845 is the best solution.

k. "Disparity in caseload is unfair."

Opponents of S. 1845 have suggested that it would create unfair disparity in caseload between the new Ninth Circuit and the new Twelfth Circuit. The Ninth Circuit currently ranks third in caseload, with 570 cases per active circuit judge.

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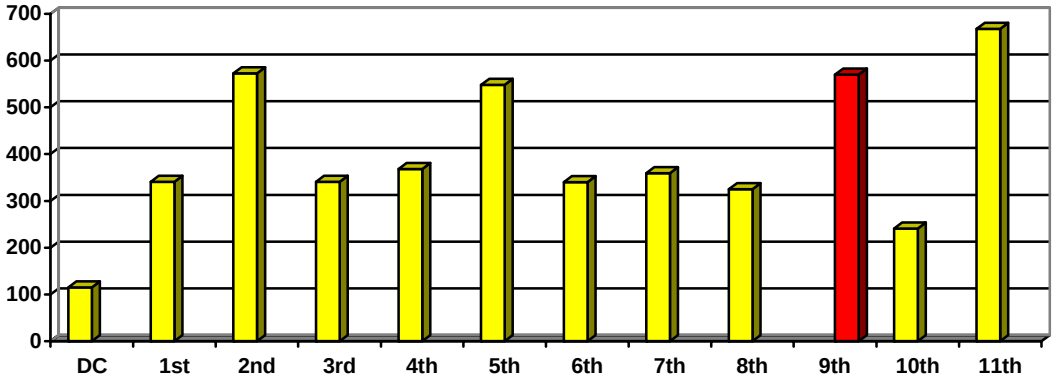
[26] 1999 House Subcomm. Hearing, *supra* note 4, at 52 (statement of Hon. Proctor Hug, Jr., Chief Judge, U.S. Court of Appeals for the Ninth Circuit).

[27] Hon. Proctor Hug, Jr. & Carl Tobias, *A Split by Any Other Name*, 15 J.L. & Pol. 397, 407-08 (1999).

[28] Elizabeth Rogers, *ABA Opposes Plan to Restructure 9th Circuit Court of Appeals*, 85 A.B.A. J. 101 (Nov. 1999); Bruce Moyer, *FBA Opposes Ninth Circuit Division Proposal*, 76 Fed. Law. 8 (Aug. 1999).

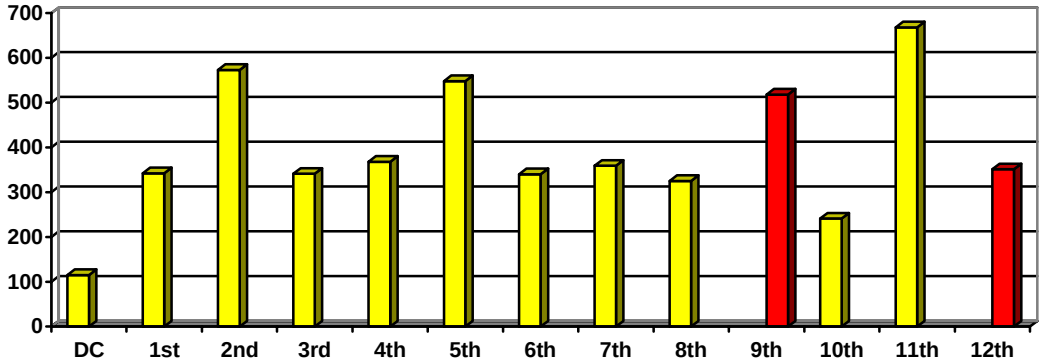
Number of Cases Per Active Judge - Current, for 12-Month Period Ending March 31, 2006 (Attachment D)



	11th	2nd	**9th**	5th	4th	7th	1st	3rd	6th	8th	10th	DC
Cases Filed	8024	7453	**15967**	9326	5527	3951	2055	4787	5441	3584	2894	1380
Active Judgeships	12	13	**28**	17	15	11	6	14	16	11	12	12
Cases Per Judge	668	573	**570**	548	368	359	342	341	340	325	241	115

Under S. 1845, the new Ninth Circuit's caseload would be significantly reduced—dropping from 570 cases per active circuit judge to 518 cases per active circuit judge. The new Ninth Circuit would also have 13 senior circuit judges to assist with this caseload. Overall, the caseload of the new Ninth Circuit judges would be less than three other circuits. In addition, although the new Twelfth Circuit would have a caseload of 351 cases per active circuit judge, this would be larger than that of six other circuits. (Attachment D).

Number of Cases Per Active Judge - After Two-Way Split of the Ninth Circuit, for 12-Month Period Ending March 31, 2006 (Attachment D)



	11th	2nd	5th	**9th**	4th	7th	**12th**	1st	3rd	6th	8th	10th	DC
Cases Filed	8024	7453	9326	**11402**	5527	3951	**4565**	2055	4787	5441	3584	2894	1380
Active Judgeships	12	13	17	**22**	15	11	**13**	6	14	16	11	12	12
Cases Per Judge	668	573	548	**518**	368	359	**351**	342	341	340	325	241	115

l. "This is just politically motivated."

Despite the overwhelming and compelling evidence in support of a circuit split, some split opponents continue to rely upon the unfounded claim that attempts to split the Ninth Circuit are simply politically motivated. However, judges who support a split have consistently focused on the impracticality of having a single circuit court of such enormous proportions.

While there is little or no evidence of pro-split judges and lawyers articulating political reasons for a division of the circuit, this has not been true of all split opponents. (Attachment R).

The reasons why a split is necessary far transcend politics. No one can seriously maintain that the Ninth Circuit is proportionate to the other geographic circuit courts or that it adjudicates well despite its enormous caseload and number of judges.

m. "All that is needed is for current vacancies to be filled."

More judges will not solve the insurmountable imbalance caused by the limited en banc procedure. Judge Rymer, in testifying before a subcommittee of this Committee nine years ago, said that "no amount of [good will or good administration] can make it possible for 30, 40, or 50 or more judges to decide cases together. It simply cannot be done, and that is the problem."[29]

CONCLUSION

The administration of justice is not well-served by having one of 12 federal circuit courts entertain 30% of the nation's federal appeals, house over one-fifth of the nation's population, and contain nearly one-fifth of the nation's states (including the most populous state). The consequences of having a single circuit encompass so many states and hear so many cases resonate in many ways, including too many judges, lengthy dispositional time, utilization of a structurally-flawed mini-en banc process, an extraordinary unanimous reversal rate, and gross under-representation in the U.S. Judicial Conference.

For 115 years there has been no diminution in the boundaries of the Ninth Circuit despite a tenfold increase in population. The need for a split has been discussed in earnest for over three decades, including studies by two national commissions. The situation has become exacerbated and, without a division of the Ninth Circuit, will continue to deteriorate. This issue will not go away.

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[29] 1999 Senate Subcomm. Hearing, *supra* note 1, at 60 (statement of Hon. Pamela Ann Rymer).

As the western population continues to increase, so will the need for a circuit split. There is nothing "rash" or "peremptory" about dividing the circuit at this time. In 1999, highly-respected law professor Daniel J. Meador, who served as Executive Director of the White Commission, provided a written statement to a House subcommittee, in support of the White Commission's recommendations. He said that unless Congress acts, "the controversy over the Ninth Circuit will continue to fester, with debilitating consequences . . . ."[30]

Both the new Ninth and new Twelfth circuits would benefit from a split as provided for in S. 1845.

For Congress to divide the Ninth Circuit is not an attack upon judicial independence; it is the wise exercise of authority expressly entrusted to Congress by the Constitution. This Congress has a unique, historic opportunity to take much-needed remedial action regarding a circuit which now dwarfs all others.

I most respectfully urge passage of S. 1845. Thank you.

[30] 1999 House Subcomm. Hearing, *supra* note 4, app. at 209 (prepared statement of Daniel J. Meador, James Monroe Professor of Law Emeritus, University of Virginia, and Executive Director, White Commission).