Notes

CALIFORNIA SPLIT: A PLAN TO DIVIDE THE NINTH CIRCUIT

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INTRODUCTION

> [T]hese changes come at the end of a continuous process of tinkering, minor adaptations, temporary expedients, proposals for major reforms giving rise to influential debates—all the reflexes of the creaking of the judicial machinery because of its inadequacy to cope with the demands made upon it by changing circumstances.
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> . . . Congressional preoccupation with judicial organization is extremely tenuous all through our history except after needs have gone unremedied for so long a time as to gather compelling momentum . . . .[1]

The words of Justice Frankfurter and his colleague James Landis, written nearly seventy years ago to describe the incredible Congressional inertia that had to be overcome to institute much-needed federal judicial reform, are just as applicable to the condition of the United States Courts of Appeals today. The modern circuit courts of appeals, created by the Evarts Act[2] in 1891 to relieve a severely overburdened Supreme Court, are faced with a similar dilemma: Appellate dockets are swelling at a rate that outstrips the ability of the larger circuits to keep pace. Our current federal lawmakers face a judicial situation that has been met by previous Congresses with too much deliberation and too little action. This hesitancy to change the structure of the American federal judiciary has led repeatedly to the

1. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 30, 36 (Wm. W. Gaunt & Sons Inc. 1993) (1927).

2. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 [hereinafter Evarts Act]. For further discussion of the Evarts Act, see *infra* text accompanying notes 102-08.

dangerous accumulation of unmet needs of which Landis and Frankfurter wrote.

The explosion of appellate litigation in the United States over the past twenty-five years has contributed to the current caseload crisis. There are multiple causes for the increase in appeals; among the contributing factors are the rise in prisoner litigation[3] and the reduction of certainty in predicting appellate outcomes produced by larger courts with more possible three-judge panels.[4] The Congressional response to the rise in federal appellate litigation thus far has been to keep adding judges to the circuits. The Ninth Circuit, already the largest with twenty-eight judgeships, will soon expand to thirty-eight as a result of Congress' latest attempt to alleviate the nation's largest appellate caseload.[5] The Ninth Circuit itself has instituted a number of internal reforms in the past ten years, including sophisticated com-

3. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 213 tbl.341 (115th ed. 1995) (reporting that the number of prisoner constitutional claims has climbed from 218 cases in 1966 to 56,283 cases in 1994).

4. *See* Paul D. Carrington, *U.S. Courts of Appeals and U.S. District Courts: Relationships in the Future*, *in* THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY 69, 74 (1989) [hereinafter *Relationships in the Future*]. Specifically, Carrington states:

> Lawyers afflicted with greater difficulty in predicting appellate outcomes are likely also to experience greater difficulty in settling cases. The durability or nonsettlement of civil disputes turning on nonfactual issues appears to have increased significantly over the last 30 years. This partly explains the much greater increase in appeals than in trials.

Id. Carrington also attributes the lack of certainty to the loosening of the strictures of Federal Rule of Civil Procedure 11, which creates a "lack of confidence of lawyers in their own judgment as to what is truly groundless in the minds of an unidentified and diverse panel of circuit judges." *Id.*; *see also infra* notes 174-77 and accompanying text.

5. *See* 139 CONG. REC. E3046 (daily ed. Nov. 24, 1993) (extension of remarks of Rep. Kopetski). It must be noted, however, that the Ninth Circuit currently has only 18 active judges. *See Rehnquist's Aim Is True*, L.A. TIMES, Jan. 5, 1998, at B4. Ninth Circuit Chief Judge Proctor Hug, Jr. has said that he had to cancel hearings in 600 cases in 1997 "because no judges were available." *Id.* One of every ten federal judgeships is vacant nationwide; 101 judges were confirmed by the Senate in 1994, but only 43 in 1996 and 1997 *combined*. *See id.* Most observers attribute this delay to partisan politics and the Senate Judiciary Committee. The Committee's chairman, Orrin Hatch, has conceded that the backup is at least partly due to the Republican perception that President Clinton's nominees will be "too activist." *Id.* (internal quotation marks omitted). United States Supreme Court Chief Justice William Rehnquist has come out sharply against this delay, publicly criticizing Hatch, a former political ally. *See id.* The lag in federal judicial appointments is viewed by some prominent observers as having contributed to the backlog of cases in the Ninth Circuit. As Chief Judge Hug, a vehement opponent of circuit-splitting, put it recently, "[s]hortly after I came onto the court in 1978, our authorized judges were 23 to handle 3,100 cases [a year]. Today, we have 18 active judges to handle 8,600 cases." David G. Savage, *Plan to Break Up Court Assailed; House to Take Up Bill This Week*, SEATTLE TIMES, Sept. 22, 1997, at A4.

puter tracking systems and the delegation of work to staff attorneys.[6] These reforms are merely stopgap measures that mask a much deeper problem; instead of creating an ever-larger circuit with an increasingly monolithic infrastructure, Congress and the Ninth Circuit Judicial Council should realize that the circuit is simply too large to handle a caseload that is growing with no end in sight.[7] The solution lies in reducing, not increasing, the number of people served by the circuit. This can best be accomplished through circuit division.

The most recent division of a federal circuit occurred in 1981, when the Fifth Circuit was split to create a new Eleventh Circuit.[8] This split has been an enormous success.[9] The division of the Fifth Circuit was recommended by the Commission on the Revision of the Federal Court Appellate System (popularly known as the Hruska Commission).[10] At the same time the Commission made its recommendations regarding the Fifth Circuit, it advised then-President Nixon and the Congress that the Ninth Circuit should be split in or-

6. For a comprehensive look at these reforms, see generally Arthur Hellman's excellent collection of essays entitled RESTRUCTURING JUSTICE (Arthur D. Hellman ed., 1990).

7. One possible approach for reducing the caseload of all federal circuits could be a substantive reform of federal jurisdiction. However, this is unlikely to happen on any scale broad enough to effect the necessary caseload reduction. Although the increase in the amount in controversy requirement for diversity suits to $75,000 is a solid example of a Congressional reform designed to reduce the federal caseload, such streamlining measures are counterbalanced by the enactment of laws such as the Americans with Disabilities Act, which defines "disability" broadly and "provides a wide array of remedies enforceable in [federal] courts." Arthur D. Hellman, *The Crisis in the Circuits and the Innovations of the Browning Years*, *in* RESTRUCTURING JUSTICE, *supra* note 6, at 8-9 & nn.10-11 (concluding that "Congress will take no major steps to reduce the jurisdiction of the federal courts." *Id.* at 8.).

8. Prior to the split in 1981, the Fifth Circuit included Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida. The Eleventh Circuit was produced by carving out Alabama, Georgia, and Florida.

9. *See* Conrad Burns, *Dividing the Ninth Circuit Court of Appeals: A Proposition Long Overdue*, 57 MONT. L. REV. 245, 254 (1996) (observing that in 1995 the 29 judges of the Fifth and Eleventh Circuits combined disposed of more than double the number of cases that the 26 judges of the Fifth Circuit resolved in the year before the Fifth Circuit split).

10. *See* Commission on Revision of the Fed. Court Appellate Sys., *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223, 230-34 (1973) [hereinafter *Hruska Commission Report*]. The Commission, chaired by Senator Roman Hruska, was created by Congress in 1972. Due to the "urgency of the need for relief" from the heavy caseloads of the courts of appeals, Congress ordered that the Commission prepare its report within 180 days. *See id.* at 228. The Commission was "'to study the present division of the United States into the several judicial circuits and to report . . . its recommendations for changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business.'" *Id.* (quoting Act of Oct. 13, 1972, Pub. L. No. 92-489, § 1(a), 86 Stat. 807, 807 (1973)).

der to deal with many of the same problems hampering the circuit's effectiveness today.[11]

The principal problem facing the Ninth Circuit is its staggering caseload, 60% of which comes from California.[12] The Hruska Commission recommended that California be split between the Ninth Circuit (which would consist of the Northern and Eastern Districts of California, Alaska, Washington, Oregon, Idaho, Montana, Hawaii, and Guam) and a new Twelfth Circuit (comprising the Southern and Central Districts of California, Arizona, and Nevada).[13] Although Congress did not adopt the Hruska Commission's proposal, it remains the best of the several alternatives for splitting the Ninth Circuit because it is the only proposal that would evenly divide the current caseload between the two new circuits.

Despite many administrative reforms approved by Congress in the twenty-three years since the Hruska Commission's report, the Ninth Circuit remains the largest, slowest, and most unwieldy of the federal courts of appeals, handling 20% of the entire federal caseload.[14] The nine states and two territories of the Ninth Circuit cover fourteen million square miles (an area larger in size than western Europe)[15] with a population of forty-five million people, sixteen million more people than are served by any other circuit.[16] The territory of the Ninth Circuit stretches from the Rocky Mountains to the Sea of Japan, from the Mexican border to the Arctic Circle.[17] The influx of immigrants into the western states will continue to fuel significant population growth in the states of the Ninth Circuit; the population of California alone is expected to reach 49.3 million by the year 2025.[18]

11. *See id.* at 234-35. In contrast to the Ninth Circuit, however, the old Fifth Circuit appears to have been more amenable to symmetrical division in terms of equitable caseloads, the number of states involved, and a more obvious geographical split.

12. *See* ADMINISTRATIVE OFFICE OF THE COURTS: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, REPORT OF THE DIRECTOR 106 (1995) [hereinafter JUDICIAL BUSINESS].

13. *See Hruska Commission Report*, *supra* note 10, at 236. The Northern Mariana Islands were not part of the Ninth Circuit when the Report was compiled.

14. *See* Diarmuid F. O'Scannlain, *A Ninth Circuit Split Study Commission: Now What?*, 57 MONT. L. REV. 313, 314 (1996).

15. *See Opinion: Seeking Justice*, ANCHORAGE DAILY NEWS, Sept. 24, 1997, at B7.

16. *See* Burns, *supra* note 9, at 250.

17. *See* O'Scannlain, *supra* note 14, at 314.

18. *See* Haya El Nasser, *Immigration to Lead Population Boom in West: Census Predicts California Will Grow 56% by 2025*, USA TODAY, Oct. 23, 1996, at 7A; *see also* S. REP. NO. 104-197, at 9 (1995) (statement of Ninth Circuit Judge O'Scannlain) ("In light of the demographic trends in our country, it is clear that the population of the states in the [N]inth [C]ircuit,

The delays, inconsistencies, and impracticalities inherent in an appellate court the size of the Ninth Circuit point to the need for action. Operating in the measured way that it has since long before the days of Justice Frankfurter, the Senate, in 1995, reached a compromise with regard to the future of the Ninth Circuit; Senate Bill 956 was transformed from the Ninth Circuit Reorganization Act to a bill to establish a "Commission on Structural Alternatives for the Federal Courts of Appeals."[19] In a rare legislative concession to expediency in judicial matters, the bill called for the Commission to submit its report by February 28, 1997.[20] Regrettably, the House of Representatives failed to approve the Commission before the end of the term. On January 30, 1997, Senator Diane Feinstein of California introduced Senate Bill 248, which revived the notion of the Commission and requested a $1.3 million budget for a study of the federal courts system to be completed within two years.[21] This bill also died, as did Feinstein's third attempt to establish a study commission.[22] On July 25, 1997, in a 55-45 vote along party lines, the Senate defeated Feinstein's final study proposal in favor of a highly controversial rider to an appropriations bill which called for a split of the Ninth Circuit into two circuits, a new Ninth comprising California, Nevada, Guam, and the Northern Mariana Islands, and a Twelfth made up of Alaska, Arizona, Hawaii, Idaho, Montana, Oregon, and Washington.[23] Attaching a circuit-splitting proposal to a spending bill was an unprecedented move which forced the issue to be voted upon in the appropriations process; the White House "'strongly object[ed]' to attaching the reorganization [plan] to a spending bill."[24]

This move by the Senate set the stage for an eventual confrontation in a House-Senate conference committee between pro-split senators and members of the House, which passed by voice vote a popular bill (sponsored by Rep. Henry Hyde) that would appoint a commis-

and thus the caseload of the federal judiciary sitting in those states, will continue to increase at a rate significantly ahead of most other regions of the country.")

19. *See* S. 956, 104th Cong. (1996). The bill made particular reference to the Ninth Circuit and directed the Commission to recommend appropriate changes in circuit boundaries to the President and Congress. *See id.* § 1(b).

20. *See id.* § 6.

21. *See* 143 CONG. REC. S1113-14 (daily ed. Feb. 6, 1997) (remarks of Sen. Feinstein).

22. *See* David Whitney, *9th Circuit Split Clears Roadblock*, ANCHORAGE DAILY NEWS, July 25, 1997, at A1.

23. *See id.*

24. *Id.*

sion to study the federal appellate courts as a whole.[25] On October 1, 1997, during the Senate appropriations voting for fiscal 1998, the Senate passed H.R. 2267, the House's companion measure to the Senate's appropriations bill.[26] Shortly thereafter, however, passage of the bill was vitiated and a vote on the Senate's plan to split the Ninth Circuit was "indefinitely postponed."[27] Thus, after all of the controversy surrounding the rider to the appropriations bill, action on splitting the circuit was, once again, delayed.

The time for change in the Ninth Circuit is ripe;[28] indeed, some judges on the circuit have come to this conclusion.[29] While the Senate broke with its long tradition of delay in circuit-splitting matters with its dramatic appropriations rider, it acted too quickly and for the wrong reasons. The proposal is borne of frustration with the circuit's perceived liberal leanings and, by the admission of one of its prime proponents, Senator Slade Gorton (R-Wash.), of a feeling on the part of the northwestern states that "the [Ninth Circuit] is undeniably dominated by urban judges, urban issues, and California, a place viewed with great disdain in much of the West."[30]

25. *See id.*

26. *See* 143 CONG. REC. S10,265 (daily ed. Oct. 1, 1997). The Senate struck all text after the enacting clause and inserted the text of S. 1022, *see id.*, which had passed on July 29, 1997, section 305 of which contains the amendment splitting the Ninth Circuit. *See* 143 CONG. REC. S8228, S8240-41 (daily ed. July 29, 1997). The Senate insisted upon inclusion of this amendment. *See* 143 CONG. REC. S10,265 (daily ed. Oct. 1, 1997).

27. 143 CONG. REC. D1042-02, D1042 (daily ed. Oct. 1, 1997).

28. As Senator Ted Stevens (R-Alaska) put it, "we've studied this matter to death . . . . Every Congress we hear the same thing from the large delegation in the House and the two senators from California—we need more study. I'm a California lawyer. In all sincerity, I cannot believe we can continue this situation." Whitney, *supra* note 22, at A1.

29. *See* Diarmuid O'Scannlain, *A Ninth Circuit Split Is Inevitable, But Not Imminent*, 56 OHIO ST. L.J. 947, 948 (1995). United States Supreme Court Justice Anthony Kennedy, a former California lawyer and Ninth Circuit judge, told the Senate Appropriations Committee in April of 1997 that he has "increasing doubts and increasing reservations about the wisdom of retaining the 9th Circuit in its historic size, and with its historic jurisdiction . . . . I think institutionally, and from the collegial standpoint, that it is too large to have the discipline and control that's necessary for an effective circuit." David Whitney, *Justice Kennedy Favors Split of 9th Circuit*, ANCHORAGE DAILY NEWS, Apr. 20, 1997, at B1.

30. *Morning Edition* (National Public Radio broadcast, Aug. 27, 1997) (transcript available at 1997 WL 12823009); *see also Senate OKs 9th Circuit Split on Party-Line Vote*, NEWS TRIB. (Tacoma), July 25, 1997, at B4 (quoting Sen. Dianne Feinstein (D-Cal.): "Is this being done because Montana doesn't like a mining decision? . . . Is this being done because Washington state doesn't like a timber decision?"). Senator Stevens, Chairman of the Senate Appropriations Committee, was angered by a December 1996 Ninth Circuit opinion which expanded the power of Indian villages in Alaska to claim sovereign rights. Stevens, therefore, allowed the inclusion of a provision to break up the Ninth Circuit in the annual spending bill of the judi-

While the House's study proposal is a laudable suggestion, the problem of California will not go away as commission after commission ponders the fate of the courts of appeals. With the possibility of ten more judgeships looming on the horizon, there is real danger that the Ninth Circuit will become less consistent in its application of the law and less able to give the parties before it the full measure of justice to which they are entitled.[31]

This Note examines the past and future of the Ninth Circuit, placing the court within its historical context as it prepares for the twenty-first century. Part I looks at the development of the circuit court system, beginning with the Judiciary Act of 1789, through changes instituted by the Evarts Act, continuing to the present. Part II analyzes some of the problems facing the Ninth Circuit, many of which have already been alluded to in the Introduction. Part III presents the major proposals for division of the Ninth Circuit, and explains why the Hruska Commission's proposal (with some modifications) remains the best plan for division of the circuit.

I. ORIGINS OF THE CRISIS

> "Familiarity with political institutions breeds indifference to their origin. Never having been without inferior federal courts, we assume their inevitability."[32]

So much attention has been focused over the past twenty-five to thirty years on the future of the American federal appellate system that it has become easy to forget its past. An examination of the factors that precipitated the inception of the system can illuminate the essential considerations for policymakers as the Ninth Circuit attempts to address the difficulties presented by its burgeoning caseload.

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ciary. *See* Ninth Circuit Court of Appeals Reorganization Act of 1997, S. 1022, 105th Cong. § 305; Savage, *supra* note 5, at A4.

31. Judge Gerald Tjoflat, former Chief Judge of the Eleventh Circuit, has written that "judges in small circuits are able to interact with their colleagues in a more expedient and efficient manner than judges on jumbo courts." Gerald B. Tjoflat, *More Judges, Less Justice*, 79 A.B.A. J. 70, 70 (1993). Irving Kaufman, former Chief Judge of the Second Circuit, has said that "[a]dditional judgeships are both an inefficient use of scant judicial resources and a disruptive influence on the development of the law." *Id.* at 71. Chief Justice Rehnquist has advocated a cap of 1,000 Article III judges to "enable the federal courts to maintain their high quality, cohesiveness and effectiveness." *Id.*

32. FRANKFURTER & LANDIS, *supra* note 1, at 4.

The circuit courts of appeals can trace their origins back to the Judiciary Act of 1789, by which Congress "establish[ed] the Judicial Courts of the United States" pursuant to the mandate granted to it by Article III of the Constitution.[33] Like the Constitution, the Judiciary Act was a response to concerns that arose during the period of the Articles of Confederation: Fears of parochialism in the state courts (of particular concern to merchants who traded in different states) as well as the need for uniform application of maritime commerce laws led to an agreement between Federalists and Anti-Federalists to establish a national court system.[34]

The Judiciary Act divided the twelve states in the Union at the time into thirteen districts, each with a district court having original jurisdiction.[35] Part of this jurisdiction was exclusive of the state courts and part was concurrent.[36] The Act also divided the nation into three circuits: Southern (the Carolinas and Georgia), Eastern (New Hampshire, Massachusetts, Connecticut, and New York) and Middle (New Jersey, Pennsylvania, Delaware, Maryland, and Virginia).[37] The circuit courts created by the Judiciary Act were quite different from the federal circuit courts that exist today. These courts had original jurisdiction, concurrently with the state and district courts, of all diversity cases in which the amount in controversy exceeded $500.[38] Additionally, the circuit courts also were given original jurisdiction over all civil suits at common law in which an alien was a party and the amount in controversy exceeded $500.[39] The circuit courts did per-

33. *See* Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 73 [hereinafter Judiciary Act of 1789].

34. *See* FRANKFURTER & LANDIS, *supra* note 1, at 8-9. Indeed, as Alexander Hamilton wrote:

> The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. It is intended to enable the national government to institute or *authorize*, in each State or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

THE FEDERALIST NO. 81, at 481, 485 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

35. *See* HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 38 (1953).

36. *See id.* at 38-39. The district courts were given only a very limited criminal jurisdiction; they became, essentially, the maritime and admiralty courts of the federal system, while the circuit courts primarily handled cases arising under diversity of citizenship. *See* FRANKFURTER & LANDIS, *supra* note 1, at 12.

37. *See* Judiciary Act of 1789, § 4, 1 Stat. at 74. The district courts of Maine and Kentucky were given the same jurisdiction as the circuit courts, except appeals from these courts went straight to the Supreme Court. *See id.* § 4, 1 Stat. at 77-78.

38. *See* HART & WECHSLER, *supra* note 35, at 39.

39. *See id.*

form an appellate function: They had authority to review, on writ of error, final decisions of the district courts in civil cases with more than fifty dollars at stake, and to review on appeal all maritime and admiralty cases in which the amount in controversy exceeded $300.[40]

Most of the early district courts had a single judge; there was little supervision over judges built into the federal system.[41] Thus, there were elements of both Federalism and Anti-Federalism in the new courts: The federal court system would exist separately from the state courts, providing a forum insulated from the local prejudices that the Federalists feared, yet the decentralized, hierarchical structure of the new system reflected more Anti-Federalist themes of independence, decentralization, and individualism.[42]

Atop the system created by the Act sat the Supreme Court, with a Chief Justice and five associate Justices.[43] This Court, the only tribunal specifically mandated by Article III, was the court of final review in the federal system.[44] In addition to performing the duties that arose under the Court's original and appellate jurisdiction, each Justice was required to "ride circuit." Circuit courts included one district court judge and two Supreme Court Justices ("Circuit Justices"), who were required to sit twice a year in each district located within their circuits.[45] This system, considered by the framers as integral to the successful operation of the federalism they envisioned, quickly became the bane of the Supreme Court Justices' existences. Although each Congress was peppered with complaints from Justices about the time-consuming and exhausting travel schedules precipitated by the circuit-riding requirement, these duties remained (technically, at least) a part of the judicial system until 1891.[46]

40. *See* Judiciary Act of 1789, § 21, 1 Stat. at 83-84.

41. *See* PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 6-7 (1973).

42. *See id.*

43. *See* Judiciary Act of 1789, § 1, 1 Stat. at 73.

44. *See* FISH, *supra* note 41, at 4. The Supreme Court had original jurisdiction: 1) in all cases in which a state was a party, except those between a state and its citizens; 2) in suits *against* ambassadors or other public ministers; and 3) in all suits brought *by* ambassadors and public ministers. *See* HART & WECHSLER, *supra* note 35, at 41. The Court could review decisions of the circuit courts in civil cases in which the amount in controversy exceeded $2000; there was no provision for appellate jurisdiction over criminal cases. *See id.* The Court was also granted appellate jurisdiction over the decisions of the highest courts of the states (a Federalist victory) and federal question jurisdiction. *See id.*

45. *See* FRANKFURTER & LANDIS, *supra* note 1, at 11.

46. *See* FISH, *supra* note 41, at 352. It is interesting to note that vestiges of this system remain: Each Justice of the Supreme Court is still assigned to one or more circuits, *see* 117 S. Ct.

The notion of circuit-riding was the lynchpin of the old circuit court system. The idea of keeping the Justices of the highest court in the land apprised of the laws of the nation was firmly rooted in some of the concerns of federalism, which survive to this day. Such a means of keeping the unreviewable, highest court in the land (a powerful symbol of the federal government's power) in touch with the states was received positively by the states.

The expansion of the nation exposed circuit-riding's fundamental strengths and weaknesses: As the federal system became responsible for awareness of the law of an expanding number of states, the need for a high court with ultimate control over the interpretation of the laws of a rapidly-changing nation became increasingly apparent. Conversely, the idyllic concept of Justices roaming the land to familiarize themselves with the nuances of frontier justice became a practical nightmare that worsened as America expanded westward.

The Justices' distaste for their circuit-riding duties was unanimous, and it became the focus of numerous unsuccessful attempts in Congress to eliminate this onerous responsibility. Senator Buchanan's comments from 1826 characterize the typical Congressional response:

> By compelling the Judges of the Supreme Court to [ride circuit], the knowledge they have acquired of the local laws will be retained and improved, and they will thus be enabled, not only the better to arrive at correct results themselves, but to aid their brethren of the Court who [serve] different Circuits and are, of course, deprived of an opportunity to acquire such information, except in that manner.[47]

The solution to the problem of retaining the federalist ideal while adapting the courts to geographical reality was the principal problem of judicial administration for Congress in the 1800s.[48] As Professor Peter Fish points out, these problems of federalism advantaged the Anti-Federalists' ideals: As the country became more decentralized and the Justices of the Supreme Court found themselves less able to perform their circuit duties, the district judges became in-

9-10 (1996) (listing the circuit assignments of Justices), and Justices often attend the annual judicial conferences of their circuits.

47. FRANKFURTER & LANDIS, *supra* note 1, at 16 n.44 (quoting 2 CONG. DEB. 416 (1826)).

48. *See* FISH, *supra* note 41, at 12-13.

creasingly important and, in some cases, extremely powerful.[49] In many cases, these judges rendered final decisions,[50] and some feared that the low salaries paid to district judges were insufficient to attract judges of quality to the bench.[51]

The first Congressional revision of the circuit system came in 1793, when the number of Supreme Court Justices for each circuit was reduced to one.[52] This measure was more symbolic than effective; the Justices were still faced with arduous journeys to their respective circuits, and their docket back in Washington continued to swell.[53]

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49. *See id*. Indeed, many federal districts had only one judge who, as the Supreme Court's docket grew larger, became the arbiter of last resort in the majority of cases. *See id.*

> They became lions on their relatively remote thrones. However they might find or make the law, delay or accelerate the flow of cases, reward or punish friends and foes with patronage and favorable bench rulings, concerned none but themselves. Only . . . reversals on points of law and [the possibility of] impeachment . . . limited their conduct.

Id.

50. *See id.* at 13.

51. *See* FRANKFURTER & LANDIS, *supra* note 1, at 18 n.49.

52. *See* Act of Mar. 2, 1793, ch. 22, § 1, 1 Stat. 333, 333.

53. Lest it be thought that circuit-riding was a completely negative experience for the Justices, it should be mentioned that they used these opportunities to impress the populace with their superior legal knowledge: Justices Jay and Iredell delivered "eloquent" speeches (under the pretext of charges to the grand jury) that were enthusiastically reported far and wide. *See* FRANKFURTER & LANDIS, *supra* note 1, at 20. An early account of a circuit-riding visit to a New Hampshire town by Justice William Paterson serves well to illustrate this point:

> On Monday last the Circuit Court of the United States was opened in this town. The Hon. Judge Paterson presided. After the jury was impaneled the judge delivered a most elegant and appropriate charge. The law was laid down in a most masterly manner. Politics were set in their true light by holding up the Jacobins as the disorganizers of our happy country and the only instruments of introducing discontent and dissatisfaction among the well-meaning parts of the community. Religion and morality were pleasingly inculcated and enforced as being necessary to good government, good order, and good laws; for "when the righteous are in authority, the people rejoice."
>
> We are sorry that we could not prevail upon the honorable judge to furnish a copy of said charge to adorn the pages of the *United States Oracle.*

Robert W. Breckons, *The Judicial Code of the United States with Some Incidental Observations on Its Application to Hawaii*, 22 YALE L.J. 453, 454 (1913) (quoting a town newspaper's account of Paterson's visit).

Sometimes, however, the Justices took the bully pulpit presented by the grand jury a little too far. In 1803, Justice Samuel Chase told a Baltimore grand jury that Maryland's new law abolishing property qualifications for voting rights would result in the destruction of liberty and property rights. JANE SHAFFER ELSMERE, JUSTICE SAMUEL CHASE 162 (1980). Justice Chase was also reported to have made a political attack against President Thomas Jefferson during this grand jury charge, prompting Jefferson to suggest that the House of Representatives impeach Chase. *See id.* The grand jury charge became the basis of a charge of "seditious

The Justices got a full, if short-lived, reprieve by virtue of the Federalist judiciary-stacking scheme promulgated by the Act of February 13, 1801 (which gave rise to the seminal *Marbury v. Madison*[54] decision): The Act abolished circuit-riding and created sixteen new federal court judgeships.[55] This law, which flooded the newly reconstituted federal judiciary with John Adams's infamous "Midnight Judges," was repealed after Thomas Jefferson took office.[56] The Jeffersonian Congress moved quickly to institute other reforms. The nation was divided into six circuits, with a new Supreme Court Justice for each of the three new circuits.[57] A new Supreme Court seat would be created for each new circuit thereafter.[58] As before, the circuits would be manned by one district court judge and one Circuit (Supreme Court) Justice, but the Act provided that the courts could be run by a single judge if the Circuit Justice was unable to attend.[59] Each Justice was to hold court once a year in each district within his circuit, but as the Justices became less able to fulfill this duty, the circuit courts were increasingly operated by the district judges.[60]

For the next three decades, Congress wrangled over various proposals to revise the federal judiciary: There were the inevitable bills introduced to abolish circuit-riding and bills quibbling over the precise makeup of the westernmost circuits, but, despite lively debates in the House and Senate, this period was ultimately one of inertia during which no substantive reforms were enacted.[61] The only significant change to come out of these years was the first of several lengthen-

criticism," one of the eight charges brought in Chase's impeachment, which was ultimately unsuccessful. *See id*.

54. 5 U.S. (1 Cranch) 137 (1803).

55. *See* Act of Feb. 13, 1801, ch. 4, §§ 1-3, 2 Stat. 89, 89 (delineating the duties of Justices and omitting any obligation for them to ride circuit).

56. *See* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132.

57. *See* Act of Apr. 29, 1802, ch. 31, § 4, 2 Stat. 156, 157-58.

58. *See* FRANKFURTER & LANDIS, *supra* note 1, at 32. In 1807, the Seventh Circuit was formed to serve Tennessee, Kentucky and Ohio, and a seventh Justice was added to the Supreme Court. *See id.* at 34.

59. *See id.* at 31-32.

60. *See id.* The circuit work was often more substantial and challenging for the district judges than was their district duty. *See* FISH, *supra* note 41, at 13 n.54.

61. For a discussion of this period, see FRANKFURTER & LANDIS, *supra* note 1, at 34-40. Powerful forces still argued for retention of the circuit-riding system, as illustrated by Senator Buchanan's remarks: "[T]he time will come when the Judges of the Supreme Court shall not be able to perform both their appellate and Circuit Court duties: necessity will then compel their separation. The day, however, I trust, is far distant. I am willing to delay that event as long as possible . . . ." 2 CONG. DEB. 925 (1826).

ings of the Supreme Court session: The Act of May 4, 1826 added a month to the session, which began each year on the first Monday of February.[62] This measure helped the Court address its backlog of cases, but it further inhibited the Justices' ability to meet their circuit obligations.[63]

During this static period in the development of the federal judicial structure, significant changes were occurring in the United States: Shipping was becoming more sophisticated and capable of delivering goods to more places in less time, and more states were being added to the Union. Manufacturing took hold in the North and cotton became a booming business in the South. This growth in the size and complexity of the economy led to higher caseloads in the nation's courts.[64] In 1837, Congress responded (too late, in the eyes of many commentators) to the further expansion of the nation in terms of size and litigiousness by creating the Eighth and Ninth circuits and adding two new Supreme Court Justices.[65] The Justices were not placated by this turn of events and responded to a Senate inquiry following their next session with a tally of the miles they had traveled on circuit: Justice John McKinley, the Ninth Circuit Justice, logged 10,000 miles during the session, 6500 more miles than any other Justice.[66] Only

62. *See* Act of May 4, 1826, ch. 37, § 1, 4 Stat. 160.

63. *See* FRANKFURTER & LANDIS, *supra* note 1, at 44.

64. *See id.* at 45.

65. *See* Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176, 176-77. The original Ninth Circuit contained Alabama, the Eastern District of Louisiana, Mississippi, and Arkansas. *See id.*

66. *See* SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995, at 135 (Clare Cushman ed., 1995) [hereinafter JUSTICES]. Depicting the power of a circuit-riding Justice to help shape the law, McKinley's is an interesting story: He had the largest docket of circuit cases, and Louisiana presented a unique problem in that it produced a blend of civil- and common-law cases. *See id.* The rigors of circuit-riding contributed to the generally poor state of his health, which limited his role in the latter half of his fifteen years on the Court. *See id.* In 1838, while on circuit in Alabama, McKinley ruled in favor of Alabama's power to prohibit out-of-state banks from buying and selling bills of exchange within the state. *See id.* at 132-33. It was widely feared that this decision, in the words of the president of one of the banks involved in the litigation, would "shake the whole foundations of intercourse between the States." *Id.* at 133. The case was appealed to the Supreme Court. *See* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839). This momentous decision was awaited nervously by corporations across the nation, as an affirmation of the Ninth Circuit opinion would significantly restrict "the ability of corporations to engage in interstate economic activity." *See* JUSTICES, *supra*, at 134. The Supreme Court reversed in an 8-1 decision, declaring that a law of comity applied to the states. *See Bank of Augusta*, 38 U.S. (13 Pet.) at 596-97. The lone dissent came, of course, from McKinley, who insisted that the state's right to regulate banking within its borders took precedence over the nationalist position of the other eight Justices. *See id.* at 597-602 (McKinley, J., dissenting).

Chief Justice Taney traveled less than 1000 miles.[67] These distances were staggering considering the rudimentary modes of transportation available even to the most distinguished travelers of the day. This graphic illustration of the grueling task of circuit-riding was met with indifference by Congress. Another month was added to the Supreme Court session.[68] The Justices themselves attempted to cut into their backlog by limiting counsel debate at oral argument to two hours per side.[69] These piecemeal reforms, however, had little effect as the Congress continued to delay action on circuit-riding, which remained the Achilles' heel of the judiciary.

In 1855, a tenth circuit was created for California due to the huge amount of litigation that was arising in the newest state; law was being created almost overnight to deal with property disputes.[70] Oregon was added to the Tenth Circuit in 1864,[71] and a tenth Justice was added to the Supreme Court.[72] In 1866, the Court was reduced to seven Justices and the number of circuits to nine,[73] but in 1869, the number of Justices was raised again to nine.[74]

The Union's victory in the Civil War vindicated federal notions of national organization; change in the judicial structure came more rapidly after the war. In addition to the triumph of the federal governmental ideal, commercial factors provided the impetus for judicial reform. The railroads continued to press westward (the Union Pacific railroad completed the first cross-country route in 1869), shipping became more international in nature as the United States became a major exporting nation, and the proliferation of inventions created patent controversies that required the attention of the federal

67. *See* JUSTICES, *supra* note 66, at 135.

68. *See* Act of June 17, 1844, ch. 96, § 1, 5 Stat. 676, 676.

69. *See* FRANKFURTER & LANDIS, *supra* note 1, at 52.

70. *See* Act of Mar. 2, 1855, ch. 142, § 1, 10 Stat. 631, 631; *see also* FRANKFURTER & LANDIS, *supra* note 1, at 54-55 (noting the explosion of litigation in California in the early 1850s and the absolute necessity for more judges to deal with the rapidly increasing caseload).

71. *See* Act of Mar. 3, 1863, ch. C, § 1, 12 Stat. 794.

72. *See id.*

73. *See* Act of July 23, 1866, ch. 210, § 2, 14 Stat. 209, 209 (eliminating the Tenth Circuit and creating the nucleus for the modern Ninth Circuit: the Act placed California, Oregon, and Nevada in the Ninth Circuit). Montana and Washington were added to the Ninth Circuit in 1889. *See* Act of Feb. 22, 1889, ch. 180, § 21, 25 Stat. 676, 682. Idaho was added in 1890. *See* Act of July 3, 1890, ch. 656, § 16, 26 Stat. 215, 217. In 1884, certain circuit court powers were conferred on the District Court of the Alaskan Territory; it was placed in the Ninth Circuit by the Act of May 17, 1884, ch. 53, § 7, 23 Stat. 24, 26.

74. *See* Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44, 44.

courts.[75] The caseload of the Supreme Court multiplied sixfold between 1850 and 1880.[76] This, of course, reflected huge increases in the number of cases being brought in the district and circuit courts as well.[77] The need for an intermediate tier of courts with full appellate jurisdiction became increasingly apparent as the federal caseload continued to mount.

Change did not come overnight, however. The period between 1870 and 1891 has been described as the "nadir of federal judicial administration."[78] In 1875, Congress gave the lower federal courts nearly the full extent of jurisdiction contained in the Constitution. Removal jurisdiction was granted, and any suit asserting a right under the Constitution, laws, and treaties of the United States could now be brought in federal district court, even without diversity of the parties, subject to amount-in-controversy requirements.[79]

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75. For a description of this period, see FRANKFURTER & LANDIS, *supra* note 1, at 56-65.

76. *See id.* at 60. Some of the increase in the Supreme Court docket stemmed from the creation of the Court of Claims in 1855. *See id.* at 63. The *Slaughter-House Cases*, 83 U.S. 36 (16 Wall.) (1873), also created a steady stream of litigation for the Court. The cases signaled the rise of substantive Due Process review and an increase in Fourteenth Amendment claims that reached the Court:

> [I]t would seem, from the character of many of the cases before us . . . that the clause under consideration is looked upon as the means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.

Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

77. The number of cases in the district and circuit courts rose from 29,013 in 1873 to 54,194 in 1890. *See* HART & WECHSLER, *supra* note 35, at 45. Many circuits were unable to keep pace with their workloads; several became exclusively one-judge courts as judges were not able to attend at the same time because of their burgeoning district caseloads. *See* FRANKFURTER & LANDIS, *supra* note 1, at 77-78 n.95. By the 1880s, 88% of circuit work was left to single (mostly district) judges, whose word, in effect, became final in a great number of the cases before them. *See id.* at 87. Often, district judges on circuit duty would be called upon to be the sole arbiter of an appeal from one of their own decisions: "Such an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip [drunk] with the vanity of a matured opinion and doubtless also a published decision." Walter B. Hill, *The Federal Judicial System*, REP. 12TH ANN. MEETING A.B.A. 289, 307 (1889). With $5000 amount-in-controversy requirements for appeals in both the district and circuit courts, conscious efforts to keep the amount below this statutorily mandated minimum (including disclaiming all amounts awarded above that sum) ensured that the district court decision would be final. *See* FRANKFURTER & LANDIS, *supra* note 1, at 88 n.144.

78. HART & WECHSLER, *supra* note 35, at 45.

79. *See* Judiciary Act of March 3, 1875, ch. 137, § 5, 18 Stat. 470. For a discussion of this act see HART & WECHSLER, *supra* note 35, at 45. It is interesting to note that legal scholarship at the time did not seem concerned that the increase in federal jurisdiction would outstrip the system's ability to handle the resultant caseload. *See* FRANKFURTER & LANDIS, *supra* note 1, at 65 & n.34.

The system, of course, was not equipped to handle the resultant influx of litigation, and Congress seemed hopelessly divided as to a solution.[80] Proposals for additional judgeships for the inferior federal courts came to a standstill during Andrew Johnson's administration because the Republican Congress was afraid to create seats that would be filled by Johnson, a Democrat.[81] One of the proposals from this period reflected Congress' preoccupation with retention of the circuit system: Senator Williams of Oregon proposed a Supreme Court comprising eighteen Justices, nine of whom would stay in Washington and nine of whom would ride circuit, with three shifting each year. He claimed that this plan would keep the Court in touch with the circuits and prevent it from becoming "fossilized."[82] Although this notion, and others like it, was roundly criticized, due in part to the fact that it would have allowed one President to appoint nine new Justices,[83] it does mark the beginning of a slow process of acknowledgment by Congress that the Supreme Court was overburdened to a degree that could not be corrected by piecemeal legislation. After President Johnson left office, the gridlock that had made unthinkable the consensus necessary for creation of an intermediate appellate tribunal began to dissipate and the path toward the Evarts Act began to clear.

The first steps were halting. The Act of April 10, 1869,[84] reduced mandatory circuit-riding to once every two years.[85] The broadening of the lower federal courts' jurisdiction under the aforementioned Act of March 3, 1875,[86] and the ensuing onslaught of litigation, however, rendered the 1869 Act impotent.[87] The Supreme Court docket rose to an unprecedented and unmanageable 1800 cases in 1890;[88] in December of 1889, responding to nationwide pleas from bench and bar alike, including public entreaties by Justices of the Court, President Harrison (a former lawyer) encouraged Congress to create an

80. *See* HART & WESCHSLER, *supra* note 35, at 45.

81. *See* FRANKFURTER & LANDIS, *supra* note 1, at 72. Congress was suspicious that the Supreme Court would impede implementation of its Reconstruction agenda. *See id.* at 73. This tension with the Supreme Court made Congress less amenable to the notion of passing legislation to ease the Court's burdens. *See id.* at 72.

82. *Id.* at 75.

83. *See id.* at 72.

84. Act of Apr. 10, 1869, ch. 22, 16 Stat. 44.

85. *See id.* § 4, 16 Stat. 45.

86. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

87. *See id.* § 2, 18 Stat. 470-71.

88. *See* FRANKFURTER & LANDIS, *supra* note 1, at 86.

intermediate federal court of appeals.[89] Having received the command from the chief executive to take all steps necessary to address the long-unresolved problems of the judiciary, Congress finally responded with decisive action. The final round of vociferous debate and compromise came to pass: The House reported out a bill in 1890, which combined the circuit and district courts and created nine courts of appeals with jurisdiction over cases arising from diversity of citizenship, subject to certification.[90] The bill abolished circuit-riding, adding two additional judges to each circuit.[91]

The proposed legislation met with considerable resistance in the Senate.[92] Even in the aftermath of President Harrison's admonition, anti-reform sentiment retained considerable force in the upper chamber.[93] The familiar opposition arguments were trotted out with vigor: fears were expressed that a regional intermediate appellate layer would create inconsistency in the interpretation of the law.[94] There were also those who clung fiercely to the notion that the Justices should still ride circuit to keep in touch with the nation as a whole.[95]

The need arose for a man with the strength, foresight, and negotiating skill to shepherd this momentous bill through the Senate in a form that enabled it to retain its teeth. The task fell upon Senator William M. Evarts of New York. In 1882, he had led the fight before the American Bar Association (ABA) against an earlier attempt to create an intermediate layer of appellate courts.[96] He had supported an alternative proposal to divide the Supreme Court into three panels, which would hear cases involving common law, equity, and admiralty/revenue respectively.[97] Few would have guessed at this juncture that Evarts's name would be forever associated with the compromise that created the United States Circuit Courts of Appeals nine years later.

89. *See id.* at 97.

90. *See* H.R. 9014, 51st Cong. (1st Sess.) §§ 1, 9 (1890).

91. *See id.* § 2.

92. *See* FRANKFURTER & LANDIS, *supra* note 1, at 98.

93. *See id.*

94. *See id.*

95. *See id.* at 100.

96. *See id.* at 98.

97. *See id.* at 83, 98. According to this plan, introduced by Senator Manning of Mississippi, the Court would sit en banc to hear cases construing the Constitution and treaties. *See id.* at 83.

In the years between 1882 and 1891, Evarts had been elected to the Senate and had risen to a powerful position on the Senate Judiciary Committee.[98] He had also abandoned the three-division plan for the Supreme Court and embraced the theory of an intermediate appellate tier.[99] His position on the Committee made him a likely candidate to push the legislation through; he was, however, a traditionalist who favored retention of the old circuit courts.[100] Indeed, the retention of some vestiges of the 1789 system (although the old circuit courts quickly became virtually powerless) probably helped to sell the new legislation to some of the conservative senators who had blocked change for so many years. An Attorney General under Johnson and Secretary of State under Hayes, Evarts possessed both the legal expertise to perceive the dire need for change and the statesmanlike qualities to push the law through the Senate.[101]

When the bill from the House reached the Senate Judiciary Committee, Evarts led the revision process, transforming it into a bill that could pass muster in the Senate.[102] After studying the laws and cases that had shaped the jurisdiction of the federal courts, he drafted an outline of his version of the bill.[103] He requested comments from the Justices of the Supreme Court and several circuit court judges.[104] Evarts, who was going blind, then dictated what was to become known as the Evarts Act to his secretary in one sitting. The bill provided for nine intermediate federal courts of appeals of three judges each, which would hear appeals of virtually all types of cases from the district and circuit courts.[105] Although some appeals, most notably

98. *See id.* at 98.

99. *See id.* Initially, Evarts had "fear[ed] that an intermediate court might delay appeals and that two courts with power to render final decisions might be dangerous and of doubtful constitutionality." CHESTER L. BARROWS, WILLIAM M. EVARTS: LAWYER, DIPLOMAT, STATESMAN 480 (1941). However, by 1889, nothing had been done to solve the problem of the arrears of the Supreme Court docket, which at this point was so large that it would have taken the Court four years to clear it, even if no new cases were filed. *See id.* Evarts, sensing that the three-division plan which he had supported before the ABA in 1882 would not garner widespread Congressional backing, adopted the more widely palatable intermediate-layer approach, a move which subjected him to some accusations of hypocrisy. *See id.* at 480-82. Rather than hypocrisy, Evarts's move was a maneuver by a skilled diplomat who saw a way to implement important change and who did not let his own biases block the path to positive reform.

100. *See* FRANKFURTER & LANDIS, *supra* note 1, at 98-99.

101. *See* BARROWS, *supra* note 99, at 164, 311, 480-81.

102. *See id.* at 481.

103. *See id.*

104. *See id.*

105. *See id.*

those posing questions of constitutionality, would go directly to the Supreme Court, appeals from cases involving diversity of citizenship would go to the new United States Circuit Courts of Appeals, a reform that eased the burden on the Supreme Court immensely.[106] The bill passed the Senate by a vote of 44-6 and was signed into law on March 2, 1891, two days before Evarts left the Senate.[107] Thus, in his last days as a Senator, the ailing Evarts managed to end 102 years of Congressional inertia. The Act retained enough of the traditional judicial structure to ensure passage, while the Supreme Court got the docket relief it needed: New appellate filings in the Supreme Court fell forty-three percent between 1887 and 1892.[108]

Congress addressed a loophole in the Evarts Act with the passage of the Criminal Appeals Act in 1907.[109] The Criminal Appeals Act resulted from a protracted struggle between President Theodore Roosevelt and Congress over social reform legislation, centering upon Roosevelt's supposed distaste for "Big Business."[110] The Act enabled appeals to be made directly to the Supreme Court in criminal cases in which the constitutionality of a provision of federal law was in question.[111] This legislation arose from concern over the power of single federal district judges (many districts still had only one judge) to construe the meaning of federal laws and pass upon their constitutionality without Supreme Court review (the Court still did not have jurisdiction over such cases).[112]

106. *See id.* Evarts also pushed for the extension of Supreme Court jurisdiction to cover appeals from all cases involving "infamous" crimes. *See id.* at 482. Evarts took the meaning of "infamous crimes" in its constitutional sense, which is closer to the realm of "serious crimes," such as crimes of a capital nature. *See* FRANKFURTER & LANDIS, *supra* note 1, at 110. He was apparently unaware that the Supreme Court had broadened the scope of crimes that could fall into the "infamous" category. *See id.* Thus, Evarts's mistake "had the unfortunate result of adding greatly to the number of cases that would otherwise be shunted to the new courts." BARROWS, *supra* note 99, at 482. Indeed, the mistake brought to the Court all criminal cases in which "the accused might be sentenced to imprisonment in a penitentiary, even if the punishment actually imposed is a fine only." FRANKFURTER & LANDIS, *supra* note 1, at 110 n.42 (quoting Letter from Chief Justice Fuller to Senator George F. Hoar). This problem was remedied by the Act of Jan. 15, 1897, ch. 29, 29 Stat. 487, which eliminated the reference to "otherwise infamous crimes." *Id.* § 2, 29 Stat. at 487.

107. *See* BARROWS, *supra* note 99, at 482; *see also* Evarts Act, ch. 517, 26 Stat. 826.

108. *See* FRANKFURTER & LANDIS, *supra* note 1, at 110.

109. *See* Criminal Appeals Act, ch. 2564, 34 Stat. 1246 (1907).

110. *See* FRANKFURTER & LANDIS, *supra* note 1, at 115-19.

111. *See* Criminal Appeals Act, 34 Stat. at 1246.

112. In particular, the law stemmed from the uproar caused by Judge Humphrey of the Northern District of Illinois, who, in a case involving the government's pursuit of the so-called "Beef Trust," employed his own interpretation of Section 6 of the Act of Feb. 14, 1903, ch. 552,

While the traditionalist in Senator Evarts had insisted upon the retention of the old circuit courts in order for the Evarts Act to pass, it was clear that the usefulness of these courts had passed; their most important function, as courts of appeals for the district courts, was usurped by the new intermediate courts. The continuing existence of these lower circuit courts served more to create confusion than anything else; the distinction between their original jurisdiction and that of the district courts had never been clear.[113] Even after the Act of April 10, 1869 created additional circuit judgeships,[114] the circuit judges were unable to reach all of their districts for a long enough time to clear their dockets.[115] In 1899, realizing that the lower circuit courts needed to be eliminated but that enough traditionalists still sat in Congress to quash any poorly drafted bills to that effect,[116] Senator George Hoar shrewdly referred the matter to the Commission on the Revision of the Laws, which had been set up by Congress to revise and codify the nation's penal laws.[117] In 1901, the Commission's mandate was enlarged to encompass the revision and codification of all of the permanent laws of the United States.[118]

The commission produced the Judicial Code of the United States, which abolished circuit courts and replaced them with district courts.[119] This, of course, elicited one final firestorm of protest from

32 Stat. 825 (creating the Department of Commerce and Labor), in a manner unappealing to Congress. *See* United States v. Armour & Co., 142 F. 808, 816-27 (1906). Senator Patterson of Colorado went so far as to attribute Congress's action solely to Judge Humphrey's decision. *See* FRANKFURTER & LANDIS, *supra* note 1, at 116 n.64.

113. *See* FRANKFURTER & LANDIS, *supra* note 1, at 129.

114. *See* Act of Apr. 10, 1869, ch. 22, § 2, 16 Stat. 44, 44.

115. *See* FRANKFURTER & LANDIS, *supra* note 1, at 128-29. The absurdity of maintaining the two court systems is brought home by the following description of a typical day in the Wyoming circuit court in 1896:

> The indictment had been returned into the District Court, and by formal order transferred to the Circuit Court, and the case was tried there. Several other cases were tried, for crimes other than murder, some of them being of Federal jurisdiction, because committed on the same Indian reservation. These were tried in the District Court. Time and time again would the presiding judge have Court opened as a Circuit Court, and after the calling of the docket, have that Court closed with due solemnity. Immediately afterwards the crier would announce that the District Court was in session. There would be a switching of dockets, and the District Court would proceed to business.
>
> Rarely would a circuit judge preside at a Circuit Court.

Breckons, *supra* note 53, at 457.

116. *See supra* notes 92-95 and accompanying text.

117. *See* FRANKFURTER & LANDIS, *supra* note 1, at 130.

118. *See id.* at 132.

119. *See* Act of Mar. 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

old-school politicians like Senator Elihu Root and leading lawyers like Joseph Choate, whose aversion to sweeping change caused them to cling to the traditional appellate structure. The protest was to no avail.[120] The Act of March 3, 1911, abolished the circuit courts.[121] One hundred twenty-two years after the first Judiciary Act, the federal courts were restructured into a form which has basically remained intact to this day. There have been some changes, most notably the creation of the Court of Appeals for the District of Columbia,[122] the carving of the Tenth Circuit out of the Eighth in 1929,[123] the removal of Florida, Georgia, and Alabama from the Fifth Circuit to create the Eleventh Circuit in 1981,[124] and the creation of the Court of Appeals for the Federal Circuit in 1982.[125] The Act of February 13, 1925, ended the right of a second appeal from the Courts of Appeals to the Supreme Court, which theretofore had been granted in certain types of cases.[126] The Judicial Conference of Senior Circuit Justices and the Circuit Judicial Conferences, as well as the Administrative Office of the United States Courts, created in 1939 as a central office for record-keeping, represent efforts to improve the administrative operations of the federal courts.[127] Alaska and Hawaii were added to the Ninth Circuit upon attaining statehood in 1959.[128] While there have been other changes in the federal judiciary since the Evarts Act, the basic structure enacted therein has had remarkable staying power, which is indicative both of the keen foresight exhibited by the Congressmen who worked on the Act, and the equally amazing resistance to change in the judiciary throughout Congressional history.

120. *See* FRANKFURTER & LANDIS, *supra* note 1, at 133-34.

121. *See* Act of Mar. 3, 1911, § 289, 36 Stat. at 1167.

122. *See* Act of Feb. 9, 1893, ch. 74, § 1, 27 Stat. 434, 434-35.

123. *See* Tenth Judicial Circuit Act, ch. 363, § 1, 45 Stat. 1346, 1347 (1929).

124. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 2, 94 Stat. 1994, 1994.

125. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 101, 96 Stat. 25, 25.

126. The Evarts Act allowed a mandatory second appeal in civil cases where the amount in controversy was over $1000, except in diversity and certain other cases. *See* Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891). The Act of February 13, 1925 removed this right by limiting Supreme Court mandatory review to Court of Appeals decisions that invalidated state statutes on Constitutional or federal grounds. *See* Act of Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936, 939.

127. For an overview of the administrative development of the federal judicial system, see FISH, *supra* note 41, at 431.

128. *See* Act of Mar. 18, 1959, Pub. L. No. 86-3, § 13, 73 Stat. 4, 10 (Hawaii); Act of June 25, 1959, Pub. L. No. 86-70, § 23(a), 73 Stat. 141, 147 (Alaska).

II. THE PROBLEM

> "Everyone who studies the issue understands that sooner or later that [sic] the size of the ninth circuit will have to be dealt with."[129]

Typically, law review articles on the problems currently facing the federal judiciary treat the history of the system in a few short paragraphs, then move on to the problems of today. The preceding discourse on the history of this nation's judicial system is intended to give a fuller sense of how the judiciary has adapted (or not adapted) to changes in the country in general and the job of the courts in particular. The problems that have historically confronted the federal appellate tribunals have come in different forms, but underneath these trappings they have remained virtually the same: skyrocketing case filings, geographical size, and concern for consistent application of the law have been the concerns which have mobilized the sometimes obstinate Congress to effect change. These problems face the courts of appeals, particularly the Ninth Circuit, today.

The new Commission proposed by the House of Representatives would be charged with the task of evaluating methods to alleviate the Ninth Circuit's crushing caseload. If finally approved, the Commission must shake loose from the historical inertia that has bogged down its predecessors and recommend substantive change. The following sections demonstrate that the best way to accomplish the long-overdue reform of the largest circuit is to divide California between a reconfigured Ninth and a new Twelfth Circuit, and that the Senate's most recent proposal is among the worst plans for reform.

A. Caseload

The principal problem facing the Ninth Circuit today is its overwhelming caseload. This overload creates a backlog in the court's docket and a delay in processing appeals, resulting in a dilution of justice for parties that bring appeals in the circuit.[130] Some observers argue that there is no "crisis of volume" in the Ninth or any other circuit.[131] Indeed, some (including Chief Judge Procter Hug, Jr.) point

129. 142 CONG. REC. S2229 (daily ed. Mar. 18, 1996) (statement of Sen. Kyl).

130. *See* Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 32 (stating that the federal appellate courts' backlog impairs their ability to perform their lawmaking and error correction functions adequately).

131. *See* Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97, 101-02 (1994). *But see*

to the relatively quick disposition of cases by the Ninth Circuit's judges once the cases reach the three-judge panel as evidence that delay is not a problem.[132] This argument is unpersuasive in relation to the larger point at issue: While cases are disposed relatively quickly once they reach a panel, it takes far too long for these cases to reach that stage of the appellate process.

Two of the most significant reforms of the Ninth Circuit passed by Congress are the division of the court into three administrative units and the authorization of a "mini en banc" procedure, which allows en banc panels to comprise fewer than the full complement of judges in the circuit.[133] The effects of these reforms upon the perceived problems that face the Ninth Circuit are a source of lively debate among scholars, politicians, and practitioners. Even with the administrative units, the use of three-judge panels (as in other circuits), and the introduction of the mini en banc hearing, the median time for resolution of an appeal in the Ninth Circuit is approximately fourteen months, the longest in the nation.[134] Half of all appeals to the Ninth Circuit take more than two years.[135] The majority of the time is consumed by court reporters and attorneys in record preparation and briefing; only 2.5 months of this time for orally-argued cases and .9 months for submitted cases are spent in judges' chambers.[136] These statistics suggest that the circuit's problems of delay are directly related to the inordinate number of cases that the court's infrastructure must process.

There are numerous problems inherent in the long delays between the filing of an appeal and the oral argument stage. Delay may result in deterioration of evidence, which may affect the quality of

REPORT OF THE FEDERAL COURTS STUDY COMM. 109 (1990) (noting the "crisis in volume" in the courts of appeals).

132. *See* Procter Hug, Jr., *The Ninth Circuit Should Not Be Split*, 57 MONT. L. REV. 291, 297 (1996); *cf.* 142 CONG. REC. S2230 (daily ed. Mar. 18, 1996) (statement of Sen. Kyl) (arguing that the Ninth Circuit disposes of cases quickly only because it issues relatively few opinions).

133. *See* Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 ("Any court of appeals having more than 15 active judges . . . 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."). Each court of appeals has its own set of procedural rules.

134. *See* Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit Is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917, 936 (1990).

135. *See id.* at 937.

136. *See id.* at 936-37.

decisions where retrials are ordered.[137] Pressures of time may affect judges' decisionmaking. Circuit judges may give greater deference to the trial judge in the interest of speedier disposition.[138] Delay may also affect the circuit's ability to set ground-breaking precedent, since cases involving novel issues of law will be decided in other circuits while their counterparts remain mired in the Ninth Circuit system.

Delay may also affect the lawmaking function of appellate judges:

> The law-making role requires a delicate balance between the importance of flexibility in the national law and the importance of stability of doctrine. Busy judges will find it difficult to evaluate these needs in the cases that come before them, and they may be more tempted to take the shortcuts which can be made by ignoring one of the interests. . . . Appellate judges are expected to deliberate and then to arrive at a collegial decision based on the matured thought of each judge participating. Finally, the decision is expected to be explained in terms that will withstand public inspection. These techniques for controlling the personal factor require a considerable investment of time and intellectual energy; as congestion makes these commodities scarce, we must expect that judgments will become more impulsive, less reflective and less impersonal.[139]

With Congress considering the addition of ten new judges, such concerns about the dilution of justice in the Ninth Circuit become even more pertinent. The long delays between the filing of notice of appeal to the final disposition suggest that the Ninth Circuit's problems are administrative in nature: There are simply too many appeals filed for the court to handle them effectively. The Ninth Circuit, as is trumpeted far and wide by opponents of circuit-splitting, has been the vanguard circuit for administrative reform. The Ninth Circuit was the first to divide itself into administrative units, it was the first to employ the mini en banc, and it has implemented a computerized case-tracking system and electronic networks in an effort to facilitate close communication and foster what collegiality can be maintained among the twenty-eight judges.[140] Despite these impressive efforts, the total time of disposition in the "vanguard" administrative circuit

137. *See* Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 554 (1969) [hereinafter Carrington, *Crowded Dockets*].

138. *See id.*

139. *Id.* at 554-55.

140. *See* Hug, *supra* note 132, at 298-301.

remains almost four months longer than the national average of ten and one-half months and is the second worst among the circuits.[141]

B. Unpublished Opinions

One reason the Ninth Circuit is able to boast of its quick disposition of appeals once they reach a panel is that 78.9% of the circuit's opinions are unpublished.[142] While unpublished opinions are certainly not unique to the Ninth Circuit, this statistic still raises some legitimate concerns. The initial decision as to whether or not an opinion will be published often rests with a staff attorney, who employs a screening procedure that identifies certain types of cases (social security cases, Federal Tort Claims cases, pro se prisoner appeals, to name a few) as likely candidates for unpublished opinions.[143] In theory, a judge will later review this decision.[144] In practice, in a circuit as big as the Ninth, many of these decisions may go essentially unreviewed, as judges are too pressed for time to be able to give such decisions more than a cursory review.[145]

Much is made in the literature of how unpublished opinions create some sort of secret body of law and lead inevitably to incoherent intracircuit application of the law.[146] Such arguments may be overstated in an age in which unpublished opinions can be found online. However, despite the fact that the circuit has a subscription service for its unpublished opinions, the proliferation of these opinions does create some concerns for the circuit that can be traced to the sheer amount of work with which the judges are presented. First, while non-publication rules are designed to leave only routine cases unpublished, an overworked administrative system can often leave decisions of whether or not to publish in the hands of non-Article III personnel.[147] This can affect the development of precedent, because

141. *See* JUDICIAL BUSINESS, *supra* note 12, at 107 (1995). The Eleventh Circuit, at a little over fifteen months, is the worst. *See id.*

142. *See id.* at 50.

143. *See* Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 953 (1989) (observing that "[d]ecisions that result in nonpublication have been made in gross rather than individually, at least on the initial level, and judges have few incentives to examine these initial decisions closely.").

144. *See id.* at 953.

145. *See id.* at 953-54 n.69.

146. *See id. passim* (discussing drawbacks of circuits' treatment of unpublished opinions).

147. *See id.* at 953-54.

unpublished opinions are sometimes only binding in narrowly-defined areas.[148] Such a situation creates an imperfect body of published law that inevitably fails to fully reflect the opinions of the judges.[149] Second, the people whose appeals fall into categories of cases that routinely go unpublished are often precisely those who cannot afford online or subscription service and whose attorneys cannot afford the expense or time required to ferret out judicial patterns in unpublished opinions.

The prevalence of unpublished opinions can prevent litigants from effectively gauging how an appeal might be handled, especially in one of the areas targeted for unpublished opinions.[150] While unpublished decisions are meant to represent applications of settled law, leaving the costly publication process to opinions that make law, modify existing law, or are noteworthy for some other reason, this intention is not always borne out in practice.[151] An illustration of the possible confusion that can result from limited publication of Ninth Circuit opinions is found in a study done by Professor Robel of the court's immigration decisions for the period between October 1986 and September 1987.[152] In the court's published immigration opinions, one concurrence and one dissent appear.[153] In the unpublished opinions, however, there are seven concurrences and seven dissents, reflecting wide disagreement among members of the court as to what ought to be required of the state's immigration agency and what its procedures should be.[154] This 7:1 ratio of unpublished to published

148. *See* 9TH CIR. R. 36-3 (providing that unpublished dispositions do not have precedential value and should not be cited except when relevant under the doctrines of res judicata, collateral estoppel, or the particular law of the case).

149. Even judges sometimes have difficulty finding published precedent. Judge Richard Posner has written that "[d]espite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals are difficult to decide, not because there are too many precedents but because there are too few on point." RICHARD A. POSNER, THE FEDERAL COURTS 123 (1985).

150. *See* Robel, *supra* note 143, at 947.

151. *See id.*

152. *See id.* at 948.

153. *See id.* Of the Ninth Circuit's 88 immigration decisions on the merits in 1987, only 22 were published. *See id.*

154. *See id.* at 948-49:

> Taken together, the large number of reversals and separate expressions in unpublished opinions reveals a good bit of dissatisfaction on the [court's part] with a wide variety of agency practices, as well as a fair amount of disagreement among members of the court about what it ought to require of the [immigration] agency. It would be difficult to discern this pattern, however, if one were limited to the court's expressions.

opinions illustrates the difficulty that a potential appellant would experience while attempting to gauge the court's views on immigration procedure.

Reducing the judges' caseload would help immensely to solve these problems by facilitating more judicial supervision of publication decisions and leaving more time for deliberation in cases which might otherwise go unpublished.[155] An additional benefit might be an increase of published decisions in specialized areas in which the vast majority of opinions currently go unpublished.

C. The Mini En Banc

An additional difficulty caused by the size of the Ninth Circuit is that the large number of judges has rendered the en banc hearing[156] extinct: There have been no full en banc hearings of the twenty-eight judges.[157] Instead, the mini en banc has become the norm, with

Id. at 949.

155. The Federal Courts Study Committee found that 63% of judges responding to its survey "rely on their clerks to do at least some work they believe they should do themselves, and 30% do so 'often' or 'usually.'" 1 FEDERAL COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 72 (1990). Of the federal appellate judges who responded, 39% said that they often, sometimes, or usually rely on staff attorneys to do work they believe they should do themselves. *See id.* at 74.

156. The en banc procedure developed as a response to the inevitable "instances when the law of the circuit fails to take shape in the ordinary course of panel decisions." Carrington, *Crowded Dockets*, *supra* note 137, at 580-81. In *Lang's Estate v. Commissioner*, the Ninth Circuit certified an intracircuit disagreement to the United States Supreme Court because it doubted that an en banc hearing would be legal due to a long-standing requirement (stemming from the original circuit courts, which comprised three judges), seemingly codified at 28 U.S.C. § 212, which, at the time, ordered appellate court panels to be composed of three judges. *See* 97 F.2d 867, 869, 870 n.2 (1938). The Supreme Court resolved the conflict without passing on the legality of the en banc. *See* Lang's Estate v. Commissioner, 304 U.S. 264 (1938). In *Textile Mills Securities Corp. v. Commissioner*, the Court approved an en banc decision of the Third Circuit and placed the onus of maintaining intracircuit stability upon the circuit courts of appeals themselves. *See* 314 U.S. 326, 333-35 (1941). In *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, the Supreme Court issued a ruling requiring all federal courts of appeals to formulate en banc procedures and to draft rules enabling litigants to request en banc rehearings. *See* 345 U.S. 247, 267-68 (1953). The Court was careful to require rules enabling litigants to *request*, not *compel*, the courts of appeals to rehear cases en banc; the ultimate decision to sit en banc rested with the courts, to be made as they saw fit. *See Western Pac. R.R. Corp.*, 345 U.S. at 257-58.

157. There have been only three attempts to assemble a full en banc panel of the Ninth Circuit since the Act of Oct. 20, 1978, Pub. L. No. 95-485, 92 Stat. 1629, made the mini en banc possible. *See* Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir.), *reh'g denied*, 85 F.3d 1440 (9th Cir. 1996), *rev'd and remanded sub nom.* Washington v. Glucksberg, 117 S. Ct. 2258 (1997); Campbell v. Wood, 20 F.3d 1050 (9th Cir.), *cert. denied*, 511 U.S. 1119 (1994); United States v. Penn, 647 F.2d 876 (9th Cir.), *cert. denied*, 449 U.S. 903 (1980).

eleven-judge panels consisting of the Chief Judge and ten circuit judges chosen by lot.[158] In 1978 when Congress approved the expansion of the Ninth Circuit from thirteen to twenty-three justices, it also authorized any court of appeals with more than fifteen active justices to "perform its en banc function by such number of members . . . as may be prescribed by rule of the court."[159] The Ninth Circuit is the only circuit which employs the mini en banc. Any Ninth Circuit judge may initiate a vote on whether or not the court should hear a case en banc (at this stage, en banc refers solely to the 11-judge mini en banc); such hearings are rare.[160] Technically, a mini en banc decision may be reheard by all twenty-eight judges (once again, a majority vote of the court is required), but such a full hearing has not been granted since the mini en banc was authorized in 1978.[161] Thus, although an option exists for the full court to rehear a case, in practice, as few as six of twenty-eight judges can speak for the full court (and, thus, potentially affect the lives of the forty-five million people living within the circuit's boundaries) in hearings supposedly designed to resolve intracircuit disagreements.[162]

As Senator Conrad Burns, a chief proponent of the most recent legislative effort to split the Ninth Circuit, characterized the mini en banc's inherent luck-of-the-draw approach to the development of circuit law: "[T]he purpose of the en banc court is to establish the law of the circuit by a majority of all the judges, not by a simple majority of a subset of judges randomly chosen, whose decision may not be representative."[163] Such a situation seems unfair to parties who may wish to request a rehearing en banc: Their request for a rehearing of a decision rendered by three judges chosen at random to speak for twenty-eight will, if granted, be heard by another randomly-chosen panel of less than half of the sitting judges. Although a true expression of the will of the full court (a full en banc) is possible, such a hearing has never been granted and even the staunchest advocates of the Ninth Circuit's en banc system admit that assembling a full re-

158. *See* Burns, *supra* note 9, at 252.

159. The Act of Oct. 20, 1978, § 6, 92 Stat. at 1633.

160. *See* Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 548-49 (1989) [hereinafter Hellman, *Jumboism*].

161. *See Compassion in Dying*, 85 F.3d at 1441 (O'Scannlain, J., dissenting).

162. *See* Burns, *supra* note 9, at 252.

163. *Id.* at 260 n.30.

hearing would be an incredibly lengthy administrative undertaking,[164] and, presumably, quite a costly financial endeavor as well.

It is commonly argued that the en banc situation in the Ninth Circuit is not an important enough concern to constitute an argument in favor of circuit division because the full en banc mechanism is seldom invoked.[165] This contention fails to acknowledge the importance of the en banc mechanism for maintaining intracircuit consistency. That a form of review is seldom granted does not logically diminish either its importance or the need for fairness in its application: The United States Supreme Court annually grants certiorari to less than one percent of cases brought to its attention,[166] but few would extrapolate from this that the certiorari process is a trifling concern. The fact that the Supreme Court has sanctioned the full en banc as the method for resolving intracircuit disputes attests to its continuing vitality.

The Ninth Circuit's size is likely the ultimate reason why the full en banc (and, indeed the mini en banc) is invoked so rarely. As Professor Carrington pointed out as early as 1969, even in a moderately sized circuit, "[t]he en banc procedure is . . . time-consuming for the judiciary."[167] One argument that can be advanced in favor of the Ninth Circuit's current size is that all twenty-eight judges participate in the decision to hold a mini en banc hearing. Thus, in theory, the entire court has input as to whether or not a case is reheard, even if only eleven of the judges actually participate in the rehearing. This process, however, involves exchanges of memoranda and lengthy consultations that disrupt the judges' already packed schedules. The fact that this time-consuming process can result in a mini en banc, which is even more disruptive (and expensive) could militate, even

164. *See* Hellman, *Jumboism*, *supra* note 160, at 546.

165. *See id.* at 548-49 (noting that Ninth Circuit judges called for a vote on en banc rehearing in fewer than 160 of the more than 12,000 cases heard between 1981 through 1986); *see also* Office of the Circuit Executive for the U.S. Courts for the Ninth Circuit, *Position Paper in Opposition to S. 956-Ninth Circuit Court of Appeals Reorganization Act of 1995* (1995), *reprinted in* 141 CONG. REC. S10,436-02, S10,437 (daily ed. July 20, 1995) (noting that Ninth Circuit judges hold mini en banc hearings less than twelve times a year).

166. *See* Ruggero J. Aldisert, *Then and Now: Danger in the Courts*, 44 FED. LAW., Jan. 1997, at 41, 42. The Long Range Planning Office of the Administrative Office of United States Courts estimates that by the year 2020, the United States Supreme Court will hear one-tenth of one percent of circuit court appeals. *See* Charles W. Nihan & Harvey Rishikof, *Rethinking the Federal Court System: Thinking the Unthinkable*, 14 MISS. C. L. REV. 349, 351 (1994).

167. Carrington, *Crowded Dockets*, *supra* note 137, at 582. Another significant problem inherent in coordinating an en banc hearing or rehearing is the arrangement of oral arguments, which necessarily falls outside the regular schedule. *See id.*

subconsciously, against the initiation of the en banc process. Professor Carrington presciently posited such a situation twenty-eight years ago:

> As long as the three-judge panel making decisions is not too small a segment of the whole court, this [en banc] means of keeping the panels in step with one another is probably effective enough to make its inefficiencies worth bearing. As the court is enlarged to meet the burgeoning caseload, however, there is a serious threat that the enterprise of maintaining the law of the circuit will gradually collapse because of the inherent weakness of its operation. At some point, en banc procedure becomes entirely unmanageable. Twenty judges cannot . . . effectively deliberate. As the number of judges . . . is increased, en banc procedure becomes not only less effective, but more costly and more dilatory and therefore less likely to be invoked. Thus it becomes less useful as an implicit restraint on the individual panels. Indeed, as the size of the court is increased, the likelihood of differences among the judges is increased, and a wider variety of idiosyncrasies is likely to appear in their decisions.[168]

The most recent of the three attempts to convene a full en banc rehearing of a Ninth Circuit decision is a telling example of the problems that result when a circuit becomes too big to effectively police its own laws. In *Compassion in Dying v. Washington*,[169] the Ninth Circuit voted not to rehear in full the 8-3 decision of a mini en banc panel to strike down Washington's law against assisted suicide on constitutional grounds.[170] Judges O'Scannlain, Kleinfeld, and Trott submitted a blistering dissent decrying the plight of a circuit that cannot be roused to full rehearing by one of the most fiercely debated and stirring questions of our era.[171] Judge O'Scannlain, in his portion of the dissent, posits several possible reasons for the denial of rehearing, among them being the ominous specter of "up to twenty-eight judges looming from three tiers of benches, intimidating the hapless appellate advocates."[172] Although the Ninth Circuit declined to review its decision, the Supreme Court granted certiorari.[173] With

168. Carrington, *Crowded Dockets*, *supra* note 137, at 584.

169. 85 F.3d 1440 (9th Cir. 1996), *rev'd and remanded sub nom.* Washington v. Glucksberg, 117 S. Ct. 2258 (1997) (holding that assisted suicide is not a fundamental right protected by the Fourteenth Amendment's Due Process Clause).

170. *See id.* at 1440.

171. *See id.* at 1442 (O'Scannlain, J., dissenting).

172. *Id.* (O'Scannlain, J., dissenting).

173. *See* Washington v. Glucksberg, 117 S. Ct. 37 (1997).

the Supreme Court's low rate of certiorari grants, most litigants spurned by the Ninth Circuit's defective en banc mechanism will not be so fortunate. A division of the Ninth Circuit would more evenly apportion the caseload among the new circuit judges, as well as the number of judges who must be assembled for an en banc hearing, thus lessening the strain on the en banc mechanism and making full rehearings more feasible.

D. Collegiality

The unwieldy size of the Ninth Circuit is perhaps the most cited reason for the Circuit's difficulties. With twenty-eight judges and 3276 possible panel combinations,[174] true collegiality among the judges becomes virtually impossible. Judge O'Scannlain summarized the importance of collegiality in a recent article:

> Collegiality, in the appellate court context, means much more than mere mutual respect among judges. It defines an environment where judges have the opportunity to sit frequently on panels together, thus increasing understanding of each other's reasoning, decreasing the possibility of misunderstandings, and increasing the tendency toward rendering unanimous decisions. It is a precious value which is forged from close, regular and frequent contact in joint decisionmaking, and it is the glue which binds the judges in a shared commitment to maintaining the institutional integrity of circuit law. As the court of appeals continues to grow, it becomes increasingly difficult to maintain the collegiality necessary for the court to do its job.[175]

With ten new judgeships on the horizon, the close contact of which Judge O'Scannlain speaks will become even less likely: The number of possible panel permutations will grow to 8436.[176] Division of the circuit might sever some relationships which have developed over time in spite of the court's size, but, as former Chief Judge Tjoflat of the Eleventh Circuit has said, smaller circuits foster quicker development of collegiality among fewer judges, which usually leads to increased productivity.[177]

174. *See* Tjoflat, *supra* note 31, at 72.

175. O'Scannlain, *supra* note 14, at 315.

176. *See id.*

177. *See* Tjoflat, *supra* note 31, at 70.

A good illustration of the improvements in caseload disposition that could result from a Ninth Circuit division is found in the records of the Fifth and Eleventh Circuits following the Fifth Circuit split. The Fifth and Eleventh Circuits have a total of twenty-nine authorized judgeships.[178] In recent years, the two circuits combined have disposed of 50 percent more cases than the twenty-eight judges of the Ninth Circuit have resolved.[179] The fewer judges sitting on a court, the more likely it is for one judge to sit with any other given judge on a panel of three.[180] While collegiality is not the sole issue upon which a decision to divide an appellate court should turn, it is a vital factor for consideration in the development of coherent law within a circuit.

A byproduct of the lack of collegiality among judges is a lack of predictability: Not only do litigants face a "crapshoot" as to which panel they will get, there is also little chance of being able to predict with any degree of accuracy what the judges might decide once empanelled.[181] While litigants certainly are not guaranteed absolute predictability in our adversary system, some idea of how a panel might rule is helpful when the huge cost of an appeal in federal court is taken into account.[182] Division of the circuit would help to alleviate this unpredictability by fostering collegiality and increasing the likelihood that judges will sit together more often.

E. California

As the previous sections demonstrate, the principal problem facing the Ninth Circuit is its caseload. The principal cause of the caseload crisis is, simply put, California. The state of California alone

178. *See* Burns, *supra* note 9, at 251.

179. *See id.*

180. *See* Tjoflat, *supra* note 31, at 70-71.

181. *See* 142 CONG. REC. S2230 (daily ed. Mar. 18, 1996) (statement of Sen. Kyl). As Daniel Meador told the Ninth Circuit Judicial Conference in 1988: "[A] reasonable lawyer looking at the court could convince himself that, with a lucky draw in the panel selection, he had at least a chance to win almost any appeal." Carrington, *Relationships in the Future*, *supra* note 4, at 73.

182. The Ninth Circuit discloses the names of panel judges on the Monday of the week preceding oral argument to "permit[ ] the parties *to prepare for oral argument before particular judges*. Once the calendar is made public, motions for continuances will rarely be granted." 9TH CIR. R., Introduction, Court Structures and Procedures § E(3) (emphasis added). The Ninth Circuit, therefore, recognizes the value of preparation for particular judges; reduction in the number of possible panels would give counsel more of a realistic opportunity to know how particular judges might interact in a panel setting.

accounts for 60% of case filings in the Ninth Circuit.[183] California's district courts produced 21,789 of the 36,953 civil filings within the circuit in 1995 and 1680 of the 2891 habeas petitions filed.[184] With the population of California projected to increase more than 50% in the next 30 years,[185] there is no foreseeable reduction in the rate of case filings in California's district courts absent a Congressional reduction in federal-court jurisdiction, which seems highly unlikely.[186] These district court filings will indubitably lead to a steady stream of appeals to the Ninth Circuit; thus, any effort to ameliorate the caseload crisis must be primarily concerned with how to cope with the volume of cases coming to the court from California. The vast majority of proposals to modify the Ninth Circuit have failed to take this paramount concern into account. The next section will analyze these efforts and select the one which best addresses the problem presented by California.

III. THE SOLUTION

> Those who wish to create or maintain jumbo courts do so for a variety of reasons. Some are members of the jumbo court itself. The court is their Edsel, so it's okay. Presumably, they believe that if they try hard enough to make the jumbo court work, it will work. Unfortunately, the most determined elephant will never leap like a gazelle. We must recognize the fallacy and extravagance of relying on expansion to fulfill our judiciary's essential missions. As many segments of corporate America have learned the hard way, such an approach fails in the long run.[187]

A. Possible Reconfigurations

When evaluating proposals to split a federal circuit court of appeals, one must consider the historical context in which the courts developed. In an oft-cited passage of their 1973 report, the members of the Hruska Commission stated that the geographical boundaries of the circuit courts "are largely the result of historical accident."[188] This

183. *See* O'Scannlain, *supra* note 14, at 318 (citing 1993 and 1994 case filings statistics). California accounts for nearly 9% of all case filings in the federal appellate system. *See* JUDICIAL BUSINESS, *supra* note 12, at 106.

184. *See* JUDICIAL BUSINESS, *supra* note 12, at 148-49.

185. *See* El Nasser, *supra* note 18, at 7A.

186. *See supra* note 7 and accompanying text.

187. Tjoflat, *supra* note 31, at 73.

188. *See Hruska Commission Report*, *supra* note 10, at 228.

somewhat overstates the role of chance; perhaps it is better to characterize the development of circuit boundaries as "temporal geographical necessity." The boundaries evolved as they did for many reasons, including the need for compact areas within which circuit-riding for the Supreme Court was (initially) plausible; the westward and southward expansion of the nation; and concerns of federalism, which dictated the need for federal courts that, although decentralized, could address national concerns in a more local context in the growing nation.[189]

When one considers circuit boundaries in their historical context, it becomes harder to dismiss them. Although concerns such as circuit-riding have given way to more modern views of judicial administration, respect for the relationships that develop over time among judges, advocates, and litigants in the context of an implicit reliance upon circuit stability demands thorough consideration of any proposal to change those relationships.[190]

One common proposal for revision of the Ninth Circuit, that of making California its own circuit, is not viable for a number of reasons. First, such a circuit (commonly called the "horsecollar" configuration because the remaining contiguous states would surround California like a horsecollar) would not comport with notions of federalism, which promote diversity. The judges in the California circuit would most likely be from California; this could create a circuit lacking in the viewpoints of judges who had lived and practiced in other states.[191] In addition, the two senators from California, by virtue of their key role as consultants in the appointments process, would be in a position to shape an entire court of appeals for an indeterminate length of time.[192] It is also doubtful that a proposal which would give one state so much judicial clout would ever pass through both houses of Congress.

A second approach (introduced by Senator Gorton of Washington and Senator Burns of Montana as Senate Bill 948 in 1989) would have created a Twelfth Circuit of Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands,

189. *See supra* note 47 and accompanying text.

190. The Hruska Commission did recognize this point: "Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but the loyalty of their constituents." *Hruska Commission Report*, *supra* note 10, at 228.

191. *See id.* at 237.

192. *See id.*

leaving Arizona, California, and Nevada in the Ninth Circuit.[193] While this configuration had some regional appeal in that it kept states grouped together geographically, it did not distribute the caseload evenly. According to 1995 statistics, this plan would have split the caseload among the states in the following manner:[194]

Thus most of the appeals remain in the Ninth Circuit, with fewer judges to handle 73% of the current caseload, while the Twelfth Circuit would be comparatively underworked. Senate Bill 948 died in committee.

Similar problems arise when one considers the Senate's most recent attempt to split the circuit, which has become known as the "hopscotch" circuit because Arizona borders no other state in the Twelfth Circuit proposed by this plan, thus litigants would have to

193. *See* S. 948, 101st Cong. (1989).

194. All statistics in the forthcoming tables come from JUDICIAL BUSINESS, *supra* note 12, at 102. They do not include original proceedings or appeals from the bankruptcy and tax courts, the NLRB, or administrative agencies, which together comprised 17% of all proceedings in the Ninth Circuit in 1995. *See id.*

hop over Nevada, a Ninth Circuit state, to get to and from Arizona.[195] The hopscotch circuit's appellate caseload would break down as follows:

This plan does little to solve the caseload problem. By grouping California, Nevada, and the islands in one circuit, sixty percent of the caseload remains in the newly-configured Ninth Circuit, virtually all of which comes from California. Indeed, judges of the Twelfth Circuit would have to handle 239 cases per year, while judges of the Ninth Circuit would average 363 cases.[196]

The hopscotch plan also calls for two new "co-equal" headquarters (which would require the construction of new courthouses) in Phoenix and Seattle.[197] This would cost the taxpayers millions of

195. Ninth Circuit Judge David R. Thompson of San Diego dismissed this part of the plan as "idiotic," and Circuit Judge Mary Schroeder of Phoenix denounced the hopscotch plan as a "'silly' response to the alleged problems of slow decisionmaking." David G. Savage, *Debate Rises Over Proposal to Break Up Appeals Court: Senate Republicans Call Region 'Huge and Unwieldly'*, L.A. TIMES, Sept. 21, 1997, at A3.

196. *See* Carl Tobias, *Justice and the Ninth Circuit*, WASH. TIMES, Sept. 15, 1997, at A19.

197. *See* William A. Rusher, *Splitting the Ninth Circuit*, LAS VEGAS REV. J., Aug. 20, 1997, at 15B.

dollars, money that could be saved by dividing California and using the current courthouses in San Francisco and Pasadena as headquarters for the newly-configured circuits.[198]

In 1995, Senators Gorton and Burns tried again, introducing Senate Bill 956, which originally proposed what is called the "icebox"[199] circuit because it would create a new Twelfth Circuit consisting of the northern states of the current Ninth Circuit.[200] The caseload breakdown would have looked like this:

There are numerous problems with this bill, not the least of which lies in the fact that it seems to be motivated by the desire to create a circuit for the Pacific Northwest. Senator Gorton has stated that the Ninth Circuit is "dominated by California judges and California judicial philosophy" and has invoked environmental concerns indigenous to the region as a reason to create a circuit for the Pacific Northwest because "the interests of the Northwest cannot be fully

198. *See infra* notes 232-33 and accompanying text.

199. *See* O'Scannlain, *supra* note 14, at 317.

200. *See* 141 CONG. REC. S7505 (daily ed. May 25, 1995).

appreciated . . . from a California perspective."[201] Such concerns seem to miss the point of national courts of appeals: While regional division of courts of appeals is a byproduct of federalism, such regionalism reflects a need for a decentralized system for the maintenance of a national perspective on the law, not a forum for protection of regional concerns under the aegis of federalism.

Another problem with the bill is its grossly uneven division of the appellate docket; the bill was revised due to concerns expressed at Congressional hearings over the inequitable split of cases between the circuits. The revised bill looked like this:

This configuration, called the "string bean approach" was reported favorably out of the House Judiciary Committee by an 11-7 vote on December 7, 1995.[202] At first glance, it appears to improve the caseload situation over the horsecollar and icebox approaches

201. 141 CONG. REC. S7504 (daily ed. May 25, 1995) (statement of Sen. Gorton). Some have gone so far as to label proposals for a Pacific Northwest circuit "environmental gerrymandering." *See* Carl Tobias, *The Proposal to Split the Ninth Circuit*, 20 HARV. ENVTL. L. REV. 547, 549 (1996).

202. *See* Burns, *supra* note 9, at 249.

due to the more even 58-42% split. However, as Senator Feinstein noted during debate on Senate Bill 956, this approach would create a Ninth Circuit in which California would contribute 94% of the caseload, thus raising similar concerns to those engendered by the horsecollar configuration.[203] This arrangement satisfactorily addressed the problem of caseload distribution, but a circuit dominated so completely by one state would hardly assuage concerns about federalism and diversity. There are additional efficiency problems with such a circuit: as Senator Feinstein and Judge O'Scannlain point out, this Twelfth Circuit would be headquartered in Phoenix, which would require not only construction expenditures between $23 and $59 million, but would also require judges sitting in Fairbanks, Alaska, to make regular trips to Phoenix; this would be wasteful in terms of time and resources.[204] As Professor Carrington pointed out in a letter to the Senate Judiciary Committee:

> Everyone . . . has assumed that any split of the Ninth Circuit would follow geographic boundaries . . . . There is no administrative convenience, or convenience of litigants to be served by a court extending from Tucson to Fairbanks. The 12th Circuit as envisioned would still be a jumbo circuit, far too large to assure any of the advantages one might hope to secure by having a smaller court of appeals.[205]

Given the difficulties inherent in such a proposal, the Senate acted wisely in choosing not to enact the stringbean approach.[206]

The final and most logical of the major approaches to the division of the Ninth Circuit remains the proposal submitted by the Hruska Commission in 1973. This proposal would create a Twelfth Circuit consisting of Arizona, Nevada, and the Southern and Central Districts of California.[207] The Ninth Circuit would consist of Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam, the Northern Mariana Islands (added to the circuit after the Report was pub-

203. *See* 142 CONG. REC. S2221 (daily ed. Mar. 18, 1996) (comments of Sen. Feinstein); *see also supra* notes 191-92 and accompanying text.

204. *See id.*; O'Scannlain, *supra* note 14, at 317.

205. Letter from Paul D. Carrington, Professor of Law, Duke University, to the Senate Comm. on the Judiciary (Mar. 21, 1996), *quoted in* Hug, *supra* note 132, at 307-08.

206. *See* 142 CONG. REC. S2545 (daily ed. Mar. 20, 1996).

207. *See Hruska Commission Report*, *supra* note 10, at 236.

lished)[208] and the Northern and Eastern Districts of California.[209] This configuration would break the caseload down as follows:

This scheme was introduced in Congress by Representative Michael Kopetski of Oregon as House Bill 3654, entitled the "Ninth

208. The Northern Mariana Islands were, however, included in the Ninth Circuit under the version of the Hruska Commission's plan introduced by Rep. Kopetski. *See* 139 CONG. REC. E3046 (daily ed. Nov. 24, 1993) (statement of Rep. Kopetski). For a more detailed discussion of the Hruska/Kopetski plan, see *infra* notes 210-13 and accompanying text, and for a map, see *infra* Appendix.

209. *See Hruska Commission Report*, *supra* note 10, at 236. Here is one blunt statement of the problem:

> Because the State of California comprises 10 percent of the national population and . . . alone generates two-thirds of the judicial business of the present ninth circuit, the Commission concluded that the only feasible redefinement [sic] of States within the Ninth Circuit must include a division of the four judicial districts in California between the two new circuits in the west.

Arthur D. Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. PA. L. REV. 1188, 1190 (1974) [hereinafter Hellman, *Legal Problems*] (quoting 120 CONG. REC. 22,610 (1974) (statement of Sen. Burdick)).

Circuit Court of Appeals Reorganization Act of 1993."[210] The bill was introduced at the end of the session and was not revived at the next session. It deserves to be revived and to be given strong consideration. The principal advantage of the Hruska/Kopetski plan over the other proposals to divide the Ninth Circuit is that it meets the caseload crisis with the only real means of solving it: by dividing California.[211] This plan creates a virtually even split in the caseload between the Ninth and Twelfth Circuits.[212]

The division of California is both the principal advantage and most controversial feature of the Hruska plan, and was perhaps the most hotly debated Ninth Circuit issue at the Hruska Commission Hearings.[213] It is true that the plan would entail the first split of a state between circuits; the size of California's caseload has, however, made this the only viable alternative. Criticisms of the one-state, two-circuit approach center upon the obvious possibility that the two circuits could construe California law differently, thus creating equal protection implications for litigants in the two circuits.[214] There are several ways to combat these perceived problems.

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210. *See* 139 CONG. REC. E3046 (daily ed. Nov. 24, 1993) (statement of Rep. Kopetski).

211. It would, of course, be naive to neglect to mention that Rep. Kopetski hails from Oregon, which could open his bill up to attacks of regionalism since the Pacific Northwestern states are kept together by the Hruska alignment. Rep. Kopetski responded to this challenge in the following passage:

> Finally, Mr. Speaker, I want to emphasize that this bill is not motivated out of a desire to split the Northwest, particularly Oregon and Washington, from California in an attempt to affect substantive legal opinions. In fact, the bill would include northern California in the ninth circuit. The only motivation behind the introduction of the bill is to remove what has become an impediment to the swift and uniform administration of the law for all those currently under the ninth circuit.

Id.

One argument against Kopetski's explanation of his motive is that northern California has some significant interests (timber, for example) in common with the Pacific Northwest. However, the significant caseload relief afforded by the plan and the fact that it was originally conceived by a bipartisan, non-regionally-affiliated commission serve more than adequately to defend the Hruska/Kopetski realignment against such criticism. *See Hruska Commission Report*, *supra* note 10, at 224 (listing membership of the Commission).

212. It is significant to note that had the Hruska plan been enacted in 1973, the caseload division would have been roughly 55% in the Twelfth Circuit and 45% in the Ninth Circuit. Thus, the caseload division grew closer to 50-50 in the years between 1973 and 1995.

213. *See Hruska Commission Report*, *supra* note 10, at 238-40.

214. Such an equal protection argument could arise if a litigant lost an appeal because the Ninth Circuit ruled unconstitutional the state law upon which his case relied while the Twelfth Circuit upheld the constitutionality of the same law in a separate case. The Ninth Circuit litigant could claim that his equal protection right was violated because he was similarly situated to the Twelfth Circuit litigant, yet he lost his appeal based upon the Ninth Circuit's contrary interpretation of the same statute upheld in the Twelfth Circuit. In the absence of some inter-

1. *Hruska Approach*. The Hruska Commission relied on already-existing methods in its proposed solutions for potential intercircuit difficulties. Pointing out correctly that there were already (and continue to be) four federal *district* courts applying California law without major detriment to litigants, the Commission suggested that questions of state law arising in the new circuits could be certified to the California Supreme Court.[215] Such certification could be interlocutory so as to avoid final federal adjudication before resolution by California's highest court.[216] This certainly seems like a viable solution even today.[217]

Another issue addressed by the Commission was the possibility of forum-shopping by litigants between the circuits.[218] Again, this is not a novel problem, as opportunities for forum-shopping already exist in the federal courts.[219] Weapons available to combat forum-shopping include venue restrictions and transfer provisions, which could be tightened by Congress if the circuit split caused a significant rise in forum-shopping.[220]

An additional concern expressed at hearings before the Hruska Commission was the possibility of conflicting orders to state agencies from the two circuits.[221] However, 28 U.S.C. § 2112(a)(4) provides for

circuit means of resolving this inconsistency, this litigant's claim would be brought either to the Ninth Circuit sitting en banc (which might deny hearing or hear the case and then simply affirm its three-judge panel's version of the statute's constitutional status, thus leaving the inconsistency unresolved) or to the United States Supreme Court, where the chances of it being heard would be slim at best and, even if it was heard, substantial delay would inhere in the process.

215. *See Hruska Commission Report*, *supra* note 10, at 239.

216. *See id.*

217. This solution would require the California legislature to pass a rule enabling federal courts to certify questions to its supreme court. Such rules are common in the United States, even within the Ninth Circuit (Arizona, Hawaii, Idaho, Oregon, and Washington all have such rules). *See* 17A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4248 & n.30 (1988); *see also, e.g.*, IDAHO APP. R. 12.1 (West 1996) (allowing for federal courts to certify questions of Idaho law to the Idaho Supreme Court in the absence of controlling precedent when a determination would "materially advance" the resolution of the federal case).

Certification raises concerns with respect to delays in adjudication, the very problem that dividing California sets out to solve. The fact that this would be a new procedure would enable the legislature to develop a more stream-lined process than those found in other states. In any event, the overall beneficial effect that the split will have on the time necessary for appellate adjudication will more than compensate for any slowdown inherent in a certification procedure.

218. *See Hruska Commission Report*, *supra* note 10, at 239.

219. *See id.*

220. *See id.*

221. *See id.*

transfer and consolidation of parallel matters at the appellate level; cases involving the same order of a state agency are consolidated at the court where the first appeal was filed.[222]

2. *Kopetski Bill.* The Kopetski bill provides for an intercircuit en banc comprised of the judges of the Ninth and Twelfth Circuits to "convene as necessary" to address any inconsistent applications of federal law between the two circuits.[223] It is unclear whether this court would also address conflicts as to state law.[224] The process for convening an intercircuit en banc is identical to that required for an

222. *See* 28 U.S.C. § 2112(a)(4) (1994).

223. H.R. 3654, 103d Cong. § 3 (1993). Kopetski appears to have based this proposal upon an identical suggestion in Hellman's work. *See* Hellman, *Legal Problems*, *supra* note 209, at 1271-74 (explaining his proposal to allow certain cases to be heard by two courts of appeals sitting together en banc). This suggestion creates the possibility of a 28-judge en banc hearing, which, as has already been demonstrated, would be difficult to convene. *See supra* notes 156-58, 164 and accompanying text. Consequently, such hearings would possibly occur infrequently. As Ninth Circuit Judge Ben C. Duniway wrote in a letter to then-Attorney General William B. Saxbe (in response to concerns expressed by Robert Bork, when he was Acting Attorney General, that there would be frequent conflicts between the Ninth and proposed Twelfth Circuits as to California law):

> With the greatest respect for Mr. Bork, the fears expressed in his letter remind me of the ancient Scottish prayer which goes: "From ghoulies and ghosties and long-leggity beasties and things that go bump in the night, Good Lord deliver us." Based upon my experience of more than twelve years as a member of the Court . . . , I think that the problems that Mr. Bork foresees are in the category of "things that go bump in the night." They are not real.

Letter from Judge Ben C. Duniway to Attorney General William B. Saxbe (Feb. 8, 1974), *reprinted in* Hellman, *Legal Problems*, *supra* note 209, at 1203 n.61.

An alternative to the 28-judge en banc would be a smaller panel, perhaps consisting of the five most senior judges and the four most junior. *See, e.g.*, Hellman, *Legal Problems*, *supra* note 209, at 1273 (discussing a similar proposal). However, this runs into the aforementioned problems of the mini en banc, in which fewer than the total number of judges decides a crucial issue. *See supra* notes 158-62 and accompanying text. For this reason, the full en banc seems to be the best, if most cumbersome, solution. Its infrequent application and the administrative advantages inherent in the smaller circuits should make it more feasible than the current full en banc procedure.

224. A curious feature, noted earlier, of the debate over splitting California is the amount of concern expressed, by those who oppose the division, about the possibility that the two circuits would construe California law differently. *See supra* notes 214-16 and accompanying text; *see also Hruska Commission Report*, *supra* note 10, at 238-39 (addressing these concerns). Such concern is unwarranted, because *all* of the circuits could be called upon from time to time to construe California law; the four federal district courts in California do so every day. In any event, federal interpretation of state law technically has no precedential effect. Federal courts are to construe the law of California as would the state's supreme court—it is the state courts whose interpretation of California law is binding. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); *see also* 28 U.S.C. § 1652 (1994) ("The laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

en banc in the present Ninth Circuit. Litigants may request a rehearing, but a judge must initiate a vote and a majority of the court is required to convene an en banc.[225] The bill emphasizes that such hearings are to be held in exceptional cases only.[226]

The best resolution to concerns about intercircuit conflicts is an amalgamation of the Hruska and Kopetski plans. Such a fusion will let existing mechanisms take care of as many state-law conflicts as possible with certification to the California Supreme Court as a last resort; the intercircuit en banc will serve as a tribunal for the resolution of conflicts involving federal law. If certifications became too burdensome for the California Supreme Court, a new court could be created to hear such appeals, perhaps composed of retired California judges, law professors, or other experts in state law.[227] The intercircuit en banc would be convened seldom enough to avoid overburdening the judges of the newly configured circuits.

Another advantage of the Hruska/Kopetski plan is its creation of an even split in judgeships. The plan would create fourteen judgeships in the Twelfth and fourteen in the Ninth.[228] The icebox and stringbean plans each create one large, unwieldy circuit and one small circuit. The large circuit in each plan has too many judges to operate effectively, thus replicating, rather than reducing, the overcrowded bench of the current Ninth Circuit.[229]

A significant argument that can be levied against this approach is that it merely redistributes judges between two circuits, with the same number of filings per judgeship, and thus solves no real problems. Such an argument fails to take into account, however, the inherent benefits of a smaller circuit which offset this redistributive effect. The administrative apparatus of the new circuits will be half of that which the current Ninth Circuit carries. Appeals are therefore less likely to be caught in the bureaucratic delays inherent in an organization as large as the current circuit. Judges will travel shorter distances, enabling panels to hear appeals at a greater pace. The Fifth Circuit split is instructive on this point. In 1995 (with only three

225. *See* H.R. 3654, § 3.

226. *See id.*

227. A constitutional question would arise from the creation of such a tribunal: Would its members need to be Article III judges, sitting for life? A possible answer is that they could be Article I judges (along the lines of Bankruptcy judges) with 15-year tenures.

228. *See* H.R. 3654, § 2.

229. The horsecollar approach, of course, suffers from problems of diversity, rather than size, of the bench. *See supra* notes 191-92 and accompanying text.

judgeships added since 1980), the combined Fifth and Eleventh Circuits terminated more than two times as many appeals as did the former Fifth Circuit in 1980, its last year of operation.[230]

Smaller circuits also remove many of the obstacles to the en banc process. Fourteen judges are more easily assembled in a panel than are twenty-eight judges, and the procedure becomes more administratively feasible as petitions and memoranda need circulate through fewer hands in order to prepare for a vote on an en banc hearing. To be sure, the en banc would remain a time- and resource-intensive process even in smaller circuits, but reductions in judgeships to fourteen per circuit bring the en banc mechanism more into the realm of possibility than the notion of an assembly of twenty-eight judges. The newly-constituted circuits would fall short of the fifteen-judge minimum prescribed by Congress for mini en banc eligibility; there is no provision in the Hruska/Kopetski plan for a request to Congress to relax this limitation. The plan is designed to preclude use of the mini en banc in the Ninth and Twelfth Circuits.

Individual justice for appellants would also be enhanced by the smaller circuits created by the Hruska/Kopetski plan. The plan fosters collegiality among the judges by reducing the possible number of panels by half, thus increasing the odds that judges will work together on multiple appeals. The time-saving elements of the plan will engender speedier disposition of appeals without compromising the capacity of judges to pay more attention to the details of each case. In smaller circuits, there will be less need for total delegation of, for example, decisions concerning publication of opinions. Shorter disposition times will also reduce the overall cost of appeals for litigants.[231]

A final common criticism of plans to split the Ninth Circuit is that construction of new Circuit headquarters would cost taxpayers enormous sums. One of Chief Judge Hug's main arguments against division is that Congress has already approved, and construction has almost been completed on, "an extensive post-earthquake rehabilitation of the historic Ninth Circuit headquarters building in San Fran-

230. *See supra* note 9 and accompanying text.

231. Improvement of appellate justice may have the ironic effect of increasing the number of appeals as more potential appellants feel they have access to the system via lower costs and higher predictability. While a curious byproduct of an effort to alleviate a caseload crisis, the improvement of justice can hardly be regarded as a negative effect of reform. Overall improvements in the ability of the circuits to handle appeals in a timely manner should make it possible for them to absorb better any increase in new filings.

cisco at a cost of over $100 million."[232] The Hruska/Kopetski plan solves this problem by retaining the newly-refurbished headquarters building in San Francisco and using the large Ninth Circuit courthouse at Pasadena as headquarters for the new Twelfth Circuit.[233]

Even the most vociferous opponents of splitting California acknowledge that this is probably the most realistic way to solve the caseload problem: Professor Tobias, who frequently writes about the federal courts and opposes a split of the Ninth Circuit, said recently: "No one really thinks it's a good idea to divide up California, but then no one has a good answer how to do it otherwise."[234] Even Senate Judiciary Committee Chairman Hatch, in denouncing what he perceived as further delay which would be caused by Senator Feinstein's final proposal for a study commission, said that he "believe[s] there will be a split of California if we go this route."[235]

IV. CONCLUSION

The history of the United States Courts of Appeals is one characterized by bitter struggle in Congress and gradual, measured change. Seldom has any major change in the courts of appeals (and the old circuit courts before them) been enacted without years of wrangling and dealmaking among legislators. The courts of appeals, particularly the Ninth Circuit, find themselves at a crossroads again: The Commission proposed by the House of Representatives, if indeed it is ever impaneled, will be charged with recommending the changes that need to be made to ease the overburdened Ninth Circuit.

Those who wish to see effective change enacted in the Ninth Circuit by the turn of the century should hope that the House Commission arrives at the same conclusion that the Hruska Commission reached before it: California is the problem, and it must be divided. This is the only way truly to solve the caseload crisis, and the problems of delay and lack of collegiality, and to preserve stability in the application of the law.[236] The controversial hopscotch plan recently

232. Hug, *supra* note 132, at 309.

233. *See* O'Scannlain, *supra* note 14, at 318.

234. Savage, *supra* note 195, at A3.

235. Whitney, *supra* note 22, at A1.

236. All Ninth Circuit precedent passed down before the official date of division of the circuit (or within a suitable period after the division) should be binding upon the new Twelfth Circuit. The Eleventh Circuit pursued a similar course of action following the division of the old

proposed by the Senate would do little to address the issues underlying the Ninth Circuit's difficulties, principally the problem of California.

The process of reaching consensus to split the Ninth Circuit will be a long one. The majority of the judges of the circuit as well as the Ninth Circuit Judicial Council currently oppose a split.[237] But the resistance may be starting to crack. Judge O'Scannlain has endorsed the Hruska plan,[238] and the latest Congressional proposal for dividing the circuit,[239] although seriously flawed, survived the Senate.[240]

The creation of a commission would be an important step toward ultimate division of the Ninth Circuit; it is troublesome, however, that the Hruska Commission recommended the best solution twenty-four years ago and nothing was done. Study commissions are popular Congressional compromises and, while often useful, they are also popular delay tactics. A study is completed, all sing its praises, nothing is enacted and the topic is forgotten. Chief Judge Hug, deftly summarizing the federal appellate mission, recently stated that "a principal purpose of federal appellate courts [is] to reduce the impact of local and regional parochialism by providing a federalizing function over a substantial geographic area."[241] The Ninth Circuit has simply grown too big to perform this function adequately. Those seeking justice within its jurisdiction should hope that Congress breaks with its tradition of procrastination in matters of appellate structure long enough to realize that the time has come to enact the Hruska Commission's remarkably prescient recommendations.

Fifth Circuit. *See* Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981).

237. *See* Hug, *supra* note 132, at 305.

238. *See* O'Scannlain, *supra* note 14, at 318-19.

239. *See* S. 1022, 104th Cong. (1997).

240. *See supra* notes 23-27 and accompanying text.

241. Hug, *supra* note 132, at 308.

APPENDIX

CONFIGURATION OF THE NINTH AND TWELFTH CIRCUITS UNDER THE HRUSKA/KOPETSKI PLAN

Note: The Northern Mariana Islands (not pictured) would be part of the Ninth Circuit.
Source: 62 F.R.D. 250 (1973).