Too Big to Hail: Why We Need to Split Up the Ninth Circuit

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Some may say that at the rate law schools are churning them out, there will be more lawyers than humans by 2050. While this little population "prediction" does provide a nice laugh, it also speaks to the increasingly litigious nature of American society in recent times. Americans, in general, respect the rule of law, but they are also becoming increasingly involved with it in a variety of fields and topics. Thus, it should be alarming to Americans that justice is not being properly dispensed everywhere in the country. The United States Ninth Circuit Court of Appeals appears as an anomaly in the judicial system. Spanning from Arizona to Alaska and from Montana to Guam, the Ninth Circuit jumps off the map when compared to other circuits. It encompasses the states of Arizona, California, Nevada, Oregon, Washington, Idaho, Montana, Alaska, Hawaii; the territory of Guam; and the commonwealth of the Northern Mariana Islands (Roll 2007, 109). It covers more states (nine) than any other circuit with one of them, California, being the most populous state in the nation and two, Arizona and Nevada, among the fastest growing states. Therefore, it is no surprise that the Ninth Circuit houses close to a fifth of the population with around 60 million people on about forty percent of the country's land (Roll 2007, 110).

The massively disproportionate size of the Ninth Circuit clearly indicates that it is not simply one of twelve circuit courts operating in the American judicial system. In fact, due to its vast size, about thirty percent of all federal appeals are pending in the Ninth Circuit (Roll 2007, 109). Thus, the Ninth Circuit presents an excellent opportunity for reform based on some common sense, sound reasoning, and statistical data. While advocates for reform have been pushing for a division of the Ninth Circuit for decades, the debate still rages on without any clear conclusion in sight. However, the debate seems to inch closer to real reform in the form

of a split of the circuit as time passes. The adoption of a bill splitting the Ninth Circuit by the House in 2004 represented the farthest the issue has progressed yet (Spreng and Tobias 2004, 1). Thus, it may be poised to become actual law in the coming years. While a political element is present in this debate, the Circuit has unique qualities unrelated to its decisions that make reform desirable. The problems and concerns with the circuit's logistics, efficiency, atmosphere, predictability, consistency, and system integrity necessitate a division of the Ninth Circuit into multiple, smaller circuits.

The circuit court of appeals system that Americans know today was not formed until 1891 with the Evarts Act (Gribbin 1997, 368-9). This act created nine circuit courts across the country. At the time, the ninth only contained California, Oregon, Washington, Montana, Idaho, and Nevada. Since it was still fairly early in America's westward expansion, the population of this large circuit was only three million. Since the Evarts Act, three states, a territory, and a commonwealth have been added along with massive population growth (Roll 2007, 111-3). Surprisingly though, the Ninth Circuit has never been divided. Ninth Circuit Judge Andrew Kleinfeld has gone so far as to call the current situation of the Ninth an "accident." His view is that the Ninth was originally created for California, but then the surrounding areas populated and no adjustment was made (Roll 2007, 113). Is a circuit designed for an early twentieth century West still appropriate nowadays? Notably, one should consider that Congress has historically been very slow and resistant to altering the structure of the federal judicial system in general (Gribbin 1997, 371). This does not mean Congress should not have acted by now, though. This resistance to change has had negative impacts on the Ninth Circuit by allowing it to grow and remain at an incredible size in area and population.

The geographic enormity of the Ninth Circuit presents logistical problems that adversely affect the administration of justice. The sheer size means travel is more complicated.

Some judges have to travel great distances to get to various meetings and hearings (Spreng 1998, 903). Just looking at any map and seeing the tremendous distance covered by the Ninth Circuit should cause any average person to have concerns about its ability to properly decide cases. Additionally, the large variety of court locations and the high number of judges make it virtually impossible for all the judges to be in the same place simultaneously (Spreng 1998, 903). All of these long trips waste time that judges could be spending on cases or working together. While the amounts may be small, the hours would add up and prove helpful if a split occurred and made the circuit smaller.

Furthermore, the vast size of the Ninth Circuit leads to a sort of discrimination against smaller states in the circuit. The three judge circuit panels rarely or almost never travel to these states to hear cases. One of these panels comes to Alaska once a year and the average judge will only visit Alaska once every ten. The situation is even worse for Montana and Idaho. Montana very rarely hosts a panel and Idaho almost never does since it has no regularly scheduled panel visits. Idaho really just gets a visit for very special circumstances, such as the hundredth anniversary of its statehood (Spreng 1998, 934). Thus, these less populated states are put on the back burner and do not really receive appropriate attention. Judges do not really have to learn their laws and legal norms, and their issues are not given the same respect as say California gets. Therefore, the size of the Ninth Circuit leads to inadequate representation for many of the smaller states in it. The logistical problems resulting from the geographical size of the Ninth Circuit parallel the efficiency issues resulting from the circuit's population.

Common sense says that the more people in a circuit, the more cases that will be filed. This is certainly accurate for the Ninth Circuit, which contains over 60 million people. This is about 27 million more than the next most populous circuit, and the average population of the other eleven circuits is around 22 million (Roll 2007,127). This huge disconnect is mirrored in

case filings. In 2006, the Ninth Circuit had 17,299 cases by September 30, which was about five times as many as the average for the other circuits. It also had 5,157 more case filings than the next closest circuit by that point in 2006 (Roll 2007, 124). The incredible caseload of the Ninth Circuit obviously creates efficiency problems. No circuit court could properly and quickly handle the massive number of cases it receives annually.

The cases naturally pile up, causing delays and other problems in the judicial process. Split opponents are quick to counter this by pointing to the Ninth's short time from submission to final disposition. It has even been the fastest circuit in this category in recent years. However, this statistic is misleading because it actually only looks at the beginning of deliberation to the presentation of the final decision (Spreng and Tobias 2004, 5). On the contrary, a quick time here may actually be disadvantageous if judges are not giving proper consideration and time to your case. A more accurate measure of court efficiency is the length of time between the filing of the case and the final decision. Here, the Ninth has been the slowest circuit even after having its vacancies filled (Spreng and Tobias 2004, 5-6). These delays create serious problems that can diminish chances for justice. Evidence can deteriorate or disappear, which will prevent proper decisions from being reached. Judges may not fully consider all of a case or may be less inclined to overturn district rulings in the interest of time. Chances to establish precedent may be missed because another panel or circuit decides a similar case first (Gribbin 1997, 373-4). All of these possible effects from the delays of overloaded dockets can hurt the pursuit of justice.

With the highest number of cases, it follows naturally that the Ninth Circuit also has the most judges. In fact, it is an outlier in terms of number of judges as it has many more than the next largest circuit. Another important variable to look at is the number of cases per active judge. In 2006, the Ninth Circuit ranked third in cases per active judge at 547 (Roll 2007, 126).

This actually presents a troubling outlook on the ability of the Ninth Circuit to handle its caseload because this active judge category does not include senior and visiting judges. The Ninth Circuit makes substantial use of these types of judges, which will be discussed in greater detail later (Spreng and Tobias 2004, 3). Additionally, the Ninth Circuit has enacted a number of reforms in recent years to address some of its efficiency problems.

In fact, the Ninth Circuit has been a leader in improving efficiency and has set an example for other courts to follow as their caseloads increase with time. "The Ninth has become a model of what can be done- through screening, delegation to staff, limited en banc proceedings, memorandum dispositions, and submission on the brief- to maximize the efficient use of judicial resources" (Spreng 1998, 894). Furthermore, the Ninth Circuit has tried dividing itself into smaller units without an actual circuit split to improve administrative capacity and has incorporated the use of "a computerized case-tracking system and electronic networks" to bring the judges closer together, improve communication in the circuit, and increase interaction (Gribbin 1997, 374). Thus, the Ninth Circuit has served as a sort of judicial laboratory in which experimentation and innovation thrive and foster the growth of new ideas and techniques to improve the judicial process not only for the Ninth but for all the circuits and courts in general. Proponents of the status quo for the Ninth Circuit cite this as a reason it should remain in its current large size. They believe it operates well still and provides a testing ground for new theories that is integral to the continuing advancement and development of the courts (Roll 2007, 141-3). However, split advocates view the Ninth Circuit "experiment" as largely a failure and believe a split is now necessary (Roll 2007, 123).

While some of the reforms made by the Ninth Circuit have worked out well, others have actually damaged the judicial process for the circuit and even spread to others to create systemic problems. Ninth Circuit was able to so quickly decide cases once the judges began

deliberation was through the use of staff attorneys and unpublished opinions. While this will be examined later in this paper, it is important to note here. Judges assigned work normally under their domain to staff attorneys to speed up the review of cases. They also have increasingly utilized unpublished opinions, which are much quicker to adopt than a carefully-composed published one. But, these opinions are often inaccessible and do not contribute to the accumulation of precedent (Gribbin 1997, 375-6). The use of unpublished opinions is not entirely bad though. It can be quite useful and even desirable in cases of routine norm enforcement since this then allows more time for the more complex and difficult cases. The Ninth Circuit only publishes twenty-five percent of its decisions (Spreng and Tobias 2004, 2). It should be noted, however, that the Ninth Circuit is not the worst offender in shortcuts to justice. It ranks seventh and eighth out of twelve respectively in percentage of appeals that receive oral argument and published opinions (Spreng and Tobias 2004, 3).

Even with its extra help, reforms, and shortcuts, the Ninth Circuit still decides cases the slowest of any circuit. The typical solution to this has been to add more judges. However, the Ninth has likely already passed the point of diminishing returns on the economies of scale for number of judges (Spreng 1998, 905). The Ninth already uses a huge number of judges and adding more would likely only complicate matters further. Therefore, splitting the circuit is the logical answer. Two major benefits will come from this path. First, dividing the circuit will actually reduce the workload for judges. Critics point out that cases will not drop, but rather, they will be divided with the judges resulting in the same number of cases per judge as before (Spreng 1998, 894-5). While case filings may remain the same, the return to a full en banc system, which will be addressed later, along with less logistical costs mentioned earlier combine to create several more hours a week that judges can spend reviewing and hearing cases. The complexity of the mini en banc wastes numerous hours every week, so it would be

beneficial to do away with this flawed structure (Spreng 1998, 896-903). Second, with smaller circuits, there will be fewer judges on each one. Studies show that smaller circuits are much more collegial because they can actually communicate face to face and see each other more frequently. This increased interaction creates a more productive work environment which leads to higher efficiencies in smaller circuit courts (Spreng 1998, 905). Indeed, the atmosphere of the Ninth Circuit is another major reason for reform.

The atmosphere of a court is certainly another key factor in whether the court operates effectively. Like most jobs, the work environment can play an important role in how much work gets done. It seems to be the case that smaller and closer knit circuit courts operate more efficiently than the larger, more spread out ones such as the Ninth. Based on his understanding of the inner workings of the court and his research, the leading empirical student of the Ninth Circuit, Professor Arthur Hellman has even raised concern in recent years about the collegiality of the Ninth Circuit (Spreng and Tobias 2004, 4). Despite the fact that it is difficult to quantify, collegiality has been and remains a prized judicial value. Ninth Circuit Judge Diarmuid O'Scannlain views collegiality as more than just "mutual respect among judges" (Gribbin 1997, 381). He believes collegiality is present when judges can sit down and freely exchange ideas and opinions, thereby facilitating a growth of thoughtfulness and appreciation for other judges' ideas and views and working to bring everyone closer together. He goes on to describe it as "a precious value which is forged from close, regular and frequent contact in joint decision-making, and it is the glue which binds the judges in a shared commitment to maintaining the institutional integrity of circuit law" (Gribbin 1997, 381). Moreover, there is a strong, long held belief in the positive impact of collegiality on courts.

Most judges seem to agree that collegial courts are superior to non-collegial ones and that collegial courts by nature are smaller in size. This is especially significant for the

discussion of the Ninth Circuit. The strong, close personal relationships built on smaller courts contribute directly to collegiality. The importance of regular face-to-face interaction is very high in the development of mutual understanding and respect for one another's views and opinions. This allows for a more comfortable work environment and increased chance for compromise and agreement on decisions. This positive environment is believed to improve the quality of judicial decision-making, so collegiality is constructive for judges and courts and valuable to the public (Spreng 1998, 921). The ability to work together also allows for faster work. Collegiality, thus, can also increase efficiency on appellate courts (Gribbin 1997, 381). However, the Ninth Circuit's enormity impedes the development of collegiality, which prevents the circuit from obtaining these benefits and even causes it to suffer.

The Ninth Circuit clearly lacks collegiality. With anywhere from twenty-eight to possibly forty judges serving on it (depending on vacancies, senior judges, and visiting judges), the Ninth is clearly not small like other courts. Even with twenty-eight judges, this results in 3,276 possible three-member panels (Gribbin 1997, 381). Thus, in the Ninth Circuit, judges are constantly working with new people from all over the circuit and never get a chance to develop personal relationships. Just by random chance, a judge is likely to go years without working with particular colleagues of the circuit. The Ninth's increased use of senior and visiting judges further compounds this issue (Spreng 1998, 921-4). In fact, recent Ninth Circuit appointees have gone over four and a half years before sitting with all the other circuit judges to hear cases (Spreng and Tobias 2004, 2). It seems completely ridiculous not to work with a colleague for that length of time especially considering the relatively small size of circuits compared to many professions. A splitting of the Ninth Circuit could generate collegiality and increased productivity for the Ninth's judges. Combined, the Fifth and Eleventh Circuits have twenty-nine judges, which is about equal to that of the Ninth alone. Combined these two circuits,

which used to be one circuit until 1980, outperform the Ninth by fifty percent in cases resolved (Gribbin 1997, 382). Put simply, there are just too many judges in the Ninth Circuit for the critical judicial value of collegiality to flourish, let alone exist. The comparison to the Fifth and Eleventh Circuits raises another issue of court atmosphere unique to the Ninth.

While three judge panels make most circuit court decisions, there is another mechanism employed that provides a backstop to the panels. Circuit courts may vote to hear cases en banc, which means the entire circuit court will sit together to hear, discuss, and decide a particular case. This is an efficient and collegial way to make sure panels are behaving responsibly. While not many cases each year are heard en banc in each circuit, the tool is always useful as a protection against radical decisions by panels (Rymer 2006, 317-8). The Ninth Circuit has a special take on the en banc process. The Ninth Circuit is clearly too large to realistically hold en banc hearings, so it has adopted the use of the limited, or mini, en banc. The limited en banc was a reform adopted as an alternative to splitting the circuit after the 1973 Hrsuska Commission recommended splits to the Fifth and Ninth Circuits, the two largest circuits at the time. The Omnibus Judgeship Act of 1978 authorized, among other things, the use of the limited en banc for circuits with over fifteen judges. After trying a full en banc instead of the new reform, the Fifth Circuit came to realize the trouble its size caused and decided to split in 1980. However, the Ninth Circuit instead chose to adopt the mini en banc to stay alive and continues to use it today (Rymer 2006, 318).

The advantage limited en banc does have is that it allows a very large court to still hold hearings with a larger body than three to assess important issues (Rymer 2006, 319). However, there are also a great number of flaws in the limited en banc that make it a less than desirable option. "En banc" actually means, "full bench," so a limited en banc presents a contradiction in and of itself (Rymer 2006, 317). Moreover, the practice has employed the use of eleven and

now fifteen judges to review cases. Since it operates according to majority rule, as few as six and eight judges can speak for the entire Ninth Circuit. While it is not always the case, this has resulted in a circuit majority being in the minority opinion because the selection of en banc judges is random (Rymer 2006, 319-20). Additionally, there is no guarantee that any judge from the original panel will be on the en banc, so the review may not even have the benefit of input about earlier interaction and reasoning of the case from the panel decision. Also, since no one knows who will participate in the en banc hearing, an incentive exists for judges to make more extreme decisions on panels because they may not be checked by the limited en banc depending on who is selected. Thus, accountability suffers as well as the collegiality that other circuits obtain by meeting full en banc (Rymer 2006, 320-23). Furthermore, judges not on the mini en banc usually cannot access the record, know what a decision will be before it is released, or participate at all in the process. Their exclusion can be damaging to the actual consideration of the case, other rulings they are about to make, and the legitimacy of the en banc ruling (Rymer 2006, 323). The concerns and problems of atmosphere in the Ninth Circuit are directly related to the issues of predictability and consistency that the court faces.

The extreme number of judges of the Ninth Circuit and its previously mentioned deficiencies in collegiality both contribute to unpredictability and inconsistency in the court's rulings. This comes to light in a few different ways. First, as mentioned before, the high number of judges means individual judges may go long stretches, even years, without working with other particular judges. They lack a mutual understanding that may cause problems when they are placed together. Additionally, the lack of collegiality throughout the circuit means judges are not working and communicating closely with another to form uniform law for the circuit. Instead, everyone is more or less free to act on his or her own because the circuit is not working as a whole to form circuit law. Collegiality is necessary for the development of

consistent circuit law (Gribbin 1997, 382). Furthermore, the number of judges produces over 3,000 possible panel combinations. With the wide variety of views on the circuit and complete lack of knowledge of who will be on the panel, it is impossible to predict or even gain a sense of how an appeal will go until one learns who is on the panel. This is especially concerning given the high cost of appeals (Gribbin 1997, 382).

Consistency issues also arise from the amazing number of cases decided each year by the Ninth Circuit. With so many cases, it is difficult for judges to keep track of them all and be aware of new rulings and precedents. This means that judges may not read or keep up with all the decisions of the circuit. While this is understandable given the situation, it should signal a definite need for a split. Multiple judges have told Congress that they simply cannot keep pace with the number of decisions produced. Some judges have admitted they have given up and are not even attempting to keep up anymore (Spreng and Tobias 2004, 4). This is particularly alarming for the court's capacity to produce consistent rulings. Also, by strictly using the limited en banc, the Ninth Circuit eliminates the opportunity to ever come together and decide cases as a circuit. The lack of a full en banc prevents the Ninth from speaking with one clear, consistent voice (Spreng and Tobias 2004, 2).

Finally, the use of "extra" judges may be of concern. These include circuit judges who have taken senior status, circuit judges visiting from other circuits, and district judges. In this case, they temporarily serve as Ninth Circuit judges and are used to assist with the heavy caseload. It is well-known that the Ninth Circuit is not being run completely by Ninth Circuit judges. In fact, the Ninth uses "extra" judges more than any other circuit (Wasby 1981, 369-70). What is unclear is the impact of these judges on consistency. While some studies have indicated that they create more inconsistencies in circuit law due to lack of knowledge of circuit norms and less perceived legitimacy to make law, the active judges of the Ninth Circuit say

they do not cause more inconsistency than any average active judge does (Wasby 1981, 380-1). Thus, there is uncertainty that needs further study. The large number of non-Ninth Circuit judges making law for the Ninth raises concern and judges may not be able to objectively tell whether the "extras" have impacts on consistency. On the other hand, lawyers and other critics may simply be exaggerating their perceived problems with how the law is being applied (Wasby 1981, 382-3). These judges may contribute to delays though as they are not as well rehearsed in Ninth Circuit procedure, often have restricted schedules, and may prioritize the work from their home area over that of the Ninth (Wasby 1981, 375-6). While predictability and consistency are important to appellate justice, upholding the integrity of the system is a particularly important reason for reforming the Ninth Circuit.

The recent shortcut reforms implemented by the Ninth Circuit and later other circuits as well damage the integrity of the judicial system. The parallel proliferations in the use of staff attorneys and law clerks and unpublished opinions represent a miscarriage of justice currently plaguing the judicial system. It appears that many circuit judges are not actually doing all the work they were appointed to do. To deal with caseload issues, they have used a screening process to delegate decision making to staffs. The result is that primarily the staff attorneys and law clerks handle the "less important" or pressing cases (Pether 2007, 6-7). They review the cases, do the research, and even write the opinions sometimes with little to no supervision. The cases are then briefly presented to judges who generally just look at the result and approve it (Pether 2007, 11-13). This is not an entirely negative development though. In cases involving simple norm enforcement, this delegation of work might actually be beneficial since it gives judges more time to focus on the tougher cases that require more thoughtful decisions. Thus, this critique should not be interpreted as all encompassing. However, the ideal image of this course of action is not always the one that plays out in the real

world.

This practice places the pursuit of efficiency over that of justice. While judges could delegate some of the easier tasks and cases, the level of involvement and frequency of the utilization of this technique are unacceptable. The staff members are not qualified to be writing opinions and essentially deciding cases and they were not appointed to do so either. Most of the staffs are made up of recent graduates from elite law schools where they did receive excellent legal education. These young graduates have no judicial training though. They actually lack even attorney experience too. With proper training and supervision by circuit judges, they could probably become qualified to handle routine cases. Unfortunately, they often receive little to no training and have minimal supervision (Pether 2007, 9-10). The increased use of unpublished opinions coincides with the delegation practices and affirms their problems. Many of the decisions are unpublished because staff members rather than judges poorly wrote them. They may contain errors in language, reasoning, interpretation of precedent, facts of the case, and even the final decision. Some circuit judges, other legal participants, various studies, and a study by the Federal Judicial Center affirm this troubling situation. Judges cannot spend time on training and supervision because they are already overloaded with their own cases (Pether 2007 9-10, 16-8). Furthermore, the lack of contribution to case law from unpublished opinions causes additional harm and affects certain groups more than others.

The unpublished opinions can also be designated, as not for precedent, so they do not contribute to case law or help attorneys and litigants gain an expectation of how their case will be handled. With fewer cases contributing, the case law tradition suffers (Pether 2007, 39-40). Additionally, this practice disproportionately affects the poor, indigent, and less resourced litigants. Their cases are more often the ones handled through the shortcut method and to receive unpublished opinions. They also lack the resources or attorney expertise to investigate

further and gain access to these unpublished opinions that may affect their own cases (Pether 2007, 20-1). This is illustrated by the extremely low success rate of litigants who raise immigration, disability, and labor issues in unpublished opinions. These problems are especially significant in the Ninth Circuit, so they add to the reasons for splitting it to reduce caseload issues (Pether 2007, 44-5). However, they also pose a systemic problem that needs to be addressed, although it is beyond the scope of this paper to deal with that issue. A deficiency in system integrity should alarm and ultimately convince split opponents, but there is also disagreement about how the split should occur.

A wide variety of solutions have been proposed over the last several decades for how best to split up the Ninth Circuit. A few of the notable ones will be presented here. The 2004 bill that passed the House proposed a division into three circuits. This would involve the creation of the Twelfth and Thirteenth Circuits. One circuit would contain California, Hawaii, Guam, and the Northern Mariana Islands. Another would house Arizona, Nevada, Idaho, and Montana. The third would contain Washington, Oregon, and Alaska (Spreng and Tobias 2004, 2). This design would be a big mistake though. California would completely dominate the other tiny entities in its circuit. Also, Arizona differs greatly culturally and economically from Idaho and Montana, so conflict could become a significant problem. Arizona more closely ties to California in these areas and even follows its law in some areas. Thus, Arizona fits much better with California (Spreng 1998, 892). However other proposals seek to only divide the circuit into two rather than three smaller circuits.

Another proposal is the Icebox Circuit, which divides the Ninth into two circuits. One would contain Washington, Oregon, Idaho, Montana, and Alaska while the other had California, Arizona, Nevada, Hawaii, Guam, and the Northern Mariana Islands (Spreng 1998, 891). This proposal has both good and bad elements. The northern and southern parts of this

circuit are characterized by polarization and stark cultural differences that signal separation is needed (Spreng 1998, 935). This solution accomplishes that. The northern circuit with only about a fourth of the original circuit would be very manageable. However, there may still be size problems in the southern circuit that will likely only get worse as those states grow. This idea is actually designed for flexibility. It anticipates another division of the southern circuit later on, but leaves it open to future proposals. Then, the entire system would not have to be redone (Spreng 1998, 893).

The California Split represents the best proposal, though. California presents a major problem to splitting the Ninth because it is so enormous. About sixty percent of the Ninth's filings come from California (Gribbin 1997, 382-3). The California Split proposal creates two roughly equal circuits out of the Ninth. This would immediately solve the problems of the oversized Ninth because each circuit would only be half the size (Gribbin 1997, 390). While future growth is possible, the large reduction to a half of the current size should make it manageable. This proposal also makes a north-south division, so regional interests are kept together. Neither new circuit would have to deal with the size problems of the current Ninth. The division would involve one circuit consisting of Washington, Oregon, Idaho, Monatana, Alaska, Hawaii, Guam, Northern Marian Islands, and the Northern and Eastern Districts of California. The other circuit would contain Arizona, Nevada, and the Southern and Central Districts of California (Gribbin 1997, 390). With the judges divided evenly, each circuit would have an appropriate number and could implement the full en banc. The courts would be much more collegial. While this plan has many positives, it is not completely free of concerns.

The original proposers of this plan also provided solutions to the obvious criticism of splitting a state between two circuits. This taboo may actually not be that problematic. An intercircuit en banc between the two could be used to address conflicts or inconsistent

applications of federal law between the two when necessary. The four district courts do not seem to pose a problem to Californians, so why should two circuit courts be different? State law issues could be referred to the California Supreme Court. Critics point out the possibility of forum-shopping too. However, this can already be done in federal courts in some ways and use and tightening of venue restrictions and transfer provisions should prevent abuse (Gribbin 1997, 302-4). Thus, the California Split seems to fulfill the desired positive qualities without any major drawbacks. In a complicated issue with many possible solutions, splitting the Ninth Circuit via the California Split effectively solves the circuit's problem in a way that produces the most benefits and fewest downsides.

One of the more highly debated issues over the last half-century has revolved around whether or not the Ninth U.S. Circuit Court of Appeals should be divided. Split opponents do raise some worthy points and concerns. For example, Congress has never divided a circuit without the approval of its judges. While advocacy for a split has grown in recent decades, most of the circuit's judges and lawyers still oppose a division. They especially do not want to see a division brought about by political motivations (Goodman 2008, 2681-2). The Ninth Circuit did hand down the second highest percentage of liberal decisions, at fifty-one percent, of the circuit courts from 1980-2012. In February 2005, Republican House Majority Leader Tom DeLay heavily criticized the "liberal, left-leaning, wacko Ninth Circuit over in San Francisco" at a Republican Party dinner (Carp et al. 2014, 314). Additionally, defenders of the Ninth point to the late 1990s commission's findings, which urged against a split and found no size or administrative reasoning for a split (Hug et al. 2000, 1665-7). Defenders contend that the Ninth is still operating well and serves as a source of innovation of efficiency techniques that other circuits can later implement (Hug et al. 2000, 1671-2). While some of these arguments have merit, the vast majority are false or misleading. The Ninth Circuit has considerable

problems in logistics, efficiency, atmosphere, predictability, consistency, and system integrity. These problems endanger justice in the Ninth Circuit, so Congress must take action to split the circuit now.

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