Ten Reasons Why the Ninth Circuit Should be Split

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Good afternoon. It's a pleasure to be back at Harvard Law School, my alma mater. I commend you for your courage in inviting me to talk about the need for a reorganization of the Ninth Circuit since I now seem to be in the minority within my court on this issue. As you may know, I wrote an article in a recent issue of the Federalist Society's *Engage* publication, explaining my ten reasons for supporting a split of the Ninth Circuit. Thirty-three of my colleagues on this 47-judge Court, including Chief Judge Schroeder and all past (and future) Chief Judges co-authored a response to my arguments which will appear in the next issue of *Engage*, so I gather I must have hit a nerve. Of the remaining fourteen who declined to join the response, ten are publicly on record as supporting restructuring. Today, I would like to address again the need for a split of the Ninth Circuit and to provide some answers to those of my colleagues who resist the inevitable.

First, let me admit that back in the 1980's I was opposed to splitting the Ninth Circuit, because I was convinced that split supporters were primarily motivated by disapproval of some of the Court's environmental decisions. Nevertheless, after completing an LL.M. in Judicial Process at the University of Virginia Law School in the early 1990s, I have become convinced that, for judicial administration reasons, the Ninth Circuit must be restructured into at least two smaller circuits. My concern about our Circuit's ability to administer justice effectively for the nearly sixty million Americans in the nine states, two territories, fifteen district courts, and fifteen bankruptcy courts that comprise the Ninth Circuit has only grown as the situation in the Circuit worsens. Ultimately, the Ninth Circuit simply has too many judges, too many courts, encompasses too vast an expanse of territory, and is burdened with too large a volume of filings to operate effectively.

My ten reasons for splitting the Ninth Circuit are rooted in history, empirical evidence, and my own judicial experience. I believe that when looking at the evidence, one can no longer claim that the Ninth Circuit is doing "fine." Indeed, I believe that it is split <u>opponents</u> who must now bear the heavy burden of establishing that the status quo should be maintained.

I

REASON ONE: The Boundaries of the Federal Judicial Circuits Have

Been Repeatedly Redrawn Since the Founding. Ever since the Judiciary Act of 1789, Congress has repeatedly redrawn circuit boundaries to accommodate territorial expansion and population changes. Splitting the Ninth Circuit in response to the Western states' burgeoning population and the Court's crushing caseload is simply the next logical step in this historical progression.

Consider the numerous Congressional actions in reorganizing the Circuit Court system over the years:

Congress first created three circuits for the first thirteen states: the Eastern, Middle, and Southern.

Thirteen years later, in 1802, Congress doubled the number of circuits to six, dividing several of the existing circuits in the process.

As the United States expanded in the 1800's, Congress created three more circuits and then reconfigured their boundaries in response to the nation's rapid growth. Indeed, Congress realigned the circuits *thirteen* times between the Founding and the end of the Civil War.

In 1866, Congress created the precursor to the present-day Ninth Circuit, grouping California, Oregon, and Nevada into a single judicial circuit. In 1891, the Evarts Act added Washington, Idaho, Montana, and the Territory of Alaska to the Ninth Circuit. Since that time, our Circuit's boundaries have remained unchanged, save for the later additions of Hawaii, Arizona, Guam, and the Northern Mariana Islands.

Throughout the rest of the country, circuit realignment continued during the twentieth century. Even the American Bar Association became involved, calling for circuit realignment in 1926 because changes in population and economic conditions, as well as in jurisdiction and volume of litigation, had resulted in "an unequal distribution of the work of the United States Courts of Appeal[s] for the several circuits." Congress answered the call in 1929, carving the Tenth Circuit out of the Eighth. Then, in 1948, the District of Columbia Circuit was carved out of the Fourth. Of course, most recently in 1981, the Eleventh Circuit was carved out of the Fifth.

My colleagues' response to the *Engage* article is to insist that Congress has been "chary" about re-drawing circuit lines. But the facts belie that view – Congress has reorganized circuits as required by the country's growth. Congress made the first alteration to the Circuit map in 1929, 38 years after its realignment by the Evarts Act. Nineteen years later, in 1948, Congress responded to change again, creating the D.C. Circuit. Fast-forward another thirty-three years and we have the creation of the Eleventh Circuit. Hopefully, you see the pattern.

Demographic shifts and population growths—the changing face of our country—prompt Congress to reconfigure circuits. Now, twenty-five years have passed since the last change; following the population and caseload explosion in the West, the time is right for Congress to carve a Twelfth and maybe even a Thirteenth Circuit out of the Ninth.

I should emphasize that I am not in favor of the haphazard, repeated redrawing of circuit lines. I believe that Congress should only revisit the structure of the circuit court system when warranted by specific demographic or administrative reasons. The process should be careful and deliberative. The historical record indicates that Congress's approach to this issue has been just that. No one argues that the past realignments were ill-advised or haphazard. Considering the massive changes in the West, I believe the evidence suggests that a split is inevitable for the Ninth.

But, my colleagues argue that Congress has never split a circuit contrary to the wishes of that circuit's judges. Well, there's a first time for everything. Congress has the clear duty and authority under the Constitution and, in this case, ample justification for splitting the Ninth Circuit, notwithstanding some internal opposition.

There is, of course, no constitutional justification for giving judges veto power over a circuit realignment that Congress believes is justified. According to Article III, Congress has the authority to "ordain and establish" inferior federal courts. There is no requirement that Congress give the judiciary opportunity to "advise and consent" or present the plan for the judiciary's signoff. To presume to demand Congressional action or inaction, in my view, is inconsistent with our system of government. More importantly, I believe the judges of the Ninth Circuit will simply be overruled, which I will explain a little later on.

To sum up this first argument, let me say that for two centuries Congress has consistently relied upon circuit realignment to ensure that the federal judiciary is not overwhelmed by population growth and caseload increases. Congress should respond to the long manifest demographic shift in the West by dividing the overburdened Ninth Circuit into smaller circuits that will be better able to administer justice effectively.

II

REASON TWO: Both Congressionally Appointed Commissions Have Recommended That the Ninth Circuit Be Restructured. In 1972, Congress

created the Commission on Revision of the Federal Court Appellate System to study the configuration of the Fifth and Ninth Circuit and the appellate courts' internal operating procedures. This Commission was chaired by Senator Roman Hruska and became known as the Hruska Commission. It recommended splitting the Ninth Circuit by dividing California and creating a northwest and southwest circuit and splitting the Fifth into what is now the Fifth and Eleventh Circuits. The Commission concluded that a restructuring of the Ninth Circuit was necessary because of delays in resolving appeals, the unwieldy number of Ninth Circuit judges (even at that time), and inconsistent resolution of appeals by different Ninth Circuit panels.

Unlike the Fifth Circuit, the Ninth Circuit's leadership rejected the Hruska Commission's recommendation, and it was, of course, never implemented. But the West continued its tremendous growth, and in 1997, the Senate unanimously passed a bill that would have created a new Twelfth Circuit out of the Ninth Circuit. The House requested further study of the realignment issue, so in late 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals. The Commission was chaired by retired Supreme Court Justice Byron R. White, and came to be known, not surprisingly, as the White Commission.

The White Commission recommended reorganizing the Ninth Circuit into three semi-autonomous regional units comprised of seven to eleven active circuit judges. It endorsed this restructuring because growth in the number of Ninth Circuit judges had impeded the effectiveness of the circuit's en banc process. The Commission specifically concluded that "the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals." Although the White Commission stopped short of recommending a formal "split" of the Ninth Circuit, the circuit's leadership was unwilling to countenance <u>any</u> change to the status quo and resoundingly rejected the Commission's report.

Curiously, split opponents, including my colleagues on the Court, emphasize that the White Commission did not recommend splitting the Circuit. They ignore, however, the White Commission's position that <u>restructuring was mandatory</u>. The White Commission's proposed structural changes were intended to avoid the necessity of a split. Critically, <u>the entire proposal was rejected, and nothing was done</u>.

It is ludicrous for split opponents to rely on the White Commission's conclusions to support their position—the Commission clearly identified problems

and recommended an extensive restructuring of the Circuit. I submit that split opponents are now acting like someone whose doctor tells him that, while he does not need open heart surgery right now, he must make serious lifestyle changes to avoid surgery in the future. Instead of changing his lifestyle, this person merely celebrates his good fortune at not needing immediate surgery. When reminded that the doctor prescribed a specific remedy to "fix" the looming problem, he remarks that "the doctor told me I don't need open heart surgery." I submit that we would find such an approach foolish in the extreme, but that is essentially the tack taken by split opponents. The 1998 White Commission's report diagnosed certain problems with the Ninth Circuit, but split opponents ignore them, choosing to focus on the almost irrelevant fact that the Commission stopped short of recommending an outright split.

At bottom, the White Commission report simply cannot be read as an endorsement of the status quo. Indeed, the Hruska and White Commissions together expended thousands of hours studying the Ninth Circuit's operations. In light of their collective expertise on matters of judicial administration, the onus, in my view, rests upon the split's opponents to rebut the conclusion of both Commissions that the Ninth Circuit must be reconfigured.

III

REASON THREE: The Large Number of Ninth Circuit Judges Inhibits Collegiality. The Ninth Circuit has twenty-eight authorized judgeships, while the average of the remaining circuits is but thirteen. Indeed, the Ninth Circuit has eleven more authorized judgeships than the next-largest circuit, the Fifth, and nearly five times more than the smallest circuit, the First, which has only six authorized judgeships.

This intercircuit disparity is exacerbated by the fact that there are also twenty-three senior judges serving on the Ninth Circuit, almost all of whom continue to hear cases regularly. The total number of Ninth Circuit judgeships (authorized and senior) stands at a staggering fifty-one. I find it significant that no other circuit has more than twenty-nine total judgeships, and the average among the other circuits is only twenty, making my full court two and a half times the average of all others and four times the size of the smallest circuit.

But even more disturbing, the Ninth Circuit's lengthy judicial roster has a detrimental effect on the court's decision-making process because it inhibits the development of collegiality and fosters fractiousness. The Ninth Circuit's judges

typically participate in eight, week-long three-judge panel sittings per year. Assuming that we sit with no visiting judges and no district judges—a mighty assumption given our history, where we often enlist such extra-circuit help to deal with the overwhelming workload—we might sit with approximately twenty of our colleagues on three-judge panels over the course of a year. That is less than half of the total number of judges on the court. Because the frequency with which any set of judges hears cases together is therefore quite low, it becomes difficult to establish effective working relationships in developing the law.

Many of my colleagues disagree with me, but this only emphasizes their selective use of the White Commission's findings. The White Commission perceptively observed, "One reason judges in larger decisional units have difficulty maintaining consistent law is that as the size of the unit increases, the opportunities the court's judges have to sit together decrease." Consistency of law in the appellate context requires an environment in which a reasonably small body of judges has the opportunity to sit and to conference together frequently. Such interaction enhances understanding of one another's reasoning and decreases the possibility of misinformation and misunderstandings.

My colleagues argue that the small size of the Supreme Court during the past eleven years undercuts my argument. I would wager that misinformation and misunderstanding were rare occurrences at the Supreme Court during the past eleven years. The members of the Court were, without question, intimately familiar with one another's reasoning. That they disagreed, vehemently at times, is not the point. I have not and do not claim that a smaller court will always be unanimous or will always agree.

Unlike a legislature, a court is expected to speak with one consistent, authoritative voice in declaring the law. But the Ninth Circuit's vast size hinders this process and encourages disparity, creating the danger that its deliberations will resemble those of a legislative—rather than a judicial—body.

For the sake of comparison, consider the average state senate. Including Nebraska's unicameral legislature, the average state senate consists of 39 senators, with a median size of 38. Six states have fewer than 30 senators, and twenty-one states have 35 or fewer. A whopping forty-five states have fewer state senators than the Ninth Circuit has total judges.

With 28 authorized judgeships, and 51 total judgeships, the number of judges on the Ninth Circuit approaches and exceeds the size of the average state senate. With seven additional judgeships slated for addition to the Circuit, the number of active judgeships would rise to 35, and the total to almost 60. In my

view, a court that size looks astonishingly like a legislative body, and has little choice but to act like one.

IV

REASON FOUR: The Ninth Circuit Encompasses Nearly Forty Percent of the Total Land Mass of the United States. The geographical size of the Ninth Circuit militates in favor of a split. The Circuit covers an enormous geographical expanse. It stretches from the Rocky Mountains and the Great Plains along its eastern border to the Philippine Sea and the Northern Mariana islands and Guam in the west, from the Mexican Border and the Sonoran Desert in the south to the Bering Strait and the Arctic Ocean in the north. Because most cases are heard in Pasadena and San Francisco, and the rest spread over Honolulu, Portland, Seattle, and Anchorage, the circuit's vast geographic reach creates significant travel costs (and inefficiency) for those judges who must routinely travel to California from such distant locations as Billings, Montana, and Fairbanks, Alaska. The travel requirements for being a judge in the circuit are sometimes taxing, and the expense, inefficiency, and hassle of those requirements could be reduced by splitting the circuit.

Counter-intuitively, my colleagues complain that, post-split, travel would become a nightmare for judges traveling to Seattle, Portland, or Missoula. But judges from the entire circuit, including the southern parts, routinely travel to Portland and Seattle for oral argument and court meetings. To date, I have heard no complaints about the difficulty in getting to those cities and see no reason that a split would create such complaints.

Further, although a split would authorize additional argument sites, like Missoula, Montana, some judges who now travel for every oral argument calendar would frequently remain in their home states to hear cases. Under the current system, Arizona, for example, is one of four states without an authorized site for oral argument, meaning attorneys and judges from Arizona must travel out-of-state for argument. With Arizona's recent growth, it makes no sense to force litigants and judges to travel out of state for their federal appeals to be heard, particularly when the state accounts for the third-most appeals in the Circuit, next to California and Washington. The split proposals remedy this situation. In sum, I refuse to accept the idea that a split could exacerbate travel problems.

Even putting aside the sheer geographical enormity of the present Ninth Circuit, population size also weighs in favor of a split. It is astounding to realize

that fully one-fifth of our nation's population—over fifty-eight million people—lives within the Ninth Circuit's expansive borders. The average of all the other circuits is around 22 million, and this substantial gap between the Ninth Circuit's population and that of its counterparts is steadily increasing. Of the ten fastest-growing cities of over 100,000 residents, seven are located in the Ninth Circuit.

There are few discernible geographic, economic, or social features that bind together the circuit's diverse states and territories. The northwestern states of Oregon, Washington, and Alaska, for example, have much more in common with each other than they do with Arizona and Nevada. Even within California, the northern half and southern half of the states are markedly different, as even residents will tell you. Despite its diversity, the Ninth Circuit is dominated, for all intents and purposes, by one state: California. The Golden State accounts for nearly seventy percent of all appeals filed within the circuit; no other state contributes even ten percent of the circuit's filings.

Because the court's docket is dominated by cases that originate in California, Ninth Circuit judges are much more familiar with California law than with that of, say, Montana or Idaho. The division of the Ninth Circuit into two or three smaller circuits would create cohesive judicial units where judges would be able to become intimately familiar with the laws of all states from which they receive filings.

My colleagues insist that "any circuit that includes California will always be the largest circuit in the country, and the one with the greatest caseload." I submit that this is no reason to oppose splitting California off into a proportionally smaller circuit. The truth remains that the size of the circuit containing California <u>can be</u> smaller than it is today. California's unique character, from a caseload and population standpoint, should compel us to treat the state as an exceptional case. There is no logical reason that California and Hawaii cannot be in a separate circuit that would be larger than every other circuit; maybe California should be a circuit by itself. Opponents, however, insist that creating a circuit of fewer than three states is contrary to tradition and precedent. (They seem to ignore the D.C. Circuit, which contains <u>no</u> states and only one district court.) Opponents claim that the split endangers "the regional and national character of our court," but I remain convinced that my colleagues will continue to uphold their judicial oaths and will not allow the interests of the state in which they reside to influence their approach. I do not believe any federal appellate judge in the country would disagree.

It is also curious that split opponents are selective about the traditions they regard as important. In the recent past, it was accepted tradition that an appellate court should never have more than nine judges. As the Ninth Circuit marches towards a court of 35 active judges, my colleagues display no regret over the death of that particular tradition, calling any attempt to "keep the number of appellate judges small" "a pipe dream." May I suggest that the same applies to their beloved "three-state" rule.

V

REASON FIVE: The Ninth Circuit's Caseload Has Become Unmanageable. During 2005, there were 16,109 appeals filed in the Ninth Circuit. To provide some perspective, the Ninth Circuit received over 7,000 more filings than the next-busiest circuit, the Fifth, and more than triple the average of all other circuits. This means that over 23% of the total appeals filed nationwide are filed in only one of the twelve regional circuits.

Because of this staggering workload, the Ninth Circuit is now the slowest circuit in the nation. It now takes over 16 months from the filing of a notice of appeal until the appeal is resolved. My colleagues point out that we are prompt in deciding a case once it is submitted to the judges. But the only measure litigants care about is the total length of time it takes to have their appeals resolved.

Unfortunately, the Circuit's backlog of cases continues to grow, guaranteeing that the delay in resolving appeals will only increase. In the twelve months ending September 30, 2005, pending cases increased almost 20%, an increase of over 2,600 cases from the same period ending in 2004. With no reason to expect a change, I expect this trend to continue unabated during the 2006 fiscal year.

Some split opponents argue that judicial vacancies are to blame for the delays, that once the four vacancies on the Circuit are filled, the delays will disappear. But delay is not the only problem created by the crushing caseload. The vast number of cases compromises judges' ability to keep current on the law of the circuit. In addition to handling his or her own share of 16,000 annual cases, each Ninth Circuit judge is faced with the daunting task of reviewing all of his or her colleagues' published opinions—not to mention all the opinions issued by the Supreme Court—along with the relevant public and academic commentary. This endeavor strains the capacity of even the most efficient judges.

Moreover, if we heard fewer cases, three-judge panels could circulate

opinions to the entire court before publication, which is the practice of many other appellate courts. Pre-circulation not only prevents intra-circuit conflicts, it also fosters a greater awareness of the body of law created by the court. As it now stands, I read the full opinions of my court no earlier than the public does—and frequently later, and often not at all, which can lead to some unpleasant surprises. In addition to the published opinions, the Court issues four times that number in unpublished dispositions, which must also be reviewed to ensure that the law is being consistently and correctly applied.

The near impossibility of comprehensively monitoring the law of the circuit greatly increases the likelihood that different panels of Ninth Circuit judges will reach divergent conclusions about the same legal issue, one of the dangers identified by the White Commission. Indeed, when the Justice Department recently formally endorsed splitting the Ninth Circuit, it cited specific inconsistent Ninth Circuit dispositions in justifying its position. Filling vacancies cannot and will not make it easier to keep up with the court's caseload.

The overriding interest in the timely disposition of appeals and the consistent resolution of recurring legal issues therefore weighs strongly in favor of restructuring the Ninth Circuit.

VI

REASON SIX: The Ninth Circuit's Caseload Is Increasing More Rapidly Than Any Other Circuit's. Since 1998, the year of the White Commission Report, the Ninth Circuit's caseload has increased 75%, five times greater than the average caseload growth of the remaining circuits. This rapid increase in case filings is attributable not only to the Ninth Circuit's steady population growth but also to the Board of Immigration Appeals' decision to streamline its appellate process, which has drastically multiplied the number of petitions for review filed in the Ninth Circuit. BIA appeals account for over 6,500 of the Ninth Circuit's 16,000 appeals over the past 12 months—over 40% of the Circuit's total docket.

Because it is impossible for the Ninth Circuit to accommodate the present rate of near-geometric growth, the operational shortcomings occasioned by the court's already oppressive workload will only grow worse in the next few years. Indeed, if the current rate of growth in Ninth Circuit filings continues, the court will be burdened with almost 29,000 annual filings in 2010, which would represent over one thousand appeals for each active judge currently on the court.

Such an overwhelming number of filings would truly bring the wheels of appellate justice to a halt in the western United States.

VII

REASON SEVEN: The Ninth Circuit Is Using Questionable Procedural Shortcuts to Ease Its Caseload Crisis. In response to the burgeoning caseload, the Ninth Circuit has developed a number of procedural innovations to facilitate the efficient resolution of appeals. While I commend our Chief Judge and Clerk of Court for instituting these measures, there are limitations—both practical and constitutional—to what such innovations can accomplish.

An excessive reliance upon procedural shortcuts creates the possibility that important judicial decisions will be taken out of Article III judges' hands and delegated to court staff who lack a constitutional mandate. For example, one of the circuit's principal procedural innovations is the use of oral and written screening panels to dispose of uncomplicated appeals on the basis of dispositions prepared by staff attorneys. I have the utmost confidence in the legal abilities of our staff attorneys and endorse the judicious use of such screening panels. I worry, however, that—in an effort to cope with our unmanageable workload—the circuit may soon be forced to ask staff attorneys to undertake responsibilities that properly rest with Article III judges appointed by the President and confirmed by the Senate.

Moreover, as the Ninth Circuit's filings have increased, the court has begun to resort more frequently to the use of unpublished memorandum dispositions, soon to become precedential! There is, of course, nothing wrong with resolving a straightforward case through a memorandum disposition. It is possible, however, that the court is beginning to place too much reliance upon such unpublished dispositions and that—as a result of recent caseload pressures—the court is more regularly issuing memorandum dispositions in cases that warrant a fully-reasoned, published opinion.

VIII

REASON EIGHT: The Ninth Circuit's Limited En Banc Process Inhibits the Resolution of Intracircuit Conflicts. Because it was deemed impractical for all twenty-eight active judges to sit together to rehear cases en banc, the Ninth Circuit uses a limited en banc procedure whereby a randomly

selected panel (formerly eleven, now fifteen) judges decides cases taken en banc. If, as my colleagues argue, the limited en banc panels are no less legitimate than a three-judge panel deciding cases, then I wonder why the Court did not, for the sake of efficient use of judicial resources, decrease the number of judges on the panel. Why not reduce the size of the panel to nine or seven or five? Significantly, no other circuit uses such a nontraditional en banc procedure, and the Eleventh Circuit has declined new judgeships specifically to avoid having to make use of such a procedure.

At bottom, the Ninth Circuit's limited en banc process enables a minority of circuit judges to make law for the entire circuit and leads to unrepresentative results. In many cases, if two different groups of Ninth Circuit judges were randomly selected to hear a case, the two groups might resolve the case differently. This actually happened in *Payton v. Woodford*, in which seven judges, two from the original panel and five from the en banc panel, reached a result conflicting with that reached by six judges, a majority of the en banc panel. There, six judges bound our circuit when seven were on record to the contrary. Thankfully, the Supreme Court eventually reversed *Payton*, but it could happen again.

Dividing the Ninth Circuit would create smaller circuits that—like all other circuits—could more readily convene en banc courts comprised of all active judges. Use of that traditional procedure would enable the reconfigured circuits to issue en banc decisions that truly represent the views of the entire court.

IX

REASON NINE: A Significant Number of Federal Judges Support Splitting the Ninth Circuit. Despite my opponents' protestations, there is substantial support among federal judges for a restructuring of the Ninth Circuit. Including myself, there are nine Ninth Circuit judges who publicly support splitting the circuit: Judges Sneed, Hall and Fernandez from California, Beezer and Tallman from Washington, T.G. Nelson and Trott from Idaho, and Kleinfeld from Alaska. Moreover, Judge Rymer (California), who served on the White Commission, is on record as stating that our Court of Appeals is too large to function effectively. Even though split opponents may outnumber us, we have the important votes.

Four Supreme Court Justices publicly endorsed restructuring of the circuit. Justices Stevens, O'Connor, Scalia, and Kennedy each wrote to the White

Commission, stating that they were "all of the opinion that it is time for a change." Consider the White Commission's account of the Justices views:

> [T]he Justices expressed concern about the ability of judges on the Ninth Circuit Court of Appeals to keep abreast of the court's jurisprudence and about the risk of intracircuit conflicts in a court with an output as large as that court's. Some expressed concern about the adequacy of the Ninth Circuit's en banc process to resolve intracircuit conflicts.

Additionally, the late Chief Justice Rehnquist endorsed the White Commission's restructuring proposal, stating that he shared the concerns of the other justices. The views of these federal judges, among many others, are based upon years of collective judicial experience, and they should not be lightly discounted. It bears emphasizing the fact that the two Justices from the West, Justice O'Connor from Arizona and Justice Kennedy, who served on the Ninth Circuit, favor a change in the Ninth Circuit's configuration. And of course, as I alluded to earlier, in my view, five votes from the Supreme Court trump the views of even thirty-three Ninth Circuit judges. Make no mistake, these five justices were familiar with the Ninth Circuit's problems — the Supreme Court has unanimously reversed the Ninth Circuit in written opinions over fifty times in just the last few years. Although we have two new Supreme Court Justices, including a new Chief Justice, I find it significant that five Justices, including those labeled conservative, moderate, and liberal, believed even in 1998, before the Circuit's caseload broke 10,000 cases, that change was necessary. Perhaps even more significant, no Justice has endorsed my colleagues' view.

It is also important to emphasize that federal judges throughout the country, as well as District Judges within the Ninth Circuit, support splitting the Ninth Circuit. Their views must also be considered, for we are dealing with a unified federal appellate system, not with random principalities. What benefits the federal court system, not solely the Ninth Circuit, must be the dominant factor in any analysis of the inevitable split. We should ask, based on the hard numbers, whether it is a good thing to have 23% of all case filings and 20% of the nation's population in just one of twelve regional circuits. We should value the views of those Justices who oversee the work of the Circuits and of other judges within the entire system.

X

REASON TEN: There Is A Viable Split Bill Currently Pending In Congress. Many members of Congress, including Representative F. James Sensenbrenner, Chairman of the House Judiciary Committee, have publicly expressed concerns about the Ninth Circuit's ability to operate effectively. Last year, there were no less than five different split bills offering comprehensive solutions to the Ninth Circuit's difficulties, the most active being HR 4093. The House inserted HR 4093 into budget reconciliation legislation at year's end that would have created a new Twelfth Circuit comprised of Alaska, Arizona, Idaho, Oregon, Nevada, Montana, and Washington. The "new Ninth" Circuit would include Hawaii, California, Guam, and the Northern Marianas. The bill would also create seven new California-based judgeships, five permanent and two temporary. (By the way, these judgeships might not be needed if Congress passes Senator Specter's immigration bill, removing over 6,500 immigration appeals from the Ninth Circuit's plate and reassigning them to the Federal Circuit. Unfortunately, as has become a predictable response to Congressional judicial initiatives, Chief Judge Schroeder has come out in opposition to this proposal as well—one that would reduce the circuit's caseload by over 40% and ease the mounting burden on the Second and Fifth Circuits as well.)

Some opponents argue that a split would give judges in the new Twelfth circuit "the luxury of a reduced caseload," while requiring the addition of many more California-based judgeships to the new Ninth. But under the current proposal, circuit judges in the new Twelfth would have a caseload larger than that of their counterparts in the First, Third, Sixth, Tenth, and D.C. Circuits. Meanwhile, considering the new judgeships proposed for the "new" Ninth Circuit, my colleagues who remain in the circuit would also have smaller workloads—smaller than those handled by judges on the Second, Fifth, and Eleventh Circuits. Hardly "luxurious" for any judge, the redistributed workloads would be an improvement for everyone involved—most importantly the litigants, who will benefit from judges with more time to dedicate to their cases.

I have previously avoided stating a preference among the various restructuring proposals (except the Hruska Commission alternative) that have been put forward since I joined the Court. Although it is not my ideal choice, I do believe that HR 4093, if enacted, would immeasurably improve the administration of justice in the Western United States and would remedy many of the operational shortcomings that currently plague my court. If Congress is willing to act, the

judiciary, including judges in the Ninth Circuit, should not stand in its way.

CONCLUSION

In conclusion, let me reiterate my sincerest belief that the Ninth Circuit Court of Appeals can no longer withstand the pressures being exerted upon it by unrelenting caseload growth. A restructuring of the circuit is inevitable. It is my hope that my colleagues who oppose a split will, rather, participate in planning the circuit's future in the hope that we can find the most effective means of implementing a proper restructuring. Without their input, the split we get may be less than ideal.

Thank you. I welcome your questions.