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SPLITTING THE NINTH CIRCUIT AND PREPARING FOR THE FUTURE – A PROPOSAL FOR A FEDERAL BUSINESS COURT

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And yet there is something to the notion of western independence; there is something about living in big empty space, where people are few and distant, under a great sky that is alternately serene and furious, exposed to sun from four in the morning till nine at night, and the wind that never seems to rest —there is something about exposure to that big country that not only tells an individual how small he is, but steadily tells him who he is.

-Wallace Stegner, *Where the Bluebird Sings to the Lemonade Springs*[1]

I. INTRODUCTION

The burgeoning of economic development in the western United States has resulted in a Ninth Circuit that is too large by several measures—geographical size, case load, and number of judges. The western United States has evolved since the creation of the Ninth Circuit.[2] The Ninth Circuit needs to change to reflect the progress within its jurisdiction.

The burden the size of the Ninth Circuit places on those responsible for its administration of justice, and those subject to its jurisdiction, cannot be tolerated. The Ninth Circuit is a behemoth compared to the other circuits.[3] Because of its large geographical footprint, which encompasses nine states—Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington—and two territories—Guam and the Northern Mariana Islands, its large caseloads, and its substantial number of judges, the Ninth Circuit is the most burdened circuit.[4]

This Comment suggests that due to the evolution of the economy in the western United States, the Ninth Circuit has developed into an overwhelmed circuit, which threatens to create serious consequences to our federal judicial system.[5] These consequences include increased caseload pressure on judges, backlogged dockets, and slow and inconsistent administration of justice for its constituents.[6] This

[1] WALLACE STEGNER, WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRINGS 9–10 (1992).

[2] *See* discussion *infra* Part II.B.

[3] Kimberly Strawbridge Robinson & Christina Brady, *Heavy Caseload to Blame for Ninth Circuit's Bad Rap*, BLOOMBERG L. (May 3, 2018), https://www.bna.com/heavy-caseload-blame-n57982092471/.

[4] *What is the Ninth Circuit?*, U.S. CTS. FOR THE NINTH CIR., https://www.ca9.uscourts.gov/judicial_council/what_is_the_ninth_circuit.php (last visited Mar. 4, 2019).

[5] *See infra* Part II.

[6] *See infra* Part II.B.

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Comment recommends that these consequences should be remedied by splitting the Ninth Circuit into at least two circuits.[7]

In addition to splitting the Ninth Circuit, this Comment proposes an optional intra-circuit Federal Business Court in hopes to prolong the beneficial effects of splitting the Ninth Circuit.[8] The Ninth Circuit is seen as a circuit of judicial experimentation.[9] A Federal Business Court would be a superb instrument to experiment within a new smaller Ninth Circuit.

Part II of this Comment presents an overview of the history of the economy of the western United States and how it relates to the history of the Ninth Circuit.[10] The use of "the West" or "Western" within this Comment is used to signify the western United States. Part III analyzes the proposed solutions to the problems the Ninth Circuit faces from esteemed academics, judges, and this author.[11] One of the many hopes for this Comment is that it will reignite the debate about splitting the Ninth Circuit. In that spirit, Part IV considers arguments that refute the proposals presented in this Comment.[12] Finally, Part V concludes by summarizing the overall likelihood of and offers perspective on a Federal Circuit with a new Ninth and Twelfth Circuits.[13]

II. HISTORY OF THE WESTERN UNITED STATES ECONOMY

A. Burgeoning Business in the West

1. It all began with the Gold Rush

The majority of economic growth in the West occurred along the Pacific coast.[14] For this reason, this discussion of the history of the western economy will concentrate heavily on the states of California and Washington.

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[7] *See infra* Part III.A.

[8] This Comment is limited to the scope of the business world. Though there are many other valid options for specialized courts such as a Veterans court, Family law court, or Employment Discrimination court, this Comment only concentrates on the idea of a specialized business court.

[9] *See* Shay Lavie, *Appellate Courts and Caseload Pressure*, 27 STAN. L. & POL'Y REV. 57, 61 (2016).

[10] *See infra* Part II.

[11] *See infra* Part III.

[12] *See infra* Part IV.

[13] *See infra* Part V.

[14] *See* Alexander E.M. Hess & Michael Sauter, *Top States with the Fastest Growing Economies*, USA TODAY (June 15, 2013, 8:03 AM), https://www.usatoday.com/story/money/business/2013/06/15/states-with-the-fastest-growing-economies/2416239/.

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California gained its statehood in the United States at the peak of the Gold Rush in 1850.[15] The Gold Rush began on January 24, 1848, with the initial discovery of gold at Sutter's Mill in Coloma, California.[16] This resulted in a population boom that would define the West's economy.[17] The city of San Francisco became the world's fastest growing city in this time period with its population increasing from 812 in 1848 to 25,000 by 1850.[18]

The impeccable timing of the Gold Rush was pivotal for the economic development in the West. With the signing of the Treaty of Guadalupe Hidalgo in 1848, which ended the conflict between the United States and Mexico,[19] and the beginning of the Industrial Revolution,[20] the West was ready to boom. These events combined with the Gold Rush's instigation of an exploding population in the West created a high demand for goods, food, finance, and entrepreneurship.[21]

The Gold Rush drew people from all over the country and the world.[22] These emigrants came to the West not only for the potential of striking gold, but to also exploit the needs of those in search of gold.[23] Some examples are Domingo Ghirardelli, the Italian chocolate maker; Levi Strauss, the denim producer; and William Bovee, founder of Folgers Coffee.[24] All of these individuals would likely not have

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[15] John F. Burns, *Taming the Elephant: An Introduction to California's Statehood and Constitutional Era*, *in* TAMING THE ELEPHANT: POLITICS, GOVERNMENT, AND LAW IN PIONEER CALIFORNIA 1, 12 (John F. Burns & Richard J. Orsi eds., Univ. of Calif. Press 2003); *see generally* Gerald D. Nash, *A Veritable Revolution: The Global Economic Significance of the California Gold Rush*, *in* A GOLDEN STATE: MINING AND ECONOMIC DEVELOPMENT IN GOLD RUSH CALIFORNIA 276, 287 (James J. Rawls & Richard J. Orsi eds, Univ. or Calif. Press 1999).

[16] Douglas Watson, *Herald of the Gold Rush: Sam Brannan*, *in* 10 THE CALIFORNIA HISTORICAL SOCIETY QUARTERLY 298, 299 (1931).

[17] *See generally* David J. St. Clair, *The Gold Rush and the Beginnings of California Industry, in* A GOLDEN STATE: MINING AND ECONOMIC DEVELOPMENT IN GOLD RUSH CALIFORNIA 185, 187 (James J. Rawls & Richard J. Orsi eds, Univ. or Calif. Press 1999).

[18] *Id.*

[19] Burns, *supra* note 15, at 4 (The treaty added an additional 525,000 square miles to United States territory, including the land that makes up all or parts of present-day Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming).

[20] Nash, *supra* note 15, at 276.

[21] *See generally* St. Clair, *supra* note 17, at 193–203 (describing the effect of the Gold Rush on the West).

[22] *See* Nash, *supra* note 15, at 285–86.

[23] *Id.*

[24] St. Clair, *supra* note 17, at 195–96 (also including Claus Spreckels of Spreckles Sugar Company; Shilling Spices; and the automobile pioneers, the Studebaker brothers).

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traveled west but for the Gold Rush.[25] As Mark Twain famously said, "[d]uring the gold rush, it's a good time to be in the pick and shovel business."[26]

The Gold Rush ended just seven short years later in 1855.[27] What may be more impressive, than the Gold Rush itself, was the ability of the West's economy to adjust quickly after the Gold Rush.[28] As the mining industry declined, agriculture naturally grew.[29] From 1855 to 1880, the new, large, and spread-out population began to nucleate.[30] During the Gold Rush, small settlements that did not have enough time to develop into towns disappeared while settlements that created more of a purpose than just supporting mining flourished.[31] By 1920, the mining industry virtually disappeared, and the agricultural industry, including lumber, dominated.[32]

2. Through the Wars to the Valley: The American West in the Twentieth Century

The American West's economy was sustained and advanced through military spending from the World Wars up to the Cold War.[33] For example, Boeing, which found its beginnings in Seattle, Washington,[34] received millions of dollars to create and manufacture its planes like the B-17 and B-52 during these contentious eras.[35] Silicon Valley found its roots in the creation of the Federal Telegraph

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[25] *See id.* at 196. (discussing how various industries were affected by the gold rush).

[26] *A "Pick and Shovel" Play on Gold Miners,* U.S. GLOBAL ETFS, https://www.usglobaletfs.com/insights/a-pick-and-shovel-play-on-gold-miners/ (last visited Mar. 4, 2019) (quoting Mark Twain).

[27] Lary M. Dilsaver, *After the Gold Rush*, 75 GEOGRAPHICAL REV. 1, 2 (1985).

[28] *See generally id.* at 2–4 (explaining the economic revolution that occurred after the gold rush).

[29] *Id.* at 8.

[30] *Id.* at 9.

[31] *Id.* at 9.

[32] *Id.* at 15–17.

[33] MANSEL G. BLACKFORD, PATHWAYS TO THE PRESENT: U.S. DEVELOPMENT AND ITS CONSEQUENCES IN THE PACIFIC 63 (2007); *see also A Brief History of Washington's Economy*, WASH. STATE DEPT. OF COMMERCE, http://choosewashingtonstate.com/research-resources/about-washington/brief-state-history/ (last visited Mar. 4, 2019).

[34] Brad Smith & Jon Fine, *How Boeing Has Helped Washington State Thrive*, SEATTLE TIMES (July 15, 2016, 8:03 AM), https://www.seattletimes.com/opinion/how-boeing-has-helped-washington-state-thrive/.

[35] Sutton Gustison, *The Boeing Story*, 45 PAC. NW. QUARTERLY 41, 44–46 (1954).

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Corporation (FTC), a company formed by engineers, businessmen, and the president of Stanford University in the early 1900s.[36] The FTC created new ways for the U.S. Navy to send messages during World War I.[37] A strong relationship between industry and academia assisted in supplying the West Coast with a work force equipped for high-technology fields.[38] The government became known as the "'angel' of Silicon Valley"[39] by providing the demand and funds needed to support a growing technology industry and a large supply of tech-trained engineers. As a result, the West Coast was able to develop into the hub of the technology industry it is today.[40]

The spirit of entrepreneurship has brought the West from its rugged beginnings to an industrialized powerhouse over the past 270 years.[41] The Gold Rush quickly drew a large new population into the West, which provided the resources needed to stabilize the West with agriculture and technology.[42] Unfortunately, the systemic structure of the Ninth Circuit carries with it the remnants of the rugged West. The geographic area within the Ninth Circuit has evolved over time. It is vital that the structure of the Ninth Circuit not hinder the development in the West.

B. History of the Ninth Circuit

Beginning in the 1850s, the blossoming economy of the West attracted a growing population.[43] While the Ninth Circuit was initially the least populous circuit, its burgeoning growth has created more litigation.[44] This section analyzes the development of the Ninth Circuit by looking at the decisions made to adapt to the evolving region. These decisions have resulted in the Ninth Circuit we have today—plagued with an overburdened docket, an overly expansive geographic jurisdiction, and other procedural downfalls.[45] This section begins with

[36] BLACKFORD, *supra* note 33, at 65.

[37] *Id.*

[38] *Id.* at 65–66. The father of Silicon Valley.

[39] *Id.* at 67.

[40] *See id.*

[41] *See id.*

[42] *See infra* text accompanying note 43.

[43] Lyman Stone, *A Brief History of California Migration: 160 Years of Migration Data in the Golden State*, MEDIUM.COM (Feb. 23, 2016), https://medium.com/migration-issues/a-brief-history-of-californian-migration-7fe7653ca0d.

[44] Olivia B. Waxman, *The History Behind President Trump's Problem with the Ninth Circuit Court*, TIME (Apr. 27, 2017), http://time.com/4758187/donald-trump-ninth-circuit-history/.

[45] *Id.*

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a brief history of the Ninth Circuit followed by a discussion of the difficulties the Court has faced and solutions used in failed attempts to resolve them.

1. In the Beginning

At its founding in 1850, the State of California had two district courts—the Northern District and Southern District.[46] In 1855, Congress created the Circuit Court of the United States for the districts of California.[47] In 1863, this court was abolished and California and Oregon became part of the Tenth Circuit.[48] However, after the Civil War, Congressional Republicans saw their hold on the courts slipping away.[49] To remedy this, Congress passed the Judicial Circuits Act of 1866.[50] The 1866 legislation created the Ninth Circuit and ensured that the Fifth Circuit was the only circuit exclusively composed of confederate states.[51] This new Ninth Circuit, the same circuit we debate today, initially only consisted of California, Nevada, and Oregon.[52]

The Evarts Act of 1891, also known as the Judicial Act of 1891, created the structure of the modern day United States Circuit Courts of Appeals.[53] With an overbearing docket at the Supreme Court, Congress provided the courts of appeals with the powers to take on many of the cases clogging the Supreme Court.[54] This Act created the authority for a panel of three judges to hear virtually all types of cases from district and circuit courts.[55] As time progressed, the Supreme Court's jurisdiction became increasingly discretionary, while the courts of appeals heard the mandatory appeals once heard by the Supreme

[46] *U.S. District Courts for the Districts of California: Judicial District Organization, 1850-Present*, FED. JUD. CNTR., https://www.fjc.gov/history/courts/u.s.-district-courts-districts-california-judicial-district-organization-1850-present (last visited Mar. 4, 2019).

[47] Act of Mar. 2, 1855, ch. 142, 10 Stat. 631.

[48] Act of Mar. 3, 1863, ch. 100, 12 Stat. 794.

[49] Philip S. Bonforte, *Pushing Boundaries: The Role of Politics in Districting the Federal Circuit System*, 6 SETON HALL CIR. REV. 29, 39 (2009); *see also* Stanley Kutler, *Reconstruction and the Supreme Court: The Numbers Game Reconsidered*, 32 J. OF SOUTHERN HIST. 42, 42 (1966).

[50] Kutler, *supra* note 49, at 45; *see also* Judicial Circuits Act of 1866, ch. 210, 14 Stat. 209.

[51] Kutler, *supra* note 49, at 56.

[52] Judicial Circuits Act of 1866, ch. 210, 14 Stat. 209.

[53] Eric Gribbin, Note, *California Split: A Plan to Divide the Ninth Circuit*, 47 DUKE L.J. 351, 368–69 (1997).

[54] *Id.*

[55] *Id.*

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Court.[56] Today, the attention of the courts of appeals is in high demand making a large and populous circuit that much more inefficient for its constituents.[57]

2. Difficulties for the Ninth Circuit

Even before the Evarts Act, there was concern that the Ninth Circuit was too large.[58] Frank Stone, a San Francisco attorney, wrote to the Senate Judiciary Committee of the 51st Congress arguing that the size of the Ninth Circuit "would be more than any one such court of appeals … could possibly attend to without the business running behind, and the calendar becoming clogged, if such circuit judges attended to nothing but the appeals, and sat as a court of appeals."[59] The argument in favor of splitting the Ninth Circuit is not new and is a recurring proposal.[60]

There are numerous reasons for this suggestion. The three fundamental issues the Ninth Circuit faces are its: (1) large geographic size; (2) increasing case load; and (3) significant number of judges, which hinder judicial efficiency.[61] These issues have resulted in slow case resolution, an inhibition of collegiality among judges, and inconsistencies in the application of the law.[62]

The Ninth Circuit's geographic footprint accounts for almost forty percent of the total land mass of the United States.[63] From the foundation of the Ninth Circuit, this footprint has imposed a significant travel burden on judges and litigants.[64] This burden did not lessen as states and territories were added to the Circuit.[65] At times, judges in the Ninth Circuit are required to travel long distances to locations like

[56] Martha J. Dragich, *Once A Century: Time for A Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 21–22 (1996).

[57] Stephen G. Calabresi, *The Federal Courts Are Overworked and Need to Be Expanded*, NAT'L REV. (Nov. 29, 2017, 8:15 PM), https://www.nationalreview.com/2017/11/federal-court-expansion-republicans-courts/.

[58] DAVID C. FREDERICK, RUGGED JUSTICE: THE NINTH CIRCUIT COURT OF APPEALS AND THE AMERICAN WEST, 1891-1941, at 216 (1994).

[59] *Id.* at 216–17.

[60] *See id.* (describing the ongoing debate over whether to divide the Ninth Circuit).

[61] *Id.* at 216–17, 219.

[62] *Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems, Hearing Before the Subcomm. on Privacy, Tech. and the Law of the S. Comm. on the Judiciary*, 115th Cong. 7–13 (2017) (statement of J. Richard C. Tallman, United States Circuit J., Court of Appeals for the Ninth Circuit).

[63] Diarmuid F. O'Scannlain, *Ten Reasons Why the Ninth Circuit Should Be Split*, 6 ENGAGE, no. 2, 2005, at 58, 60.

[64] FREDERICK, *supra* note 58, at 228.

[65] *See* O'Scannlain, *supra* note 63, at 58.

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Guam, Alaska, and Hawaii.[66] These travel expenses burden the operational efficiency of the Circuit.[67]

With the Circuit's large geographical size comes a large population.[68] Though it is not a rule that a large land mass equates to a large population, the diversity and robustness of the Western economy has enabled the Ninth Circuit to enjoy its large population.[69] The Census Bureau estimates that the Ninth Circuit makes up over twenty percent of the United States' population.[70] With one in five United States citizens under the jurisdiction of the Ninth Circuit, the Circuit surpasses the Eleventh Circuit—the next most populous circuit—by nearly thirty million people.[71]

A large population not only increases the case load for the Circuit, but it also inhibits constituents from being as well represented in the Circuit as others in the country are in their circuits.[72] The state of Arizona is an example of a population that is not well represented within its circuit.[73] It is tradition for three judges on the Ninth Circuit to sit in Arizona.[74] This means that only ten percent of the judges in the Circuit live, know, and understand Arizona's culture.[75] This problem is rooted

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[66] Frank Tamulonis III, Comment, *Splitting the Ninth Circuit: An Administrative Necessity or Environmental Gerrymandering?*, 112 PENN ST. L. REV. 859, 862 (2008).

[67] *Id.*

[68] *Id.* at 861.

[69] *Cf. id.* at 861 (illustrating that the abundance of open land and natural resources transformed the area enabled the population to grow).

[70] *See QuickFacts Chart*, CENSUS BUREAU (July 1, 2018), https://www.census.gov/quickfacts/geo/chart/US/PST045218#PST045218.

[71] *See id.*

[72] *See generally* Paul Charton & Stephen Richer, *Splitting the Ninth Circuit: A Pro-Con Debate*, ARIZ. ATT'Y, July–Aug. 2017, at 34, 36–39. Though it is atypical to think of the judiciary as a means of representation for a people, it may be important to certain cases that the presiding judges understand the culture and importance of the issues at hand. *Id.* at 38. At the very least, it is comforting to those within the jurisdiction that their judge is best situated to understand their circumstances because that judge lives near them. *Id.*

[73] *Id.* at 34–36.

[74] *Id.*

[75] *Id.* To provide greater standing on their argument, the authors conducted a statistical comparison. *Id.* ("In order to compare apples to apples, we calculated Arizona's percent representation in its circuit court (three out of 29, 10.3%) with its percentage of the country's population (2.1%). This yields a ratio of approximately 4.8 to 1--that is 4.8 percentage points of representation within a circuit court for every one percent of the country's population. This is third lowest (worst represented) ratio of all states. Compare Arizona with, for example, Louisiana. Louisiana has approximately 4.68 million people, yet it has five of the 17 judges in the Fifth Circuit. Or compare Arizona with Connecticut. Like Arizona, Connecticut is home to three circuit court judges. But the Second Circuit in which Connecticut

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in the vestiges of the treatment of the West as a singular entity. As the West industrialized, those responsible for the Ninth Circuit's development should have responded by dividing the Circuit to allow for the new courts to manage the evolving nuances in each geographic area.

As previously discussed, the caseload of the Ninth Circuit exceeds what it should be allowed to hold.[76] From June 30, 2017 to June 30, 2018, 10,661 cases originated in the Ninth Circuit.[77] In that same time frame, 49,220 cases commenced for the entire U.S. Courts of Appeals.[78] These statistics reflect the same population statistics previously cited.[79] The Ninth Circuit accounts for about one in five cases begun in the U.S. Courts of Appeals.[80] However, the main issue is that as of June 30, 2018, there are 11,432 cases pending in the Ninth Circuit.[81] The backlog of cases for the Ninth Circuit is larger than the number of cases started annually to the Circuit.[82] Additionally, the Ninth Circuit is responsible for nearly one-third of the total pending federal appeals.[83]

U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending June 30, 2018

Circuit	Commenced 2018	Terminated 2018	Pending 2018	Total Present Cases 2018	Total Judges Oct. 15, 2018	Authorized Judges Oct. 15, 2018	Case per Senior + Authorized Judge 2018	Case per Authorized Judge 2018
DC	932	1,068	1,263	2,195.0	18.0	11.0	121.9	199.5
1st	1,226	1,296	1,321	2,547.0	11.0	6.0	231.5	424.5
2nd	4,212	3,929	3,714	7,926.0	25.0	13.0	317.0	609.7
3rd	2,972	2,874	2,310	5,282.0	25.0	14.0	211.3	377.3
4th	4,211	4,307	2,253	6,464.0	18.0	15.0	359.1	430.9
5th	7,347	7,386	4,848	12,195.0	27.0	17.0	451.7	717.4
6th	4,304	4,584	2,675	6,979.0	29.0	16.0	240.7	436.2
7th	2,800	2,673	1,796	4,596.0	14.0	11.0	328.3	417.8
8th	2,811	2,990	1,918	4,729.0	17.0	11.0	278.2	429.9
9th	10,661	11,782	11,423	22,084.0	47.0	29.0	469.9	761.5
10th	1,836	1,813	1,259	3,095.0	22.0	12.0	140.7	257.9
11th	5,908	6,102	3,676	9,584.0	20.0	12.0	479.2	798.7
Total	**49,220**	**50,804**	**38,456**	**87,676.0**	**273.0**	**167.0**	**—**	**—**
Average	**4,102**	**4,234**	**3,205**	**7,306**	**23**	**14**	**302**	**488**

Table 1

resides only has 13 authorized judges, and Connecticut has only 3.57 million people--roughly half Arizona's population.").

[76] *See id.* at 40.

[77] *Table B.—U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending June 30, 2017 and 2018*, U.S. CTS., https://www.uscourts.gov/statistics/table/b/statistical-tables-federal-judiciary/2018/06/30 (last visited Mar. 4, 2019).

[78] *Id.*

[79] *See QuickFacts Chart, supra* note 70 and accompanying text.

[80] *Table B., supra* note 77.

[81] *Id.*

[82] *See id.* (showing the number of cases commended in the Ninth Circuit in 2018 as 10,661 and the number of cases pending as 11,423).

[83] *Id.* (demonstrating that total pending appeals are 38,456 making the Ninth Circuit responsible for about 29% of the backlog).

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For a breakdown of the above refer to the following chart at Table 1.

One can argue that because each judge[84] in the Ninth Circuit is responsible for 470 cases of the total cases on its docket, which is similar to that of the Fifth and Eleventh Circuits, then the Ninth Circuit is performing at par with other circuits. The issue with this argument is that the Ninth Circuit is the slowest circuit in terminating cases.[85] The Ninth Circuit has a median time of thirteen months from the filing of notice of appeal or docket date to the last opinion or final order.[86] This is much longer than the median time of about nine months for the entire U.S. Courts of Appeals.[87] With a large pending docket and a slow termination of cases, it is likely the backlog will grow unless the system is reformed.

This high volume of cases makes a judge's job harder.[88] A judge has a duty to keep abreast of what the law says.[89] However, with such a large number of appeals coming into the Ninth Circuit every year, a judge must work hard to maintain their knowledge of the law.[90] A failure to stay on top of changes in the law will lead to an inconsistent application of the law.[91] Together with a large docket, the size of the Ninth Circuit requires a large group of judges to take on the great task the Ninth Circuit presents.[92]

The Ninth Circuit has twenty-nine authorized judgeships.[93] Judge O'Scannlain of the Ninth Circuit has stated that a large judge roster makes it difficult to create a strong working relationship with his fellow

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[84] This includes senior and authorized judges.

[85] *Table B-4.—U.S. Courts of Appeals—Median Time Intervals in Months for Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2017*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2017.pdf (last visited Mar. 4, 2019).

[86] *Id.*

[87] *Id.* (showing that the calculation of the median time for the entire COA includes the Ninth Circuit).

[88] Dragich, *supra* note 56, at 32.

[89] MODEL CODE OF JUD. CONDUCT r. 2.5 cmt. 1 (AM. BAR ASS'N 2014).

[90] *See* O'Scannlain, *supra* note 63, at 60 ("The vast numbers of cases being decided by the Ninth Circuit compromises judges' ability to keep current on the law of the circuit.").

[91] *See id.* at 61 ("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.").

[92] *See id.* at 60 ("More than 58 million Americans—nearly one-fifth of the nation's population—live within the Ninth Circuit's expansive boarder, which represents nearly three times the average population of all other circuits."); *see also id.* at 59 ("The Ninth Circuit has twenty-eight authorized judgeships, which is more than double the average of all other circuits.").

[93] 28 U.S.C. § 44 (2012).

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judges. His rationale for this stems from the fact that it is likely a judge will only sit on a three-judge panel with less than half the total number of judges on the court in the course of a year.[94] Judge O'Scannlain argues that a small body of judges is necessary to create the environment needed to obtain consistency of law.[95]

The many problems afflicting the Ninth Circuit today stem from a governmental failure to understand the present economic state of the West. The failure exists because Congress is committed to the idea that the West is still in its rugged state and needs to be treated as a single entity. This can be seen as an imbalance between the fast-growing economy of the West and the slow separation from the idea that the West is still in its rugged state. However, in the past half century, there has been much debate about the Ninth Circuit, which has resulted in Congressional commissions and some reform.[96] Unfortunately, the resulting studies and changes have either not gone far enough or have made the matter worse.

3. Past 'Solutions'

A large land mass and population creating an unmanageable caseload requiring an unprecedented number of judges has led to many problems in the Ninth Circuit.[97] There have been many attempts to understand how to relieve these symptoms and some reforms were put into action.[98] Unfortunately, none of these have actually produced the beneficial outcome that solves the root problem in the Ninth Circuit—*its size*.[99] Some solutions have even made the matter worse.[100] The following describes two Congressional commissions that sought to understand the issues plaguing the Ninth Circuit, some solutions that have been implemented, and the effects of the solutions on the Circuit.

[94] O'Scannlain, *supra* note 63, at 59.

[95] *Id.* at 60.

[96] COMM'N ON STRUCTURAL ALTERNATIVES FOR FED. COURTS OF APPEALS, 105TH CONG., FINAL REP. 33–34 (1998).

[97] *See id.*

[98] *Id.*

[99] *Review of the Report by the Comm'n on Structural Alternatives for the Fed. Courts of Appeals Regarding the 9th Cir. and the 9th Cir. Reorganization Act: Hearing on S. 253 Before the Subcomm. on Admin. Oversight and the Courts*, 106th Cong. 2–3 (1999) (statement of Sen. Charles E. Grassley).

[100] *Id.* at 37.

a. Hruska Commission

Congress created the Commission on Revision of the Federal Court Appellate System (Hruska Commission) in 1972 to study the possible ways to restructure the federal appellate system to solve the issues resulting from an overburdened appellate court system at large.[101] The Hruska Commission's main conclusion was that the Supreme Court was unable to adequately review and correct for circuit splits leading to "an intolerable legal mess."[102] The Commission found that the circuit system was unable to address issues of national law.[103] This resulted in a failure of four main areas: "(1) unresolved inter-circuit conflicts; (2) delay; (3) burden on the Supreme Court to hear cases less than worthy of its review; and (4) uncertainty even in areas where a justifiable conflict may never develop."[104]

This led to the proposal by the Hruska Commission to create a National Court of Appeals which would have jurisdiction over cases referred to it by the Supreme Court or transferred to it from regional courts.[105] The Commission believed a National Court of Appeals would create a more uniform law and assist the appellate system in supporting the Supreme Court.[106]

In addition to creating a National Court of Appeals, the Commission advised a split of both the Ninth and Fifth Circuits.[107] Congress accepted the Commission's advice on splitting the Fifth Circuit, but declined to act on splitting the Ninth Circuit.[108] In analyzing the need for a Ninth Circuit reorganization, the Commission recognized many of the issues discussed in this article: geographic size, number of authorized judgeships, and caseload.[109] The Commission proposed the creation of a Twelfth Circuit, which would include the Southern and Central Districts of California and the states of Arizona and Nevada.[110]

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[101] Comm'n on Revision of the Fed. Court App. System of the United States, Pub. L. No. 92-489, 86 Stat. 809.

[102] Samantha M. Basso, Note, *When National Law Means Regional Law: A Look at the Non-Uniformity of Copyright Law and How the Federal Circuit Can Help*, 21 FED. CIR. B.J. 355, 359 (2012) (quoting the Hruska Commission).

[103] *Id.*

[104] *Id.*

[105] ROMAN L. HRUSKA ET AL., COMM'N ON REVISION OF THE FED. COURT APP. SYSTEM STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195, 199 (1975).

[106] *Id.* at 208.

[107] *Id.* at 267.

[108] *See* H.R. REP. NO. 96-1390, at 4236.

[109] 67 F.R.D. at 264-65.

[110] COMM'N ON REVISION OF THE FED. COURT APP. SYSTEM, 62 F.R.D. 223, 235 (1973).

continued . . .

The Ninth Circuit would be reduced to Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam and the Eastern and Northern Districts of California.[111]

b. White Commission

Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission) in late 1997 to answer the question of whether Congress should split the Ninth Circuit.[112] The White Commission answered in the negative, but offered an alternative.[113] The White Commission proposed that the Ninth Circuit be split into three regional divisions.[114] Each division would act as a "semi-autonomous decisional unit."[115] The White Commission recognized the potential for interdivisional conflicts.[116] With this in mind, they suggested a Circuit Division for conflict correction.[117]

The main issue with the White Commission's proposal is that it would create inconsistent intra-circuit decisions.[118] Even though a Circuit Division devoted to resolving interdivision conflicts may assist in resolving this issue, it is not the best use of scarce judicial resources. Another glaring issue is that, under this proposal, California would be split into two divisions.[119] This would likely cause confusion to litigants and present issues of forum shopping.

c. Limited En Banc Court – Frustration of the Majority Rule

For the circuit courts to function more efficiently, the courts utilize a panel system in which only three of the judges preside over a case.[120] This method was introduced by the Evarts Act and eased the burden the United States Courts of Appeals bear when taking on more cases originally destined for the Supreme Court.[121] However, two panels may have come to different conclusions on different cases which can be

[111] *Id.*
[112] Comm'n on Structural Alternatives for the Fed. Courts of Appeals: Final Rep. 1 (1998).
[113] *Id.* at 29–30.
[114] *Id.* at 40–41.
[115] *Id.* at 43.
[116] *Id.* at 45.
[117] *Id.*
[118] *See id.* at 43.
[119] *See id.* at 42.
[120] 28 U.S.C. § 46(c) (2012).
[121] Evarts Act, 26 Stat. 826 (1891).

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considered indistinguishable.[122] To preserve uniformity, if a majority of the court requested for a rehearing of the case en banc, the entirety of the jurists would rehear the case.[123] To enable even more efficiency, Congress, on the advice of the Hruska Commission, authorized courts with more than fifteen sitting judges to utilize a limited en banc court.[124] This means that the court, when called en banc, only needs a certain number of judges to preside. For the Ninth Circuit, this is 11 out of the 29 authorized judges.[125]

The Ninth Circuit is the only appellate court to use the limited en banc panel, even though any circuit with more than fifteen judges is authorized to do so.[126] As identified by Judge Pamala Rymar, the limited en banc has systematic flaws.[127] The idea that a minority of judges could speak for the whole court is illogical. The Hruska Commission mentioned this possibility, but had confidence that the courts, with experience of limited en banc panels, would be able to manage this minority rule problem.[128] Judge Rymar pointed out,

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[122] Pamela Ann Rymer, *The "Limited" En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317, 321 (2006).

[123] *Id.* at 318.

[124] *Id. See* ROMAN L. HRUSKAET. AL., COMM'N ON REVISION OF THE FED. COURT APP. SYSTEM STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195, 199 (1975). *See also*, 28 U.S.C. § 46(c) (2012); Act of Oct. 20, 1978, Pub.L. No. 95-486, § 6, 92 Stat. 1629, 1633 (allowing courts with more than fifteen judges to create limited en banc panels); Final Rep. of the Comm'n on Structural Alts. for the Fed. Courts of Appeals: Hearing Before the Subcomm. on Courts and Intell. Prop. of the Comm. on the Judiciary H.R., 106th Cong. 65 (1999), (statement of David R. Thompson, Circuit Judge, Ninth Circuit Court of Appeals) (noting a concern that "because all of the active judges do not sit on the en banc court, the en banc decision does not reflect the views of all judges.").

[125] Rymer, *supra* note 122 at 317. There are currently 23 active judges on the Ninth Circuit as of the publishing of this Comment. *See*, *Active Judges of the United States Court of Appeals for the Ninth Circuit*, U.S. CTS. NINTH CIR., https://www.ca9.uscourts.gov/content/view_active_senior_judges.php (last visited Feb. 23, 2019).

[126] O'Scannlain, *supra* note 63, at 62.

[127] *See generally* Rymer, *supra* note 122.

[128] ROMAN L. HRUSKA ET AL., COMM'N ON REVISION OF THE FED. COURT APP. SYSTEM STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195, 269 (1975) ("At the present time there is no federal appellate court so large that the nine who would sit en banc would constitute a minority of the full court. With circuit realignment, the probability of a court so large would be remote and certainly the many disadvantages of such a tribunal make it clear that this is an eventuality to be avoided. Should this eventuality occur, it would only be after a period of experience with the limited en banc and with whatever method of selection is authorized by the Congress. We therefore recommend that Congress reconsider the method of selection of the nine judges who constitute the en banc court, when the nine no longer constitute the majority of the court.").

continued . . .

limited en banc is an oxymoron because en banc means 'full court' in Latin.[129] Essentially, the name is very apt to what it does, it limits the whole court.[130]

Some proponents of the minority rule argue that because courts are not legislative bodies, a majority rule is not imperative to pursue. It is also argued that having more judges will just complicate a decision because more people means more perspectives on how the law should be interpreted.[131] However, the minority rule's application has shown that limited en banc courts create a larger number of inconsistencies within the circuit.[132] The Ninth Circuit is the most overturned circuit.[133] For the first decade of the twenty-first century, the Supreme Court reversed or vacated 148 of the 182 decisions by the Ninth Circuit on which the Court issued opinions.[134] This gives the Ninth Circuit a nineteen percent success rate at the Supreme Court.[135] Putting these statistics in perspective, the average success rate of the remainder of the Courts of Appeals for the same time period was twenty-nine percent.[136]

In his article, *A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court Since October Term 2000*, Judge O'Scannlain counters the idea that these reversals were due to a conservative bias on the Supreme Court by stating that, "[w]hile about half of the cases reversing the Ninth Circuit were decided by a unanimous Court, a mere [fourteen percent] were decided by a five-to-four vote along traditional 'conservative-liberal' lines."[137] These statistics reveal a problematic pattern that the Ninth Circuit has developed. This pattern might be broken by removing the ability to call a limited en banc court.

The main issue with a limited en banc court is that a decision by a

[129] Rymer, *supra* note 122, at 317.

[130] *Id.* at 317–18.

[131] *See* Arthur D. Hellman, *Courting Disaster*, 39 STAN. L. REV. 297, 305–06 (1986) (refuting a conjecture by a former Chief Judge of the Ninth Circuit to consolidate the circuits to allow for more judges to take on the caseload burdening the Ninth Circuit).

[132] *See* Arthur D. Hellman, *Getting it Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 425, 466 (2000).

[133] Diarmuid O'Scannlain, *A Decade of Reversal: The Ninth Circuit's Record in the Supreme Court Since October Term 2000*, 14 LEWIS & CLARK L. REV. 1557, 1557–58 (2010).

[134] *Id.*

[135] *See id.* at 1558. By stating "success rate" it is not intended to induce the idea that the decisions by the Supreme Court are absolute truth or correct and that the Ninth Circuit is incorrect. It is used in the sense that the judges on the Ninth Circuit had a certain success rate at deciding cases the way in which the Supreme Court would hold.

[136] *See id.*

[137] *Id.* at 1559.

continued . . .

limited en banc court can differ from that of a full en banc court.[138] This method of creating efficiency for the Ninth Circuit creates more issues than it solves, chief among these issues is the inconsistent and potentially inaccurate application of the law.[139] It is possible that the minority rule would never be used if the Ninth Circuit is split because there will be fewer judges in each new circuit than required to be authorized to have a limited en banc court. Nonetheless, limited en banc panels should be eliminated.

Congress declined to adopt the restructuring recommendations from both the Hruska and White Commissions.[140] To date, Congress's solutions, such as the limited en banc panel, have been simple patchworks to the overwhelming problem the Ninth Circuit presents to the judicial system.[141] It is time to split the Ninth Circuit.

III. PROPOSALS

A. Split the Ninth Circuit – Inspired by Judge O'Scannlain

In a speech given to the Wake Forest University School of Law chapter of the Federalist Society, Judge Diarmuid O'Scannlain outlined the reasons for a need to split the Ninth Circuit.[142] Judge O'Scannlain was appointed to the Ninth Circuit by President Ronald Reagan in 1986.[143] Judge O'Scannlain opposed any changes to the Ninth Circuit

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[138] Rymer, *supra* note 122, at 319–20.

[139] *The Case for Restructuring the Ninth Circuit: An Inevitable Response to an Unavoidable Problem, Hearing on Oversight of the Structure of the Federal Courts Before the Senate Comm. on the Judiciary*, 115th Cong. 11-12 (2018) (testimony of Diarmuid F. O'Scannlain, United States Circuit Judge, United States Court of Appeals for the Ninth Circuit) ("This presents the quite real possibility that some of the circuit's most important or divisive issues will be decided by a substantial minority of judges, who do not represent the true views of our court.").

[140] *Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit, Statement of the American Bar Association for the Subcommittee on Courts, Intellectual Property, and the Internet*, 115th Cong. 3-4 (2017) (statement of the American Bar Association to the House Committee on Courts, Intellectual Property, and the Internet).

[141] Limited En Banc Court, 9th Cir. R. 35-3 ("The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court.").

[142] Diarmuid O'Scannlain, Address at Wake Forest School of Law Federalist Society Chapter: "Is Now the Time to Split the Ninth Circuit?" (Mar. 23, 2018). This speech is the inspiration for this paper.

[143] *Background Information on Diarmuid O'Scannlain*, BALLOTPEDIA, https://ballotpedia.org/Diarmuid_O%27Scannlain (last visited Mar. 4, 2019).

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until the 1990s.[144] However, Judge O'Scannlain now views an alteration to the Ninth Circuit as necessary to remedy severe judicial administration issues.[145]

Judge O'Scannlain's perspective on how systematic issues within the Ninth Circuit impact the judges' ability to do their jobs is invaluable. He stated in his speech that "the work of an appellate court requires an environment in which a reasonably small body of judges has the opportunity to sit and to conference together frequently."[146] The best solution to achieve this goal is to split the Ninth Circuit. In a recent interview with Judge O'Scannlain, he praised the ideas that resulted from the Hruska Commission.[147] In his speech to the Federalist Society, Judge O'Scannlain stated he supported a bill from 2017 entitled "Judicial Administration and Improvement Act of 2017," (S.276) which would create a new Twelfth Circuit consisting of Alaska, Arizona, Idaho, Montana, Nevada, and Washington,[148] while the Ninth Circuit is reduced to just California, Hawaii, Oregon, Guam and Northern Mariana Islands.[149]

Regardless of how the Ninth Circuit is split, as long as it is split along state lines, a circuit singularly consisting of California will always be the largest circuit in the Courts of Appeals.[150] This Comment does not recommend splitting California–yet. If history repeats itself, it is likely a circuit consisting of just California will develop many of the problems discussed today.[151]

This Comment agrees with Judge O'Scannlain in his support for both means to split the Ninth Circuit. The benefit of splitting the Ninth Circuit along state lines, as was proposed in S.276, is that the idea of each state being in just one Court of Appeals's jurisdiction is preserved.[152] However, it is likely California will need to be split in the

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[144] O'Scannlain, *supra* note 143.

[145] *Id.* at 2–3.

[146] *Id.* at 6.

[147] Telephone Interview with Diarmuid F. O'Scannlain, U.S. Cir. Judge for the Ninth Cir. (Nov. 28, 2018).

[148] O'Scannlain, *supra* note 143, at 10; *see also* Judicial Administration and Improvement Act of 2017, S. 276, 115th Cong. (2017).

[149] *Id.*

[150] *See What is the Ninth Circuit?*, U.S. CTS. NINTH CIR., https://www.ca9.uscourts.gov/judicial_council/what_is_the_ninth_circuit.php (last visited Mar. 4, 2019) (Indicating that out of the 15 districts, four of them come from California. The other states and territories only have one district per state, with the exception of Washington, which has two).

[151] *See supra* Part B(ii); *see infra* note 157 and accompanying text; *See generally* Hans Johnson, *Just the Facts: California's Population*, PUB. POL'Y INST. OF CAL. (Mar. 2017), https://www.ppic.org/publication/californias-population/.

[152] S.276, 115th Cong. (2017); *see also*, Mike Simpson, *Splitting the Ninth*

continued . . .

future. The Hruska Commission's proposal of dividing California and distributing it to two new circuits (as shown in Figure 1) will solve this problem now.[153] The Hruska Commission recognized the concern with splitting a state between two circuits.[154] However, they believed the benefits derived from splitting the Ninth Circuit in this manner would outweigh the disadvantages brought on by such a split.[155]

Circuit is Inevitable, CTR. FOR INDIVIDUAL FREEDOM (Feb. 3, 2005), http://www.cfif.org/htdocs/legislative_issues/federal_issues/hot_issues_in_congress/confirmation_watch/split-ninth-circuit.htm.

[153] COMM'N ON REVISION OF THE FED. COURT APP. SYSTEM, 62 F.R.D. 223, 237–40 (1973); *see also* Judge Diarmuid F. O'Scannlain, An Illustrated Guide to Restructuring the Federal Courts of Appeals and the Ninth Circuit in Particular Exhibit 22 (unpublished manuscript) (on file with the Wake Forest J. of Bus. & Intell. Prop. L.).

[154] COMM'N, *supra* note 153, at 238–40.

[155] *Id.* at 231–232 (Listing the benefits: "First, where practicable, circuits should be composed of at least three states; in any event, no one-state circuits should be created. Second, no circuit should be created which would immediately require more than nine active judges. Third, the Courts of Appeals are national courts; to the extent practicable, the circuits should contain states with a diversity of population, legal business and socio-economic interests. Fourth is the principle of marginal interference: excessive interference with present patterns is undesirable; as a corollary, the greater the dislocation involved in any plan of realignment, the larger should be the countervailing benefit in terms of other criteria that justify the change. Fifth, no circuit should contain noncontiguous states.").

1973 Hruska Commission Proposed Split Map
(93rd Congress)

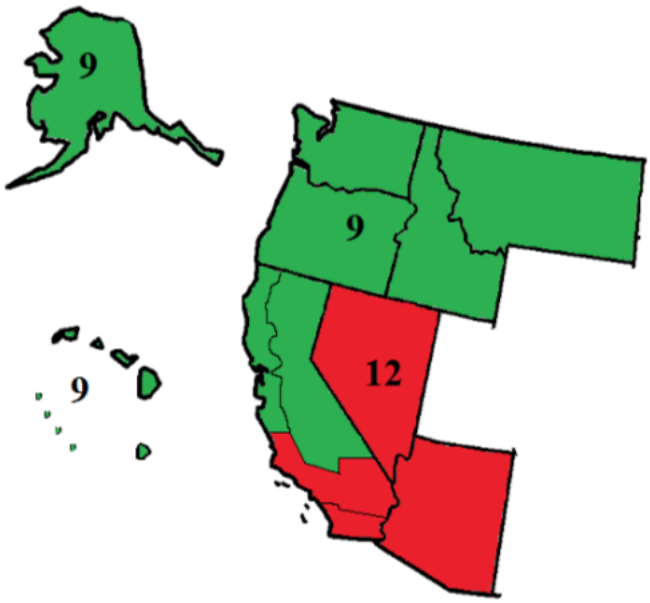

Figure 1

Splitting the Ninth Circuit is necessary to resolve the issues plaguing the Circuit. A dramatic shift like splitting the Ninth Circuit will have long-lasting beneficial effects; however, these effects will last as long as the new courts remain a reasonable size by other measures. To prolong the beneficial effects of a Ninth Circuit spit, new policies must be adopted.

B. The United States Courts of Business

While this Comment has thus far suggested some solutions to the problems that plague the Ninth Circuit it also suggests the idea that the growth of business, and in the same sense the economy of the western United States, is a culprit in causing the problems the Ninth Circuit faces. Therefore, to solve a business problem, one needs a business solution. This Comment proposes instituting a Federal Business Court within the United States Courts of Appeals.

Nearly twenty percent of Fortune 500 companies are headquartered within the Ninth Circuit with over half of those companies calling California home.[156] With this large business presence, courts are likely

[156] *States with the Most Fortune 500 Companies*, CEO, https://www.ceo.com/miscellaneous/states-with-the-most-fortune-500-companies

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to be burdened by business oriented litigation.[157] A business court is not the only specialized court that has developed as a solution to problems in the judicial system.[158] There are many other options available such as Family Courts, Veterans Courts, and Employment Discrimination Courts.[159] Those are all great possibilities, however, the proposal in this Comment of a Federal Business Court has the potential to be self-funding and presents an immediate advantage over these other options.

1. Success of State Business Courts

To support the main proposal of this Comment which is to create a Federal Business Court, this section details the successes of state business courts. The following is a result of research and an interview with Judge Michael Robinson of the North Carolina Business Court.[160] Allowing any circuit court, regardless of size, to create a business court would increase judicial efficiency and accuracy.[161]

State business courts have been successful in many of the states that have adopted business courts.[162] The American Bar Association has been a proponent of business courts as a means to create more efficiency through specialization.[163] There are currently twenty-three states with some form of a business court on the city, county, region, or state level.[164] Three courts stand out among these: Delaware, North

(last visited Feb. 24, 2019).

[157] *See supra* note 157 and accompanying text; *cf.* Mark Brnovich & Ilya Shapiro, *Split Up the Ninth Circuit— but Not Because It's Liberal*, WALL STREET J. (Jan. 11, 2018, 7:05 PM), https://www.wsj.com/articles/split-up-the-ninth-circuitbut-not-because-its-liberal-1515715542.

[158] *See* Kelly Frailing, *The Achievements of Specialty Courts in the United States*, SCHOLARS STRATEGY NETWORK (Apr. 11, 2016), https://scholars.org/brief/achievements-specialty-courts-united-states.

[159] *See* Chad M. Oldfather, *Judging, Expertise, and the Rule of Law*, 89 WASH. U. L. REV. 847, 847–48 (2012).

[160] Interview with Judge Michael L. Robinson, Special Superior Court Judge for Complex Business Cases, North Carolina Business Court, in Winston-Salem, N.C. (Nov. 16, 2018).

[161] *Id.*

[162] *See* The Ad Hoc Committee on Business Courts, *Business Courts: Towards A More Efficient Judiciary*, 52 BUS. LAW. 947, 947 (1997).

[163] *Id.*

[164] Jenni Bergal, State's Set Up 'Business Courts' for Corporate Conflicts, Stateline (Oct. 28, 2015, 2:35 PM), http://www.governing.com/topics/mgmt/business-courts-take-on-complex-corporate-conflicts.html (Stating specialized courts that handle business disputes have been created in Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nevada, New

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Carolina, and South Carolina.[165]

a. Delaware

The Delaware Court of Chancery is considered the "Godfather" of the business court.[166] With its creation in 1792, the Delaware's Chancery Court was not singularly business oriented; subsequently, matters involving equity generally applied to the business context.[167] The Court evolved into the corporate law powerhouse it is today attracting 66.8% of all Fortune 500 companies to be incorporated in Delaware.[168] Though the Chancery Court itself is not the only reason for its dominance in the corporate law realm, the fact that the Court has no jurisdiction over criminal or tort cases gives it the opportunity to provide quick and efficient decisions.[169]

b. North Carolina

The North Carolina Business Court is seen by some as the 'gold standard' of business courts, providing the predictability, efficiency, and accuracy businesses seek.[170] The Author had the opportunity to speak with the Honorable Judge Michael Robinson, one of five judges currently serving on the North Carolina Business Court, to get his perspective on the Business Court's benefits to the North Carolina judicial system.[171] Judge Robinson was sworn in as a Special Superior

Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, and West Virginia).

[165] *See* Anne Tucker Nees, *Making A Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477, 503–04 (2007).

[166] *Id.* at 480.

[167] *Id.*

[168] *See* William Quillen & Michael Hanrahan, *A Short History of the Court of Chancery*, DEL. CTS. (1993), https://courts.delaware.gov/chancery/history.aspx; *see also Annual Report Statistics*, DEL. DIV. OF CORP., https://corp.delaware.gov/stats/ (last visited Mar. 5, 2019).

[169] Demetrios G. Kaouris, *Is Delaware Still A Haven for Incorporation?*, 20 DEL. J. CORP. L. 965, 970–75 (1995) (It is important to note that the Delaware General Corporate Law plays a large part in Delaware's attractiveness to corporations, thus allowing for a well-developed caselaw in the jurisdiction).

[170] Nees, *supra* note 165, at 503–04 ("[T]he North Carolina Business Court contains every predictive feature for efficiency, quality and due process, thus quantifying its status as the 'gold standard.'").

[171] Interview with Judge Michael L. Robinson, Special Superior Court Judge for Complex Business Cases, North Carolina Business Court, in Winston-Salem, N.C. (Nov. 16, 2018).

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Court Judge for Complex Business Cases on July 1, 2016.[172] Prior to becoming a judge, he was a practicing attorney for thirty-five years, focusing his practice for a number of years on complex business litigation.[173] Judge Robinson shed some light on why the North Carolina Business Court has been so successful in North Carolina.[174]

Judge Robinson believes that the Business Court's design allows its judges to apply their experience in and knowledge of complex business cases to the cases under their supervision.[175] Because the court assigns each case to a particular judge, the Business Court judges are able to become familiar with and better understand the facts and law in a given case.[176] Judge Robinson stated that litigants appreciate accessibility to and the responsiveness of the Business Court to litigation issues.[177]

The North Carolina Business Court was originally created to handle a broad range of sophisticated business cases.[178] The praise directed at the Business Court reflects the prediction that business courts would increase judicial efficiency, access, and speed.[179] The North Carolina Business Court should not only be seen as a model for other states, but as a potential model for a Federal Business Court.

c. South Carolina

The South Carolina Business Court is a recent experiment. The Court began as a pilot program in 2007.[180] The program began by covering only certain counties, but it was expanded in 2016 to encompass the entire state.[181] The State issued surveys to attorneys

[172] NORTH CAROLINA JUDICIAL BRANCH: JUDICIAL DIRECTORY, MICHAEL L. ROBINSON, https://www.nccourts.gov/judicial-directory/michael-l-robinson (last visited: Mar. 20, 2019).

[173] *Id*.

[174] *Id.*

[175] Interview with Judge Michael L. Robinson, Special Superior Court Judge for Complex Business Cases, North Carolina Business Court, in Winston-Salem, N.C. (Nov. 16, 2018).

[176] *Id.*

[177] *Id.*

[178] Gregory Day, *Revisiting the North Carolina Business Court After Twenty Years*, 37 CAMPBELL L. REV. 277, 288 (2015).

[179] *Id.* at 293.

[180] South Carolina Judicial Department, In re: Business Court Pilot Program Expansion Statewide, Administrative Order 2014-01-03-02, https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=909 (last visited Mar. 4, 2019).

[181] South Carolina Judicial Department, In re: Amended Business Court Pilot Program, Administrative Order 2017-02-08-02, https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2180 (last visited Mar. 4, 2019).

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across the program's jurisdiction and resulted in positive responses toward the new court.[182] The South Carolina Business Court is just another example of the expansion of judicial specialization and the benefits that can be obtained from such a system.

2. The Model for the Proposal

Business courts are successful because their judges: (1) become specialized in a particular part of the law; (2) execute their duties efficiently due to their specialized knowledge; and (3) become increasingly predictable.[183] Businesses enjoy business courts due to their accessibility, quick results, and specialized knowledge.[184] The following is a proposed model for a new Federal Business Court, which will increase efficiency, accuracy, and uniformity within the Courts of Appeals.

There are two types of courts that can be created with this proposal: (1) an external court; or (2) a specialized branch of the Courts of Appeals. The term external court essentially means that the business court in this scenario would be outside the Courts of Appeals and below all federal courts. This is similar to the way bankruptcy courts work in that they have appeal rights to the district court and then to the court of appeals, and the judges are appointed by the court of appeals for the circuit the court resides.[185]

The benefits to an external business court is that it can assist in removing complex cases from the dockets of the district courts and courts of appeals. Additionally, the higher courts will likely give great deference to the external business court, and parties who would normally appeal would possibly think twice before deciding to appeal in this new process.[186]

However, the main downside to the external business court is that it may not be as robust as is necessary to ensure the court of appeals runs more efficiently. This is because litigants may eventually view the external business court as an additional stepping stone in the litigation

[182] Andrew A. Powell, *It's Nothing Personal, It's Just Business: A Commentary on the South Carolina Business Court Pilot Program*, 61 S.C. L. REV. 823, 833–34 (2010).

[183] Carrie A. O'Brien, *The North Carolina Business Court: North Carolina's Special Superior Court for Complex Business Cases*, 6 N.C. BANKING INST. 367, 369–70 (2002).

[184] *Id.* at 371–72.

[185] *Id.* at 384–85.

[186] *Cf.* Day, *supra* note 178, at 297 n.94 (stating that Delaware's legislature gives deference to the Court of Chancery).

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process instead of a final solution.[187] This will not achieve the goal of this new court and it will likely add onto the costs to the economy through excess litigation.

It is the opinion of the Author that a specialized branch of the Court of Appeals would bring the energy needed within the Court to more efficiently administer justice. The idea to mitigate crowded dockets with specialized branches of a court is not an uncommon or stretched idea.[188] Senator William Evarts, the senator who lead the charge in easing the Supreme Court docket with the Evarts Act of 1891, suggested splitting the Supreme Court into three specialized panels: common law, equity, and admiralty/revenue.[189]

A specialized branch of the Courts of Appeals, or more specifically, a Federal Business Court of Appeals will have jurisdiction over all complex business cases appealed from the district courts, and the litigants will have a right of appeal to the courts of appeals. These cases should have to meet certain criteria to be classified as a complex business case. Congress should look to statutes like North Carolina's complex business case statute for guidance.[190] Having this process of appeal maintains the balance of easing the burden on the Supreme Court—the purpose of the courts of appeals[191]—and ensures that litigants have the least number of steps needed to obtain an accurate interpretation of the law.

The judges of a Federal Business Court of Appeals must be of the highest quality to ensure the robustness of this new court. To achieve this goal, the judges in this court should be nominated by the president and confirmed by the Senate. The judges should have a lifetime appointment and preferably have a long career working with business law. The number of judges should vary by each circuit depending on the needs of the court. However, there should also be a minimum of three judges to each Business Court. Having at least three judges ensures accountability, larger breadth of knowledge, and collegiality.[192]

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[187] *See* Andrew R. Jones, *Toward a Stronger Economic Future for North Carolina: Precedent and the Opinions of the North Carolina Business Court*, 6 ELON L. REV. 189, 208 (2014).

[188] Eric J. Gribbin, *California Split: A Plan to Divide the Ninth Circuit*, 47 DUKE L.J. 351, 367 (1997) (describing a proposal to split a court into specialized branches from as early as 1891).

[189] *Id.*

[190] N.C. Gen. Stat. § 7A-45.4 (2016).

[191] *The Evarts Act: Creating the Modern Appellate Courts*, UNITED STATES COURTS, https://www.uscourts.gov/educational-resources/educational-activities/evarts-act-creating-modern-appellate-courts (Mar. 21, 2019).

[192] *See* Howard M. Wasserman, *Argument Preview: Is a Three-Judge Court "Not Required" When a Pleading Fails to State a Claim?*, SCOTUSBLOG (OCT. 19, 2015), https://www.scotusblog.com/2015/10/argument-preview-is-a-three-judge-

continued . . .

Finally, to ensure uniformity and predictability, judges of the Business Courts should be required to produce written opinions. These desired results are possible because they have been achieved in North Carolina with its business court.[193]

A new court will require resources.[194] To achieve the aim of making the Federal Business Court self-funding (or at least close to self-funding), the filing fee for the court should be relatively large. Currently, the docket fee for the Ninth Circuit is $505.[195] The minimum filing fee to file with the American Arbitration Association is $1,725 for commercial arbitration.[196] This includes the initial and final fees. These fees can reach upwards of $65,000 depending on the amount of the claim.[197] Companies are attracted to arbitration because of its speed, specialized knowledge, and privacy, among other things.[198] The Federal Business Court achieves two out of three of these goals.

To make the filing fee with the Federal Business Court relatively large, the fee could be set at $20,000. This might be low enough to encourage companies to forego arbitration and its aspect of privacy in their case while still obtaining quick adjudication by specialized judges. If the features of the Federal Business Court and its lower relative cost could bring companies away from arbitration, one large benefit would be given to our society— well-developed business caselaw.[199]

Owen Fiss's landmark article, *Against Settlement*, sheds light on the troubles with alternative dispute resolution (ADR).[200] ADR deprives a court of its opportunity to interpret the law or resolve an issue faced by many.[201] In addition to its efficiency, access, and speed, a Federal Business Court would hopefully lead to a well-developed business

court-not-required-when-a-pleading-fails-to-state-a-claim/ (explaining that, among other things, a three judge panel is meant to render more accurate decisions).

[193] O'Brien, *supra* note 183, at 374.

[194] *See, e.g.*, *Ninth Circuit Fee Schedule*, U.S. CTS. FOR THE NINTH CIR., https://www.ca9.uscourts.gov/content/feeschedule.php (demonstrating the different services that cost money to provide in a court).

[195] *Id.*

[196] *Commercial Arbitration Rules and Mediation Procedures: Administrative Fee Schedules*, AM. ARB. ASSOC., https://www.adr.org/sites/default/files/Commercial_Arbitration_Fee_Schedule_1.pdf (last visited Mar. 4, 2019).

[197] *Id.*

[198] Brenton D. Soderstrum, *Litigation v. Arbitration: Pros and Cons*, BEST LAWYERS, https://www.bestlawyers.com/Content/Downloads/Articles/4379_1.pdf (last visited Mar. 4, 2019).

[199] James Lewis, *Litigation or Arbitration?*, FIELDFISHER (Oct. 1, 2014), https://www.fieldfisher.com/publications/2014/10/litigation-or-arbitration.

[200] Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

[201] *Id.* at 1085.

continued . . .

caselaw.

IV. COUNTER-ARGUMENTS

While there is significantly less literature that argues to keep the Ninth Circuit as is, it is obvious that the attempt to split it has been thwarted by those who want to stay with the status quo.[202] Below are a few arguments that can be made against a Ninth Circuit split. Though there is validity to these arguments, this Comment maintains the benefits of splitting the Ninth Circuit far outweigh the potential costs.

A. Need for Uniformity

One can argue that it is beneficial for the West to maintain a uniform law. This is a desirous goal, however, as this goal is not being met by the current Ninth Circuit because of its intra-circuit inconsistencies.[203] As stated above, states like Arizona dislike the 'uniform' law of the Ninth Circuit because the majority of judges reside in one region within the Circuit.[204] The law reflects the values of a society.[205] Our federal system has supported this idea.[206] Because the Ninth Circuit has grown rapidly over the past century and a half, it is important to allow for the regional societies within the Circuit to develop their own set of laws.

B. There will always be the big one

A largest circuit will always exist.[207] But that is no excuse for letting a circuit reach a point where the administration of justice does not match the standard across the country. Though there may be challenges to splitting the Ninth Circuit, or even splitting California, the benefits outweigh the costs.[208] Splitting the Ninth Circuit will solve the immediate issues facing litigants and judges today.

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[202] Scott Bomboy, *Drive to Split Ninth Circuit Faces an Uncertain Future*, NAT'L CONST. CTR. (Aug. 29, 2017), https://constitutioncenter.org/blog/drive-to-split-ninth-circuit-faces-an-uncertain-future.

[203] Mark Brnovich & Ilya Shapiro, *Split Up the Ninth Circuit—but Not Because it's Liberal*, CATO INST. (Jan. 11, 2018), https://www.cato.org/publications/commentary/split-ninth-circuit-not-because-its-liberal.

[204] Charton & Richer, *supra* note 72, at 36.

[205] *See id.* at 38–39.

[206] *See id.*

[207] *See*, Patricia Lee Refo, *Retain the Ninth!*, 53 AUG ARIZ. ATT'Y 35, 46 (2017).

[208] *See supra* Part III, A.

continued . . .

C. Courts Adapt

The Ninth Circuit is seen as a circuit that likes to experiment with new policies of judicial administration in hopes to increase efficiency.[209] This is shown by the usage of the limited en banc panel.[210] While the Circuit has undoubtedly attempted to adapt to its robust size, it cannot, on its own, reduce it, only manage it. It is up to Congress to reduce its size in order for the Ninth Circuit to adopt its lost procedural safeguards.

V. CONCLUSION

The Ninth Circuit has become overwhelmed due to its large geographical size, increasing caseload, and large group of judges. Beginning with the Gold Rush, the West expanded in terms of population, economics, and litigation.[211] As the region within the Ninth Circuit has progressed, the Circuit itself has been left behind resulting in the issues impairing this Court. There have been attempts to ease the burdens on the Ninth Circuit, but none have resulted in long term benefits.[212] The Ninth Circuit is long overdue for a split.

Splitting the Ninth Circuit alone is not enough. Additional novel reforms must be adopted to maintain the benefits of a split. This is why this Comment proposes introducing a Federal Business Court, which can be adopted by each Circuit. It is my hope this article re-ignites the discussion to split the Ninth Circuit and ignites a conversation of instituting a Federal Business Court.

The ideology of the rugged West has hindered the evolution of the Ninth Circuit. The Ninth Circuit has not been permitted to adapt to current needs of the jurisdiction it serves. Along with innovative reforms, it is time for the Ninth Circuit and a new Twelfth Circuit to serve the West to their fullest potential.

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[209] Gribbin, *supra* note 53, at 352–53.
[210] *See*, *supra* Part II,B.3.c.
[211] St. Clair, *supra* note 17, at 187.
[212] *See, e.g.*, *id.*