Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals

Arthur D. Hellman[*]

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[*] Professor of Law, University of Pittsburgh School of Law. The research for this article could not have been carried out without the cooperation of the judges and supporting staff of the Ninth Circuit Court of Appeals. I particularly want to thank two dedicated and able public servants: Cathy Catterson, the Clerk of Court, and Paul Keller, the Supervising Attorney in the Case Management Unit. Of course, the conclusions and interpretations expressed here are my own; I do not speak for the court or any other institution.

"Why are judges [who are] so good making so many errors?"[1]

That question, posed at a hearing of the Senate Judiciary Committee in July 1999, nicely captures one of the principal arguments made in the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals. The Commission, chaired by retired Supreme Court Justice Byron White, recommended that Congress divide the existing Ninth Circuit Court of Appeals into three "adjudicative divisions," each of which would operate almost as an independent appellate court.[2] Restructuring is necessary, the Commission said, because "the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals."[3] That conclusion, in turn, rested on the Commission's view that "a smaller decisional unit can more effectively maintain the coherence and correctness of the law of that unit."[4]

The reference to "coherence" in the Commission's rationale came as no surprise. Critics of the Ninth Circuit have long argued that a large court of appeals inevitably has difficulty maintaining consistency in its decisional law; in embracing that view, the Commission ploughed familiar ground. What is new is the emphasis on "correctness."

A recurring theme in the Commission report is the idea that smaller adjudicative units will be better able to produce decisions that are "correct" and to rectify panel rulings that are "aberrant."[5] The inference is clear: the Ninth Circuit today generates a disproportionate number of panel decisions that are wrong, and the existing en banc process fails to provide the necessary corrective.

The latter point has been made explicitly by the United States

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[1] *Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and the Ninth Circuit Reorganization Act: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 106th Cong. 84 (1999) (prepared statement of Hon. Andrew J. Kleinfeld, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit) [hereinafter *1999 Senate Hearing*].

[2] Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 41 (1998) [hereinafter Final Report]. Citations to Final Report can be found at http://app.comm.uscourts.gov (last visited Oct. 25, 2000). Hard copies of all cited Final Report documents are on file with the UC Davis Law Review.

Although the Commission described the divisions as "semi-autonomous," *see* Final Report, *supra*, at 43, analysis demonstrates that the autonomy would be almost complete. *See* Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. CAL. L. REV. 377, 381-93 (2000) [hereinafter Hellman, *Unkindest Cut*].

[3] Final Report, *supra* note 2, at 47.

[4] *Id.* at 51.

[5] *See, e.g., id.* at 30, 48.

Department of Justice. The Department opposes the Commission recommendation for adjudicative units. Nevertheless, it agrees that a "shortcoming" of the Ninth Circuit today is "its failure effectively to address erroneous panel decisions in important cases."[6]

If the evidence establishes that the Ninth Circuit Court of Appeals is handicapped in maintaining the "correctness" of its decisional law by reason of its size, that would be a strong argument in favor of restructuring. It is therefore important to test the validity of the proposition. That is the task undertaken by this article. The article is in four parts. Part I provides background on the Commission proposal and identifies two possible standards for testing the "correctness" of a court of appeals panel decision. Part II posits that correctness is measured by the views of the United States Supreme Court. It examines the Ninth Circuit's record of reversals in the Supreme Court to determine whether that record points to systematic failings in the way the Ninth Circuit Court of Appeals carries out its business. Part III considers "correctness" from the perspective of majority rule within the circuit. It focuses on the Ninth Circuit's unique mechanism for rectifying aberrant panel decisions: the "limited en banc court." The article concludes with brief observations on the future of the Ninth Circuit and the three legislative proposals introduced in the 106th Congress.

I. THE WHITE COMMISSION AND THE QUEST FOR "CORRECTNESS"

The Commission on Structural Alternatives for the Federal Courts of Appeals (the "Commission") was created by an Act of Congress in late 1997.[7] The legislation originated as an alternative to bills that would have effected an immediate split of the Ninth Circuit.[8] Chief Justice Rehnquist appointed the five members of the Commission in December 1997, and in January 1998 the members selected Justice White as their chair. Over the next few months the Commission held hearings in several cities; it also received extensive written submissions, mostly from judges, but also from bar associations and lawyers.

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[6] Comments of the United States Department of Justice on the Tentative Draft Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 6, 1998), *available at* http://app.comm.uscourts.gov/report/comments/DOJ.htm.

[7] The legislation establishing the Commission was included in the Judiciary appropriations bill. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491 (1997).

[8] For a brief account of the process that led to the passage of the legislation, see Hellman, *Unkindest Cut*, *supra* note 2, at 378-80.

In October 1998, the Commission circulated a draft report for public comment. Included in the draft report was the recommendation that Congress keep the Ninth Circuit intact but divide its court of appeals into three largely autonomous "adjudicative divisions."[9] The chief judge of the Ninth Circuit, speaking for a majority of the judges of the court of appeals, wrote to the Commission urging several modifications to the proposed restructuring. The Commission emphatically rejected the judges' suggestions. In doing so, the Commission made explicit the central premise of its recommendation: "a smaller decisional unit can more effectively maintain the *coherence and correctness* of the law of that unit."[10]

This response indicates that the Commission perceived two distinct ways in which the Ninth Circuit's size has hampered the performance of its "law declaring function." The court has failed to maintain consistency in the law of the circuit; it has also failed to correct decisions that are erroneous.

Assertions of inconsistency in Ninth Circuit panel decisions have a long history. More than twenty-five years ago, former Solicitor General Erwin N. Griswold raised the subject in testimony before a predecessor of the White Commission, the Commission on Revision of the Federal Court Appellate System (the "Hruska Commission"). He said:

> I formed the impression . . . that in the Ninth Circuit very little attention was paid to the question of intra-circuit conflicts. The judges of the Ninth Circuit who were assigned to a panel endeavored to do justice in the case as they thought it appeared to them, and they decided it. And we would frequently find another panel ten days later deciding essentially the same question the other way without any reference to the first case . . . .[11]

Many similar statements can be found in the debates that preceded the creation of the White Commission and in the record of the White Commission's proceedings. Relying on these assertions and on its own "experience," the White Commission concluded that "large appellate units have difficulty developing and maintaining consistent and

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[9] Commission on Structural Alternatives for the Federal Courts of Appeals, Tentative Draft Report 39 (1998), *available at* http://app.comm.uscourts.gov.

[10] Final Report, *supra* note 2, at 51 (emphasis added).

[11] Commission on Revision of the Federal Court Appellate System, Hearings First Phase 10 (1973) (testimony of Erwin N. Griswold).

coherent law."[12]

The Commission offered no empirical support for its judgment, and indeed the available evidence is quite to the contrary. Over the years, I have carried out a series of empirical research projects designed to ascertain the nature and extent of inconsistency in Ninth Circuit panel decisions.[13] That research does not support the Commission's conclusion.[14]

Perhaps recognizing the vulnerability of relying solely on assertions of intracircuit inconsistency, the Commission also offered a more novel justification for its proposed restructuring of the Ninth Circuit Court of Appeals. The Commission argued that, with fewer judges, the semi-autonomous adjudicative divisions would be able to "more effectively maintain the . . . *correctness* of the law of the unit."[15]

Curiously, although the Commission referred repeatedly to the court of appeals' responsibility for issuing decisions that are "correct," the Commission never defined the standard by which "correctness" is to be tested. A reading of the report suggests two possibilities: the "hierarchical" and the "horizontal." Under the hierarchical view, a panel decision is incorrect if it diverges from the position ultimately taken by the United States Supreme Court. Under the horizontal view, a panel decision is incorrect if it departs from the position of a majority of the judges of that "adjudicative unit."

Support for the hierarchical interpretation is found in the Commission's references to letters it received from members of the Supreme Court. The Commission pointed out that all four of the Justices

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[12] Final Report, *supra* note 2, at 47.

[13] *See* Arthur D. Hellman, *Breaking the Banc: The Common Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 941-65 (1991) [hereinafter Hellman, *Breaking the Banc*]; Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 544-51 (1989); *see also* Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1088-1107 (1999).

[14] For a summary of the research, see Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 MONT. L. REV. 261, 275-80 (1996) [hereinafter Hellman, *Dividing the Ninth Circuit*]. The issue is also addressed in Hellman, *Unkindest Cut*, *supra* note 2, at 397-401. In that article I called attention to evidence of inconsistency in the decisions of the Court of Appeals for the Federal Circuit, a court of only twelve judges. *See id.* at 399. A recent analysis of Federal Circuit rulings on the doctrine of equivalents – an important area of patent law – reinforces this point. *See* Paul E. Schaafsma, *Court Offers Mixed View of Equivalents Doctrine*, NAT'L L.J., Oct. 16, 2000, at C26. The author concludes that "given the current state of the court, a litigant's chance of success on appeal appears to ride as much on the viewpoint of the Federal Circuit panel to which it is assigned as on the merits of the case." *Id.*

[15] Final Report, *supra* note 2, at 51 (emphasis added).

who commented on the Ninth Circuit "were of the opinion that it is time for a change."[16] The Commission then added: "We believe that our divisional proposal addresses the Justices' concerns." Of particular interest are the comments of Justice Scalia and Justice O'Connor. Justice Scalia wrote:

> [T]he function of en banc hearings . . . is not only to eliminate intra-circuit conflicts, but also to correct and deter panel opinions that are pretty clearly wrong . . . . The disproportionate segment of this Court's discretionary docket that is consistently devoted to reviewing Ninth Circuit judgments, and to reversing them by lop-sided margins, suggests that this error-reduction function is not being performed effectively.[17]

Justice O'Connor spoke in a similar vein. In her letter to the Commission she said, "It is important to the federal system as a whole that the Courts of Appeals utilize en banc review to correct panel errors within the circuit that are likely to otherwise come before the Supreme Court." Citing statistics on en banc decisions and cases reviewed by the Supreme Court, she added pointedly: "These numbers suggest that the present system in [the Ninth Circuit] is not meeting the goals of en banc review."[18]

On the basis of this evidence, it would be plausible to conclude that the Commission adopted the hierarchical view of correctness. However, this interpretation is called into question by the testimony of Judge Pamela Rymer, a member of the Commission, at a hearing of the Senate Judiciary Committee. Judge Rymer, "representing and speaking in behalf of" the Commission, told the committee that the Ninth Circuit's record of reversals in the Supreme Court "is not a problem that the Commission identified or that the Commission believes should weigh into the consideration of structural alternatives one way or another."[19]

If the Commission were measuring correctness by the positions of the United States Supreme Court, the reversal rate would be highly relevant. Judge Rymer's comments thus suggest that the Commission viewed

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[16] *Id.* at 38.

[17] Letter from Justice Antonin Scalia to Justice Byron R. White 1 (Aug. 21, 1998), *available at* http://app.comm.uscourts.gov/hearings/submitted/pdf/Scalia1.pdf [hereinafter Scalia Letter].

[18] Letter from Justice Sandra Day O'Connor to Justice Byron R. White 2 (June 23, 1998), *available at* http://app.comm.uscourts.gov/hearings/submitted/pdf/oconnor.pdf [hereinafter O'Connor Letter].

[19] *1999 Senate Hearing*, *supra* note 1, at 59, 60-61 (statement of Hon. Pamela A. Rymer, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

correctness from a different perspective – the horizontal. Other language in the report supports this interpretation. For example, the Commission argued that its proposed restructuring would enable each adjudicative unit to "more readily take cases en banc . . . that seem wrong to a majority of the judges."[20] Further, in explaining why each division should have its own en banc court, the Commission stated that the function of "rectifying incorrect panel decisions" should be carried out in such a way that "the entire body of judges for whom an en banc opinion speaks should have a voice in that opinion."[21] The implication is that what makes the panel decision "incorrect" is that it does not reflect the views of "the entire body of judges for whom [the] opinion speaks."

For present purposes, there is no need to choose between these two interpretations. Both arguments have loomed large in the debate over restructuring the Ninth Circuit, and both raise important issues about the Ninth Circuit's performance of "the law-declaring function" of an appellate court. In Part II of this article, I look at the Ninth Circuit from the "hierarchical" perspective. Part III addresses correctness in the "horizontal" setting.

II. THE NINTH CIRCUIT AND THE SUPREME COURT

In disclaiming reliance on the Ninth Circuit's record of reversals in the Supreme Court, Judge Rymer departed from the approach taken by many supporters of restructuring. Indeed, minutes after Judge Rymer testified at the Senate Judiciary Committee hearing, another Commission member, Judge William D. Browning, sounded a very different note. After acknowledging the "minimal importance" of the reversal rate, Judge Browning continued:

> [I]t is also true that the ninth circuit is the most reviewed circuit in the country.... [I]t is the most reversed circuit in the country, according to Judge Justice Scalia.... [I]t is the circuit reversed unanimously by the U. S. Supreme Court the most; and it is the circuit, when reversed, which draws the fewest dissents in the U. S. Supreme Court. There is some message there. The message has been out there for all to read and hear for years.[22]

More recently, Senator Orrin Hatch, chairman of the Senate Judiciary

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[20] Final Report, *supra* note 2, at 29.

[21] *Id.* at 49.

[22] *1999 Senate Hearing*, *supra* note 1, at 129 (statement of Hon. William D. Browning, United States District Judge).

Committee, explicitly described the reversal rate as a problem that could be dealt with through dividing the circuit:

> Three terms ago, the Ninth Circuit's reversal rate before the U.S. Supreme Court exceeded 95 percent. It is no cause for celebration to note that during the last two terms, the Ninth Circuit reversal rate averaged 77 percent, and this term I have noted that the Ninth Circuit is not faring particularly well, with a record of 0 to 7 before the Supreme Court. What is really wrong is there are literally thousands of cases they hear that they are probably making the wrong decisions on that will never go to the Supreme Court because the Court doesn't have time to listen to thousands of cases from the Ninth Circuit Court of Appeals. So we are having all kinds of injustice out there just because of judges who are out of control, who are activist judges ignoring the law itself. I believe these problems will be corrected when we streamline the circuit, leaving two more manageable circuits in place to more carefully and exactingly do the work currently undertaken by one.[23]

How should this line of argument be evaluated? The first question is normative: should it be a matter of concern if a court of appeals has a disproportionately high reversal rate? The answer is yes. In a hierarchical system, it is not healthy when an intermediate court is reversed repeatedly by the highest court in the structure. There are at least two reasons for this. One reason involves perception and legitimacy. A pattern of reversals puts a personal cast on a process that should be seen as transcending personalities; it may also raise doubts about the competence or integrity of the intermediate court judges. From a purely instrumental perspective, repeated reversals destabilize the law by creating the impression that no decision of the court of appeals can be relied upon until it has been tested in the Supreme Court.

The next question is whether critics are correct in asserting that "the Ninth Circuit has a singularly . . . poor record on appeal" in the Supreme Court.[24] Although some defenders of the Ninth Circuit insist that the record is not as bad as it appears,[25] their argument does not withstand scrutiny. Two scholars have independently analyzed the reversals. Professor Marybeth Herald focused on the notorious 1996 Term of the

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[23] 146 CONG. REC. S1235 (daily ed. Mar. 7, 2000) (statement of Sen. Hatch).

[24] Letter of Justice Antonin Scalia to Justice Byron R. White 2 (Sept. 9, 1998), *available at* http://app.comm.uscourts.gov/hearings/submitted/pdf/Scalia2.pdf.

[25] *See, e.g.*, Jerome Farris, *The Ninth Circuit – Most Maligned Circuit in the Country – Fact or Fiction?*, 58 OHIO ST. L.J. 1465 (1997).

Supreme Court, the Term in which the Court reversed the Ninth Circuit in twenty-seven out of twenty-eight cases.[26] She concluded:

> The number of cases that the Supreme Court took for review in the 1996-97 Term from the Ninth Circuit was high. The percentage of reversals was also high, as was the number of unanimous reversals. In addition, many cases involved issues where the Ninth Circuit decisions had no support from other courts of appeal. Some panels of the Ninth Circuit were not synchronized with the Supreme Court or fellow circuits. For all these reasons, the reversal rate and the cases are hard to explain away.[27]

Professor Stephen L. Wasby sought to determine whether the 1996 Term represented an aberration or "spike." After looking at other circuits and other Terms, he concluded: "Examined in terms of the years which preceded it, [the 1996 Term] was no 'spike.'"[28]

But is the reversal rate a product of circuit size? That is a much tougher question. Justice Scalia and Justice O'Connor draw the connection by focusing on en banc review. As Justice Scalia sees it, one function of en banc review is "to correct and deter panel opinions that are pretty clearly wrong."[29] But "the current size of the Circuit discourages" en banc hearings, and the reversal rate "suggests that this error-reduction function is not being performed effectively."[30] Justice O'Connor has offered a similar analysis. She said, "It is important to the federal system as a whole that the Courts of Appeals utilize en banc review to correct panel errors within the circuit that are likely to otherwise come before the Supreme Court."[31] She continued by contrasting the low number of cases heard en banc by the Ninth Circuit with the much higher number of Ninth Circuit cases reviewed by the Supreme Court.[32]

At one level, this analysis is unquestionably accurate. Of the scores of

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[26] Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405 (1998). There is some room for disagreement over the precise numbers, but Professor Herald's count is certainly reasonable. *See id.* at 423-24.

[27] *Id.* at 488.

[28] Stephen L. Wasby, The Ninth Circuit and the Supreme Court: Relations Between Higher and Lower Courts 11 (1998) (unpublished paper prepared for delivery at the 1998 Annual Meeting of the American Political Science Association) (on file with author). In the 1999 Term, the Supreme Court reversed the Ninth Circuit in 9 out of 10 cases.

[29] Scalia Letter, *supra* note 17, at 1.

[30] *Id.*

[31] O'Connor Letter, *supra* note 18, at 2.

[32] *Id.*

Ninth Circuit decisions that the Supreme Court has reversed during the last few years, only a handful were the product of en banc hearings.[33] Thus, as a factual matter, it is true that the Ninth Circuit did not use en banc review to correct the panel opinions that the Supreme Court viewed as erroneous. Moreover, when the Ninth Circuit did take cases en banc, its decisions fared quite well at the hands of the Justices.[34] But these facts simply recast the question: why did the Ninth Circuit judges not make use of the en banc process to address the errors in panel decisions that resulted in reversals by the Supreme Court?

One possible answer is suggested by the White Commission report. The Commission too questioned the effectiveness of en banc review in "rectifying incorrect panel decisions" in the Ninth Circuit.[35] But it went further, asserting that the size of the court makes it impossible for the judges to monitor panel opinions and thus to identify the cases that warrant en banc rehearing.[36] To be sure, the Commission focused on monitoring primarily as a device for preserving consistency within the circuit. But it also emphasized the importance of monitoring as a tool for "identify[ing] and correct[ing] any misapplication or misstatements of the law."[37]

The hypothesis, then, can be stated as follows. Because the Ninth Circuit is so large, its judges cannot effectively monitor the opinions of its many three-judge panels. Because monitoring does not operate as it should, the court fails to grant en banc rehearing to correct panel rulings that are erroneous. Instead, the cases are taken to the Supreme Court. The Court overturns the panel decisions, thus bringing about the high reversal rate.

To assess this argument, I begin by examining the procedures available to Ninth Circuit judges for monitoring decisions by three-judge panels and the use made of those procedures. Next, I compare the results of the monitoring process with the pattern of reversals in the Supreme Court. Finally, I consider the possible significance of recent developments in both courts.

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[33] *See infra* section B.

[34] *See infra* text accompanying notes 61-66.

[35] Final Report, *supra* note 2, at 49.

[36] *Id.* at 47.

[37] *Id.*

A. Opinion Monitoring and the En Banc Process in the Ninth Circuit

In the Ninth Circuit, as in other courts of appeals, cases are ordinarily heard and decided by panels of three judges selected from among the active judges of the court, senior judges, and visiting judges.[38] Congress has also authorized the court of appeals to hear or rehear cases "before the court [en] banc."[39] En banc rehearing will be granted if a majority of the active judges vote to do so. In other circuits, the en banc court consists of all active judges.[40] The Ninth Circuit, acting under the authority of a 1978 statute, convenes a "limited en banc court" (LEBC) composed of the chief judge and ten other judges selected at random for each case.[41]

There are two ways of initiating the process that can lead to rehearing by a limited en banc court. The party who lost at the panel level may file a petition for rehearing en banc (PFREB).[42] The petition is circulated to all active judges and to senior judges who have chosen to participate in the process. If any judge calls for a vote, a vote will be held, and if a majority of the nonrecused active judges agree to rehearing, a limited en banc court will be chosen from among the eligible judges. In the alternative, a judge may call for a vote even though no party has requested it.

It would be a mistake, however, to think that rehearing by the en banc court is the only way in which Ninth Circuit judges can affect the disposition of cases heard by panels on which they did not sit. On the contrary, under the court's internal rules, off-panel judges can make use

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[38] *See generally* JUDITH A. MCKENNA, LAURAL L. HOOPER, & MARY CLARK, CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS (Federal Judicial Center 2000).

[39] 28 U.S.C. § 46(c) (1998). The statute uses the spelling "in banc," as did the Federal Rules of Appellate Procedure until the 1998 revision.

[40] Senior judges may sit on the en banc court if they served as a member of the panel that decided the case. *See id.*

[41] For background on the 1978 legislation, see Arthur D. Hellman, *Deciding Who Decides: Understanding the Realities of Judicial Reform*, 15 LAW & SOC. INQUIRY 343, 346-51 (1990) [hereinafter Hellman, *Judicial Reform*]. For a detailed account of the deliberations that led to the establishment of the limited en banc court, see Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, *in* RESTRUCTURING JUSTICE 62-70 (Arthur D. Hellman ed., 1990) [hereinafter Hellman, *Maintaining Consistency*].

[42] Until the 1998 amendments to the Federal Rules of Appellate Procedure, litigants filed a petition for rehearing with a "suggestion" for rehearing en banc. For convenience, I will use the current terminology even though most of the cases discussed in this article were governed by the pre-1998 version of the rule.

of several procedures for raising and pursuing questions about panel decisions. They can "stop the clock."[43] They can "request 5.4(b) notice," thus requiring the three-judge panel to inform all judges of the disposition of the petition for rehearing.[44] And, of course, they can call for rehearing by an en banc court. Each of these procedures may generate an exchange of memoranda that can result in a modification of the opinion or even of the disposition.

Stop-clocks, 5.4 requests, and en banc calls are treated as part of the en banc process, and communications among the judges in these cases are recorded in the court's monthly en banc report. In addition, judges may communicate privately with panels; these communications will not be reflected in the monthly report.

In the five years 1994 through 1998, off-panel judges initiated en banc activity in more than 420 cases.[45] The panel decisions that were the subject of this monitoring spanned the full range of the court's docket. They embraced civil appeals and criminal matters, high-profile cases and cases notable only for their obscurity. Sometimes the off-panel judge questioned the outcome, but in many instances the concern was limited to reasoning, language, or even case citations in the panel decision. In more than ninety cases the panel modified its opinion, and sometimes the outcome, even though the court did not hear the case en banc.[46]

A few examples will give a sense of the nature and extent of the monitoring that goes on in the Ninth Circuit Court of Appeals. To preserve confidentiality, I have omitted some identifying details, but even without that information we can see the kind of scrutiny that panel opinions receive from off-panel judges.

- A panel issued a unanimous decision in a habeas case. Ten

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[43] "Stopping the clock" is the name given by the court to the procedure that allows a judge, without calling for an en banc vote, to extend for fourteen days the time limits for issuing the mandate or taking other action in a pending case. *See* United States Court of Appeals for the Ninth Circuit, General Orders 5.1(a)(7) and 5.4(e) (2000), *available at* http://www.ca9.uscourts.gov.

[44] *See* Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process"*, 74 N.Y.U. L. REV. 313, 328-29 (1999).

[45] This figure does not include cases in which en banc activity was initiated by one or more members of the three-judge panel to which a case was assigned. Although these initiatives contribute significantly to maintaining harmony in the law of the circuit, it is not clear that they fall within the realm of "monitoring" as the White Commission envisioned it. To be conservative, I have omitted them from the tally.

[46] This is a conservative figure. In some cases the panel modified its disposition, but on the basis of the available information I could not determine whether the panel was acting in response to an expression of concern by an off-panel judge.

days after the filing of the opinion, an off-panel judge requested 5.4 notice. The judge did not object to the panel's results on any of the issues presented; he objected only to the reliance on a Ninth Circuit decision that had recently been overruled by the Supreme Court. The original opinion was withdrawn before it reached the advance sheet, and a revised opinion was issued.

- In another habeas case, the panel found a constitutional violation. An off-panel judge asked the panel to stay the mandate to consider an amendment to the opinion. The panel circulated a proposed amendment to the requesting judge. The amendment made a single change: it replaced a statement of a general proposition with a sentence focusing on the facts of the particular case. The requesting judge said that he appreciated the panel's accommodation of his concerns and was withdrawing his stop clock. The prosecutor asked the Supreme Court to review the case, but certiorari was denied.

- A panel issued a unanimous opinion on a highly technical issue of federal taxation. Two judges requested 5.4 notice, one before the PFREB was circulated to the court, the other afterwards. The panel issued an amended opinion that made no changes in the result or the analysis; the only change was the omission of language suggesting deference to the Commissioner of Internal Revenue. Both judges said their concerns were satisfied by the revision.

- In a suit by a trustee, a panel initially held that the defendant was not an ERISA fiduciary and that the plaintiff's state law claims were preempted. After the filing of a PFREB, an off-panel judge requested 5.4 notice. The judge argued in a closely reasoned memorandum that the panel's opinion had incorrectly analyzed the ERISA preemption issue. Another judge said that he shared the initiating judge's concern. Thereafter, the panel withdrew its opinion. The panel issued a new opinion that adhered to the holding on fiduciary status but reexamined the preemption holding and concluded that the state law claims were not connected with ERISA and thus were not preempted.

- In a brief per curiam opinion, a panel rejected a pro se litigant's challenge to the district court's denial of leave to proceed in forma pauperis. No PFREB was ever filed, but an off-panel judge stopped the clock and asked the panel to consider a small change in the opinion. The panel amended the opinion to modify a one-paragraph reference to the Federal Rules of Civil Procedure. The off-panel judge thanked the panel for the change and withdrew his stop-clock.

- In an appeal from a criminal conviction, an off-panel judge expressed concern about the line of authority cited by the panel on an alternate ground that did not affect the result. The panel issued an amended opinion that modified the one paragraph in question.

Other examples could be adduced, but there is no need to do so. The research tells us that the problem – if there is a problem – does not lie in the inability of judges on a large court to monitor the opinions handed down by panels on which they do not serve. Contrary to the apparent belief of the White Commission,[47] Ninth Circuit judges engage in extensive monitoring of their colleagues' decisions.[48] But the process has not resulted in en banc rehearing of numerous panel decisions that the Supreme Court has viewed as erroneous. Why not? To that question I now turn.

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[47] Although the White Commission briefly describes the operation of the limited en banc court, *see* Final Report, *supra* note 2, at 32, the Commission's report makes no mention of the various procedures, short of calling for en banc rehearing, that enable off-panel judges in the Ninth Circuit to direct their colleagues' attention to panel opinions that may warrant further consideration. Given the high value the Commission places on the monitoring of panel decisions by court of appeals judges, this omission seems especially strange.

[48] This finding also casts doubt on the relevance of a hypothesis recently advanced by Judge Richard A. Posner. Judge Posner argued that "informal norms" are likely to be less effective in keeping judges "in line" in a large circuit than in a small circuit. *See* Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711, 712 (2000). Whether or not that is so, this study shows that Ninth Circuit judges make extensive use of formal mechanisms to keep their colleagues "in line."

B. The En Banc Process and the Supreme Court

Although Ninth Circuit judges engage in extensive monitoring of other panels' decisions, that monitoring has not led to the correction of the "panel errors [that have therefore] come before the Supreme Court."[49] Why does the process fail? Do the judges not initiate en banc consideration, or does the process stop short of en banc rehearing? Is there a flaw in the mechanisms the Ninth Circuit has adopted, or are the judges applying different criteria from those that guide the Justices in reviewing and reversing Ninth Circuit decisions? To answer these questions, it is necessary to undertake an empirical examination of the relationship between the en banc process and the Supreme Court reversals.

1. Two Sets of Cases

For this segment of the study, I have compared two sets of cases. One set encompasses Ninth Circuit decisions that were reversed by the Supreme Court. The second set embraces Ninth Circuit panel decisions that were the subject of en banc activity within the court. I begin by explaining how I selected the two sets of decisions for the study.

a. The Reversals

In the 1996 Term, as already noted, the Supreme Court reversed twenty-seven out of twenty-eight Ninth Circuit decisions, including eight that were reversed summarily. However, it would be wrong to draw conclusions based on dispositions in a single Term. I therefore decided to study the Court's treatment of Ninth Circuit cases over a longer period of time. To assure that the analysis reflects current conditions, I chose the five most recently completed Terms – 1994 through 1998.[50]

The "reversal" cases are the Ninth Circuit decisions that were accepted for review by the Supreme Court during those five Terms[51] and reversed

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[49] *See supra* text accompanying note 31 (quoting Justice O'Connor).

[50] The 1999 Term was still in progress when I began the research.

[51] Officially, the 1998 Term did not end until October 3, 1999; however, Court action after the June 1999 adjournment is functionally part of the 1999 Term. On that basis, I would have excluded the two Ninth Circuit cases in which review was granted in September 1999. But one of these cases was the subject of an unsuccessful en banc vote in 1998; it would thus have been included in the "en banc activity" set. In the interest of

summarily or after oral argument.[52] A case is counted as a reversal if the judgment was reversed or vacated in whole or in part on the merits of any issue.[53] GVRs – cases in which the Court granted certiorari, vacated the judgment, and remanded for reconsideration in light of a recent precedent – are not treated as reversals.[54]

The "reversal" group encompasses eighty-four Ninth Circuit decisions. Seventy-one decisions were reversed after oral argument and thirteen were reversed summarily.[55] During the study period the Court granted certiorari in fourteen additional Ninth Circuit cases and affirmed. One petition from the Ninth Circuit was dismissed and one judgment was vacated without decision.

b. The En Banc Activity Cases

The cases accepted by the Supreme Court during the five Terms 1994 through 1998 would be those that received final disposition in the Ninth Circuit during a somewhat earlier period. To examine the Ninth Circuit's handling of cases that were candidates for Supreme Court review in those five Terms, I have studied the record of en banc activity during calendar years 1994 through 1998.

As explained in the preceding section, en banc activity in the Ninth Circuit embraces a broad range of inter-judge communications. It includes not only actual en banc calls and votes, but also "stop clocks" and requests for 5.4 notice – in short, all efforts by members of the court to initiate en banc proceedings, whatever the label.[56] During the five

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simplicity, and to avoid any suggestion of undercounting, both cases were included in the study.

[52] Cases that were reversed in the 1994 Term but accepted for review in the 1993 Term are not included. Four cases fit that description.

[53] Two cases in the Study Group arguably should not be counted as reversals. *See* Unum Life Ins. Co. v. Ward, 526 U.S. 358 (1999) (affirming on what appears to be principal issue); Metropolitan Stevedore Co. v. Rambo, 521 U.S. 121 (1997) (Rambo II) (affirming on principal issue). In five other cases the Supreme Court agreed with the Ninth Circuit on at least one substantial issue. *See* Hanlon v. Berger, 526 U.S. 808 (1999); California Dental Ass'n v. FTC, 526 U.S. 756 (1999); Blessing v. Freestone, 520 U.S. 329, 346-48 (1997); Koon v. United States, 518 U.S. 81 (1996); United States v. Aguilar, 515 U.S. 593 (1995).

[54] On GVRs, see generally Lawrence v. Chater, 516 U.S. 163, 165-175 (1996) (per curiam); Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 HASTINGS CONST. L.Q. 5 (1983).

[55] Two Ninth Circuit decisions were reversed in a single Supreme Court opinion. *See* United States v. Watts, 519 U.S. 148 (1997). They are counted as two cases because they were heard by separate panels in the Ninth Circuit.

[56] The category does not include communications from off-panel judges to panel members that are not shared with all judges in accordance with the court's en banc

years of the study the record of en banc activity embraced more than 450 appeals.[57]

Although the correlation between the two groups of cases is not exact, the temporal correspondence is very close.[58] I am confident that if a reversal case generated any kind of en banc activity, the decision would be included in the en banc activity records for the 1994-98 period.

2. A Gap in Perceptions

From the perspective of the en banc process, the Supreme Court reversals can be divided into six groups. At one end of the spectrum are the six cases that were heard and decided by a limited en banc court. Remarkably, in all but one of these, the en banc court overturned the panel decision in whole or in substantial part.[59] Thus, in the eyes of the Supreme Court, it was the panel that "got it right" and the en banc court that committed an error.[60]

At first blush, it might appear that these decisions cast doubt on the theory that the Ninth Circuit could avoid repeated reversal by the Supreme Court if it heard more cases en banc. But the picture looks very different when we put the six reversals in context. In the eight years 1991 through 1998, the Ninth Circuit heard a total of ninety-six cases en banc.[61] As often as not, the losing party accepted the en banc decision and did not seek Supreme Court review. Certiorari petitions were filed in only forty-eight of the cases, and only ten were accepted for review. Of those ten, one decision was affirmed and six were reversed.[62] Three others were vacated for reconsideration in light of plenary decisions that in effect overruled the en banc decision. Thus, even when the GVRs are

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procedures.

[57] This figure does include cases in which en banc activity was initiated by one or more members of the three-judge panel to which a case was initially assigned. Although such cases may not fall within the realm of "monitoring," they must be considered in assessing the performance of the court as an institution.

[58] Only four of the reversals involved panel decisions that were handed down before January 1, 1994. One of these cases was the subject of en banc activity in 1994, as were more than thirty other panel decisions issued in 1993.

[59] The only case in which the en banc court endorsed the result (and indeed the opinion) of the three-judge panel was *Yniguez v. Arizona*, 69 F.3d 920 (9th Cir. 1995) (en banc), *rev'd sub nom.* Arizonans for Official English v. Arizona, 520 U.S. 43 (1997).

[60] This group includes *United States v. Aguilar*, 515 U.S. 593 (1995). The Supreme Court agreed with the panel on both issues in the case; it agreed with the en banc court on one.

[61] Data are available for this eight-year period, and I see no reason not to take advantage of that fact.

[62] This figure includes one case that was summarily reversed. Roy v. Gomez, 81 F.3d 863 (9th Cir. 1996), *rev'd sub nom.* California v. Roy, 519 U.S. 2 (1996).

included, the reversals account for not quite ten percent of the Ninth Circuit's en banc cases over an eight-year period.

The record looks even more impressive when we consider some of the en banc decisions that the Supreme Court declined to review. These include four cases in which the en banc court overturned a state death sentence on federal constitutional grounds.[63] The vote in each instance was six to five or seven to four. Given the Supreme Court's concerns about the federalism implications of such cases,[64] one would have expected the Court to intervene if the Justices thought the limited en banc court had erred in ordering new trials. But the Court allowed the decisions to stand.

I recognize that the Supreme Court – especially the current Court – does not ordinarily take cases to correct error in the court below.[65] But the Court is willing to make exceptions when a federal court of appeals has erroneously granted relief to a habeas petitioner. As the Court itself said in one case where it summarily reversed the Ninth Circuit, "[W]here, as in this case, a federal appellate court, second-guessing a convict's own trial counsel, grants habeas relief on the basis of little more than speculation with slight support, the proper delicate balance between the federal courts and the States is upset *to a degree that requires correction.*"[66] Against this background, it is legitimate to treat the denial of certiorari in the cases I have mentioned as reflecting a conclusion that the grant of habeas relief did not "require[] correction."

At the other end of the spectrum are nineteen cases – almost a quarter of the total – in which the losing party in the Ninth Circuit did not seek rehearing of the panel decision by the limited en banc court. Do these cases tell us anything about the effectiveness of the en banc process? A good argument can be made that they do not. The thrust of the argument is that in an adversarial system, it is difficult to fault the off-panel judges for not pursuing the en banc process when the litigants have not asked the court to do so. I believe that the argument is persuasive.

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[63] *See* Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998), *cert. denied*, 525 U.S. 1033 (1998); Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998); McDowell v. Calderon, 130 F.3d 833 (9th Cir. 1997), *cert. denied*, 523 U.S. 1103 (1998); Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997), *cert. denied*, 522 U.S. 1008 (1997).

[64] Recall the now-classic opening line of Justice O'Connor's opinion for the Court in one noteworthy death penalty habeas case: "This is a case about federalism." Coleman v. Thompson, 501 U.S. 722, 726 (1991).

[65] *See* Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 430-31 (1997).

[66] Wood v. Bartholemew, 516 U.S. 1, 8 (1995) (emphasis added).

It is true that Ninth Circuit judges do not necessarily rely on the parties to call their attention to panel decisions that may warrant further consideration within the court. In more than one-third of the cases that were the subject of en banc activity during the study period, an off-panel judge requested 5.4 notice or otherwise initiated the process before a petition for rehearing en banc was filed. Moreover, sua sponte requests accounted for about forty percent of the cases in which en banc review was granted.[67]

On the other hand, judges who initiated en banc activity before the filing of any petition for rehearing often did not pursue the cases if the losing party chose not to seek rehearing en banc. There are ample justifications for this behavior. Hundreds of PFREBs are filed each year, and most of them plainly do not satisfy the criteria set forth in the Federal Rules of Appellate Procedure. A judge could reasonably assume that if the deadline passes without the filing of a PFREB, the case probably does not present an issue warranting reconsideration by a limited en banc court.

This assumption is especially justifiable if the judge's reasons for flagging the case involved apparent error in the panel opinion rather than the possibility of conflict with some earlier Ninth Circuit decision. The members of the court of appeals are in a unique position to identify inconsistency or confusion in circuit law, and they may feel a special responsibility to bring clarity to that law even when the parties to a pending appeal have not found anything to complain about. But when the concern is that a panel has deviated from the national law as laid down by Congress and the Supreme Court, it makes sense for the judges to rely primarily on the litigants to bring the error to their attention. This is especially true when, as in a substantial majority of the reversal cases, the losing party is the United States, a state government, or some other repeat player. These entities are represented by able and experienced counsel, and if the litigants do not seek en banc rehearing, the off-panel judges can reasonably assume that the panel decision does not contain error requiring correction within the court.

In this light, I believe the absence of en banc activity in reversal cases in which no PFREB was filed generally does not reflect negatively on the effectiveness of opinion monitoring in the Ninth Circuit. There is one exception: when the panel has followed circuit law as established in a recent precedent that did generate an unsuccessful petition for rehearing

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[67] This figure includes cases in which en banc activity was initiated by one or more members of the three-judge panel to which the case was originally assigned.

en banc. That description fits two of the reversals in the study period.

This brings us to the reversals that most acutely raise the question of the Ninth Circuit judges' sensitivity to panel error as perceived by the Supreme Court: the cases in which the losing party sought en banc rehearing but the court denied it. The cases fall into four groups:

- In thirty-three cases, a petition for rehearing en banc[68] was filed with the court of appeals and presumably circulated to all active judges, but no judge initiated en banc activity. No judge stopped the clock; no judge requested a 5.4 notice.

- In another thirteen cases, an off-panel judge stopped the clock or requested a 5.4 notice, but the judge did not follow up. The en banc report does not reflect that any memoranda were exchanged or that any further en banc activity took place after the initial announcement.[69]

- In five cases, an off-panel judge initiated en banc activity, and one or more memoranda were exchanged, but the process stopped short of a vote on rehearing en banc.

- Finally, there were eight cases in which a judge requested a vote on rehearing en banc and the vote was taken, but a majority of the active judges did not vote in favor of rehearing. In five of these there was a published dissent from the denial of en banc review.

What stands out from these findings is that there is a wide gap between the Supreme Court's perception of the Ninth Circuit panel decisions that are both wrong and important and the perception of the Ninth Circuit's own judges. In all but nineteen of the eighty-four cases that the Supreme Court reversed, a petition for rehearing en banc was circulated to the active judges of the court of appeals. But in half of those cases, not a single judge asked other members of the court to take a second look at the panel decision. In only nineteen cases did the PFREB

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[68] As noted earlier, during this period the document was formally styled "petition for rehearing with suggestion for rehearing en banc." *See supra* note 42.

[69] In one reversal case, the losing party petitioned for certiorari shortly after the 5.4 notice was requested, cutting off further en banc activity. Thus the reversal does not impugn the court's processes for addressing erroneous panel decisions.

generate any exchange of memoranda within the court.[70]

This gap in perceptions may help to explain the apparent belief of at least some Supreme Court Justices that the Ninth Circuit Court of Appeals is a court that cannot keep its house in order. Here are cases that the United States Supreme Court thought worthy of review, either as part of the shrunken plenary docket or among the even smaller number of cases that receive summary disposition. Here are cases in which the Supreme Court found – often without dissent – that the panel had committed error. Yet the judges of the Ninth Circuit saw nothing in the panel opinions that lifted them out of the mine run of appellate dispositions.

3. Who Drops the Ball? .

The analysis thus far points to a collective indifference on the part of Ninth Circuit judges to panel error as perceived by the United States Supreme Court. But there is another way of looking at the en banc process that puts the Ninth Circuit in a somewhat more favorable light. I have already mentioned that when the Ninth Circuit did take cases en banc, the court's decisions fared quite well in the Supreme Court. Much the same can be said of the en banc calls that failed. During the period of the study, there were 102 cases in which a judge unsuccessfully called for en banc rehearing of a panel decision.[71] Memoranda were circulated within the court, but the necessary votes did not materialize. In sixty-three of these cases the losing party filed a petition for certiorari in the Supreme Court.[72] Only nine petitions were granted, and one resulted in a judgment of affirmance. As already noted, eight decisions were reversed. The remaining petitions were denied.

A similar pattern can be seen in the cases in which one or more memoranda were circulated within the court but no vote was taken. There were more than 150 such cases during the study period. More often than not, the losing party accepted the Ninth Circuit's decision and did not seek Supreme Court review, but certiorari petitions were filed in almost sixty of the cases. Five of the Ninth Circuit's decisions were reversed and one was vacated; in all of the others, review was denied.

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[70] This figure includes the six cases that were heard by an en banc court as well as the thirteen in which there was an exchange of memoranda or a vote that failed.

[71] This figure does not include one case in which the court rejected an en banc call made by a panel before a decision was issued.

[72] In one additional case the panel withdrew its decision before a certiorari petition could be filed.

These data suggest that when the Ninth Circuit judges focus their collective attention on a panel decision, the probability is very high that the outcome will be one that the Supreme Court will find at least acceptable. The problem is that in so many cases no individual judge ever initiates the process that leads to this next level of scrutiny.

4. . . . And Why?

What accounts for the failure of individual judges to flag the cases that the Supreme Court later reversed? One possible explanation is suggested by Professor Herald's analysis of the reversals in the 1996-97 Term. Professor Herald concluded that the high reversal rate resulted from an "ideological disagreement" between the Supreme Court and the Ninth Circuit over how to resolve conflicts between government interests and individual rights.[73] She elaborated:

> The Supreme Court took cases where the Ninth Circuit had ruled against the government's position. In reversing, the Supreme Court generally ruled in favor of the government. The Ninth Circuit's approach in the subsequently reversed cases was: (a) individuals and individual rights prevail over the interests of the state and federal governments; (b) the federal government prevails over states' interests; and (c) the state generally loses, unless environmental interests are at issue. The Supreme Court's approach during the term was: (a) the states win; (b) the federal government wins if the states do not have a conflicting interest; and (c) individuals and individual rights generally lose unless real property interests are at stake.[74]

If Professor Herald is correct – and I believe that she is – this "ideological disagreement" might also explain why Ninth Circuit judges did not initiate en banc proceedings in so many of the reversal cases. The theory would be that Ninth Circuit judges, unduly sympathetic to claims of individual rights, turned a deaf ear when panels handed down dubious decisions that rejected the position of a governmental litigant.

To test the hypothesis, I have compared the government cases that the Supreme Court reversed with the government cases that were the subject of en banc activity in the Ninth Circuit. "Government" cases are defined as those in which the government - state or federal - is on one side and a claim of individual rights is on the other side. "Individual rights"

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[73] Herald, *supra* note 26, at 489.

[74] *Id.* at 410.

embrace all assertions of rights or immunities against governments as governments.[75] The "reversals" are, of course, the Ninth Circuit decisions that the Supreme Court reversed during the five Terms of the study. The en banc activity cases are the cases from the corresponding calendar years in which (a) a member of the court stopped the clock, requested 5.4 notice, or called for en banc rehearing;[76] and (b) the court voted on an en banc call or one or more memoranda were exchanged among the judges.[77]

During the five Terms of the study the Supreme Court reversed the Ninth Circuit in sixty-one government cases.[78] The record of en banc activity in the corresponding period encompasses more than 200 government cases.[79] Table 1 presents data on the two groups of decisions.

The first thing that stands out is that the Supreme Court reversals were heavily weighted in favor of governmental litigants. By far the largest portion of the cases – half of the total – were brought to the Court by state governments or their representatives.[80] Cases heard at the behest of the federal government accounted for nineteen additional reversals.[81] Reversals supporting the claimant were much less common. There were only eight cases in which the Court ruled against the federal government

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[75] The category is not limited to constitutional cases; in particular, it includes appeals arising out of federal criminal prosecutions and petitions filed by aliens challenging orders of deportation. On the other hand, it excludes cases in which the government's position is equivalent to that of a private litigant, e.g., suits against state or local governments under Title VII or the Americans with Disabilities Act.

[76] I did not include cases in which a panel called for en banc review before issuing a decision. The purpose of the study is to ascertain, if possible, why Ninth Circuit judges did not initiate en banc activity to correct panel decisions that the Supreme Court found to be erroneous. When there is no panel error to correct, the existence of en banc activity is largely irrelevant. In any event, sua sponte en banc calls by panels generally involved apparent conflicts between earlier panel decisions.

[77] For this phase of the study, I excluded cases in which a member of the court stopped the clock or requested 5.4 notice but did not follow up. While these procedures fall within the category of "en banc activity," the absence of a supporting memorandum makes it unlikely that other judges will actually focus their attention on the panel decision in question.

[78] Government cases thus accounted for almost three-quarters of the reversals during the study period.

[79] For some Ninth Circuit cases, the available information was not sufficient for classification. Thus the figures in the table slightly understate the extent of en banc activity in one or more of the categories.

[80] The "state" includes political subdivisions and state officials litigating in their official capacity.

[81] As previously noted, this tally treats *United States v. Watts*, 519 U.S. 148 (1997), as two cases. *See supra* note 55.

Table 1
Supreme Court Reversals and
Ninth Circuit En Banc Activity in
"Government" Cases 1994-1998*

Type of Case	Supreme Court Reversals	Ninth Circuit En Banc Activity**
Federal government case; government prevailed in 9th Circuit	8	77
Federal government case; individual prevailed in 9th Circuit	19	48
State government case; government prevailed in 9th Circuit	4	51
State government case; individual prevailed in 9th Circuit.	30	38
Total government cases	61	214

* As noted in the text, the "en banc activity" cases are limited to those in which at least one memorandum was circulated within the court.

** Numbers may be slightly low. See text.

and only four in which state governments were on the losing side. The Court's behavior during the period of the study thus reflects the same patterns that Professor Herald identified in the 1996-97 Term.

When we look at en banc activity in the Ninth Circuit, however, we find that the picture is more complex. Consistent with the pattern observed by Professor Herald in the cases that the Supreme Court reversed, Ninth Circuit judges challenged numerous panel opinions that favored government interests over individual rights. But Ninth Circuit judges were also attentive to cases in which panels ruled against the government.

In fact, the raw numbers probably overstate the tilt toward individual rights in the en banc process. For one thing, almost one-third of the cases in which judges challenged panel decisions favoring state governments were cases in which the panel had upheld a sentence of death. It is understandable that the judges would give special scrutiny to rulings which, if not modified, represent the last step on the road to execution.[82] But only five of those cases resulted in overturning the death sentence, and the Supreme Court denied certiorari in all but one of the five.[83]

More important, although we do not have hard data, we can be confident that panel decisions rejecting individual rights claims far outnumbered panel decisions that favored the individual. Thus it is quite possible that the overall tilt favoring intervention in pro-government decisions reflected only the predominance of those cases in the court's dispositions as a whole. We see this particularly in the cases involving the federal government. Affirmances of criminal convictions – a staple of the business of the courts of appeals – accounted for more than half of the cases in which judges raised questions about a panel opinion.

Further analysis of the en banc activity would no doubt be enlightening, but for purposes of testing the hypothesis I do not think it is necessary. If the failure of Ninth Circuit judges to flag the panel decisions that the Supreme Court reversed was attributable to "ideological disagreement," we would expect to find that en banc activity was overwhelmingly concentrated in cases where panels rejected

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[82] *See* Calderon v. Thompson, 523 U.S. 538, 569 (1998) (Souter, J., dissenting) ("[H]owever true it is that the en banc rehearing process cannot effectively function to review every three-judge panel that arguably goes astray in a particular case, surely it is nonetheless reasonable to resort to en banc correction that may be necessary to avoid a constitutional error standing between a life sentence and an execution.").

[83] The exception was the notorious case of *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997) (en banc), *rev'd*, 523 U.S. 538 (1998).

individual rights claims. That simply is not what the data show. Judges flagged many cases in which panels ruled against the government. But, more often than not, these were not the cases that the Supreme Court chose to review and reverse. And even when the judges did flag the cases, their actions generally did not lead to en banc reconsideration.[84]

C. A Passing Phenomenon?

The data tell us that Ninth Circuit judges engaged in extensive monitoring of panel opinions during the period of the study. In the course of that monitoring, the judges initiated en banc consideration in numerous cases of the kind that the Supreme Court has frequently reviewed and reversed. But more often than not, the cases that did attract the Supreme Court's interest fell below the radar of the court of appeals judges. Why? The available data do not give us an answer to that question.

Perhaps further analysis of the cases would reveal one or more patterns that would explain the gap in perceptions. Be that as it may, there is some evidence that the high number of reversals in the 1994-98 period may reflect a transient phenomenon that has now come to an end. During the five years of the study, the Supreme Court granted plenary review to eighty-seven Ninth Circuit cases, an average of seventeen per Term. The reversal rate was about eighty percent. In addition, the Court summarily reversed thirteen Ninth Circuit decisions, all but five of them in the 1996 Term. But in the 1999 Term the Court heard only ten cases from the Ninth Circuit. All but one were reversed. There were no summary reversals.[85]

It may not be coincidence that during the last few years the Ninth Circuit Court of Appeals has substantially increased the number of cases it has taken en banc. Table 2 provides the data. In the three years 1993 through 1995, the total number of cases heard or reheard en banc was only twenty-two. In the last three years of the 1990s, the court was accepting almost that number every year.[86] Several of the panel

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[84] I emphasize that this research does not cast doubt on Professor Herald's conclusions that "ideological disagreement" exists and that it helps to account for the high reversal rate. But "ideological disagreement" does not explain the Ninth Circuit's failure to use the en banc process to avert the reversals.

[85] At this writing (after the issuance of the October order lists), the Court has accepted twelve Ninth Circuit cases for argument in the 2000 Term. Only six of the petitions were filed by governmental litigants.

[86] The pattern has continued into the new millenium. As of October 15, 2000, the court had already granted en banc review in seventeen cases.

Table 2
Ninth Circuit Court of Appeals
Cases Taken En Banc
1991-1999

Year	Total Ballots	No. of Cases Rejected	No. of Cases Accepted
1991	22	14	8
1992	38	22	16
1993	29	23	6
1994	32	24	8
1995	27	19	8
1996	25	11	14
1997	41	22	19
1998	44	27	17
1999	40	21	19

decisions that were overturned by the en banc court would have been prime candidates for review and reversal by the Supreme Court if the panel outcome had been allowed to stand.[87] Thus, it appears that,

[87] *See, e.g.*, United States v. Lombera-Camorlinga, 170 F.3d 1241 (9th Cir. 1999) (holding that Vienna Convention on Consular Relations creates individual right enforceable through suppression of evidence), *on reh'g*, 206 F.3d 882 (9th Cir. 2000) (en banc) (rejecting suppression remedy); Lambright v. Stewart, 167 F.3d 477 (9th Cir. 1999) (reversing convictions in capital cases because state used dual juries), *on reh'g*, 191 F.3d 1181 (9th Cir. 1999) (en banc) (upholding convictions); Hodgers-Durgin v. De La Vina, 165 F.3d 667 (9th Cir. 1999) (allowing plaintiffs to pursue class action alleging violations of Fourth Amendment by Border Patrol), *on reh'g*, 199 F.3d 1037 (9th Cir. 1999) (en banc) (affirming

contrary to its practice during the period of the study, the Ninth Circuit is now using its en banc process to bring its jurisprudence closer to the views of the Supreme Court.[88]

The number of reversals may, of course, rise once again to the levels experienced in the middle years of the 1990s. But even if it does, that would not support the restructuring proposed by the Commission. The Commission relies on its belief that judges on a large court of appeals cannot adequately monitor the opinions handed down by panels on which they do not sit. The research reported here shows that, at least as to the Ninth Circuit, that belief is unfounded.[89]

III. THE LARGE COURT AND ITS PANELS

Thus far I have been examining the Ninth Circuit's performance of the error correction function on the premise that "error" in a panel decision means: erroneous in light of the position ultimately taken by the United States Supreme Court. That is undoubtedly the meaning given to the term by Justice Scalia and Justice O'Connor. It is probably what the Justice Department had in mind as well.[90] However, the White Commission appears to have been addressing a very different point. The Commission emphasizes that under its proposed structure – but not under any form of limited en banc – "issues of exceptional importance will be determined by *all of the judges for whom the decision speaks.*"[91]

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grant of summary judgment to defendants); United States v. Kaluna, 152 F.3d 1069 (9th Cir. 1998) (holding federal "three strikes" law unconstitutional), *on reh'g*, 192 F.3d 1188 (9th Cir. 1999) (en banc) (upholding law), *cert. denied*, 120 S. Ct. 1561 (2000).

[88] Justice Sandra Day O'Connor, speaking at the Ninth Circuit Judicial Conference in August 2000, said it is "possible" that the Ninth Circuit's "use of more en banc procedures" is responsible for the diminished number of Ninth Circuit cases accepted for review by the Supreme Court. *See* Jason Hoppin, *O'Connor Grades Circuit*, RECORDER (San Francisco), Aug. 23, 2000, at 1.

[89] Judge Richard Posner recently published an empirical study using summary reversals by the Supreme Court to test the hypothesis that the size of the Ninth Circuit Court of Appeals has impaired the quality of the court's work. He concluded that "the Ninth Circuit's uniquely high rate of being summarily reversed by the Supreme Court (a) is probably not a statistical fluke and (b) may not be a product simply of that circuit's large number of judges." Posner, *supra* note 48, at 719. I am very dubious about a research method that places so much weight on a phenomenon that encompasses only thirty-nine cases from all circuits over a period of thirteen years. But the conclusion drawn by Judge Posner from the research is sufficiently equivocal that I need not pursue the matter here. For criticism of Judge Posner's method, see Chief Judge Procter Hug, Jr., *Potential Effects of the White Commission's Recommendations on the Operation of the Ninth Circuit*, 34 U.C. DAVIS L. REV. 325 (2000).

[90] *See supra* text accompanying note 6.

[91] Final Report, *supra* note 2, at 51 (emphasis added).

Together with an earlier reference to rectifying "aberrant" decisions,[92] this passage suggests that decisions are erroneous if they are contrary to the position of a majority of the judges in the decisional unit.

Although the Commission does not elaborate on this "horizontal" perspective, others have done so. The assumption, as Judge Douglas H. Ginsburg has written, is that "the majority should rule; that is, the decisions of the panels ideally should reflect the views of the court as a whole, or where that is not possible because the court is divided, come as close as possible to that ideal by reflecting the views of a majority of the court."[93] Judge Ginsburg explicitly defines "panel error" as "divergence from the views of the majority of the circuit judges."[94] Thus, the full court "can and should convene en banc whenever the majority believes that [a panel's] error is grave enough to warrant the cost of correction, regardless of whether the case would fall under a neutral category of exceptional importance."[95]

In contrast to the hierarchical principle, the norm of majority rule is not universally accepted. Particularly in the Ninth Circuit, many judges are committed to a competing principle – the principle of panel autonomy.[96] These judges believe that as long as a new decision does not conflict with binding precedent, panels should be given wide leeway to resolve issues, even important ones, on which there is no controlling authority. They believe that the best corrective for aberrant panels decisions generally will not be found in immediate en banc review, but in the evolutionary processes of law over time.[97]

The White Commission's apparent rejection of the panel autonomy model raises fundamental issues about the role of individual judges in a geographically organized system of intermediate appellate courts. But there may be no need to address these issues if the Commission's assessment of the unique aspects of the Ninth Circuit Court of Appeals proves unpersuasive. I therefore turn to that diagnosis.

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[92] *Id.* at 30.

[93] Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008, 1034 (1991).

[94] *Id.* at 1009.

[95] *Id.* at 1041.

[96] *See* Annual Judicial Conference, Second Judicial Circuit of the United States, 106 F.R.D. 103, 162 (1984) (remarks of Judge James R. Browning) [hereinafter Browning Remarks].

[97] *See id.* at 161-62.

A. The Limited En Banc Court in the Ninth Circuit: The Record

The White Commission appears to identify two ways in which the existing arrangements in the Ninth Circuit Court of Appeals frustrate the ideal of majority rule. One involves the frequency of en banc rehearing. The second involves the use of a limited en banc court (LEBC).

At the outset of its discussion of the Ninth Circuit, the Commission asserts that smaller decisional units "may . . . more readily take cases en banc . . . that seem wrong to a majority of the judges."[98] The implication is that the Ninth Circuit today too seldom grants en banc rehearing when panels hand down decisions that a majority of the full court views as erroneous. The Commission offers no evidence on this point, and it is difficult to see how the proposition might be tested. What we do know is that the members of the court vote on en banc rehearing if even one judge requests that balloting take place. Perhaps some judges vote "no" (or fail to call for en banc in the first place) for reasons related to size. However, it is equally possible that the judges stay their hand because they agree with the panel decision or because they believe that the panel opinion, although perhaps erroneous, is not important enough to warrant en banc correction.[99] It is also worth noting that in the last three years the court has granted en banc review in substantially more cases than in the three years that preceded the creation of the Commission.[100]

In this light, I see no reason to pursue the argument – if indeed the Commission makes the argument – that the size of the Ninth Circuit has frustrated majority rule by unduly diminishing the frequency of en banc rehearing. I turn, rather, to an argument that the Commission undoubtedly makes: that when Ninth Circuit does grant en banc rehearing, the limited en banc court does not adequately reflect the views of the judges for whom the en banc opinions speak.

The Commission's concern about the representativeness of the limited en banc court is widely shared. For that reason, the Ninth Circuit Court of Appeals Evaluation Committee consulted Professor David Kaye, a noted expert on statistics and the law.[101] Professor Kaye calculated the

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[98] Final Report, *supra* note 2, at 29.

[99] Even in smaller circuits, judges do not necessarily call for en banc simply because they disagree with a panel opinion. *See* Patricia M. Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 483 (1985-86) (stating that on District of Columbia Circuit, "en bancs are not undertaken lightly; the initiating judge must feel deeply that circuit jurisprudence is significantly threatened to call for an en banc").

[100] *See supra* note 86 and accompanying text.

[101] The primary focus of the Evaluation Committee was on the question whether to

probability that the outcome of a vote in the eleven-judge LEBC will match the outcome that would be reached if all 28 active judges were participating. He concluded that if the number of judges in the hypothetical majority on a court of twenty-eight judges is seventeen or more, there is an eighty percent probability that the LEBC will decide the case the same way. But if the full court would be closely divided, the probability of the same outcome diminishes.[102]

Professor Kaye's analysis provides at best a partial counter to the Commission's expressions of skepticism about the effectiveness of the limited en banc court.[103] Moreover, a statistical approach necessarily addresses the question in a rather abstract way. I have therefore chosen a more concrete method, one that looks at the actual operation of the en banc court. Specifically, I have sought to determine whether rehearing by a limited en banc court generally results in reversing the decision handed down by the three-judge panel. If it does, this is some evidence that the en banc process is working as it should.

The premise is that judges who vote for en banc rehearing generally believe that the panel decision is wrong, or at least that it is open to serious question. There are exceptions, notably when the en banc call asserts an intracircuit conflict and does not dwell on the error of the panel opinion, but my research shows that such situations are rare.[104] Thus, if the en banc court reaches the opposite result from that of the panel, this generally indicates that the judges who voted for en banc would find the outcome to be satisfactory. And since those judges would normally constitute a majority of the active judges, we can take

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increase the number of judges on the limited en banc court. *See* David R. Thompson, *The Ninth Circuit Court of Appeals Evaluation Committee*, 34 U.C. DAVIS L. REV. 365 (2000).

[102] Letter from Prof. David H. Kaye, Arizona State University College of Law, to Hon. Mary Schroeder 1 (May 14, 1999) (on file with author).

[103] It does, however, deflect a point made by Judge Posner. Judge Posner argues that "a three-judge panel that decides to . . . go out on a thin limb has a reasonable prospect of getting away with it" in the Ninth Circuit because even if rehearing en banc is granted, "the luck of the draw may result in an en banc panel's being dominated by the original panel's members and their allies." Posner, *supra* note 48, at 712. To say that a panel has gone out on a "thin limb" is to say that the panel decision is highly aberrant. If so, the panel could not reasonably expect that an eleven-judge LEBC would ratify its decision. And the thinner the limb, the higher the probability (actual and perceived) that the LEBC will saw it off.

[104] When an en banc call is directed at a panel opinion, the memoranda in support of rehearing almost invariably argue that the panel opinion is erroneous. This is so even when one or more supporting memoranda also assert that the opinion creates an intracircuit conflict. *See* Hellman, *Maintaining Consistency*, *supra* note 41, at 74-75. En banc review aimed at eliminating a preexisting intracircuit conflict typically is the product of a panel's sua sponte en banc call. *See* Hellman, *Unkindest Cut*, *supra* note 2, at 387-88.

this as evidence that the en banc ruling does reflect at least the preliminary views of the full court.

How does the Ninth Circuit's limited en banc court fare when measured in this way? To find out, I looked at all of the cases that were accepted for en banc review from January 1, 1994, through September 30, 1999.[105] The total number of cases was seventy-seven. However, nine of the cases were taken en banc at the request of a panel before the panel issued its decision. Thus there is no panel ruling to compare with the en banc decision. In another three cases, the en banc court did not reach the merits; it dismissed the appeal for want of jurisdiction or sent the case back to the panel. Again, comparison is not possible.

This gives us sixty-five cases in which we can compare panel outcome with en banc outcome. The results are summarized in Table 3. In forty-three cases, the panel outcome was unequivocally reversed. In six other cases, the reversal was not quite as unequivocal, but the outcome did change. Further, in each of the six cases there are particular reasons for believing that the en banc outcome would satisfy the judges who challenged the panel decision.[106] Thus, in forty-nine of the sixty-five cases, we can say with some confidence that the en banc result did reflect the will of the majority as manifested in the vote to take the case en banc.[107] It is also noteworthy that in all but five of the cases the vote to reverse the panel outcome was seven to four or better.[108]

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[105] I chose the cutoff date of September 30, 1999, because, at the time I carried out the research, en banc decisions had been issued in all cases in which rehearing had been granted as of that date.

[106] For example, in one case the en banc majority opinion was authored by the judge who called for en banc. In another case the en banc majority opinion was written by the panel dissenter. The judge who called for en banc joined the opinion.

[107] I recognize that this research does not tell us whether a majority of the full court would have endorsed the analysis or rationale of the limited en banc court, as distinguished from its outcome. Analysis and rationale are important, but, even more than the outcome, they are subject to the evolutionary processes of our system of precedent. *See infra* text accompanying notes 142-147.

[108] In one of the cases that I have counted as 6-5, there were actually nine votes to reject the panel outcome, but only six judges rejected the panel holding. *See* Lopez v. Smith, 203 F.3d 1122, 1133, 1134 & n.1 (9th Cir. 2000) (en banc) (Rymer, J., concurring).

Table 3
Comparison of
Limited En Banc Outcome and Panel Outcome
(Cases Taken En Banc Jan. 1, 1994 – Sept. 30, 1999)

Limited En Banc Outcome	Number of cases
Panel result *reversed*; vote is 11-0	12
Panel result *reversed*; vote is 10-1	6
Panel result *reversed*; vote is 9-2	5
Panel result *reversed*; vote is 8-3	9
Panel result *reversed*; vote is 7-4	12
Panel result *reversed*; vote is 6-5	5
Panel result *sustained*; vote is 11-0	7
Panel result *modified*; acceptability to full court unclear	5
Panel result *sustained*; vote is 6-5 (3 cases) or 7-4	4
Total	**65**

In seven additional cases, the LEBC reached the same result as the panel, but in a decision that was unanimous. Statistically, the absence of dissent by any of the eleven randomly chosen judges is strong evidence that the result represented the views of the full court. But we need not rely on statistical inferences alone. In all but two of the cases, the opinion of the LEBC was joined by one or more of the judges who wrote in support of en banc rehearing. In one case where no requesting judge joined the en banc opinion, the LEBC retreated substantially from the breadth of the panel holding. Also, in each instance, the LEBC included appointees of both Republican and Democratic presidents.

On the basis of this analysis, there is every reason to believe that in at least six of the seven cases, the unanimous ruling by the LEBC did reflect the position of a majority of the active judges. When we add these to the forty-nine cases in which the LEBC reached the opposite result from that of the panel, we have accounted for fifty-five of the sixty-five en banc rulings.

The remaining cases require individual discussion. In four cases, the evidence suggests that the LEBC reached a result contrary to the one the full court would have endorsed.

- *Yniguez v. Arizona*[109] is the clearest example. The case presented a novel issue; the only reason to grant rehearing en banc was that the panel "got it wrong." But the limited en banc court, in a six to five decision, not only reaffirmed the result reached by the three-judge panel; it issued an opinion that was almost identical to the panel opinion.[110]

- In *United States v. Doe*,[111] the en banc court, by a vote of six to five, reaffirmed the principal holdings of the three-judge panel. There is no hint in the opinion of an intracircuit conflict, and the majority does not repudiate any circuit precedent. In all likelihood, the judges who voted for en banc review did so because they thought the panel had erred.

- In *Taylor v. United States*,[112] the three-judge panel held that section 802 of the Prison Litigation Reform Act violates separation of powers principles. It thus affirmed the district court's denial of the state's motion to terminate a consent decree. On rehearing, the LEBC reached the same result by a vote of six to five.[113] The holding of the court rested on

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[109] 69 F.3d 920 (9th Cir. 1995) (en banc). For the subsequent history of the case, see *infra* note 110.

[110] The Supreme Court reversed on procedural grounds and did not reach the merits of the First Amendment issue that divided the en banc court. Arizonans for Official English v. Arizona, 520 U.S. 43 (1997). Soon afterwards, the Supreme Court of Arizona endorsed the position of the Ninth Circuit en banc majority and held that the Arizona ballot initiative violated the First Amendment. The United States Supreme Court declined to review the case. Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998), *cert. denied*, 525 U.S. 1093 (1999).

[111] 155 F.3d 1070 (9th Cir. 1998) (en banc).

[112] 143 F.3d 1178 (9th Cir.), *opinion withdrawn on grant of reh'g*, 158 F.3d 1059 (9th Cir. 1998).

[113] Taylor v. United States, 181 F.3d 1017 (9th Cir. 1999) (en banc).

grounds of mootness; five of the six judges also agreed that application of the statute to the case would be unconstitutional.[114] It is highly doubtful that the judges who voted for en banc – a majority of the court – would have been satisfied with this outcome.

- In *United States v. Qualls*,[115] the court granted rehearing en banc "to determine whether our prior decision in *United States v. Dahms* should be overturned."[116] But the LEBC, by a vote of seven to four, held that *Dahms* was correctly decided. Here it is at least possible that some judges voted for en banc review on the theory that a precedent rejected by three other circuits[117] should be reconsidered whether or not the decision appears to be correct. But there is no evidence one way or the other.

In the remaining five cases, the available information is ambiguous as to whether the en banc decision likely represented the views of a majority of the full court:

- In *Vizcaino v. Micrososoft Corp.*,[118] the limited en banc court divided three ways. The lead opinion did not reject the plaintiffs' claim, as the panel dissent would have done, nor did it order entry of judgment for the plaintiffs, as did the panel majority. We can only speculate as to whether some or all of the judges who voted for en banc rehearing would have been satisfied with this partial reversal of the panel outcome.

- In *Kearney v. Standard Insurance Company*,[119] an ERISA case, the en banc court was even more badly fragmented. On one issue (the standard of review) a majority agreed with the three-judge panel.[120] On a second issue (the scope of review) a

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[114] Neither the United States nor the state of Arizona filed a certiorari petition in the Supreme Court. Both had sought en banc rehearing of the panel decision.

[115] 140 F.3d 824 (9th Cir. 1998) (en banc).

[116] *Id.* at 825.

[117] *See id.* at 831 (Hall, J., concurring) (citing cases).

[118] 120 F.3d 1006 (9th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1098 (1998).

[119] 175 F.3d 1084 (9th Cir. 1999) (en banc), *cert. denied*, 120 S. Ct. 398 (1999).

[120] *See id.* at 1087-90 (agreeing with panel that review by court is de novo, without deference to insurer's decision).

majority repudiated the panel holding.[121] Moreover, according to the lead opinion, the court granted en banc rehearing to eliminate a conflict between two panel decisions. Thus, some judges may have voted for en banc review even though they thought the panel opinion was correct.

- In *Rand v. Rowland*,[122] the en banc court overruled one element of the "pro se prisoner fair notice" rule, but by a vote of six to five left the rule itself in place. We have no way of knowing whether some of the judges who voted for en banc would have been satisfied by the partial overruling of the precedents that the panel followed.[123] A further complication is that two members of the six-judge majority concurred on grounds of stare decisis, noting that "the litigants before us have not raised an objection to the continued vitality of [the underlying rule]."[124] Some of the judges who voted for en banc might have been equally reluctant to reconsider a precedent that the state did not challenge.[125]

- In *United States v. Perez*,[126] two circumstances cloud the analysis. First, there was an apparent intracircuit conflict, so that some judges may have voted for en banc review even though they agreed with the panel's decision to reverse the conviction. Second, the en banc court affirmed the conviction, thus changing the result; however, it adopted a narrow view of "invited error" that probably would not have satisfied the judges who viewed the panel decision as erroneous. Five members of the LEBC disagreed with the analysis adopted by the majority.

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[121] *See id.* at 1090-91 (holding, contrary to panel, that district judge did not abuse his discretion in limiting scope of review to evidence that was before insurer).

[122] 154 F.3d 952 (9th Cir. 1998) (en banc).

[123] A request was made for full-court en banc rehearing in *Rand*; however, a majority of the active judges voted against the request.

[124] *Rand*, 154 F.3d at 964 (Thomas, J., concurring).

[125] At the time of voting on the en banc call, the judges probably assumed that, if the case was heard by an en banc court, the state *would* challenge the validity of the underlying rule. Of course, the state would not have done so in its arguments to the three-judge panel, which would have been bound to follow circuit precedent.

[126] 116 F.3d 840 (9th Cir. 1995) (en banc).

- In *Lopez v. Thompson*,[127] the three-judge panel held that a state-court criminal defendant knowingly waived his right to counsel and chose self-representation. The en banc court agreed by a vote of nine to two.[128] But the LEBC disavowed Ninth Circuit decisions that appeared to require state trial courts "to engage in a specific colloquy with the defendant."[129] Those decisions were heavily relied on by the panel dissenter.[130] It is quite possible that some judges voted for en banc because they agreed with the dissenter that circuit law had gone astray, not because they quarreled with the panel's outcome.

Although it is difficult to generalize about these five cases, one common thread is that the limited en banc court cut back in some way on the panel decision. In *Perez*, the outcome changed; in the other cases the LEBC repudiated one or more elements of the panel holding. Additionally, in *Kearney*, *Perez*, and *Lopez*, judges might have voted for an en banc rehearing to clarify circuit law even if they agreed with the outcome of the panel decision. *Rand* presents the further wrinkle that no litigant urged the overruling of the precedent that was central to the grant of en banc review. Under these various combinations of circumstances, it is quite possible that a majority of the active judges would have decided the cases in the same way that the limited en banc courts did, but we simply do not know.

It appears, therefore, that the available information does not enable us to measure with confidence the extent to which LEBC decisions have departed from majority rule. Looking at the data in the worst possible light, we cannot rule out the possibility that departures occurred in as many as nine out of sixty-five cases. However, other information that we do have suggests a more benign view of the process.

In all but one or two of the nine cases I have discussed, the limited en banc court was closely divided or badly fragmented.[131] These

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[127] 175 F.3d 1120 (9th Cir. 1999) (Lopez I), *opinion withdrawn on grant of reh'g*, Lopez v. Thompson, 187 F.3d 1160 (9th Cir. 1999).

[128] Lopez v. Thompson, 202 F.3d 1110 (9th Cir. 2000) (en banc) (Lopez II).

[129] *Id.* at 1117.

[130] *See* Lopez I, 175 F.3d at 1129 (Kozinski, J., dissenting) (criticizing "this court's formalistic approach" but noting that "a three-judge panel doesn't have the power to reverse the circuit's course"). Of course the en banc court was not bound by prior panel decisions.

[131] Reasonable people can differ as to whether a 7-4 split (as in *Qualls*) should be treated as a "close" division in this context.

circumstances call into question the assumption that the judges who voted for rehearing on the basis of the panel opinion would necessarily disagree with the en banc opinion that reached a similar result. Justice Stephen Breyer commented recently on the difference between thinking about a question in the abstract and thinking it through "for real":

> Until [an issue] comes up, I don't really think it through with the depth that it would require. . . . So often, when you decide a matter for real, in a court or elsewhere, it turns out to be very different after you've become informed and think it through for real than what you would have said at a cocktail party answering a question.[132]

Considering a petition for rehearing en banc is not like answering a question at a cocktail party, but neither is it like studying the record, studying the briefs, and writing or commenting on a draft opinion. And the judges who are not on the panel have not done any of those things. When the en banc court – composed of judges selected at random – divides six to five or seven to four, this suggests that the issue itself is a close one.[133] So too when the court is fragmented. And the closer the issue, the more likely it is that "think[ing] it through for real" might lead a judge to a different conclusion than the one he or she reached on the basis of the materials available at the time of the en banc vote.

B. The Role of Majority Rule in a Multi-Judge Court

On the basis of the preceding analysis, I conclude that, far more often than not, decisions of the limited en banc court in the Ninth Circuit do reflect the position of a majority of the court's active judges. At the same time, I would not deny that, almost certainly, some departures from majority rule have occurred. I therefore turn to the normative question: how troubling is it that in some instances the limited en banc court has handed down an "aberrant" ruling – a ruling that the full court would repudiate if all active judges participated in the decision of the case?

In the conventional view, minority control of en banc outcomes would probably be regarded as inconsistent with the purpose of en banc review. Not long after Congress adopted the legislation authorizing en banc proceedings, Justice Felix Frankfurter commented that "insofar as

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[132] Stephen Breyer, Supreme Court Issues, Remarks at Harvard Law School (Dec. 10, 1999) (unofficial transcript on file with author).

[133] I would not make this statement about close decisions in the Supreme Court. In the Supreme Court, 5-4 decisions often reflect well-established fissures on recurring issues such as state sovereign immunity.

possible, determinations *en banc* are indicated whenever it seems likely that a majority of all the active judges would reach a different result than the panel assigned to hear a case or which has heard it."[134] Supporters of the "majority rule" approach quote this language with approval.[135] However, as commentator Phil Zarone has pointed out, Justice Frankfurter was addressing the situation where en banc rehearing would avert a conflict between panel decisions.[136] He was not arguing generally for majoritarian rule in the courts of appeals.[137]

Further, it was also Justice Frankfurter who admonished us that we should not confuse the familiar with the necessary.[138] Majority rule is a familiar characteristic of courts like the United States Supreme Court that always sit en banc, but is it a necessary feature of multi-judge courts that generally hear cases in panels of three?

Historically, it has not been so. A few years ago, Professor Daniel J. Meador, who later served as executive director of the White Commission, described the operation of the Court of Appeal in England.[139] That court, which hears both civil and criminal appeals, was then composed of twenty-six Lord Justices of Appeal and two presiding judges. The court decided cases in panels of three judges. There is no mention in Professor Meador's account of any provision for rehearing en banc, and it does not appear that anyone was bothered by the prospect that panel decisions would not necessarily reflect the position of the majority within the court.

Admittedly, this arrangement may be more tolerable in England than it would be here, because appellate judges in England pay less attention to precedent than do American judges.[140] But what are the consequences if a limited en banc panel in the Ninth Circuit hands down a decision

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[134] W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring).

[135] *See, e.g.*, Ginsburg & Falk, *supra* note 93, at 1038-39.

[136] Phil Zarone, *Agenda Setting in the Courts of Appeals: The Effect of Ideology on En Banc Rehearings*, 2 J. APP. PRAC. & PROCESS 157, 164 (2000).

[137] Moreover, Justice Frankfurter was construing the en banc statute of that era; he wrote long before Congress enacted the legislation authorizing en banc hearings by less than the full court. That legislation – which specifies no minimum number of judges for the limited en banc court – necessarily rests on the premise that majority rule is not required. *See generally* sources cited *supra* note 41.

[138] *See* Griffin v. Illinois, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring) (attributing admonition to de Toqueville).

[139] Daniel J. Meador, *English Appellate Judges from an American Perspective*, 66 GEO. L.J. 1349 (1978). Professor Meador updated this work in DANIEL J. MEADOR, MAURICE ROSENBERG, & PAUL CARRINGTON, APPELLATE COURTS 757 (1994).

[140] *See* Meador, *supra* note 139, at 1366.

that would be rejected by the full court if it had the opportunity?

The answer depends, in the first instance, on the precedential significance of the en banc decision. Some rulings will have little importance for future litigation.[141] In that situation, it is hard to argue that the frustration of majority rule will have anything other than symbolic impact.

More commonly, however, an en banc decision can be expected to establish a precedent that will be invoked by litigants in future cases. Panels will be required to follow it even though a majority of the active judges would disavow the decision if a vote were taken by the full court.[142] In this situation, the impact is certainly more than symbolic. Yet even in this setting the consequences can easily be overstated.

First, an appellate decision is not an artifact, and the evolution of circuit law does not come to an end with the en banc ruling. Rather, under our system of precedent, the en banc decision will be tempered by later decisions of panels, by subsequent en banc opinions, and by decisions of the Supreme Court.[143] The more broadly applicable the en banc opinion proves to be, the more opportunities judges will have to qualify or limit the minority supported precedent. Moreover, as time passes, the membership of the court will change, and the new judges will put their own cast on the law of the circuit.

Second, if the court is so closely divided that the en banc outcome depends on which eleven judges are selected from among twenty-eight or fewer, that itself may suggest that the en banc ruling is a particularly strong candidate for the process of evolution through "trial, and then correction" that is the essence of the common law tradition.[144] It borders

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[141] One might think that a case would not be heard en banc unless it presents an issue that does have future importance. That is not necessarily so. *See, e.g.*, United States v. Moore, 109 F.3d 1456, 1460 n.2 (9th Cir. 1997) (en banc) (noting amendments to governing statutes subsequent to events giving rise to case).

[142] Defenders of the Ninth Circuit's system often point out that, in fact, a mechanism is available for correcting "erroneous" rulings by a limited en banc court. Under the court's rules, any judge can call for rehearing by all active judges, and if a majority vote in the affirmative, the case will be reheard. United States Court of Appeals for the Ninth Circuit, General Orders 5.8 (2000), *available at* http://www.ca9.uscourts.gov. On four occasions the court has voted on a request for full-court rehearing; none of those requests has been successful. I believe that resistance to full-court rehearing has become part of the court's culture, and that the unsuccessful votes tell us little about the majority's view of particular LEBC decisions.

[143] *See* Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 249, 300-01 (1999).

[144] *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 397 (1960); *see also* Hellman, *Breaking the Banc*, *supra* note 13, at 916-17.

on the naïve to think that a single six-to-five decision – whether by a limited en banc court in the Ninth Circuit or by all eleven active judges of the Eighth Circuit – could settle matters for all time in a developing area of the law.[145]

Third, the occasional frustration of majority rule is not unique to the Ninth Circuit. None of the federal courts of appeals take more than a handful of cases en banc. In each of the other circuits, there are panel decisions that a majority of the active judges might disagree with, but that for one reason or another do not receive en banc rehearing.[146] As in the Ninth Circuit, aberrant rulings are cabined over time as precedents are subjected to "redirection" or to the "checking, or reversal, of movement."[147]

Finally, even if one agrees with the White Commission that the limited en banc is a highly flawed mechanism for correcting panel errors, there is a certain irony in the Commission's proposed solution. Each of the regional divisions would include "some judges not residing within the division, assigned randomly or by lot for specified terms of at least three years."[148] How valuable is majority rule when "the court" would be composed of a shifting, and to some degree arbitrary, group of judges?

Perhaps the Commission recognized that, in the end, the idea of "majority rule" is of limited value as a formula for the effective design of

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[145] Judge Learned Hand held a similar view. In the 1950s, he "mocked those courts [of appeals] that resorted to the practice [of en banc rehearing] with ever increasing frequency." GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 515-16 (1994). Writing to a judge of the Third Circuit – where en bancs were more widely used – Hand commented sardonically that the device "so much increases the certainty of the result. For example, here [in an opinion [Third Circuit] Judge Goodrich had sent to Hand] your vote is four to three, when it might have been only two to one." *Id.* at 516 (footnote omitted; internal bracketing added).

[146] Even those who believe strongly in majority rule do not argue "that the court should rehear 'every' panel decision with which the majority disagrees." *See* Ginsburg & Falk, *supra* note 93, at 1035 (acknowledging that this course "would require an unimaginable disregard of both personal and institutional costs"). Other judges go further in accepting panel decisions with which they disagree. For example, Judge Jon O. Newman, describing the approach on the Second Circuit Court of Appeals, has said:

> We express our judicial convictions strongly as members of a panel but do not insist that individual views prevail throughout the court. Despite the occasions when each of us has read a panel opinion with which we profoundly disagree, we have been able, to a remarkable degree, to submerge our individual judicial convictions in the interest of the proper functioning of our court.

Jon O. Newman, *En Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365, 384 (1984).

[147] LLEWELLYN, *supra* note 144, at 113.

[148] Final Report, *supra* note 2, at 43.

a multi-judge court. Indeed, one can go further. One can argue that in the federal courts of appeals, it is actually desirable for "the minority" to prevail every now and then. The reason is that in any given period "the majority" is likely to correspond – not always, but often – to the appointees of one of the two great parties that dominate American politics.[149] By allowing "the minority" an occasional victory, the Ninth Circuit reduces the extent of the "sharp and unsettling shifts in the law" that would otherwise result from the "periodic shifts in the ideological roots of the majority."[150]

I do not want to overstate the point. Majority rule resonates deeply for Americans, even in the context of appellate adjudication. If limited en banc courts were routinely handing down decisions that flouted the will of a majority of the active judges, this would impair the legitimacy of the procedure whatever the merits of the theoretical arguments that might be advanced in support of the practice. But, on the available evidence, that is not what has happened.

C. Conclusion

The use of a limited en banc court arouses unease because of the unavoidable tension with intuitively appealing principles of majority rule. And it is probably true that limited en banc courts sometimes fail to correct panel decisions that the full court would view as erroneous. But, like the high rate of reversal by the United States Supreme Court, the occasional departures from majority rule do not provide sufficient justification for restructuring the court of appeals as proposed by the White Commission.

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[149] For example, there is evidence that appointees of President Reagan were substantially less "liberal" on a wide range of issues than appointees of President Carter. Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 300 (Table 3) (1993).

[150] *See* Browning Remarks, *supra* note 96, at 162. Judge Browning's phrase, "sharp and unsettling shifts in the law," precisely describes what has happened at the National Labor Relations Board as majority control has shifted from one President's appointees to those of another. For example, the "Carter Board" issued a ruling that allowed nonunion employees to bring a co-worker to disciplinary meetings with an employer. That decision was reversed by the "Reagan Board" in 1985. In July 2000, a majority composed of Clinton appointees overruled the Reagan Board precedent. *See* Carlos Tejada, *Nonunion Employees Win Right to Bring Co-Workers Along to Discipline Meetings*, WALL ST. J., July 13, 2000, at A2; *see also* Michael D. Goldhaber, *Is NLRB in a Pro-Labor Mood?*, NAT'L L.J., Oct. 9, 2000, at B1 (noting that Board, controlled by Democrats, issued twenty-two decisions overruling precedent in two-year period).

IV. THE FUTURE OF THE NINTH CIRCUIT COURT OF APPEALS

The 106th Congress was a busy time for those who follow the legislative fortunes of the Ninth Circuit. Soon after the new Congress convened in January 1999, Senators Frank Murkowski of Alaska and Slade Gorton of Washington introduced a bill that would have implemented the recommendations of the White Commission, including the restructuring of the Ninth Circuit Court of Appeals into semi-autonomous adjudicative divisions.[151] A few months later, Senator Dianne Feinstein countered with the "Ninth Circuit Court of Appeals En Banc Procedures Act of 1999."[152] As the title indicates, the legislation would have mandated modifications of the en banc process in the Ninth Circuit. The following year, a group of Senators – among them, Judiciary Committee Chairman Orrin W. Hatch – introduced a bill that would have divided the Ninth Circuit into two new circuits.[153]

In the summer of 1999, hearings were held by the Judiciary Committees in both the Senate and the House on the White Commission's proposed restructuring of the Ninth Circuit.[154] At those hearings, witnesses who supported the Commission recommendation argued that the time had come to bring the matter to closure. For example, Ninth Circuit Judge Diarmuid O'Scannlain of Oregon told the Senate Judiciary Committee:

> We've been engaged in guerilla warfare on this circuit split issue for quite some time now. What we need to do is get back to judging. You must force us to restructure now, one way or another, so that we can concentrate on our sworn duties and end the distractions caused by this long-running controversy.[155]

Judge Andrew J. Kleinfeld spoke in a similar vein, saying:

> This issue of whether to split the Ninth Circuit has been the subject of legislative attention since before I was born. Unless you split the Ninth Circuit, I am sure that the debate will continue after I die. The people suffer when their judges spend so much of their time as

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[151] S. 253, 106th Cong. (1999).

[152] S. 1403, 106th Cong. (1999).

[153] Ninth Circuit Court of Appeals Reorganization Act of 2000, S. 2184, 106th Cong. (2000).

[154] A printed version of the Senate hearing is available at http://www.senate.gov/~judiciary. An electronic version of the House hearing is available at http://www.house.gov/judiciary. I testified at the House hearing.

[155] *1999 Senate Hearing*, *supra* note 1, at 97 (prepared statement of Hon. Diarmuid F. O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

> this process takes on a matter other than adjudicating cases. We have had numerous court meetings devoted to the issue of the split since I was elevated to the Ninth Circuit eight years ago. . . . Several of our judges, and all of our chief judges for many years, have spent a great deal of time in going to Washington to address the issue. And here we are again, today.
>
> . . . All this judicial attention to the split issue takes a lot of time away from deciding cases. And it will not stop until Congress splits the Ninth Circuit.[156]

It is certainly true that the controversy over dividing the Ninth Circuit has been going on for a long time, and that the judges of the circuit have spent a great deal of time and effort dealing with the issue. But I believe that the "closure" argument can more aptly be directed to the supporters of restructuring than to those who oppose it. At least since 1973, serious proposals for dividing the Ninth Circuit have been put forth by members of Congress and by various study groups. In all that time, the proponents have never succeeded in persuading a majority of the circuit judges that restructuring is necessary or even desirable. Nor have the proponents found a receptive ear among the court's constituents. On the contrary, trial judges and representatives of the organized bar have repeatedly spoken out against circuit-splitting legislation.[157]

I suggest that the time has come for advocates of restructuring to acknowledge that the arguments for dividing the Ninth Circuit (or its court of appeals) simply have not carried the day with the judges and lawyers within the circuit. The reason that so much time and effort has been diverted to "this circuit split issue" is that circuit division proposals have been advanced again and again notwithstanding their rejection by a majority of those who would be most directly affected. The "Ninth Circuit Court of Appeals Reorganization Act of 2000," introduced on May 7, 2000 by Senator Hatch and others, is almost identical to the "Ninth Circuit Court of Appeals Reorganization Act of 1989." That bill, after extensive hearings,[158] died without being reported out of

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[156] *1999 Senate Hearing, supra* note 1, at 83 (prepared statement of Hon. Andrew J. Kleinfeld, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

[157] *See* Chief Judge Procter Hug, Jr., *The Commission on Structural Alternatives for the Federal Court of Appeals' Final Report: An Analysis of the Commission's Recommendations for the Ninth Circuit*, 32 U.C. DAVIS L. REV. 887, 897 (1999) (listing individuals and organizations opposing division of circuit); Procter Hug, Jr., *The Ninth Circuit Should Not Be Split*, 57 MONT. L. REV. 291, 305-06 (1996) (noting opposition by judges and organized bar).

[158] *Ninth Circuit Court of Appeals Reorganization Act of 1989: Hearings on S. 948 Before the*

committee.[159] The 1989 proposal, in turn, bears a close resemblance to the measure introduced by Senator Gorton in 1983.[160] That legislation too had the benefit of hearings, after which the Judiciary Committee took no action.[161]

Advocates of circuit division have, of course, every right to put forth their ideas, whether in the form of legislation or otherwise. But their efforts exact a cost – the "distractions" and "guerrilla warfare" that Judge O'Scannlain referred to. Perhaps at some time in the future the judges and lawyers of the Ninth Circuit will agree that the court of appeals is simply too large to operate effectively. They will then do what the judges and lawyers of the Fifth Circuit did two decades ago: they will abandon their opposition to division and ask Congress to act.[162] Until that time, those who care about the Ninth Circuit Court of Appeals can serve it best by freeing the judges from the "distractions" generated by legislative battles. This will allow the judges to "get back to judging" – and also to continue their impressive record of experimentation and innovation in the mechanisms and structures of appellate justice.

Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary, 101st Cong. (1990).

[159] *See* Conrad Burns, *Dividing the Ninth Circuit Court of Appeals: A Proposition Long Overdue*, 57 MONT. L. REV. 245, 247 (1996).

[160] S. 1156, 98th Cong. (1983).

[161] *See* Burns, *supra* note 159, at 247.

[162] *See* Hellman, *Dividing the Ninth Circuit*, *supra* note 14, at 269; Hellman, *Judicial Reform*, *supra* note 41, at 347.

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