U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 23, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the September 20, 2006, appearance before the Committee of Assistant Attorney General Rachel Brand. The subject of the hearing was "Examining the Proposal to Restructure the Ninth Circuit." We hope that the information is helpful to the Committee.

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Richard A. Hertling

Richard A. Hertling
Acting Assistant Attorney General

Enclosure

cc: The Honorable Arlen Specter
Ranking Minority Member

September 20, 2006
"Examining the Proposal to Restructure the Ninth Circuit"
Committee on the Judiciary
United States Senate

Responses of Rachel Brand
Assistant Attorney General, Office of Legal Policy

Responses to Questions from Senator Kyl:

1. *In your testimony you compare the caseload of the current Ninth Circuit to that of the pre-split Fifth Circuit. (Page 9). You said that in 1973 the Hruska Commission recommended that both the Fifth and Ninth Circuits be split. When the Fifth Circuit finally did split in 1980, seven years after the recommendation had been made, the Fifth Circuit handled 18% of appeals nationwide and the Ninth handled 16%. Then, in 1998, the White Commission also recommended that the Ninth Circuit be split. Now, twenty-six years after the first recommendation, though the Ninth Circuit processes 23% of the total appeals in the country, it still has not been split. Some have mentioned that since a clear majority of the judges in the Ninth Circuit oppose splitting the circuit we should defer to their opinion. Do these caseload numbers compel splitting the Ninth Circuit in spite of the objections of its judges? And if so, why?*

Answer: It is the position of the Department of Justice that the disproportionately large number of appeals in the Ninth Circuit is one of the factors that weighs heavily in support of splitting the Ninth Circuit. The Ninth Circuit currently handles a larger percentage of the national appellate caseload than the former Fifth Circuit handled when Congress split that court. This large caseload contributes to long delays for litigants and an increased possibility of intra-circuit splits. In his letter to the White Commission, Justice Kennedy noted that "[a] large number of dispositions tends to make it difficult for judges to keep abreast of the jurisprudence of the court . . . [t]his in turn causes inadvertent intra-circuit conflicts." While the Department respects the opinions of the judges on the Ninth Circuit and commends their innovative and focused effort to manage that circuit's caseload, it is the role of Congress to determine whether a split is appropriate. As Justice O'Connor noted in her letter to the White Commission, "[i]t is human nature that no circuit is readily amenable to changes in boundary and personnel. We are always most comfortable with what we know, and it is unrealistic to expect much sentiment for change from within any circuit."

2. *Please provide some further examples of intra-circuit splits and the effect they have had on litigation.*

Answer: The lack of clarity in the law that results from intra-circuit splits makes it difficult for all individuals in the Ninth Circuit, including law enforcement and federal agencies, to structure their primary conduct. In addition to the cases cited in response to question three and in response to Senator Feinstein, one case in particular highlights the difficulties that intra-circuit splits may create.

Intra-circuit splits have created uncertainties in the law relating to the work of law enforcement officers. Under the knock and announce rule, 18 U.S.C. § 3109, officers may forcibly enter a house to execute a search warrant if, "after notice of his authority and purpose, he is refused admittance." According to Ninth Circuit case law, a failure to answer the knock and announcement by law enforcement is equated to a refusal of admittance and gives law enforcement justification to enter after waiting for a period of time. *See United States v. Ramos*, 932 F.2d 1346, 1356 (9th Cir. 1991), *overruled on other grounds*, *United States v. Ruiz*, 257 F.3d 1030 (9th Cir. 2001); *see also United States v. Granville*, 222 F.3d 1214, 1218 (9th Cir. 2000). Case law does not establish an exact time that law enforcement must wait before entering a home if no one answers the knock and announcement; rather, "the time lapse must be reasonable considering the particular circumstances of the situation." *U.S. v. Chavez-Miranda*, 306 F.3d 973, 980 (9th Cir. 2002).

The Ninth Circuit has upheld as reasonable law enforcement delays of ten seconds, *United States v. Allende*, 486 F.2d 1351, 1353 (9th Cir. 1973), and ten to twenty seconds, *United States v. Phelps,* 490 F.2d 644, 647 (9th Cir. 1974), before entering a home. *See Chavez-Miranda*, 306 F.3d at 980 n.4. Law enforcement justifiably relied on these earlier opinions when structuring its conduct and executing search warrants. This changed for a period of time, however, after the Ninth Circuit decided *United States v. Banks*, 282 F.3d 699 (9th Cir. 2002), *rev'd*, 540 U.S. 31 (2003). In that case, the Ninth Circuit held that a delay of 15 to 20 seconds under the knock and announce rule was insufficient. The Government filed a petition for rehearing *en banc*, but that petition was denied. The Supreme Court granted a *writ of certiorari* and reversed the Ninth Circuit's opinion.

For additional examples of how intra-circuit splits have impacted federal agencies and individuals, please see question 3 and Attachment 3.

a. *What is the average length of time before such intra-circuit splits are resolved by either the Supreme Court or an en banc hearing?*

Answer: Concerning the first part of the question, it is difficult to calculate the average length of time it takes the *en banc* Ninth Circuit to resolve intra-circuit splits, as the time can vary drastically. Some splits are never resolved and others, including some of the splits that we have listed in question 3, have existed for several years. Concerning the second part of the question, the Supreme Court has resolved some of the splits, but it is institutionally and historically the role of the *en banc* court, not the Supreme Court, to resolve intra-circuit splits. Based on some anecdotal evidence, of the fifteen intra-circuit splits assessed, only three had been resolved, and those were resolved within two years.

b. How does the number of intra-circuit splits compare to other circuits?

Answer: The White Commission, in preparing its 1998 study, surveyed lawyers and judges around the country. The Committee noted in its report that more district judges in the Ninth Circuit than elsewhere reported difficulties stemming from inconsistencies between published and unpublished opinions, and that lawyers in the Ninth Circuit, more than lawyers elsewhere, reported problems relating to conflicting precedents. Our informal survey of the Department complements the findings of the White Commission, as seen in the attachments to the responses to Senator Feinstein's first two questions (Attachments 1 and 2). These attachments list cases, by circuit, in which the Department of Justice has raised concerns about an intra-circuit conflict. Our components identified more cases that raised the concern of an intra-circuit split in the Ninth Circuit than in the other circuits combined. The Department, however, does not track each instance in which the Department files a petition for rehearing *en banc* on the basis that an intra-circuit conflict exists. The Department has done its best to collect this information, however, we cannot be certain that we have identified every case.

3. *Please provide some examples of administrative agencies that have been negatively affected by intra-circuit splits?*

Answer: We do not keep records on whether and how administrative agencies have been negatively affected by intra-circuit splits.

However, intra-circuit splits can and do create challenges for administrative agencies. In fact, some of the cases identified by the Department's attorneys provide illustrative examples of how intra-circuit splits can create such problems. For example, *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005), *cert. granted* (Jan. 5, 2007), has created uncertainty regarding the role that Section 7 of the Endangered Species Act (ESA) should play when a federal agency authorizes a state to administer a federal environmental program in lieu of the federal agency. In *Defenders of Wildlife*, the Ninth Circuit held that Section 7(a)(2) of the Endangered Species Act provided additional authority for program agencies to undertake actions to avoid jeopardizing listed species. Earlier panels held, however, that ESA Section 7 did not provide any additional authority to agencies, and that agencies must have discretion to act. *See Defenders of Wildlife*, 420 F.3d at 979-80 (Thompson, J., dissenting) (listing cases that conflicted with the majority opinion). *See also Ground Zero Center for Non-Violent Action v. United States Department of the Navy,* 383 F.3d 1082, 1092 (9th Cir.2004); *Turtle Island Restoration Network v. National Marine Fisheries Service,* 340 F.3d 969, 974 (9th Cir.2003); *Sierra Club v. Babbitt,* 65 F.3d 1502, 1509 (9th Cir.1995). While the *Defenders of Wildlife* case concerned approval of Arizona's request to administer the NPDES water pollution permitting program pursuant to authority provided by Section 402 of the federal Clean Water Act (CWA), the effect of the division of the courts on the interpretation of the ESA extends well beyond EPA's responsibilities in administering the NPDES program. Any uncertainty regarding the role that Section 7 of the ESA should play in the delegation of federal environmental programs to states will inevitably create recurring problems in the "cooperative federalism" framework of multiple environmental laws, and will implicate the role of multiple federal agencies charged with the authority to delegate federal environmental regulatory programs to states.

Another example is the intra-Ninth Circuit split on the question of whether 8 U.S.C. § 1252(a)(2)(B)(ii) bars judicial review of the Secretary of Homeland Security's discretionary decision to revoke a previously approved visa petition when he determines that the alien has failed to abide by the conditions under which the visa was first obtained, as noted in the following dissenting opinions. *ANA Intern, Inc. v. Way*, 393 F.3d 886, 895 (9th Cir. 2004) (Tallman, J., dissenting); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 694 (9th Cir. 2003) (Beezer, J., dissenting) ("the court creates an inter-circuit and intra-circuit split"). Such intra-circuit splits create uncertainty in the law that inevitably negatively affects the administration of visa petition revocation proceedings under the Immigration and Nationality Act, although we have not quantified the actual effect of these particular decisions.

4. *Do we need one consistent case law in the West? As the biggest litigant in the federal courts, is the Department at all worried about adding a new body of circuit case law to the mix?*

Answer: Maintaining a consistent case law in the West is not a strong argument against splitting the Ninth Circuit. Many regions across the country are divided among circuits, including the West. For example, California, Oregon, Washington, Montana, Arizona, Nevada, Idaho, Wyoming, Utah, Colorado, and New Mexico have similar regional legal issues relating to water rights, tribal rights, and federal public lands; however, these states are divided between the Ninth and Tenth Circuits. Similarly, the Midwestern states of Minnesota, Wisconsin, and Michigan are divided among three circuits. Finally, there are six circuits along the Eastern seaboard: the First, Second, Third, Fourth, Eleventh, and District of Columbia.

In addition to regional splits, 43 states border a state that is located in a different circuit. Ohio, Missouri, and Arkansas each border three other circuits. Of the seven states that do not share a border with another circuit, five, including Hawaii and Alaska, are in the current Ninth Circuit. In some areas of the country, including the New York City tri-state area, it is very common for someone to live in one circuit and work in a different circuit. On a national scale, most large corporations are subject to jurisdiction in nearly every federal circuit. Consequently, dividing the Ninth Circuit would not pose a significant added burden to many litigants.

Finally, the Department does not believe that the creation of an additional body of circuit case law is a reason not to split the Ninth Circuit. As mentioned in our answer to Question 1, we agree with Justice Kennedy's observation that large circuits that issue large numbers of decisions are more at risk of creating inadvertent intra-circuit splits. Failing to divide the Ninth Circuit, for fear of creating an inconsistent case law in the West, only fails to address the problem of intra-circuit splits in the Ninth Circuit.

Responses to Questions from Senator Feinstein:

Background: In your testimony, you stated that there are more intra-circuit splits in the Ninth Circuit than in other Circuits. However, you also said that "there is no way to empirically prove whether there are more intra-circuit splits in the Ninth Circuit than elsewhere." You cited only anecdotal evidence of intra-circuit splits, saying that "the Department of Justice's lawyers have provided us with a number of examples of intra-circuit splits" in the 9th Circuit.

1. *Please provide documentation of each instance in which Department of Justice lawyers have raised concerns about an intra-circuit split in the Ninth Circuit.*

Answer: In my testimony, I stated that "when the White Commission did a survey of lawyers and judges in the late 1990s, it found that the perception of lawyers and the perception of district judges was that there was more ambiguity and more inconsistency in the Ninth Circuit than elsewhere." (Transcript 42).

The Department of Justice does not keep formal records on or track each instance in which Department of Justice lawyers have raised concerns about an intra-circuit split in the Ninth Circuit. The Department, however, did its best to collect this information from our litigating components. Our lawyers provided a list of 47 cases in which Department of Justice lawyers raised concerns about a Ninth Circuit intra-circuit split in a petition for rehearing *en banc*; however, we cannot guarantee that this list includes every case (Attachment 1).

2. *Please provide documentation of each instance in which Department of Justice lawyers have raised concerns about an intra-circuit split in other Circuit Courts of Appeals.*

Answer: The Department of Justice does not keep formal records on each instance in which Department of Justice lawyers have raised concerns about intra-circuit splits in other circuits. We have, however, informally gathered this information and attached a list of instances in which Department of Justice lawyers have raised concerns about intra-circuit splits in other circuits (Attachment 2).

3. *Please list all cases in the Courts of Appeals during the past five years in which the Department of Justice filed a petition for rehearing or rehearing en banc in which an intra-circuit conflict was listed as a basis for rehearing.*

Answer: The Department of Justice does not keep formal records on "all cases in the Courts of Appeals during the past five years" in which rehearing or rehearing *en banc* was sought and the need to resolve an intra-circuit split was given as a reason. However, because Fed. R. App. P. 35(a)(1) lists as one of two grounds for *en banc* review the need "to secure or maintain uniformity of the court's decisions" (the other ground is that the proceeding involves a question of "exceptional importance"), and because Rule 35(b)(1)(B) requires that every rehearing petition allege an intra-circuit split, or a conflict with a Supreme Court case, or a question of exceptional importance, intra-circuit splits are a frequent basis – if not the most frequent basis – for seeking rehearing or rehearing *en banc*. As indicated in the list of rehearing requests under questions one and two, which is not necessarily exhaustive, the Department has petitioned for rehearing *en banc* at least 73 times in the past five years.

Background: You also stated that individuals in other agencies outside of the Department of Justice have alerted the Department of Justice to intra-circuit splits within the Ninth Circuit.

4. *Please provide documentation of each instance in which individuals from agencies outside the Department of Justice have brought intra-circuit splits in the Ninth Circuit to the attention of the Department of Justice.*

Answer: In my testimony, I stated that lawyers from the Department of Justice "have provided us with a number of examples of intra-circuit splits . . . . So, yes, we have had folks from around the Government bring this to our attention." The Department, however, does not track each instance in which individuals from agencies outside of the Department have brought an intra-circuit split to the attention of the Department. Because the Department litigates for other agencies, many of the intra-circuit splits identified by our litigating components do involve other agencies. These cases are listed in Attachments 1 and 3.

Background: In your testimony, you stated that "the number of appeals the court hears makes it virtually impossible for the judges of the Ninth Circuit to read all of the opinions issued by their own court." However, the Eighth Circuit and Seventh Circuit issued more published decisions than the Ninth Circuit last year.

5. *Is it the position of the Department of Justice that the number of appeals is a problem in the Eighth Circuit and the Seventh Circuit?*

Answer: It is not the position of the Department of Justice that the number of appeals is a problem in the Seventh Circuit and the Eighth Circuit. In the 12-month period ending September 30, 2005, the Seventh Circuit and the Eighth Circuit issued 642 and 851 published opinions, respectively, while the Ninth Circuit issued 625 published opinions. The Ninth Circuit, however, only publishes 11% of its opinions, while the Seventh Circuit publishes over 43% and the Eighth Circuit publishes 41%. Consequently, the Ninth Circuit issues a much larger number of total opinions. For the 12-month period ending September 30, 2005, the Ninth Circuit issued 6,197 opinions, while the Seventh Circuit and Eighth Circuit issued 1,480 and 2,078, respectively. The large number of unpublished opinions is especially significant given the United States Supreme Court's recent approval of a rule that will allow attorneys to cite unpublished opinions before federal courts. Moreover, the possibility that other circuits may be growing too large is not a reason to forego splitting the Ninth Circuit.

6. *Is it the position of the Department of Justice that the Eighth Circuit and Seventh Circuit should be split?*

Answer: Currently, there are no bills that would split the Seventh or Eighth Circuits; therefore, the Department of Justice has taken no position on that subject. In any event, the Department of Justice believes that the issue of splitting the Ninth Circuit should be considered on its own merits.

Attachment 1: Cases in which Department of Justice lawyers, during the past 5 years, filed a petition for rehearing en banc in the Ninth Circuit claiming that there was an intra-circuit conflict:*

Gros Ventre Tribe v. United States, No. 04-36167, 2006 WL 3258221 (9th Cir. Nov. 13, 2006), *petition for reh'g en banc pending.*

Cascadia Wildlands Project v. Goodman, No. 06-35623, 2006 WL 3147418 (9th Cir. Nov. 1, 2006), *petition for reh'g en banc pending.*

Ortega-Mendez v. Gonzales, 450 F.3d 1010 (9th Cir. 2006), *petition for reh'g en banc pending.*

Earth Island Institute v. United States Forest Service, 442 F.3d 1147 (9th Cir. 2006), *petition for cert. pending.*

Oliva Osuna v. Gonzales, 169 Fed. Appx. 501 (9th Cir. 2006), *petition for reh'g en banc pending.*

Kheiro v. Gonzales, No. 03-74542, 2006 WL 314480 (9th Cir. Feb. 10, 2006).

Jibril v. Gonzales, 423 F.3d 1129 (9th Cir. 2005), *petition for reh'g en banc pending.*

Cordes v. Gonzales, 421 F.3d 889 (9th Cir. 2005), *petition for reh'g en banc pending.*

Defenders of Wildlife v. Environmental Protection Agency, 420 F.3d 946 (9th Cir. 2005), *reh'g en banc denied*, 450 F.3d 394 (9th Cir. 2006), *cert. granted* (Jan. 5, 2007).

Nikoghosyan v. Gonzales, 133 Fed. Appx. 450 (9th Cir.), *reh'g en banc denied*, No. 03-70780, 2005 U.S. App. LEXIS 19006 (9th Cir. Aug. 30, 2005).

Yeimane Berhe v. Ashcroft, 393 F.3d 907 (9th Cir. 2004).

Mashiri v. Ashcroft, No. 02-71841, 2004 WL 2435489 (9th Cir. Nov. 2, 2004).

Membreno v. Gonzales, 385 F.3d 1245 (9th Cir. 2004), *reh'g en banc granted*, 425 F.3d 1227 (9th Cir. 2005).

Sael v. Ashcroft, 386 F.3d 922 (9th Cir. 2004).

Valiente-Herrera v. Ashcroft, 110 Fed. Appx. 761 (9th Cir.), *reh'g denied, amended and superseded*, 117 Fed. Appx. 604 (9th Cir. 2004).

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* The Department of Justice does not track each instance in which the Department files a petition for rehearing *en banc* on the basis that an intra-circuit conflict exists. Although the Department has done its best to collect this information, we cannot be certain that we have identified every case.

Ferreira v. Ashcroft, 382 F.3d 1045 (9th Cir. 2004).

Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905 (9th Cir. 2004).

DeLoso v. Ashcroft, 378 F.3d 907 (9th Cir. 2004), *reh'g en banc denied*, 393 F.3d 858 (9th Cir. 2005).

Khup v. Ashcroft, 376 F.3d 898 (9th Cir. 2004).

Garcia Martinez v. Ashcroft, 371 F.3d 1066 (9th Cir. 2004).

Eyak Native Village v. Daley, 364 F.3d 1057 (9th Cir.), *vacated on reh'g en banc*, 375 F.3d 1218 (9th Cir. 2004).

Olson v. United States, 362 F.3d 1236 (9th Cir. 2004), *vacated and remanded*, 126 S. Ct. 510 (2005).

Hassan v. INS, 94 Fed. Appx. 461 (9th Cir. 2004).

Thomas v. Ashcroft, 359 F.3d 1169 (9th Cir. 2004), *vacated on reh'g en banc sub nom. Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2006).

Jie Lin v. Ashcroft, 356 F.3d 1027 (9th Cir.), *amended*, 377 F.3d 1014 (9th Cir. 2004).

Arulampalam v. Ashcroft, 353 F.3d 679 (9th Cir. 2003).

Chen v Ashcroft, 85 Fed. Appx. 44 (9th Cir. 2003).

Vazques-Hoyos v. Ashcroft, 84 Fed. Appx. 886 (9th Cir. 2003).

Wang v. Ashcroft, 341 F.3d 1015 (9th Cir. 2003).

Singh v. Ashcroft, 340 F.3d 802 (9th Cir. 2003), *reh'g en banc denied*, 362 F.3d 1164 (9th Cir. 2004).

Baballah v. Ashcroft, 335 F.3d 981 (9th Cir. 2003), *reh'g en banc denied*, *amended*, 367 F.3d 1067 (9th Cir. 2004).

Doe v. Tenet, 329 F.3d 1135 (9th Cir. 2003), *reh'g en banc denied*, 353 F.3d 1141 (9th Cir. 2004), *rev'd*, 544 U.S. 1 (2005).

Behnam v. Ashcroft, 49 Fed. Appx. 684 (9th Cir. 2002).

Valian v. Ashcroft, 48 Fed. Appx. 704 (9th Cir. 2002).

Singh v. Ashcroft, 301 F.3d 1109 (9th Cir. 2002).

Chowdhury v. INS, 44 Fed. Appx. 123 (9th Cir. 2002).

Manimbao v. Ashcroft, 298 F.3d 852 (9th Cir. 2002), *amended on reh'g en banc*, 329 F.3d 655 (9th Cir. 2003).

Xi v. INS, 298 F.3d 832 (9th Cir. 2002).

O'Toole v. United States, 295 F.3d 1029 (9th Cir. 2002).

Newdow v. United States Congress, 292 F.3d 597 (9th Cir. 2002), *reh'g en banc denied*, 321 F.3d 722 (9th Cir. 2003), *rev'd and remanded sub nom. Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

Hernandez v. INS, 34 Fed. Appx. 550 (9th Cir. 2002).

Silva-Jacinto v. INS, 31 Fed. Appx. 490 (9th Cir. 2002), *reh'g en banc denied, superseded,* 37 Fed. Appx. 302 (9th Cir. 2002), *cert. granted, vacated and remanded*, 537 U.S. 1100 (2003).

Jaiswal v. INS, 22 Fed. Appx. 937 (9th Cir. 2002).

Popova v. INS, 273 F.3d 1251 (9th Cir. 2001).

Singh v. INS, 19 Fed. Appx. 651 (9th Cir. 2001).

Chen v. INS, 266 F.3d 1094 (9th Cir. 2001), *cert. granted, vacated and remanded*, 537 U.S. 1016 (2002).

Ventura v. INS, 264 F.3d 1150 (9th Cir. 2001), *cert. granted, rev'd in part and remanded*, 537 U.S. 12 (2002).

Attachment 2: Cases in which Department of Justice lawyers, during the past 5 years, have filed a petition for rehearing en banc in other circuits, claiming that there was an intra-circuit conflict:*

<u>District of Columbia Circuit</u>

Davy v. Central Intelligence Agency, 456 F.3d 162 (D.C. Cir. 2006), *reh'g en banc denied*, (Sept. 18, 2006).

New York v. Environmental Protection Agency, 443 F.3d 880 (D.C. Cir.), *reh'g en banc denied*, 2006 U.S. App. LEXIS 17121 (D.C. Cir. Jun. 30, 2006), *petition for cert. pending*.

Rochon v. Gonzales, 438 F.3d 1211 (D.C. Cir. 2006), *reh'g en banc denied*, (D.C. Cir. Jul. 11, 2006).

American Federation of Labor and Congress of Industrial Organizations v. Chao, 409 F.3d 377 (D.C. Cir.), *reh'g en banc denied*, 2005 U.S. App. LEXIS 21286 (D.C. Cir. Oct. 28, 2005).

Select Milk Producers, Inc. v. Johanns, 400 F.3d 939 (D.C. Cir.), *reh'g en banc denied*, 2005 U.S. App. LEXIS 15491 (D.C. Cir. Jul. 27, 2005).

United States v. Philip Morris USA Inc., 396 F.3d 1190 (D.C. Cir.), *reh'g en banc denied*, 2005 U.S. App. LEXIS 6734 (D.C. Cir. Apr. 19), *cert. denied*, 126 S. Ct. 478 (2005).

Honeywell International, Inc. v. Environmental Protection Agency, 374 F.3d 1363 (D.C. Cir. 2004), *reh'g granted in part, denied in part*, 393 F.3d 1315 (D.C. Cir. 2005).

Aid Association for Lutherans and American Bar Endowment v. United States Postal Service, 321 F.3d 1166 (D.C. Cir.), *reh'g en banc denied*, 2003 U.S. App. LEXIS 9181; 2003 U.S. App. LEXIS 9180 (D.C. Cir. May 12, 2003).

American Corn Growers Association v. Environmental Protection Agency, 291 F.3d 1 (D.C. Cir.), *reh'g en banc denied*, 2002 U.S. App. LEXIS 20120 (D.C. Cir. Sep. 19, 2002).

Stewart v. Evans, 275 F.3d 1126 (D.C. Cir. 2002), *appeal after remand*, 351 F.3d 1239 (D.C. Cir. 2003).

Maydak v. Department of Justice, 218 F.3d 760 (D.C. Cir. 2000), *cert. denied*, 533 U.S. 950 (2001).

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* The Department of Justice does not track each instance in which the Department files a petition for rehearing *en banc* on the basis that an intra-circuit conflict exists. Although the Department has done its best to collect this information, we cannot be certain that we have identified every case.

American Trucking Associations, Inc. v. Environmental Protection Agency, 175 F.3d 1027 (D.C. Cir.), *reh'g en banc granted in part, denied in part, modified*, 195 F.3d 4 (D.C. Cir. 1999), *cert. granted sub nom. Browner v. American Trucking Association, Inc.*, 529 U.S. 1129 (2000), *cert. granted, American Trucking Associations, Inc. v. Browner*, 530 U.S. 1202 (2000), *aff'd in part, rev'd in part sub nom. Whitman v. American Trucking Associations*, 531 U.S. 457 (2001), *on remand sub nom. American Trucking Associations, Inc. v. Environmental Protection Agency*, 283 F.3d 355 (D.C. Cir. 2002).

Federal Circuit

Northwest Louisiana Fish & Game Preserve Commission v. United States, 446 F.3d 1285 (Fed. Cir.), *petition for panel reh'g and reh'g en banc pending*, 2006 WL 2628089 (Fed. Cir. Jul. 13, 2006).

Banks v. United States, 314 F.3d 1304 (Fed. Cir.), *reh'g en banc denied*, 2003 U.S. App. LEXIS 10933 (Fed. Cir. May 16), *cert. denied*, 540 U.S. 985 (2003).

First Circuit

Maine v. Department of Interior, 285 F.3d 126 (1st Cir.), *amended and superseded*, 298 F.3d 60 (1st Cir. 2002).

Arecibo Community Health Care, Inc. v. Puerto Rico, 244 F.3d 241 (1st Cir.), *reh'g en banc granted, vacated and remanded,* 270 F.3d 17 (1st Cir. 2001), *cert. denied*, 537 U.S. 813 (2002).

Second Circuit

New York Public Interest Research Group, Inc. v. Johnson, 427 F.3d 172 (2d Cir. 2005).

Third Circuit

Miller v. Philadelphia Geriatric Center, 463 F.3d 266 (3d Cir.), *reh'g en banc denied* (Nov. 28, 2006).

Cochran v. Veneman, 359 F.3d 263 (3d Cir. 2004), *cert. granted, vacated and remanded sub nom. Lovell v. Cochran*, 544 U.S. 1058 (2005).

In re Trans World Airlines, Inc., 322 F.3d 283 (3d Cir. 2003).

Chmakov v. Blackmun, 266 F.3d 210 (3d Cir. 2001), *on remand, writ of habeas corpus denied sub nom. Chmakov v. Riley*, 2004 U.S. Dist. LEXIS 4368 (E.D. Pa. Feb. 9, 2004), *aff'd*, 125 Fed. Appx. 419 (3d Cir. 2005).

Fourth Circuit

McMellon v. United States, 338 F.3d 287 (4th Cir. 2003), *reh'g en banc granted, vacated*, 387 F.3d 329 (4th Cir. 2004), *cert. denied*, 544 U.S. 974 (2005).

Fifth Circuit

Public Citizen, Inc. v. Environmental Protection Agency, 343 F.3d 449 (5th Cir. 2003).

Sixth Circuit

Ohio Hospital Association v. Shalala, 201 F.3d 418 (6th Cir. 1999), *reh'g en banc denied*, 2000 U.S. App. LEXIS 11056 (6th Cir. 2000), *cert. denied*, 531 U.S. 1071 (2001).

Seventh Circuit

City of Chicago v. Department of Treasury, 384 F.3d 429 (7th Cir. 2004), *reh'g en banc granted, vacated and remanded*, 423 F.3d 777 (7th Cir. 2005).

Eighth Circuit

In re Reynolds, 425 F.3d 526 (8th Cir. 2005), *reh'g en banc denied*, 2006 U.S. App. LEXIS 1999 (8th Cir. Jan. 26, 2006), *cert. denied*, 127 S. Ct. 46 (2006).

Tenth Circuit

Utah Environmental Congress v. Bosworth, 421 F.3d 1105 (10th Cir. 2005), *reh'g granted, withdrawn, superseded,* 439 F.3d 1184 (2006).

O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170 (10th Cir. 2003), *aff'd*, 389 F.3d 973 (10th Cir. 2004), *cert. granted sub nom. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 544 U.S. 973 (2005), *aff'd and remanded,* 126 S. Ct. 1211 (2006).

Senator Kyl's Attachment 3: Please provide some further examples of intra-circuit splits and the effect they have had on litigation.

Listed below are several more examples of intra-circuit splits in the Ninth Circuit. These intra-circuit splits have a significant effect on litigation. First, as stated in the full answer to question two, the splits create a lack of clarity in the law that makes it difficult for individuals, businesses, and government entities to structure their primary conduct. Second, the splits lead to increased litigation as litigants attempt to clarify the uncertainties in the law. Third, the splits create confusion for district court judges who are tasked with applying the law of the circuit. Fourth, the splits create problems for prosecutors who are uncertain what burden of proof applies in criminal cases. Several of these effects are illustrated in the examples below.

- *Gros Ventre Tribe v. United States*:[1] A Ninth Circuit panel held that two earlier panel decisions were in direct conflict on the issue of whether the waiver of sovereign immunity in APA Section 702 was limited by Section 704's "final agency action" requirement. The first panel[2] held that the Section 702 waiver was not limited by Section 704's final agency action requirement. The second panel[3] held that the waiver of sovereign immunity in APA Section 702 was limited by Section 704's "final agency action" requirement. Rather than resolve the issue or call for an *en banc* rehearing, a third panel affirmed the district court on alternate grounds.

- *United States v. Staffeldt*:[4] A Ninth Circuit panel held that the Government's error in not identifying the Department of Justice official who authorized a wiretap could not be considered a minor error and, because of the error, the evidence found as a result of the wiretap must be suppressed. An earlier panel[5] held, however, that the Government's failure to identify the authorizing official for a wiretap was a minor error that did not require suppression of the evidence.

- *Ortega-Mendez v. Gonzales*:[6] One panel of the Ninth Circuit held that simple battery violating Cal. Penal Code § 242 was not a crime of violence within the Immigration and Nationality Act ("INA").[7] In a prior decision,[8] a panel reached precisely the opposite conclusion, holding that battery violating § 242 was a "crime of violence" under the INA.

- *United States v. Staten*:[9] A Ninth Circuit panel held that the Government may have to prove by "clear and convincing evidence" a sentencing factor that has an extremely

[1] No. 04-36167, 2006 WL 3258221 (9th Cir. Nov. 13, 2006).
[2] *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989).
[3] *Gallo Cattle Co. v. United States Department of Agriculture*, 159 F.3d 1194 (9th Cir. 1998).
[4] 451 F.3d 578 (9th Cir. 2006).
[5] *United States v. Callum*, 410 F.3d 571 (9th Cir. 2005).
[6] 450 F.3d 1010 (9th Cir. 2006), *petition for reh'g en banc pending*.
[7] 18 U.S.C. §16(a).
[8] *United States v. Robinson*, 967 F.2d 287 (9th Cir. 1992).
[9] 450 F.3d 384 (9th Cir.), *amended and superseded*, 466 F.3d 708 (9th Cir. 2006).

disproportionate effect on the sentence. A previous panel,[10] however, held that the clear and convincing standard applies only when the court enhances a sentence based on uncharged conduct.

- *Earth Island Institute v. United States Forest Service*:[11] In addressing the standard for granting a preliminary injunction, a Ninth Circuit panel held that a plaintiff need only show a "possibility" of irreparable harm. An earlier panel,[12] however, held that a plaintiff must demonstrate a "significant threat" of injury.

- *United States v. Biggs*:[13] A Ninth Circuit panel held that there was not a reasonable alternatives element to self-defense in a prison assault case. Earlier panels[14] had held that the lack of reasonable alternatives was an element of self-defense in firearms cases.

- *United States v. Bobbie Bear*:[15] A Ninth Circuit panel held that it was plain error for a judge not to instruct *sua sponte* on an affirmative defense. A previous panel[16] held that it was not plain error if the district court failed to instruct *sua sponte* on an alibi defense, which is an affirmative defense.

- *Kheiro v. Gonzales*:[17] A Ninth Circuit panel held the Government was not entitled to a remand under *INS v. Ventura*[18] in order to raise new arguments, where the alien was entitled to a rebuttable presumption of a well-founded fear of future prosecution and the Government failed to present such rebuttal evidence before the Immigration Judge or the Board of Immigration Appeals ("BIA"). An earlier panel,[19] however, held that although the alien was entitled to a rebuttable presumption of a well-founded fear of future persecution, the Government was entitled to remand under *INS v. Ventura* to present additional evidence.

- *United States v. Heredia*:[20] A Ninth Circuit panel held that a deliberate indifference instruction cannot be given if the defendant had actual knowledge of the crime, and, without engaging in the harmless error test, that the improper giving of the deliberate indifference instruction was not harmless error. Previous panels, however, held that the instruction can be given if there is evidence that the defendant had both actual

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[10] *United States v. Rosacker*, 314 F.3d 422 (9th Cir. 2002); *United States v. Bonilla-Montenegro*, 331 F.3d 1047 (9th Cir. 2003); *United States v. Melchor-Zaragoza*, 351 F.3d 925 (9th Cir. 2003).
[11] 442 F.3d 1147 (9th Cir. 2006).
[12] *Oakland Tribune v. Chronicle Publishing Co.*, 762 F.2d 1374 (9th Cir. 1985).
[13] 441 F.3d 1069 (9th Cir. 2006).
[14] *United States v. Sahakian*, 965 F.2d 740, 741 (9th Cir. 1992); *United States v. Lemon*, 824 F.2d 763, 763 (9th Cir. 1987).
[15] 439 F.3d 565 (9th Cir. 2006).
[16] *United States v. Lillard*, 354 F.3d 850 (9th Cir. 2003).
[17] No. 03-74542, 2006 WL 314480 (9th Cir. Feb. 10, 2006).
[18] 537 U.S. 12 (2002).
[19] *Zoghbi v. Gonzales*, 148 Fed. Appx. (9th Cir. 2005).
[20] 429 F.3d 820 (9th Cir. 2005), *reh'g en banc granted*, 460 F.3d 1093 (9th Cir. 2006).

knowledge and deliberate ignorance.[21] Furthermore, other panels applied the harmless error test to determine if an erroneously given deliberate indifference instruction was harmless.[22]

- *Jibril v. Gonzales*:[23] A Ninth Circuit panel noted an intra-circuit split between two sets of cases that addressed the question of whether to uphold an immigration judge's findings that an asylum seeker's testimony was implausible based "upon common sense, not upon evidence in the record."[24] The first set of cases upheld the immigration judge's findings that the testimony was implausible.[25] The second set of cases did not uphold the immigration judge's findings on a similar factual record.[26]

- *Defenders of Wildlife v. Environmental Protection Agency*:[27] In determining whether the EPA had discretion to impose conditions on its delegation of a Clean Water Act program from itself to the state of Arizona, a Ninth Circuit panel held that Section 7(a)(2) of the Endangered Species Act provided additional authority for program agencies to undertake actions to avoid jeopardizing listed species. Other panels of the Ninth Circuit held that ESA Section 7 did not provide any additional authority to agencies. [28] The court denied the Government's petition for rehearing.

- *Nikoghosyan v. Gonzales*:[29] A Ninth Circuit panel remanded to the Immigration Judge for reconsideration, holding Jehovah's Witnesses were a disfavored and mistreated group in Armenia. An earlier panel,[30] however, did not apply the disfavored or mistreated group analysis in an asylum case involving Jehovah's Witnesses from Armenia.

- *United States v. Cassel*:[31] A Ninth Circuit panel noted an intra-circuit split as to whether the First Amendment bars the government from punishing a threat without proving that the threat was made with the intent to threaten the victim.[32] Some panels found that intent to harm was needed and others found that it was not needed. The panel did not decide the issue, however, because a recent Supreme Court case[33] was dispositive and rendered the discrepancy in the earlier Circuit decisions irrelevant.

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[21] *United States v. Perez-Padilla*, 846 F.2d 1182, 1183 (9th Cir. 1988); *see also United States v. Sanchez-Robles*, 927 F.2d 1070, 1074 (9th Cir. 1991).
[22] *See United States v. Alvarado*, 838 F.2d 311, 317 (9th Cir. 1988).
[23] 423 F.3d 1129, 1136 (9th Cir. 2005).
[24] *Id.* at 1135-36.
[25] *Malhi v. INS*, 336 F.3d 989, 993 (9th Cir. 2003); *Singh-Kaur v. INS*, 183 F.3d 1147, 1152 (9th Cir. 1999).
[26] *Ge v. Ashcroft*, 367 F.3d 1121 (9th Cir. 2004); *Singh v. INS*, 292 F.3d 1017 (9th Cir. 2002).
[27] 420 F.3d 946 (9th Cir. 2005), *reh'g en banc denied*, 450 F.3d 394 (9th Cir. 2006), *cert. granted* (Jan. 5, 2007).
[28] 420 F.3d at 979-80 (9th Cir. 2005) (Thompson, J., dissenting) (citing Ninth Circuit cases that conflicted with majority's determination).
[29] 133 Fed Appx. 450 (9th Cir.), *reh'g en banc denied*, No. 03-70780, 2005 U.S. App. LEXIS 19006 (9th Cir. Aug. 30, 2005).
[30] *Vaskanyan v. Ashcroft*, 118 Fed. Appx. 200 (9th Cir. 2004).
[31] 408 F.3d 622 (9th Cir. 2005).
[32] *Id.* at 628-30.
[33] *Virginia v. Black*, 538 U.S. 343 (2003).

- *Tchoukhrova v. Gonzales*:[34] Earlier Ninth Circuit panels held that when a child's application for withholding of removal is part of a family unit's application, the resolution of the parent's application will govern that of the minor child,[35] and there is no derivative withholding of removal.[36] In *Tchoukhrova,* however, a Ninth Circuit panel held that a parent could establish an asylum claim based on a derivative child's fear of persecution. The Government's petition for rehearing *en banc* was denied. The government then petitioned for certiorari. Without argument the Supreme Court granted the petition, vacated the decision, and remanded to the Ninth Circuit.

- *Bockting v. Bayer*:[37] A Ninth Circuit panel held that the new rule that the Supreme Court announced in *Crawford v. Washington*[38] does apply retroactively. An earlier unanimous, unpublished memorandum decision, however, held that *Crawford* does not apply retroactively.[39]

- *Berhe v. Ashcroft*:[40] One panel of the Ninth Circuit held that evidence that an alien had submitted a fraudulent document could not support an adverse credibility determination in an asylum proceeding where the alien was unaware the document was fraudulent. Another panel,[41] however, held that submission of fraudulent documents could support an adverse credibility determination, regardless of the alien's cognizance of the fraud, if in the circumstances, substantial evidence supported such a finding.

- *Cazarez-Gutierrez v. Ashcroft*:[42] A Ninth Circuit panel held that a state felony controlled substance possession offense was not a "drug trafficking offense," under 18 U.S.C. § 924(c), and hence was not an "aggravated felony" as applied to aliens in removal proceedings. This opinion was inconsistent with an earlier Ninth Circuit panel,[43] which held that a state felony drug offense is a "drug trafficking offense" under § 924(c) and therefore an aggravated felony in removal proceedings.

- *United States v. $4,224,958.57 in United States Currency*:[44] A Ninth Circuit panel granted standing to challenge forfeiture to fraud victims who were unsecured

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[34] 404 F.3d 1181 (9th Cir. 2005).
[35] *See Yang v. INS*, 79 F.3d 932, 933 (9th Cir.), *cert. denied*, 222 US 222 (1996); *Fisher v. INS*, 79 F.3d 966 (9th Cir. 1994) (*en banc*) (where son's asylum status derives from mother's application, court "will focus on the status of [the mother]").
[36] *Ali v. Ashcroft*, 394 F.3d 780, 782 n.1 (9th Cir. 2005).
[37] 399 F.3d 1010 (9th Cir.), *reh'g en banc denied*, 418 F.3d 1055 (9th Cir. 2005), *cert. granted sub nom. Whorton v. Bockting*, 126 S. Ct. 2017 (2006).
[38] 541 U.S. 36 (2004).
[39] *Bockting*, 418 F.3d at 1060 (O'Scannlain, J., dissenting from the denial of reh'g *en banc*) (citing *Hiracheta v. Attorney General*, 105 Fed. Appx. 937 (9th Cir. 2004)).
[40] 393 F.3d 907 (9th Cir. 2004).
[41] *Randhawa v. Ashcroft*, 107 Fed. Appx. 100 (9th Cir. 2004).
[42] 382 F.3d 905 (9th Cir. 2004).
[43] *United States v. Ibarra-Galindo*, 206 F.3d 1337 (9th Cir. 2000), *cert. denied*, 528 U.S. 1102 (2001).
[44] 379 F.3d 1146 (9th Cir.), *amended and superseded on denial of reh'g en banc*, 392 F.3d 1002 (9th Cir. 2004).

creditors. A previous panel[45] had held that unsecured creditors lacked standing to challenge forfeiture.

- *Garcia-Martinez v. Ashcroft*:[46] One panel of the Ninth Circuit held that, in order to prove past persecution based upon the alien's political opinion, an alien was not required to submit direct evidence of the persecutor's motive. Previous panels,[47] however, held that the alien was required to submit direct evidence of the persecutor's motive.

- *Eyak Native Village v. Daley* ("*Eyak II*"):[48] A Ninth Circuit panel, *sua sponte*, asked the parties whether the Alaska Native Village's appeal should be heard *en banc* to resolve an apparent intra-circuit conflict between *Village of Gambell v. Hodel*[49] ("*Gambell III*"), and *Native Village of Eyak v. Trawler Diane Marie*[50] ("*Eyak I*"), regarding aboriginal rights on the outer continental shelf. In *Eyak I*, the Ninth Circuit found that the Supreme Court's paramountcy doctrine defeated the Native Alaskans' claim of aboriginal title and exclusive right to hunt and fish on the outer continental shelf off the Alaska coast. A previous panel, however, held in *Gambell III* that "aboriginal rights may exist concurrently with a paramount federal interest, without undermining that interest."[51] The *en banc* court in *Eyak II* issued an order remanding for certain factual determinations, without resolving the intra-circuit conflict.[52]

- *Olson v. United States*:[53] A Ninth Circuit panel held that the United States may be held liable under the Federal Tort Claims Act ("FTCA") if local law would make a "'state or municipal entit[y]' liable in tort." A previous Ninth Circuit panel, however, held that the court must look to the liability of private persons in determining whether the United States can be held liable for negligent inspection under the FTCA.[54] The Government's request for rehearing *en banc* was denied.

- *Thomas v. Ashcroft*:[55] A Ninth Circuit panel held that an immigrant may establish a claim for refugee status because of persecution based on family membership. A previous panel,[56] however, held that an individual may not claim persecution because of family membership to establish refugee status. The Government's request for rehearing *en banc* was granted. The en banc panel affirmed the prior panel decision.

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[45] *United States v. $20,193.39 in U.S. Currency*, 16 F.3d 344, 346 (9th Cir. 1994).
[46] 371 F.3d 1066 (9th Cir. 2004).
[47] *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001), *reh'g denied* No. 99-70739, 2005 U.S. App. LEXIS 28561 (9th Cir. Nov. 16, 2005); *see also Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).
[48] 364 F.3d 1057 (9th Cir.), *reh'g en banc granted*, 375 F.3d 1218 (9th Cir. 2004).
[49] 869 F.2d 1273 (9th Cir. 1989).
[50] 154 F.3d 1090 (9th Cir. 1998), *cert. denied*, 527 U.S.1003 (1999).
[51] *Id.* at 1277 (emphasis added).
[52] *Eyak Native Village v. Daley*, 375 F.3d 1218 (9th Cir. 2004) (*en banc*).
[53] 362 F.3d 1236 (9th Cir. 2004), *vacated and remanded*, 546 U.S. 43 (2005).
[54] *United Scottish Insurance Co. v. United States*, 614 F.2d 188, 195 (9th Cir. 1980).
[55] 359 F.3d 1169 (9th Cir. 2004), *reh'g en banc*, 409 F.3d 1177 (9th Cir. 2005), *cert. granted, vacated and remanded sub nom. Gonzales v. Thomas*, 126 S. Ct. 1613 (2006).
[56] *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991).

Subsequently, on a government petition for certiorari, a unanimous Supreme Court vacated the en banc decision.

- *United States v. Juvenile*:[57] One panel of the Ninth Circuit held that district courts do not have the authority to consider issues beyond rehabilitation when sentencing under the Federal Juvenile Delinquency Act. In cases decided after *United States v. Juvenile*, however, different panels reached precisely the opposite conclusion, holding that district courts do have the authority to consider other issues besides rehabilitation under the Federal Juvenile Delinquency Act.[58]

- *Farrakhan v. Washington*:[59] A Ninth Circuit panel held that the plaintiffs could proceed with a Voting Rights Act Section 2 vote denial case based solely on evidence of statistical disparities showing disproportionate impact on a racial group. This decision conflicted with the Ninth Circuit's earlier decision in *Smith v. Salt River Project Agricultural Improvement and Power District*,[60] which held that evidence of statistical disparities that showed a disproportionate impact alone was not enough to establish a vote denial case under Section 2 of the Voting Rights Act.[61]

- *United States v. Dominguez-Benitez*:[62] A Ninth Circuit panel held that the defendant met his burden of establishing that the district court's failure to advise him about one aspect of the plea agreement affected his "substantial rights" even though the judge posed other questions about the plea agreement. An earlier panel[63] held, however, that the district court's failure to advise a defendant about a specific right did not affect his "substantial rights" because the defendant was informed about other rights.

- *Mukhtar v. California State University*:[64] A Ninth Circuit panel set aside the jury verdict and remanded for a new trial in a civil rights case because the district court had failed to state explicitly the reasons under *Daubert*[65] for permitting expert witness testimony. In other cases where the district court judge did not explicitly state the reasons for permitting expert testimony, panels either presumed that the district court judge made an implicit *Daubert* determination[66] and reviewed that determination for abuse of discretion or remanded the case back to district court to make the *Daubert* determination; however, the panels did not order a new trial.[67] The petition for rehearing *en banc* was denied.

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[57] 347 F.3d 778, 787 (9th Cir. 2003).
[58] *See United States v. D.R.L.*, No. 03-30093, 2003 WL 22735846, at *1 (9th Cir. Nov. 17, 2003); *United States v. J.L.B.*, 141 F.3d 1181, 1998 WL 101716 at *3 (9th Cir. Mar. 9, 1998); *United States v. Juvenile #1 (LWQ)*, 38 F.3d 470, 472 (9th Cir. 1994).
[59] 338 F.3d 1009 (9th Cir. 2003), *reh'g en banc denied*, 359 F.3d 1116 (9th Cir. 2004).
[60] 109 F.3d 586 (9th Cir. 1997).
[61] *Farrakhan*, 359 F.3d at 1118 (Kozinski, J., dissenting from the denial of reh'g *en banc*).
[62] 310 F.3d 1221 (9th Cir. 2002), *cert. granted, rev'd and remanded*, 542 U.S. 74 (2004).
[63] *United States v. Morales-Robles*, 309 F.3d 609, 610 (9th Cir. 2002).
[64] 299 F.3d 1053 (9th Cir. 2002), *reh'g en banc denied*, 319 F.3d 1073 (9th Cir. 2003).
[65] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).
[66] *Mukhar*, 319 F.3d at 1076-77 (Reinhardt, J., dissenting from the denial of reh'g *en banc*) (listing cases where the court made an implicit determination or remanded the case for the *Daubert* determination).
[67] *Id.* at 1075 (Reinhardt, J., dissenting from the denial of reh'g *en banc*).

- *O'Toole v. United States*:[68] A Ninth Circuit panel held that the discretionary function exception in the Federal Tort Claims Act does not protect a discretionary decision of the Bureau of Indian Affairs regarding how to allocate its limited fiscal resources for repairing and maintaining the irrigation system on an Indian reservation. An earlier panel[69] held, however, that the "distribution of limited resources" is protected by the discretionary function exception.

- *United States v. Banks*:[70] A Ninth Circuit panel held that a delay of 15 to 20 seconds under the knock and announce rule was insufficient under the Fourth Amendment. A later panel,[71] however, noted that the opinion in *Banks* appeared to conflict with earlier panel decisions that held delays of 10 to 20 seconds to be sufficient under the Fourth Amendment.

- *United States v. Olabanji*:[72] The Ninth Circuit held that district court judges must consider policy statements and the sentencing guidelines for the underlying offense when calculating a sentence after revoking probation. However, in *United States v. George*,[73] a different panel held that when sentencing for probation violations, district court judges should consider policy statements and sentencing guidelines for probation violations, not for the underlying offense.[74]

- *United States v. Recio*:[75] A Ninth Circuit held that a factual impossibility defense was available with a conspiracy charge. A previous Ninth Circuit panel, however, held that factual impossibility was not a defense to conspiracy.[76] The petition for rehearing *en banc* was denied.

- *Popova v. INS*:[77] A Ninth Circuit panel found facts in the first instance regarding whether changed country conditions in Bulgaria rebutted the presumption of a well-founded fear of persecution created by a finding of past persecution. A previous Ninth Circuit panel, however, had held that the courts of appeals do "not sit as an administrative agency for the purpose of fact-finding in the first instance" and that petitioners must raise issues before the administrative agency for that issue to be

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[68] 295 F.3d 1029 (9th Cir. 2002).
[69] *Marlys Bear Medicine v. United States*, 241 F.3d 1208, 1217 (9th Cir. 2001).
[70] 282 F.3d 699 (9th Cir. 2002), *rev'd*, 540 U.S. 31 (2003).
[71] *United States v. Chavez-Miranda*, 306 F.3d 973, 980 n.4 (9th Cir. 2002).
[72] 268 F.3d 636, 639 (9th Cir. 2001), *reh'g en banc denied*, 286 F.3d 1114 (9th Cir. 2002).
[73] 184 F.3d 1119 (9th Cir. 1999).
[74] *Olabanji*, 286 F.3d at 1117-18 (Graber, J., dissenting from denial of reh'g *en banc*).
[75] 258 F.3d 1069 (9th Cir.), *reh'g en banc denied*, 270 F.3d 845 (9th Cir. 2001), *rev'd sub nom. United States v. Recio*, 537 U.S. 270 (2003).
[76] *Recio*, 270 F.3d at 849 (O'Scannlain, J., dissenting from the denial of reh'g *en banc*) (listing several cases where legal and factual impossibility were not defenses to conspiracy).
[77] 273 F.3d 1251 (9th Cir. 2001).

preserved for appeal[78] and, therefore, the case should have been remanded for further fact finding by the BIA.[79]

- *Singh v. INS*:[80] A Ninth Circuit panel held that it had authority under 8 U.S.C. § 1105a(a)[81] to remand a case to the BIA for the taking of additional evidence. An earlier panel[82] had held that, in a similar circumstance, the court lacked authority under 8 U.S.C. § 1105a(a) to remand for the taking of additional evidence.

- **Ninth Circuit Intra-Circuit Splits Regarding the Review of Credibility Determinations**

  - *Chen v Ashcroft*:[83] A Ninth Circuit panel remanded an impermissible adverse credibility determination to decide whether to grant asylum but, in so doing, precluded the BIA from addressing the credibility issue. In various other cases,[84] however, the Ninth Circuit remanded to the BIA to decide issues of credibility and asylum eligibility without making a credibility finding, stating it was the BIA's place to make such a determination.

  - *Vazques-Hoyos v. Ashcroft*:[85] One panel found that the BIA committed legal error when it required corroborating evidence to accompany the alien's testimony and remanded the case with the instructions to assume credibility by the alien. In various other cases,[86] however, the Ninth Circuit has remanded to the BIA to decide issues of credibility and asylum eligibility, stating it was not its place to make credibility determinations.

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[78] *See Tejeda-Mata v. INS*, 626 F.3d 721, 726 (9th Cir. 1980).
[79] There are several other cases where Ninth Circuit panels engaged in fact-finding in the first instance, rather than remanding to the administrative agency. *See Jaiswal v. INS*, 22 Fed. Appx. 937 (9th Cir. 2002); *Singh v. Ashcroft*, 301 F.3d 1109 (9th Cir. 2002); *Silva-Jacinto v. INS*, 31 Fed. Appx. 490 (9th Cir.), *reh'g en banc denied, superseded*, 37 Fed. Appx. 302 (9th Cir. 2002), *cert. granted, vacated and remanded*, 537 U.S. 1100 (2003); *Hernandez v. INS*, 34 Fed. Appx. 550 (9th Cir. 2002); *Ventura v. INS*, 264 F.3d 1150, 1157 (9th Cir. 2001), *cert. granted, rev'd in part and remanded*, 537 U.S. 12 (2002); *Chowdhury v. INS*, 44 Fed. Appx. 123 (9th Cir. 2002), *withdrawn and superseded, reh'g en banc granted*, 55 Fed. Appx. 824 (9th Cir. 2003); *Chen v. INS*, 266 F.3d 1094, 1101-03 (9th Cir. 2001), *cert. granted, vacated and remanded*, 537 U.S. 1016 (2002).
[80] 19 Fed. Appx. 651 (9th Cir. 2001).
[81] These provisions have been repealed.
[82] *Altawil v. INS*, 179 F.3d 791 (9th Cir. 1999).
[83] 85 Fed. Appx. 44 (9th Cir. 2003).
[84] *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865 (9th Cir. 2003); *Manimbao v. Ashcroft*, 298 F.3d 852 (9th Cir.), *amended on reh'g en banc*, 329 F.3d 655 (9th Cir. 2003); *Hartooni v. INS*, 21 F.3d 336 (9th Cir. 1994).
[85] 84 Fed. Appx. 886 (9th Cir. 2003).
[86] *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865 (9th Cir. 2003); *Manimbao v. Ashcroft*, 298 F.3d 852 (9th Cir.), *amended on reh'g en banc*, 329 F.3d 655 (9th Cir. 2003); *Hartooni v. INS*, 21 F.3d 336 (9th Cir. 1994).

- *Singh v. Ashcroft*:[87] A Ninth Circuit panel reversed the BIA's adverse credibility determination after finding a violation of Singh's due process rights. It held that Singh was credible and eligible for asylum, and it remanded the case to the BIA for the exercise of discretion as to asylum. However, in *Manimbao v. Ashcroft*,[88] a different Ninth Circuit panel held that when the BIA makes an independent adverse credibility decision and the petitioner is deprived of an opportunity to defend his credibility, the BIA should remand the case to an immigration judge to allow the immigration judge to conduct a full inquiry into the petitioner's credibility or it should provide the petitioner with proper notice that his credibility is an issue and allow the petitioner an opportunity to respond and adequately brief the issue. The Department's petition for rehearing *en banc* was denied.

[87] 340 F.3d 802 (9th Cir. 2003), *amended and superseded on denial of reh'g en banc*, 362 F.3d 1164 (9th Cir. 2004).
[88] 329 F.3d 655 (9th Cir. 2003).