Courting Balance at the Ninth Circuit Court of Appeals:

Exploring Strategies to Help the Court More Efficiently Manage its Caseload Without Eroding Procedural Fairness and Legitimacy

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EXECUTIVE SUMMARY

The Ninth Circuit Court of Appeals is one of thirteen intermediate federal appellate courts in the United States. By nearly any measure, it is also the largest. The court's jurisdiction includes nine of the country's westernmost states—covering 40% of its land mass and approximately one-fifth of its population (roughly 65 million people). Like other circuit courts, it has struggled to efficiently manage its perennially high caseload without compromising procedural fairness and institutional legitimacy. Nationwide, under-resourced circuit courts have been struggling to accommodate decades of caseload expansion. To manage their growing caseloads, federal courts of appeal have departed from certain traditional norms of appellate review that are believed fundamental to fair process. The collective departure from these norms has, in turn, created tension between procedural fairness and efficiency. Both are equally important to court legitimacy, but as caseloads have increased, courts have deprioritized other key components of procedural fairness by reducing oral argument, delegating decisional authority to streamline case dispositions, and publishing fewer opinions. Critics are concerned that this heavy emphasis on efficiency over visible process unbalances the scales of justice in ways that ultimately threaten institutional legitimacy.

This paper first explores the roots of the Ninth Circuit's caseload problem, focusing on the tension between procedural fairness and efficiency, and then considers strategic interventions the court can use to balance its competing priorities and relieve the tension. Using the rational policy analysis framework of Meltzer and Schwartz, three alternatives are presented and evaluated: the incorporation of Artificial Intelligence (AI) tools to enhance decisional quality and efficiency; targeted staffing increases to distribute workload more effectively; and strategically increasing oral arguments to enhance procedural fairness and improve decisional quality. The results of the analysis suggest that, while each alternative has its unique merits and limitations, a combination of all three of the presented alternatives offers the most balanced approach to address the court's caseload-adjacent challenges.

It is therefore recommended that the Ninth Circuit implement a phased integration of all three alternatives, starting with a gradual, concurrent increase of both oral argument and staffing, followed by the eventual design and integration of AI tools. This comprehensive, balanced approach will improve the court's capability to manage its caseload fairly and efficiently, fortify it against future caseload expansion, and protect its institutional legitimacy.

INTRODUCTION

There are 29 active judges—double the number of its next largest sister circuit—22 senior judges, and countless professionals who serve the federal judiciary as part of the Ninth Circuit Court of Appeals. Judges and staff are dedicated public servants united by the same mission: "to provide an impartial forum for the just and prompt resolution of cases through the uniform and coherent application of the Constitution and the Laws of the United States of America" (Mission Statement, n.d.). Yet fulfilling this mission is no simple task. Historically, the court has maintained one of the highest caseloads in the country. Even amid a recent and significant downward trend in case filings nationwide, the court still receives a disproportionately high number of new appeals, and its pending caseload remains consistently high compared to those of its sister circuits (*United States Courts*, 2014–2023 Table B-12; Catterson, 2006). Yet streamlining processes adopted by the Ninth Circuit to manage its enduringly high caseload reside in tension with the more traditional approach to appellate review that many believe is a fundamental part of our legal system. The court now faces criticism from those who question whether its efficiency efforts have come at the cost of procedural fairness and institutional legitimacy (Shapiro & Harvey, 2019; McAlister 2020; McAlister 2023a).

The court's high caseload creates a Gordian knot of interrelated problems that are not easily solved. Using the rational policy analysis framework of Meltzer and Schwartz (2018), in this paper I evaluate the costs and benefits of three potential alternatives that may be used to help the court efficiently and fairly manage its caseload: artificial intelligence tools; increasing staffing; and strategically increasing oral arguments. As discussed in the last two sections, the results of the quantitative analysis suggest that the last alternative, strategically increasing oral argument, should advance for further consideration. However, the overarching objective of this analysis is to identify the best way to relieve the tension between procedural fairness and efficiency in the court's caseload management processes. After examining the costs and benefits of each alternative, it becomes apparent that implementing the

alternatives in concert may balance weaknesses and mitigate the costs of each. I conclude that employing all three alternatives together best meets the objective.

Framework: Meltzer and Schwartz's Five-Step Approach to Policy Analysis

Meltzer and Schwartz (2018) define rational policy analysis as "a systemic comparison of strengths and weaknesses of alternative ways of addressing a given problem" (p. 20), or more simply, "evidence-based advice-giving" (p. 1). The rational model of policy analysis is derived from a neoclassical economics perspective and utilizes a cost-benefit analysis to consider options and determine efficiency and tradeoffs. While approaches vary, all forms of rational policy analysis are fundamentally steeped in logic and evidence (Meltzer & Schwartz, 2018). Still, rational policy analysis is not without criticism. The model assumes unrealistic access to information and unlimited resources and is criticized as highly quantitative and positivist. It is further criticized as overly individualistic and market-based in ways that may ignore collective community views (Meltzer & Schwartz, 2018). Nonetheless, the five-step framework for analysis created by Meltzer and Schwartz (2018) is flexible enough to systematically examine a problem and determine possible solutions. The result of analysis using this framework should provide stakeholders with a fundamental understanding of an issue and a starting point for action (Meltzer & Schwartz, 2018).

Simply put, Meltzer and Schwartz's five-step process breaks policy analysis into a logical and manageable sequence. The first step is to define the problem, then weigh the costs and benefits of alternatives and establish the criteria to quantitatively measure each alternative (steps 2-4). After completing and considering the first four steps, the recommendation is revealed in the fifth and final step. Accordingly, in the first section of this paper I explore and define the court's caseload problem, detail and analyze the proffered alternatives in sections two through four, and in section five provide a reasoned recommendation.

I. Defining the Problem

Meltzer and Schwartz (2018) provide that to properly define a problem, an analyst must first come to understand a problem from multiple perspectives, consider its "historical, political, institutional, and

social context" (p. 39), and parse the central problem from any that are related or underlying. The result should yield a "well defined, and singular problem statement" that focuses the analysis (p. 38). As discussed throughout, a review of available literature and data makes clear that **the Ninth Circuit's high caseload potentially impedes procedural fairness and threatens institutional legitimacy.** There is no single attributable cause. Instead, many contributory factors occurring over several decades have created the problems complained of today. Although the literature does not conclusively demonstrate that procedural fairness has suffered at the Ninth Circuit, efficiently managing the court's substantial caseload has necessitated tradeoffs that raise persistent and credible concerns. This section provides a brief background on the court and its unwieldy caseload and analyzes the problems that flow from it.

Background & History

The Ninth Circuit Court of Appeals is one of thirteen intermediate federal appellate courts in the United States. By nearly any measure, it is also the largest (Ninth Circuit Court of Appeals, n.d.). The court's jurisdiction includes nine of the country's westernmost states[1]—covering 40% of its land mass and approximately one-fifth of its population (roughly 65 million people) (Shapiro & Harvey, 2019). As an intermediate appellate court, the Ninth Circuit reviews trial (district) court decisions and federal agency determinations. Short of reversal by the court itself (via a full court review), or the United States Supreme Court, its published decisions bind every state within its jurisdiction (Administrative Office of the U.S. Courts, n.d.).

Nationally, appellate caseloads have been significantly expanding since at least the 1960s, after Congress enacted a sustained period of jurisdictional expansions. Today, "[w]e . . .have a lot more lawyers, a lot more prisoners, and generally a more litigious society that often turns to the courts, rather than the political process, for solutions" (Catterson, 2006, p. 3). The Ninth Circuit has been successful in

[1] Arizona, California, Washington, Oregon, Idaho, Montana, Nevada, Alaska, and Hawaii. The Ninth Circuit also covers the United States Territory of Guam and the Commonwealth of the Northern Mariana Islands (see Appendix A-1, map of United States Circuit Courts).

utilizing its size and resources to streamline its processes, increase staffing, and harness technology in ways that help it absorb increasing caseloads and minimize delay (Catterson, 2006; Thomas, 2017).

Why is the Ninth Circuit's Caseload So High?

Population and Geography. Due to its size and population, the Ninth Circuit's jurisdictional reach spans a tremendous geographical territory rich in natural resources, and dense coastal population centers. A circuit court's caseload is determined to varying degrees by both national and regional factors. History has demonstrated that Congressional action—typically that which expands or creates the courts' jurisdiction—will often trigger a case surge. Thomas, 2017; Catterson, 2006). While any resultant backlogs tend to diminish once case law is established, such actions tend to permanently expand caseloads (Federal Judicial Center, 1993). Other factors such as prosecutorial decisions, the economy, and administrative agency actions also play a large role in determining the volume and type of the court's caseload (Thomas, 2017). National and local economic shifts can also influence case filings and, as evidenced by the immigration caseload crisis discussed below, the aftermath of sweeping administrative agency actions can instantaneously and dramatically impact a court's caseload for years (Thomas, 2017; Federal Judicial Center, 1993).

The impacts of this type of change on a court can be difficult to predict. Different circuits may be more or less sensitive to change depending on circumstances unique to that region. Due in part to member states' proximity to the southern border, the Ninth Circuit handles nearly 50% of all national immigration appeals (Ninth Circuit, 2023), and its geographical boundaries include vast tracts of natural resources that require it to adjudicate environmental regulatory actions regularly. This means the region may be particularly sensitive to sweeping changes in law or regulation in these areas. Although some argue that there is no demonstrable connection between the region's population growth and appellate case filings (Thomas, 2017), its large population cannot be entirely dismissed when considering factors contributing to the court's unwieldy caseload. Given its size, any significant change to federal law or policy is likely to be magnified in a court the size of the Ninth Circuit.

Not Enough Judges. The Ninth Circuit Court of Appeals has 29 active judgeships; however, when an active judge takes senior status or vacates a seat due to retirement or death, it must be filled by the President (and confirmed by the Senate)—a process that has become increasingly contentious (McAlister, 2023b). During the late 1990s, one-third of Ninth Circuit judgeships sat vacant, which resulted in case processing delays (Thomas, 2017). Even now that the court has a full bench, and is seeing fewer appellate filings, there are still not enough judges to effectively manage the court's caseload. Between 2009 and 2020, the Judicial Conference of the United States[2] ("JCUS") recommended that Congress add five additional permanent Ninth Circuit seats. Citing a recent downward trend in new appeals, its 2021 and 2022 recommendations reduced that number to two, noting that the court's pending caseload "remains the highest in the nation" and that adding two additional seats would still leave per panel filings 23 percent above the JCUS-established standard (JCUS, 2023). However, for decades, Congress has shown little interest in creating new judgeships (Levy, 2013).

The Immigration Docket. There is perhaps no better example than the immigration surge of the early aughts to illustrate how external change can impact court dockets. Policy changes and administrative reforms instituted between 1998 and 2002 to streamline a case backlog at the immigration courts created a flood of immigration cases for courts of appeals. As a result, the Ninth Circuit's caseload increased dramatically and by 2005 the court had amassed a crushing backlog of immigration cases (Thomas, 2017; Law, 2010). Although the court has historically handled about half of all nationwide immigration appeals, as former Circuit Executive Cathy Catterson explained at the time, "[t]hat [50%] proportion [of immigration cases] really has not changed much. It is just that the pie has gotten a whole lot bigger" (Catterson, 2006, p. 297).

[2] The JCUS is the national policy making body for federal courts. Among other things, it makes recommendations to Congress regarding judicial branch legislation (*About the Judicial Conference | United States Courts*, n.d.).

High Caseloads Erode Institutional Legitimacy

Nationally, an overburdened federal judiciary has been criticized for its collective departure from the traditional "visible rationality" approach to appellate review that is believed to be the ideal. For an appellate court to decide cases using this approach, "[it] should have enough time and information to decide cases deliberately, collegially, and intelligently, and *to so appear to the litigants and the public*" (Federal Judicial Center, 1993, p. 10, emphasis added). This is accomplished when courts provide "disposition on the merits of every case after briefing, argument, and consultation among three circuit judges, who publish an opinion which fully explicates the result" (Lavie, 2017, p. 63). Critics believe that departing from this norm threatens decisional quality and impedes procedural fairness (McAlister, 2020; McAlister 2023a; Law, 2011). The literature has distilled concerns that reduced judicial attention—as evidenced by over-delegation to staff, a decline in oral argument, and fewer published opinions (among others)—allows cases to slip through cracks in the system with unjust results (McAlister, 2023a; Law, 2011). Critics further argue that any resultant error or procedural injustice is unlikely to be caught or corrected because these very same procedural shortcuts *also* reduce transparency and judicial accountability (Brown et al., 2021; McAlister, 2020; McAlister, 2023a).

Legitimacy

What is "legitimacy" and why does it matter? "Legitimacy" is often used when discussing the judiciary, yet defining it is not easy. A review of available literature offers no generally accepted definition to be used when considering the institutional legitimacy of the courts. Suchman (1995) observed that "[m]any researchers employ the term *legitimacy*, but few define it" (p. 572) and surmised that this is because "[t]he multifaceted character of legitimacy implies that it will operate differently in different contexts, and how it works may depend on the nature of the problems for which it is the purported solution" (p. 573). Suchman (1995) ultimately defined the term as "a generalized perception or

assumption that the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs, and definitions" (p. 574).

Bowers & Robinson (2012) more narrowly define the term in a criminal justice context as "a belief that legal authorities are entitled to be obeyed and that the individual ought to defer to [authorities'] judgments" (p. 214) and that legitimacy can be measured by the "quality of decisionmaking" and procedures that "are neutral, accurate, consistent, trustworthy, and fair" (p.216). Legitimate justice is effectively delivered when authorities act "impartially, honestly, transparently, respectfully, ethically, and equitably" (p. 216).

Dowling and Pfeffer (1975) suggest that legitimacy impacts resource allocation and some organizations (like the courts) might be more constrained by the concept of legitimacy than other institutions due to their visibility. Though it is not the only way to evaluate a court's legitimacy, publicly available caseload data allows the "larger social system" (i.e., Congress, lawyers, parties, and the public) to assess whether courts are fulfilling their duties by appropriately "utiliz[ing] resources which might be otherwise allocated" (p. 123). This evaluation likely includes many, if not all, of the measurement criteria set forth by Bowers and Robinson (2012) as well as an assessment of efficiency. Indeed, courts are often considered opaque by outsiders because they release relatively little data to the public. This means that a court's precedent and caseload statistics are the principal tools available for outsiders to use in evaluating institutional legitimacy, and courts should be aware how public perceptions of legitimacy may impact resource allocation to the institution. Ultimately, the literature makes clear two central points: legitimacy is fundamental to courts' existence, and procedural fairness[3] is a foundational component of legitimacy.[4] Legitimacy and procedural fairness are therefore distinct, but inextricably linked.

[3] "Procedural fairness" as used here includes decisional quality, impartiality, and transparency, as the literature seems to agree that each can be used to measure or demonstrate fairness of process (e.g., McAlister, 2023b; Lavie, 2017; Fischman, 2021; Bowers & Robinson, 2012).

[4] Procedural fairness is a significant—but not the only—component of court legitimacy. For example, judicial comportment and ethics are also fundamental to court legitimacy but they are not discussed here because they are not relevant to the caseload issue at hand.

High Caseloads Impede Procedural Fairness

The Tension Between Efficiency and Fairness

"[P]ublic confidence in American courts involves a belief in the fairness and impartiality of the tribunal, with the [courts] dispensing speedy decisions [under] 'the law'. . ." (Miller, 1970, p. 74). Thus, to maintain public confidence, courts must dispose of their cases in ways that are both efficient *and* fair. Tension between these two central requirements emerges when high caseloads require courts to prioritize one over the other. The traditional approach to appellate review is more protective of procedural fairness because it includes a "disposition on the merits of every case after briefing, argument, and consultation among three circuit judges, who publish an opinion which fully explicates the result" (Lavie, 2017, p. 63). But the traditional model of review implicitly requires focused judicial attention and, therefore, time—something sorely lacking in courts burdened by high caseloads. Arguably, many of the court processes implemented to manage caseloads more efficiently appear to have been primarily aimed at mitigating delay, which has necessitated a departure from the traditional model of review (McAlister, 2023a; McAlister, 2023b; Lavie, 2017).

High Caseloads May Reduce Judicial Attention and Decisional Quality

Researchers have tested the hypothesis that high caseloads have forced courts to cut procedural corners in ways that reduce or impede procedural fairness with mixed results. Particularly relevant here is the work of two court-focused researchers who used the immigration caseload surge in the Ninth and Second Circuits as a "natural experiment" to measure how that surge impacted the decisional quality component of traditional review (Huang, 2011; Lavie, 2017). Both analyses used trial court reversal rates in civil appeals as a measure of quality because a reversal requires more work from judges. In other words, researchers wanted to see if judges increased their approval of lower court decisions in civil cases as a case management shortcut. Huang's (2011) analysis of data between 1997 and late 2005 found that at the Ninth Circuit there was a clear "drop off" in reversal rates as overall caseloads increased. Lavie (2017) replicated Huang's study and found the Ninth Circuit's reversal rates were largely unaffected—a discrepancy that Lavie attributed to a modeling error in Huang's analysis. Lavie hypothesized that the

Ninth Circuit's streamlined case management processes helped it to better absorb caseload shocks with little effect on decisional quality. Nonetheless, taken together, Huang's and Lavie's research makes clear that many believe decisional quality may suffer from thin judicial attention, even if data yields conflicting results.

Procedural Shortcuts: Unpublished Dispositions, Reduced Oral Argument, Case Screening

Unpublished dispositions. Circuit courts are more frequently disposing of cases with brief, unpublished, memorandum dispositions instead of lengthier published opinions. The Ninth Circuit is no exception. Busy judges juggling high caseloads may be avoiding published opinions, even where warranted, as a time-saving shortcut (Brown et al., 2021; McAlister, 2020). From 2014 to 2023, an average of 92.5 percent of its case decisions were unpublished (*United States Courts*, 2014–2023 Table B-12). Critics argue that the preference for unpublished decisions reduces transparency (thereby impeding error correction) and harms decisional credibility, particularly if the decisions fail to sufficiently detail the panel's reasoning. Dispositional "reason-giving shows litigants respect, allows for meaningful participation, and demonstrates the decision maker's independence and trustworthiness" which, in turn, preserves faith in the institution (McAllister, 2020, p. 583). Unlike their unpublished counterparts, published opinions are subject to greater public scrutiny and their use strengthens perceptions of judicial accountability and credibility (Lavie, 2017). Furthermore, because published opinions are precedential (that is, binding on all courts within the Ninth Circuit's jurisdiction) they are far more labor-intensive.

Reduced oral argument. Heavy caseloads have also resulted in more cases being decided without oral argument, a time-saving tool that the Ninth Circuit relies heavily on to manage its caseload. From 2014 to 2023, the court disposed of an average of 78.5 percent of its cases without oral argument (*United States Courts*, 2014-2023 Table B-10). Yet deciding cases in this way is arguably one of the most controversial departures from the traditional model of review being used by courts today. Oral argument is considered fundamental to the legal system's adversarial process because it allows litigants meaningful participation in the legal process and focuses judicial attention in ways that yield better decisions (Lavie, 2017; McAllister, 2020). "In a system of decision-making dependent upon public confidence and

acceptance of the results of its processes, there exists a keen . . . interest in open court processes. *But for oral argument, citizens would have no real contact with appellate judges.* Public trust and institutional legitimacy are critically important, and oral argument fosters those goals" (Davidson III, 2018, p. 210 (emphasis added)).

The screening process. Of considerable concern is also the Ninth Circuit's screening process, which requires the least amount of judicial attention, and employs virtually all of the shortcuts discussed above. The process assigns central staff attorneys the responsibility of initial case review, including a determination of a case's complexity. Those cases staff attorneys find to be procedurally defective, frivolous, or otherwise very straightforward "easy" cases are briefly presented to a screening panel of three judges for disposition. Unless a judge on the screening panel votes otherwise, cases decided through this process entirely bypass the far more thorough review and consideration of a merits panel[5] (Law, 2011). Such a process allows judges "to attend to more important matters by assigning this initial investigation to well-trained court staff; only if a staff member detects a problem do the judges need to get involved during an appeal's infancy" (Wallace, 2005, p. 192). Although the ultimate decision is made by judges, not staff, critics are concerned that the screening process's sharp departure from traditional review means some cases may slip through cracks in the process. Screening cases are typically bundled for review based on issue (e.g., asylum cases by country), and a screening panel may consider as many as 100 to 150 cases over a 2–3-day period (Law, 2011). Though it is certainly an efficient way to dispose of cases, it's easy to see why critics are concerned about the process. Judges tasked with deciding so many cases at once are vulnerable to decision fatigue,[6] which increases the risk that they will simply defer to staff recommendations (Torres & Williams, 2022). As one Ninth Circuit judge said about the process,

[5] A standard three-judge panel that will decide a case during regularly scheduled oral argument calendar days. Merits panel cases receive considerably more attention than screening cases (McAlister, 2023a).

[6] "Decision fatigue" "refers to the idea that repeated acts of decision making impair one's ability to make fully informed and rational subsequent decisions" (Torres & Williams, 2022). A handful of limited studies on decision fatigue's impact on judicial decision making have demonstrated that volume and rapidity of case review will increase decisional default to status quo (or recommendation of counsel) (Torres & Williams, 2022; Danziger, et al., 2011; Hemrajani & Hobert, 2023).

"[a]fter you decide a few dozen such cases on a screening calendar, your eyes glaze over, your mind wanders, and the urge to say 'O.K.' to whatever is put in front of you becomes almost irresistible" (Law, 2011, p. 676).

Many of the cases decided by screening panels arise from administrative agency adjudicative decisions—like those from immigration courts or social security disability—because these cases tend to be relatively straightforward and therefore meet the criteria for a case that is "easy" to decide. However, the limited review these cases receive raises concerns that agency errors are not being caught and corrected (Law, 2011; Gelbach & Marcus, 2018). As impacted as appellate dockets may be, agency dockets are exponentially larger. Administrative law judges, especially immigration judges, are under immense pressure to move through cases quickly. "Time-strapped agency adjudicators have to rule under conditions hardly conducive to thoughtful deliberation. The fact that [appellate review] offers a backstop against arbitrary decision-making thus offers something of a psychological salve. Whatever happens within the agency, . . . the unfairly denied disability claimant or the immigrant wrongly threatened with deportation can always get justice in a [federal] court" (Gelbach & Marcus, 2018, p. 1099). Court review of agency decisions not only corrects errors in individual cases, but over time it helps to uncover and correct systemic problems or issues in agency policy or its application (Gelbach & Marcus, 2018).

Procedural Shortcuts Are Not Necessarily Inappropriate

One common justification for courts' departure from the traditional model of appellate review is that some cases are reliably easier to decide than others and therefore require significantly less attention and work (Levy 2013; Fischman, 2021). There is, for example, some support for carefully disposing of cases in unpublished dispositions and without oral argument. Levy (2013) argues that given caseload demands, cases raising common issues and arising from areas of settled law are well suited to this type of decision because "identifying material errors becomes relatively easy, even with complex issues" if the court sees them frequently (Levy, 2013, p. 431). Therefore, "[r]epeating appeals and appeals that seem less likely to contain errors at the outset of review--either because they are frivolous or because they

already have experienced a meaningful review--are good candidates for limited judicial attention" (Levy, 2013, p. 434). And, contrary to complaints about fewer precedential opinions, being more selective about which cases to publish may serve to ensure precedent doesn't get confused or diluted through repetition (Brown, Ford, et al., 2021).

Indeed, several circuit judges have publicly opined that approximately 90 percent of cases are relatively straightforward and easy to decide (Fischman, 2021). In other words, judges believe about 90 percent of their cases can be disposed of quickly, without the more intensive review required by the remaining 10 percent. The easier a case is believed to be, the less attention it is likely to receive. However, research suggests that a determination of case complexity is highly subjective and depends significantly on the experience of the person evaluating it (Fischman, 2021). Critics suggest that under a more traditional model of review, judges would take a hands-on approach to initial case review and assessment. Instead, high caseloads essentially require judges to delegate much of this case evaluation process to staff who may lack the experience necessary to make an accurate determination of a case's complexity (Fischman, 2021). The primary concern, which is arguably supported by the literature, is that cases that might benefit from greater scrutiny are being decided after a cursory review, and without a second, deeper look. Still, although the research suggests that some cases may slip through the cracks, it does not demonstrate prevalence. Rather, it confirms that at least 80–85 percent of cases qualify as "easy," and 15-20 percent of cases, at most, may benefit from greater scrutiny (Fischman, 2021).

II. Potential Policy Alternatives

The first section makes several things clear about the court's caseload problem: 1. History has demonstrated that appellate caseloads are sensitive to external change and the court remains vulnerable to future case surges; 2. Although it has the power to do so, there is no indication that Congress is willing to effect a large-scale institutional change to fix the court's caseload problems and; 3. Managing the Ninth Circuit's caseload has necessitated a departure from the traditional model of appellate review in ways that potentially impede procedural fairness and harm institutional legitimacy. Potential policy options presented must therefore consider how the court can use its available resources and limited authority to

manage its present and future caseload to maximize efficiency and assuage concerns about procedural fairness. Or, to put it most simply, any alternatives presented must seek to balance efficiency and fairness. This section will provide and briefly analyze three alternatives for consideration to help the court achieve these goals.

Alternative 1: Develop AI Tools to Improve Efficiency and Decisional Quality

In June 2023, a lawyer in New York was fined by a state court judge for citing fake authority in a brief that was written using ChatGPT, an artificial intelligence ("AI") chatbot (Neumeister, 2023). For a profession known to be "risk averse and technologically backward" (Grossman et al., 2023, p. 72), this incident, and a handful of others like it, felt futuristic and dystopian. Indeed, discussions surrounding the use of AI in courts have primarily focused on how to cope with problems like these, rather than how courts might incorporate AI to aid in their internal case management practices. Nonetheless, AI shows promise as a tool that can help courts more efficiently manage cases and focus judicial attention.

What is AI?

For many, AI can be difficult to conceptualize. This may be due in part to the fact that AI is a "catch-all name for machine learning, deep learning, and robotics" (Ross, 2023, p.1). Put most simply, "AI is a tool that strives to mimic human brain power and decision-making processes by the initial creation of algorithms that *learn* from themselves and that *continue to learn* from their own experience—much like humans. This allows the system (powered by AI) to harness that experience to do certain tasks better, faster, or more efficiently than humans" (Ross, 2023, p.1). Well-constructed AI models can be integrated into many functional systems to aid—not supplant—their human counterparts in the performance of their duties (Ross, 2023; Copus, 2020). The two types of AI most relevant here are "machine learning" and "deep learning." Machine learning is an "application whereby the system uses an iterative process until it 'learns' based on past experience. An example of this would be an application that processes similar data repeatedly until it can predict an answer. . . ." (e.g., the Google search engine function). Deep learning is a more complex version of machine learning "whereby the system is fed large amounts of data until it 'learns' by example; deep learning is inspired by the human neural network,

allowing the system to discover patterns" (e.g., facial recognition software and self-driving cars) (Ross, 2023, p.1).

AIs Use by Government in The United States

Coglianese, et al. (2021) sought to comprehensively catalog governmental use of AI in the United States. They determined that, as of the article's publication, AI was not being developed or used by federal courts in any meaningful way but it was being incorporated elsewhere by state, local, and federal government agencies. The researchers further pointed out that much of the data necessary to develop AI tools for court use is already digitized and publicly available because federal court e-filing systems have already created a centralized data repository. And, though courts haven't yet tried to utilize their data for AI implementation, researchers have already been actively trying to configure AI tools to provide insight into court decisions.

Indeed, using United States Supreme Court decisions between 1816 and 2015, researchers implemented a machine-learning language model that correctly predicted the outcome of 70 percent of 28,000 United States Supreme Court decisions (and 72 percent of individual justices' votes) (Cognialese, et al., 2021). Some state courts, including California's, have begun using online dispute resolution tools that draw from traditional alternative dispute resolution methods to facilitate resolution in traffic cases, low-conflict family court cases, and outstanding warrant cases without judicial decision-making. The United States Social Security Administration has begun promoting AI tools as part of its appeals process and to write and edit Administrative Law Judge opinions (Cognialese, et al., 2021). Non-learning predictive algorithmic tools are also used by criminal probation departments to calculate risks of recidivism for sentencing recommendations, although this use has also been criticized for lack of transparency and bias (Cognialese, et al., 2021). Finally, federal agencies, like the Securities and Exchange Commission, and the Internal Revenue Service are "light years ahead of the judiciary" and are

using AI tools to manage their regulatory compliance dockets and identify fraud (Cognialese, et al. 2021, p. 816).

How might AI be used at the Ninth Circuit?

The Ninth Circuit can use AI to aid improve case management efficiency and focus judicial and staff attention where it is needed most. As discussed below in greater detail, researchers have already imagined some of the ways courts can benefit from its use. AI can, for example, quickly identify potential precedential departures (Copus, 2020), or those areas of case law that require precedential development (McAlister, 2023b). AI can assist staff attorneys in screening processes by batching cases by topic, flagging potentially frivolous or procedurally barred cases, or identifying pro se cases that might benefit from an assignment of pro bono counsel. The goal is not for AI to replace staff attorneys, nor to relieve them entirely of certain responsibilities. Instead, AI could be used to quickly and accurately perform initial review functions in ways that will preserve and direct staff attention to better ensure procedural fairness. With care, AI may be used in other time-saving ways, such as to review and summarize party briefing, check citations, or even draft sections of an opinion or internal memoranda.

Copus (2020)[7] demonstrated how appellate courts could develop and implement AI tools to help judges better focus their attention. Using Ninth Circuit case data, Copus created a machine learning algorithmic model dubbed "statistical precedent" to first identify the court's past decision-making patterns (i.e., the learning phase), and then predict the statistical probability that the court would reverse a lower court decision. Copus believes that such a model could help courts to more fairly and effectively allocate attention because the results of the model: 1. "allows courts to identify which of its decisions—whether made by a staff attorney, law clerk, judge, or panel—are most incompatible with the court's collective jurisprudence"; 2. "lets a court know which appeals are likely to be correctly decided even with limited attention: cases with very high or low statistical precedent represent the "easy" cases that are almost always decided the same way"; and 3. "allows the court to identify the more complex cases that provide

[7] Space constraints do not allow for an in-depth discussion of Copus's work, however, for anyone whose interest is piqued by this alternative, the article is worth reading in its entirety.

the most promising opportunities to develop the law; a statistical precedent close to 50% indicates that the governing law is insufficient to generate a judicial consensus as to the proper outcome" (p. 612).

Costs and Caveats

Cognialese, et al. (2021) found that transparency is a chief concern in government implementation of AI, and its use has raised concerns about transparency and accountability because machine learning is effectively done in a "black box"—meaning that, at some point in the learning stage, researchers don't know what information is being used by algorithms to make decisions. Still, most of the concerns and criticisms of AI arise from its use as a *decision-making tool*. This is contrary to Copus's vision of AI tools functioning only as decision-making *aids*, a concept referred to as "human-centered" AI that supports rather than supplants human responsibilities (Copus, 2020; Komoda, 2023).

Copus also acknowledges status quo bias as an inherent risk of using AI in the way that he envisions. If this occurs, the AI tool would effectively cement existing precedential errors rather than correcting them. This risk can be mitigated through careful selection of the material used to teach the model. Copus suggests that the court create a stakeholder committee, including legal scholars and members of the bar, to select material— including law review articles and briefing—that should be included as part of the model's AI learning set (Copus, 2020). Importantly, including stakeholders in the design process adds transparency and accountability. And, because creating the initial learning dataset is time intensive, carefully outsourcing the task to a design committee preserves court resources. There is also a potential risk that judges and staff will become overly reliant on AI tools as they become smarter and more effective. Overreliance on, or delegation to, AI tools is likely to decrease transparency and exacerbate concerns about procedural unfairness (Komoda, 2023).

Developing AI for court use. There are a few ways the court could develop AI tools: public outsourcing using a competition model, hiring a private company, or in-house development. Any of these options are likely to be expensive for the court, albeit to varying degrees. The first two share a risk that the engineers designing the tools will not have a full understanding of the court's unique needs, and communicating those needs to an outside vendor with little-to-no legal background or knowledge leaves

room for confusion. And private contracting limits the court's control over data, design, and monitoring (Komoda, 2023). But in-house design, which allows the court far greater control, is not without its own potential pitfalls. In-house design is certain to be the most expensive option and, even if it were financially feasible, the court is unlikely to have the expertise necessary to create and implement AI without some outside collaboration (Komoda, 2023). Instead, Komoda (2023) recommends a combined approach that partners courts with universities or non-governmental organizations (perhaps even utilizing the competition approach used by other governmental agencies) because this type of collaboration will allow for greater control at far less expense. Copus (2020) suggests that to ensure neutrality and accuracy, the court should decentralize model construction by outsourcing the creation of several models, and select the best performing one "according to a prespecified, publicly communicated, standardized criterion." Copus further recommends that courts host annual competitions to keep models current and build on the lessons learned from previous models while promoting transparency. However, a competition model like that proposed by Copus allows the court the least control and is likely to be the highest risk from a security standpoint (Copus, 2020).

Arguably, the publication of court modeling could be utilized in ways that might be harnessed by litigants seeking to game the system, though Copus argues that the black box of machine learning would help serve as a safeguard. And, regardless of the method selected to develop AI for court use, the project is certain to be an expensive failure if judges and law clerks won't use it—a real risk given that judges are not historically known for their technological prowess. Thus, significant internal buy-in from and involvement by judges and staff is needed (Komoda, 2023). Finally, to improve transparency, stakeholders from the wider legal community should be, at minimum, invited to understand how the court intends to use AI and allowed to provide comments.

Alternative 2: Increase Staffing

Incredibly, a court's workload has no bearing on the number of elbow law clerks[8] (usually four) allotted to active circuit judges (McAlister, 2023b). This means that a Ninth Circuit judge must manage their caseload using the same number of elbow clerks as a judge sitting in a sister circuit and carrying a disproportionately lower caseload. However, the court has greater latitude to increase central staff attorney hiring to better distribute workloads. Data supports this option because the Ninth Circuit's ratio of staff attorneys to judges is relatively low—about 2.7 staff attorneys per judge. Other, smaller, courts have higher staff-to-judge ratios. For example, as of 2022, the First Circuit (which has a caseload significantly lower than that of the Ninth Circuit) had 3.3 staff attorneys per judge, and the Eleventh Circuit (which has a caseload similar to or greater than the Ninth Circuit's) had 5.4 staff attorneys per judge (McAllister, 2023b, table 16). Rather than simply expanding the number of staff attorneys to carry out typical central staff functions, as it has done in the past, the court could hire additional staff attorneys and assign them to chambers on a rotating basis. Doing so may provide workload relief, preserve judicial attention, and mitigate some of the concerns about judicial over-delegation. Incorporating central staff attorneys into chambers life may yield other, mutual, benefits by fostering central staff attorney training and growth, and creating a court culture that is less siloed and potentially more diverse.

Central Staff Assignments to Chambers

Preserve Judicial Attention and Ensure Procedural Fairness. It would not be realistic to hire a staff attorney for each of the 29 active judges. Instead, the court may consider hiring a pool of term-limited staff attorneys to be exclusively assigned to a chambers for several months, before rotating to the next or returning to a traditional central staff role. The court has the flexibility to structure such a program in myriad suitable ways to meet its needs. Broadly speaking, staff attorney placement could simply be used to provide an extra set of hands to lighten chambers workloads generally. Or, more narrowly, to

[8] "Elbow clerks" are "term" (serving only one or two years) or, more rarely, permanent law clerks (i.e., attorneys) who work exclusively for one judge in their judicial chambers. Elbow clerks interact daily with their judge and, among other things, are generally assigned case research and writing responsibilities (McAllister, 2023b).

target specific areas of need. Placement could, for example, be offered to those judges who agree to hear more cases per calendar. Or, during a case-specific surge (like immigration), the court could hire staff attorneys with subject matter expertise to provide dedicated support to help judges manage specific types of cases. Because each of these options will lighten chambers workloads, each may help to preserve judicial attention and focus to better ensure procedural fairness.

Mitigate Concerns of Judicial Delegation. One frequent criticism of the court's increased reliance on central staff attorneys stems from the idea that staff attorneys are relatively isolated from judges and therefore judicial delegation to staff attorneys is less effective. Staff attorneys "will not have a chance to acquire [a judge's particular outlook and values]…by working intimately with the same judge over a period of months or years. [Therefore, a] staff attorney will ordinarily be less able [than elbow clerks] to function effectively as a judge's alter ego…" (Posner, 1983). Chambers assignments will allow staff attorneys more contact with, and opportunities to learn from, circuit judges. And, after chambers-specific training, judges can be more confident that staff attorneys better understand their individual needs, concerns, and judicial philosophy. In turn, time in chambers is likely to improve training for central staff attorneys that will aid them should they return to performing central staff functions, like case screening. Finally, the rotation of staff attorneys through central staff and chambers may eventually contribute to the breakdown of chambers-staff silos and ultimately yield greater decisional consistency throughout the court.

Tangential Benefits. The benefits of this arrangement extend beyond case management, however, and have the potential to improve court culture and diversity. For example, this arrangement would expand opportunities for attorneys who are unlikely to be hired for traditional elbow clerk positions because they did not share the early opportunities available to their more traditional (and exclusive) elbow clerk peers. By making the position remote, the court potentially deepens its access to available talent and expands opportunities for candidates who are qualified to clerk but are unable to move for a traditional clerkship due to familial obligations or financial restrictions. Arguably, in the eyes of the legal community, a hybrid staff-elbow law clerk position may not carry as much prestige as a traditional elbow

clerkship, but it nonetheless confers a number of clerkship advantages to staff attorneys. For instance, the opportunity to develop stronger personal relationships with a judge (or judges, depending on tenure) and elbow clerks expands professional networks that are likely to confer many benefits over a career. A well-placed recommendation from a federal circuit judge, for example, can make candidates more competitive for certain jobs. And, clerkships are coveted, in part, because the intellectual rigor and intensity of the work hone legal writing and analytical skills over a relatively short period of time. Chambers assignment allows staff attorneys the opportunity to access some of the more intangible benefits of clerking because it exposes them to a broader variety of cases, and allows them more time to do the deep-dive research and writing that comes with cases assigned to merits panels.

Costs and Caveats

Hiring additional central staff attorneys means increased salary costs for the court—a moderately expensive option. Expenses are mitigated somewhat by the court's tenure policies that limit staff attorneys to no more than five years in the position, which keeps salaries manageable and provides some flexibility to eliminate the positions if necessary. The court could further limit its financial exposure by creating a shorter-term pilot program. It is also unclear whether a temporary law clerk assignment will help judges focus their attention or improve processes in ways that protect procedural fairness, especially over a longer term. For example, in 2023 the Eleventh Circuit — with a ratio of 5.4 staff attorneys per judge—held oral argument in only 13.6% of its cases (*Caseload Statistics Data Tables | United States Courts*, n.d.). This demonstrates that increasing central staff may indeed increase efficiency but it is unlikely to lead to improvements in procedural fairness without targeted intervention. And, as judges themselves have pointed out, hiring more law clerks means judges must spend more time managing their staff, which further redirects judicial attention from cases (Yoon, 2014). Accordingly, any such potential program should be designed to meet both efficiency and fairness goals. Measurement data should be tracked to assess how well the program meets the goals, including whether using staff attorneys in this way improves procedural fairness.

Alternative 3: Strategically Increase Oral Argument

A recommendation to increase oral argument time may, at first, seem a counterintuitive solution to the court's caseload problem. However, there is some support for the proposition. Although researchers acknowledge that dispensing with oral argument saves time, they argue that the benefits of oral argument can outweigh any efficiency gained by limiting it. An overreliance on limiting argument may harm both the efficiency and legitimacy of the courts over the longer term (Davidson III, 2018). Instead, by *strategically* increasing oral argument, the court may simultaneously address the problems created by caseload management tradeoffs and improve its case management efficiency.

The Benefits of Oral Argument

Better Decisions. First, research suggests that increasing oral argument may yield better decisions. In 2015, a task force of the American Academy of Appellate Lawyers (AAAL) made public its report examining the costs and benefits of oral argument (the "AAAL report"). That report determined that oral argument influences decisional outcomes in approximately 10–20 percent of cases. The AAAL report further suggested that, even for those cases where oral argument does not change the outcome, argument focuses judicial attention in ways that help judges better tailor the breadth of their decisions. It follows then that oral argument not only improves the odds that a case will be correctly decided but may also improve the quality of circuit precedent (AAAL Report, 2015; Martin & Freeman, 2018).

Building a Better Bar. Second, increasing oral argument will help to build a better bar, which not only improves decisional quality but may also serve to lighten the court's workload. Judges frequently complain about inadequate briefing and feel that oral argument will be a waste of time because a "lawyer who cannot write an adequate brief is not likely to do much to enlighten the judges at oral argument" (Davidson III, 2018, p. 211; Martin & Freeman, 2018). Poor quality briefing—that which fails to clearly or accurately present certain arguments or appropriate authorities, for example—requires significantly more work by judges and staff to achieve a correct result. And the ramifications of poor briefing are not limited to the additional time invested by merits panels. Central staff and screening panels, tasked with

disposing of cases efficiently and accurately, risk missing important facts or issues that would otherwise require greater review.

Certainly, increasing oral argument will likely improve attorneys' skills at oral argument, a benefit in and of itself. But oral argument experience is also likely to improve written briefing, which—from screening through merits determination—improves the accuracy and efficiency of the court's case management processes. Participating in oral argument allows advocates an opportunity to learn how judges think, and the experience of judicial colloquy that is unique to oral argument sharpens advocates' written arguments in future appeals. Moreover, increasing oral argument adds an element of accountability to written briefing because "lawyers are more apt to make unreasonable or extreme arguments or claims in their briefs than they are in-person before multiple, well-prepared judges" (Davidson III, 2018, p. 211). Put another way, lawyers who might be otherwise inclined to push boundaries in their briefing in potentially misleading ways may think twice about such aggressive tactics if the odds of defending those claims in open court were greater.

Protect Legitimacy. Finally, and perhaps most importantly, oral argument protects the court's institutional legitimacy. Certainly, better decisions and consistent precedent are central to preserving a court's legitimacy. However, well-reasoned decisions and consistent precedent do not provide the transparency of oral argument that is believed to be fundamental to legitimacy. "In a system of decision-making dependent upon public confidence and acceptance of the results of its processes, there exists a keen . . . interest in open court processes. *But for oral argument, citizens would have no real contact with appellate judges.* Public trust and institutional legitimacy are critically important, and oral argument fosters those goals" (Davidson III, 2018, p. 210 (emphasis added)). Although, denying oral argument provides an efficient way to manage a calendar, an overreliance on the practice "ultimately threatens the appellate decision-making process, the litigants' confidence in that process, public confidence in the rule of law, and the quality of appellate legal services" (AAAL report, 2015, p. 10). Thus, because "justice must be seen in order to be done" (Douglas III, p. 210), the value of oral argument lies in its visibility, making it perhaps the single *most* effective tool the court can use to preserve its institutional legitimacy.

Create a Local Rule Mandating Counsel Detail Why Oral Argument is (Un)necessary

Given the court's caseload, a wholesale return to oral argument is neither reasonable nor feasible. To yield the greatest benefit without overburdening staff or judges, the court needs to be strategic in the cases it selects for oral argument. One way to do this is to require counsel for both parties to provide a brief statement explaining why the court should (or should not) hear oral argument—an option suggested by AAAL in its 2015 report. The statement's deadline should follow the appellee's responsive brief because, by that point, "the issues between the parties are joined, the conflicting positions are clear, and the nuances known" (Cleveland & Witsotsky, 2012, p. 146). The statement's post-briefing timing is important because that is when counsel is best able to articulate their preferences in ways that will help the court choose its cases for argument (AAAL Report*,* 2015; Cleveland & Witsotsky, 2012).

Benefits of Mandating a FRAP 34 Statement. A statement similar to that proposed here is allowed under the Federal Rules of Appellate Procedure, but it is voluntary and the rule does not provide guidance on what information should be included (FRAP 34(a)(1)). In practice, FRAP 34 statements are rarely provided, and those that are tend to be unhelpful. This is because such statements are typically provided prematurely—before counsel has honed their arguments during briefing—and use boilerplate language (Cleveland & Witsotsky, 2012). However, under rule 34(a)(1), the court has broad authority to create a local rule mandating the statement and set forth any requirements for doing so. Instead of requiring a FRAP 34 statement, the court may even choose to develop a questionnaire seeking the information that it decides will best aid judges in their decision. Asking counsel to shoulder some of the court's burden is reasonable because counsel are the most intimately familiar with the subject matter, law, and facts of the case.

A FRAP 34 statement not only helps the court to selectively increase oral argument in the most impactful ways, but it may also yield myriad additional benefits, some of which clearly address certain negative effects imputed to case streamlining processes. First, it would provide staff attorneys an "at a glance" resource that would allow them to more quickly determine a case's complexity and whether a case should be decided by a screening or merits panel (Martin & Freeman, 2018). Second, the statement

may better ensure time-strapped staff attorneys or law clerks don't miss important details or facts that are not clearly articulated or are buried in lengthy briefing. Third, the statement would give attorneys (and thereby the parties) a voice in the court's consideration of a case's appropriateness for oral argument. If, for example, neither side believes oral argument would be helpful, and judges agree, all are assured that argument is not necessary. But a judge who otherwise favors deciding a case on the briefs might instead opt to hear oral argument if counsel felt it was important. Finally, because cases decided by screening panels seem to raise the greatest concerns about procedural fairness, the court may wish to consider testing its screening processes by sending cases that would typically have been decided at screening for further review, and potentially oral argument, by a merits panel. Tracking the outcomes of test cases might help the court find areas in need of improvement or confirm that the process is working well. A statement explaining why a case is or is not suitable for oral argument may help staff more easily identify appropriate test cases.

Costs and Caveats

Although this option is by far the most cost-effective and easiest to implement, increasing oral argument, even if done strategically, will require an initial investment of time and energy. Judges already burdened by heavy caseloads may be resistant to giving up such an effective management tool, even in a handful of cases. And, the AAAL report (2015) acknowledges that increasing argument is likely to only yield measurable benefits in counseled appeals where the attorney's practice requires them to regularly appear before the circuit. Briefing quality is unlikely to improve in other types of appeals such as those filed by pro se (unrepresented) litigants or one-off cases filed by attorneys who rarely handle appeals.

To improve the odds that argument will be helpful, the AAAL suggests that courts work with local bar associations to create training videos and mentorship opportunities that will allow attorneys (particularly those who are under-resourced or rarely handle appeals) to be better prepared. And, to truly build a better bar, the court—particularly its judges—would need to be proactive in training advocates on an ongoing basis, an investment above and beyond time spent hearing cases. Because many judges are already active in bar associations and other professional organizations, they may simply leverage the time

they are already giving to facilitate training. Professional organizations, and law schools, are likely to be supportive of any court initiative to improve oral argument and can be called upon to help plan and facilitate programs. Indeed, many already offer some version for their members or students that could be expanded with meaningful input from the court to create a truly accessible guide the court can post on its website, along with training videos and sample documents.

There are, moreover, other potential issues of concern that may be associated with increasing oral argument. One is that oral argument increases expenses for litigants because attorneys will need to prepare for argument (typically billing at an hourly rate) and then travel, sometimes long distances, to argue at one of the circuit's courthouses. Nonetheless, the court can mitigate these concerns in two ways. First, the FRAP 34 statement distributes the burden of deciding whether to hold oral arguments between counsel, court staff, and judges. Counsel can use the statement to not only detail whether they believe argument is necessary, but they may also use it as an opportunity to articulate potential hardships. Travel costs can also be minimized by allowing remote video appearances. Indeed, the court already has discretion to approve remote appearance in certain circumstances. The court could simply retain this practice, or consider how it might incorporate such requests into the statement regarding oral argument to further streamline calendaring. The court may also go a step further and consider setting special all-video argument calendars, populated with those cases where counsel has indicated they would like to argue the case but where it is less clear whether oral argument will materially benefit the panel.

III. Analysis

Objective

The Ninth Circuit's stated mission is "to provide an impartial forum for the *just* and *prompt* resolution of cases" (*Mission Statement*, n.d., emphasis added). That mission, together with the literature reviewed, provides the basis for creation of the following objective: *Identify and recommend a policy*

alternative that will help the court manage its present and future caseload in ways that maximize efficiency, improve procedural fairness, and protect legitimacy.[9]

Criteria and Measurement

Per Meltzer and Schwartz (2018), criteria do not vary across options, are designed to highlight the strengths and weaknesses of potential options, and provide a way to rank policy options logically. Criteria must be "comprehensive" and "mutually exclusive" (p.113). I chose the following criteria to determine the best option to meet the objective: efficiency, administrative feasibility, and procedural fairness. I first used a Likert scale to rank alternatives as weak (1), moderate (2), or strong (3), based on how well each alternative met the criteria (see Table B-1). I assigned weights to criteria according to my assessment of their importance. Finally, I quantitatively assessed scores from the Likert scale and criteria weighting using a Criteria Alternative Matrix (CAM) analysis (see Table 1). The results of the CAM analysis reveal which alternative best meets the selected criteria and should therefore advance for further consideration.

Criteria and Weighting

Selected criteria were assigned weights according to their importance (see Appendix B, table B-2, below).

Criterion 1: Administrative Feasibility. This criterion will be used to measure the ease of each alternative's implementation, including its financial cost and whether it will be significantly disruptive to operations (including to court staff, judges, and external stakeholders such as attorneys and litigants). To be considered administratively feasible, an option must be relatively easy for the court to implement and manage within existing structures and processes. This criterion received the lowest weight (.25) because the court has historically been able to leverage its size and resources to implement policies and programs it wishes to pursue. The court is known to be innovative and is often willing to test new technology or

[9] Per Meltzer and Schwartz (2018), objectives (i.e., goals) are usually determined by client feedback and are typically dependent on the client's purpose or mission. However, because this analysis was not performed at the request of the court, the objective and criteria used here were derived instead from a review of publicly available material.

programs. Finally, the court has strong existing relationships with the bar. That support is likely to help the court explore and implement alternatives to meet its objective.

Criterion 2: Efficiency. This criterion will be used to measure how well each alternative helps relieve workload pressure on judges and staff. It received the second-highest weight (.35). Rating this criterion lower than procedural fairness may, at first, appear to run counter to the argument that high caseloads shortcut processes fundamental to procedural fairness. However, for the past several years the court has experienced a downward trend in case filings; if that trend persists, a reprioritization of procedural fairness may be the most appropriate goal. The court has, in the recent past, been forced to prioritize efficiency because without it the delays caused by case surges would have certainly violated procedural fairness and created unjust outcomes. When caseloads were at their peak this justification was accepted—albeit grudgingly—by most court watchers, however it is doubtful that critics would accept a default to efficiency when receding caseloads allow room to rebalance processes. Were the court presently experiencing a surge I would likely assign efficiency the same or higher weight than procedural fairness.

Criterion 3: Procedural Fairness. This criterion will be used to measure how well each alternative protects procedural fairness, including how well alternatives increase transparency, ensure cases receive the appropriate amount of attention, and limit potential for cases to slip through procedural cracks. The literature has demonstrated that there is, at minimum, a perception that the court needs to improve procedural fairness in its case management processes. The literature further demonstrates that procedural fairness is central to preservation of the court's legitimacy. This criterion received the greatest weight (.40) because it is the most pressing concern for the court at this time.

IV. Assessment of Outcomes

Table 1. Criteria Alternative Matrix

	Criterion 1: Administrative Feasibility	*Criterion 2: Efficiency*	*Criterion 3: Procedural Fairness*	*Total Score*
Alternative 1: AI	Rating: 1 Weight: .25 **Total: .25**	Rating: 2 Weight: .35 **Total: .70**	Rating: 2 Weight: .40 **Total: .80**	**1.75**
Alternative 2: Increase Staff	Rating: 2 Weight:.25 **Total: .5**	Rating: 2 Weight:.35 **Total: .70**	Rating: 2 Weight: .40 **Total: .80**	**2.0**
Alternative III: Increase Oral Argument	Rating: 2 Weight: .25 **Total: .5**	Rating: 1 Weight: .35 **Total: .35**	Rating: 3 Weight: .40 **Total: 1.2**	**2.05**

The results of the CAM analysis reveal that the third alternative, "Strategically Increase Oral Argument," very narrowly emerges as the alternative that most effectively accomplishes the stated objective (see Table 1, above), followed very closely by the second alternative ("increase staff"). This alternative was rated high (3) on administrative feasibility because there were few identified barriers to its implementation. This is likely the most cost-effective alternative suggested. The court already holds regular oral arguments, and additional cases may be worked into regular calendar or en banc weeks at no extra cost to the court. It was also rated high (3) on procedural fairness because the literature suggests that oral argument is the single best way for courts to ensure procedural fairness and transparency, and protect legitimacy. This alternative was rated low (1) on efficiency, however, because although it may ultimately reduce judicial workload by building a better bar, it is unclear by how much or when that improvement might be demonstrated. Moreover, this alternative is the most likely to increase judges' workloads, especially in the nearer term, which may be untenable to many judges and could even perpetuate problems of procedural fairness.

The second option, "Increase Staffing," nearly tied with increased oral argument and it remains a viable alternative. This alternative scored moderately (2) across all criteria. It is administratively feasible because it would be relatively easy for the court to integrate staff into existing court structures, and the

financial costs to the court for salary increases are likely to be moderate. It was ranked moderately efficient (rather than highly) because although the court has already demonstrated that increased staff will improve case processing times it is not clear if the number of staff proposed, and the temporary duration of time spent in chambers would help alleviate workload over the longer term. It was also ranked as moderate on procedural fairness because the extra hands in chambers may help focus judicial attention in ways that improve procedural fairness (i.e., by publishing more opinions or hearing more cases at oral argument), but the ranking acknowledges that this is dependent on how judges choose to use their temporary assistance. Although it would be efficient, if judges instead use staff attorneys to crank out memorandum dispositions (without oral argument), transparency and visibility are not improved from status quo.

The CAM analysis ranked the first presented alternative, "Develop AI Tools" as the least effective of the three alternatives. This alternative scored low (1) on administrative feasibility, primarily due to its high cost and the amount of dedicated staff time required for implementation. AI was rated moderate (2) on efficiency and procedural fairness because although AI's use shows promise, models have not yet demonstrated effectiveness in a court setting, and there are potential concerns surrounding transparency and potential bias in AI models.

V. Recommendation

As a review of the literature makes clear, the problems that flow from the court's persistently high caseload have not been clearly demonstrated. Much of the literature cited in this paper discusses national concerns that are not necessarily specific to the Ninth Circuit Court of Appeals. Nonetheless, the takeaway is that many believe there *are* problems associated with modern courts' departure from the traditional method of appellate review and these concerns persist. Moreover, there is a temporary window of opportunity that has opened for the court— after decades of empty seats, the Ninth Circuit finally has a full bench, and is experiencing a lull in new case filings. The court should take advantage of that window to proactively examine its processes, make improvements, and prepare for the inevitable next case surge.

Although the results of the CAM analysis suggest the court consider strategically increasing oral argument, that option is not without a major pitfall— it indisputably increases workloads for judges and staff. That the option may *eventually* lighten the court's workload makes intuitive sense, but there is no concrete evidence from which to draw a timeline or estimate how much improvement it would yield. Indeed, it is entirely possible that increasing oral argument would further dilute judicial attention and encourage shortcuts elsewhere to make up for the time investment. Still, this option offers a significant amount of bang for the court's buck because oral argument is perhaps the single most effective tool available to improve procedural transparency and visibility. And this option is cheap, easily implemented, and scalable, making it a relatively low-risk option for experimentation. The court could reasonably pilot a 12–24-month project with a small number of cases for the initial phase, then based on initial outcomes, the court could decide whether and how to initiate and scale second and third phases. Phased implementation decreases risk and provides flexibility and control. By starting small, slowly increasing oral argument, and tracking outcomes, the court can determine the optimal number of cases to set for argument without overloading judges and staff.

Were the court to choose only one option for implementation, I would recommend increasing oral argument because I believe the risks can be mitigated and the option has potential to meaningfully address criticisms regarding procedural fairness. However, the other two options should not be dismissed. Analysis of each option revealed unique strengths and weaknesses which, when considered globally, suggests that these options might work best in concert. Where one option is weak, another is strong, and vice versa. For example, increasing oral argument increases judicial workload, which can be mitigated by the temporary assignment of central staff attorneys to chambers. And AI tools show promise because they may decrease judicial and staff workloads in ways that focus and preserve attention for more meaningful review of merits cases. Although they check the efficiency box, if used alone, AI and staff attorney assignments may not further procedural fairness goals because, among other things, they both lack transparency. But increasing oral argument neatly checks the box on procedural fairness. Individually,

each option has potential to exacerbate the tension between efficiency and procedural fairness we seek to alleviate, but by using all three we may ultimately find equilibrium.

Of course, implementing all three options at once is unlikely to be administratively feasible. The court faces budgetary constraints that limit how much it can reasonably spend on implementing new programs, and implementing AI and increasing staffing simultaneously may be prohibitively expensive and potentially disruptive to current functions. Instead, the court may consider how to implement the options in phases. Because they are the most complementary options, the court may consider implementing a phased pilot program (similar to what was proposed above) aimed at increasing oral argument and staffing together. Tying central staff hiring to increases in oral argument mitigates the increased workload, ensures staff are being used in ways that improve procedural fairness, and minimizes risk. AI, the most expensive and difficult option to implement, is likely to improve processes, but it is not critical to implementation of the other two. Because AI is an emerging technology that is changing rapidly, waiting may ultimately benefit the court. The court may, for now, simply enter an information gathering phase. As the technology improves, and collective knowledge increases, the price of developing AI for court use may eventually be reduced and its risks will be better known. After the court implements and assesses whether the first phases are meeting goals, it can begin to consider when and how to begin implementing AI in complementary ways.

Conclusion

Accordingly, I recommend the court consider pursuing all three options. Together, the alternatives best meet the objective of balancing efficiency and procedural fairness. Should the court prefer to pursue only one option at this time, I recommend it consider increasing oral argument (assuming the decreasing caseload trend continues) because it has the greatest potential to demonstrably improve procedural fairness, and its risks are easily mitigated.

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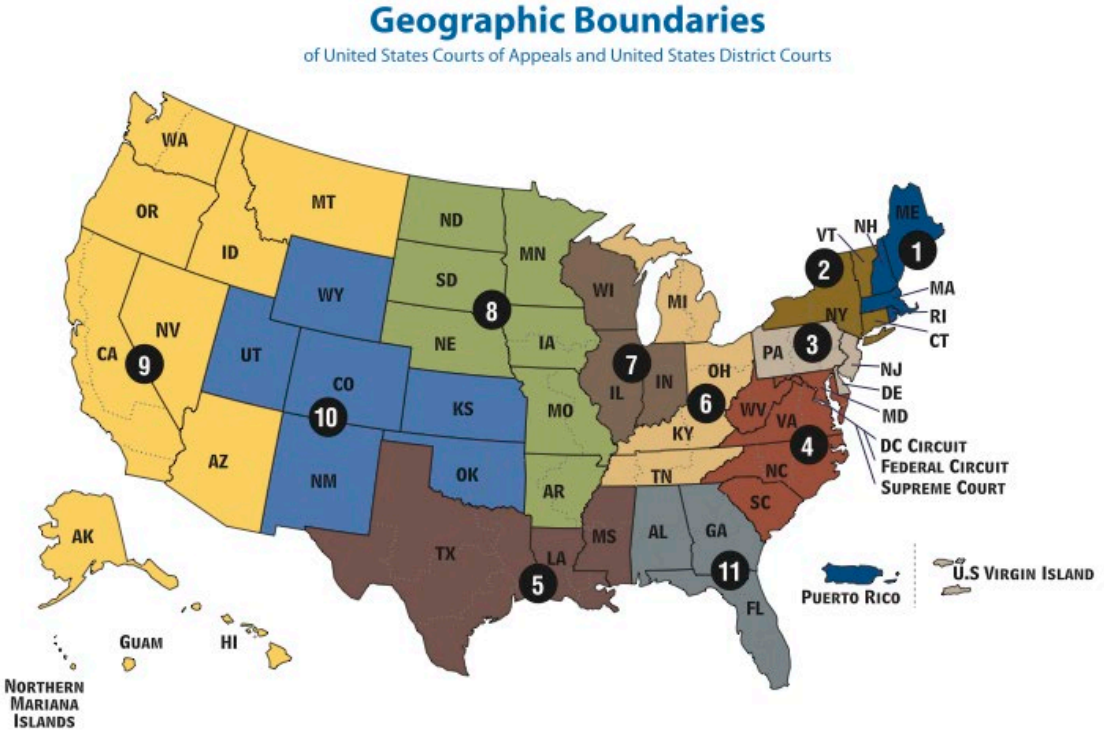
Appendix A: Map of Circuit Court Boundaries



Source: Administrative Office of the United States Courts, 2024. Available at https://www.uscourts.gov/about-federal-courts/court-role-and-structure

Appendix B: Tables

Table B1. Key for Interpreting the Likert Scale Extremes (1–3) Rating Applied to Satisfaction of a Criterion by an Alternative

Criterion	*Interpretation of Ratings*	
	"1"– Weak	*"3"–Strong*
Administrative Feasibility	May require outside approval from JCUS (or Congress); difficult to implement and/or administer; is very expensive; is highly disruptive to procedures or processes; and/or requires significant change to current administrative or operating structures.	Either requires no outside legislative or administrative approval, or is likely to be easily approved; minimally disruptive to court functions or processes; is inexpensive; can be easily incorporated in current administrative or operating structures.
Efficiency	Causes delay; requires greater judicial attention; and/or otherwise significantly increases workload for judges and staff.	Improves dispositional speed and accuracy; reduces workload for judges and staff; and/or preserves judicial attention
Procedural Fairness	Yields very little procedural transparency or accountability; reduces decisional quality; and/or otherwise unfairly shortcuts process	Maximizes transparency and accountability; improves decisional quality; and/or mitigates risks of procedural unfairness.

Table B2. Relative Weights Applied to Each Criterion Used to Evaluate Alternatives

	Criterion	*Weight*
1	Administrative Feasibility	0.25
2	Efficiency	0.35
3	Procedural Fairness	0.40
	Total	**1.00**