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REVISITING PROPOSALS TO SPLIT THE NINTH CIRCUIT: AN INEVITABLE SOLUTION TO A GROWING PROBLEM

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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REVISITING PROPOSALS TO SPLIT THE NINTH CIRCUIT: AN INEVITABLE SOLUTION TO A GROWING PROBLEM

WEDNESDAY, OCTOBER 26, 2005

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS, OF THE COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:32 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Jeff Sessions (Chairman of the Subcommittee) presiding.

Present: Senators Sessions, Kyl, and Feinstein.

Also present: Senators Murkowski and Ensign.

OPENING STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Chairman SESSIONS. Good afternoon. The Subcommittee on Administrative Oversight and the Courts will come to order. I am pleased to convene this hearing to consider a division of the Ninth Circuit.

You might say, here we go again. It has been a year and a half since we last discussed this topic in the Subcommittee and I am looking forward to hearing the witnesses and their testimonies, all of whom have traveled a long way and have dedicated, many of you, quite a lot of hours in personal time and attention to develop your well-researched opinions on the topic before us today.

I appreciate Senator Feinstein for her interest in this. We work together on the Judiciary Committee. No one works harder or is more committed to doing the right thing and we are delighted that you could be with us, you and some of our other members who will probably appear before long that are interested in the Ninth Circuit, Senators who represent States in the Ninth Circuit.

So we are eager to hear the opinions of the distinguished jurists before us. It is going to be very helpful to us.

It is, however, the constitutional duty of the Congressional branch, the legislative branch, to create such inferior courts, quote, "as the Congress may from time to time ordain and establish," Article III, Section 1 of the Constitution. So it is with this constitutional duty in mind we have convened today's hearing. Our question is whether the enormous size of the Ninth Circuit is an impediment to the administration of justice and whether a division of the circuit would enhance justice.

The division of circuits has been a normal and natural evolution of judicial organization in our country and it has succeeded, I believe, each time it has been tried. Most recently, Congress recognized this need when it decided to split the Fifth Circuit into two separate courts of appeals. In 1973, the Commission on Revision of the Federal Court Appellate System, the Hruska Commission, recommended that the Fifth and Ninth Circuits be split.

In 1980, the Congress split only the Fifth, carving out a new 11th Circuit, and I think I told you last time, as a new U.S. Attorney, I was in Atlanta at the formation ceremony of that 11th Circuit. Judge John Godbold, who had been the Chief Judge of the old Fifth, supported the division and became the new Chief at the 11th. I think that all those judges have felt very good about that division in the years since. The recommendation, however, to divide the Ninth Circuit was not acted upon.

In the year prior to this division, for example, the old Fifth Circuit's 26 judges disposed of 4,717 appeals. In 1995, the combined 29 judges from the old Fifth and the 11th disposed of nearly triple that number of appeals, 12,401. In a Montana Law Review article by Ninth Circuit Senator Conrad Burns, he noted, quote, "tripling the output of the Fifth Circuit while only adding three new judgeships certainly indicates that splitting the Fifth Circuit yielded a long-term benefit for all."

I will add that the testimony before this Subcommittee several years ago by Chief Judge Gerald Tjoflat of the 11th Circuit was unequivocal. He said that their current level of harmony and collegiality and efficiency would not be possible in a much larger circuit. As a matter of fact, he was dubious of even taking new judges. He would rather the workload go up to keep the numbers smaller.

So today, we must face the problem of the unprecedented size of the Ninth Circuit and consider the options to improve administration of justice.

The Ninth Circuit covers 40 percent of our country's land mass and stretches from Northern Alaska, and Judge, we are glad to have you down from Fairbanks, to the Mexican border. It encompasses more States than any of the other 11 circuits and manages almost one-fourth of the caseload of the whole United States, 14,800 to 63,000 total filings of the other circuits.

The Ninth Circuit claims one-fifth of the nation's population, 58 million, within its jurisdiction. That is almost three times the average population of any other circuit, or the other circuits. Though the Fifth Circuit was split 25 years ago, largely due to its size, the Ninth Circuit currently has almost the same population as the current Fifth and 11th Circuits, both of which have also grown. Today, the Ninth Circuit has 58 million people while the 11th and Fifth Circuits together have 60.

At our April 2004 hearing, we learned a lot about the numbers impacting the Ninth Circuit. Today, those numbers are still dramatic. The Ninth Circuit has 28 authorized judgeships, 24 active and four vacancies, and 23 senior judges, for a total of 51 judges. That amounts to 11 more active judgeships than the next-largest circuit, and it is more than double the average number of authorized judgeships in the other circuits. If you add senior judges to the

authorized judgeship numbers, the Ninth Circuit has 24 more judges than the total number of the next-largest circuit.

As of June 30, 2005, the Ninth Circuit had more than triple the number of appeals filed in 2005 than the average of all the other circuits and has 6,000 more filings in 2005 than the next busiest circuit. Though the average caseload increase between 2000 and 2005 for a circuit court was just over 14 percent, the Ninth Circuit's caseload increase was by almost 70 percent, which is a really stunning figure to me. During that same time—I will skip that. And the rate of increase has continued steadily. From 1997 to 2003, the Ninth Circuit caseload bore a 48.1 percent increase. Now, it is a 70 percent increase. It is still going up.

The large number of judges and the caseload burdens do appear to have impaired the administration of justice in the circuit. The Ninth's efficiency in deciding appeals, that is the time the court takes between the filing of a notice of appeal and the final disposition, has consistently lagged behind other circuits. In 2003, for example, the Ninth Circuit had 418 cases pending for 3 months or more, almost the same as the next five circuits combined. The next highest circuit had 98 such cases.

The next charts shows that 138 cases were pending in the Ninth Circuit for over a year. This was more than every other circuit in the Federal system combined, with the next highest circuit at a mere 19 cases.

According to the latest statistics, the Ninth Circuit takes almost 40 percent longer to dispose of an appeal than the average of all of the other circuits. The Ninth takes 15.4 months and the average is 11.1 months. Please note that this delay cannot be explained solely by a lack of judgeships, because although the caseload for the Ninth is high—it is high—several other circuits have higher caseloads per judge than the Ninth.

I would also note, time of disposition is important to litigants. Huge impacts are at stake as a court's cases sit on that docket. I would like to see the average of 11.1 months be reduced, frankly, and I think the addition to 15 is a significant concern.

The limited en banc procedures employed by the Ninth Circuit, coupled with the large number of public opinions issued each year, make it impossible for the Ninth to speak with clarity and consistency, it seems to me. A circuit with as many judges and as many opinions as the Ninth Circuit has loses collegiality and unity. Additionally, the Ninth Circuit's limited en banc procedures have permitted a random draw of ten judges plus the Chief Judge to be the final review of a three-judge panel decision. This can result and has resulted in a mere six judges making the law for the entire circuit. Even though the circuit has recently voted to increase the number of judges that sit en banc to 15, that number still allows a mere eight judges to make the law for the entire circuit. In all other circuits, en banc means en banc, what it always has meant, the full court.

Finally, with so many cases decided each year, it is hard for any one judge to read all the opinions of his or her peers and it is virtually impossible for lawyers who practice in the circuit to stay abreast of the law. In 2004 alone, the Ninth Circuit published 691 decisions. That is over 60 a month.

These factors, loss of collegiality, the limited en banc, and the inability to monitor new law, undermine the goal of certainty in the law. I hope that each of the Ninth Circuit judges testifying before us today will speak to these factors and tell us how they impact the Ninth Circuit's ability to maintain clear and consistent law in the circuit.

[The prepared statement of Chairman Sessions appears as a submission for the record.]

Chairman SESSIONS. Now, three of my Ninth Circuit colleagues are here today, or at least two—I guess three counting Senator Feinstein, and I think maybe another one will show up, to help us explore the issues surrounding the decision to split the Ninth Circuit.

Senator Lisa Murkowski of Alaska has been a leader in addressing reorganization of the Ninth Circuit and has introduced legislation to restructure the circuit both in this Congress and in the last. Her comments based on her experience as a Senator from the Northwest and as a lawyer who practiced within the Ninth Circuit will give us a useful context for understanding the issues.

I also see my colleague on the Judiciary Committee, Senator Kyl here, who has not only argued cases before the Ninth Circuit, on numerous occasions, he has argued a bunch of cases before the U.S. Supreme Court. He is clearly our most experienced attorney probably in the Senate, and Jon, we are glad to have you here. I know this is a matter close to your heart and we look forward to hearing you.

Senator Feinstein, thank you for your leadership on these issues. I know you have watched it very closely over the years and we are delighted to hear from you at this time, and then we will go to Senator Kyl and Senator Murkowski.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Fine. Thank you very much, Mr. Chairman. I would like to welcome each of the judges that is here. It is a long trip from the West Coast, and so we really appreciate it. I would like to acknowledge the fact that today is the Chief Judge's 40th wedding anniversary and guess where she is, right here, and so—

[Laughter.]

Chairman SESSIONS. We are impressed.

Senator FEINSTEIN. Thank you very, very much for being here.

As the Chairman has said, the Ninth Circuit is the largest circuit court of appeals in the Nation in both population and caseload. Advocates for splitting the Ninth Circuit often cite the size as a basis for dividing it. However, I think what matters is not the size of the Ninth, but whether the Ninth meets its charge of providing justice to those living in the States. The current Ninth Circuit, I believe, achieves this goal.

As I have looked at the various proposals over the years that have come before this Committee, splitting the Ninth is a lose-lose proposition. There are clear financial costs to the split. The Administrative Office of the Courts has submitted documentation. I will speak about that in a few minutes. And there are clear and dramatic costs to the administration of justice.

The uniformity of law in the West is a key advantage of the Ninth, as large as it is. It provides consistency among Western States that share many common concerns. For example, splitting the circuit could result in one interpretation of a law governing trade with Mexico in California and a different one in Arizona, or in the application of environmental regulations one way on the California side of Lake Tahoe and another way on the Nevada side.

The efficiency of the Ninth is also a significant consideration. As presently constituted, the Ninth is one of the most efficient courts of appeals in the nation. Splitting the Ninth Circuit into two or even three courts of appeals would require the creation of new and costly bureaucracies to administer these new courts, thereby losing the economy of scale which has been achieved by having a single administration tending to the Federal courts of the Ninth Circuit. Dividing up the Ninth Circuit would also require additional Federal funds for new or expanded courthouses and administrative buildings, as existing judicial facilities would be insufficient for the new circuit or circuits.

Yesterday, the Administrative Office of the United States Courts provided me with a letter estimating the costs for splitting the Ninth Circuit under S. 1845, which would split the Ninth Circuit into the Ninth and 12th Circuits. The Administrative Office estimates that the split to two circuits would have a startup cost of $95,855,172 and would have $15, almost $16 in annual new recurring costs.

In a two-way split with a circuit headquarters in Phoenix, with the new judgeships, the cost is $15.9 million, the startup cost $95,800,000. The two-way split with the 12th Circuit headquarters in Seattle, with new judgeships, the cost is $13,140,049 and the startup costs $13,815,801. The cost of the seven additional judgeships in annual recurring costs is $5.656 million, with startup costs of $1.156 million. This is a rather lengthy letter and I would like to place it in the record so that everybody could have a chance of reviewing it.

But let me summarize by saying these are substantial costs, particularly considering that the judiciary budget is already stretched thin.

Finally, one must consider what organization of the Ninth Circuit—must consider that it will be fair to all of the States of the current Ninth. The plan to split the Ninth leaves the States remaining in the Ninth with a far higher caseload per judge than those States that would move to a new 12th or 13th Circuit. They become easy. You can put your feet up on the desk, because they would have very few cases. That is the bottom line.

Under the current proposals, California and Hawaii would be left in the Ninth, while Arizona, Nevada, Idaho, Montana, Oregon, Washington, and Alaska would move to a new circuit or circuits. These proposals would create nice sinecures with low caseloads for judges in the newly created 12th or 13th Circuit but would disadvantage what would remain in the largest circuit in the nation.

The new Ninth would still have 72 percent of the cases in the old Ninth. However, even with the addition of the five permanent and two temporary judgeships proposed in the two bills before the Senate, the new Ninth Circuit would have only 60 percent of the

judges. So they would have 72 percent of the caseload, but 60 percent of the judges. Is this fair? I don't think so.

The caseload in the new Ninth would be 536 cases per judge as opposed to 317 cases per judge for the proposed 12th. This would leave judges in the Ninth with 219 more cases per judge. This is simply not a fair distribution of judicial resources. So we create all this new additional courthouses, administration, circuits, and yet 72 percent of the cases remain in the Ninth.

For the judges in the new Ninth to have a comparable caseload to judges in the new 12th, the Ninth would need an additional 14 judges on top of the five permanent and two temporary judges created by the bills before the Committee. In total, 21 new judges would need to be added to the Ninth Circuit for a split to be fair. Now, you can be sure that representing California, I am not going to let an unfair distribution of caseload happen. I am just not going to do it. This would entail its own problems and costs and it highlights the difficulties created by proposals to split the Ninth.

Opposition to splitting the Ninth comes from judges and State bar associations that would move into a proposed new circuit as well as those that would remain in the Ninth Circuit. Only three of the active judges on the Ninth Circuit, as far as I know, favor splitting the circuit, and we are going to hear from one today. He is very respected. I have had an opportunity of having at least an hour with him to discuss this, Judge O'Scannlain in San Francisco, and I very much appreciate his point of view. I thought a lot about it. But unless you want to guarantee those 21 new judges for the Ninth and an equal caseload across the field, I would be foolish to let a split happen to the circuit that I represent.

Additionally, the bar associations of Arizona, of Washington, of Montana, and Hawaii have all voiced their opposition to breaking up the Ninth Circuit. Washington State says they strongly oppose both bills. We believe there is no legitimate reason to split this jurisdiction, and certainly no reason to incur the very substantial costs that such a split will generate. We further believe that our democratic process demands formal hearings on this matter, which, of course, we are having.

It says that the Washington State Bar debated the issues of size, regional differences among the States, judicial collegiality, and necessary consistency in rulings. The Board of Governors of our organization unanimously concluded that splitting the Ninth would not serve the interests of justice or the citizens of the State of Washington.

The State Bar of Montana has passed a resolution which says in a "whereas" clause, a divided circuit would remove the numerous benefits which Montana enjoys as a part of the United States Court of Appeals for the Ninth, and whereas a divided circuit would result in additional one-time construction and division costs and increased annual administrative expenses, et cetera, they oppose it.

The Hawaii State Bar says they believe the composition of the Ninth serves the public well, representing as it does diverse demographic areas as well as a broad range of political and economic constituencies.

And the Arizona Bar says, at its regular meeting in Phoenix on August 19 of this year, the State Bar Board of Governors analyzed

the proposals to reorganize the Ninth. Further, the Board discussed how the bar is served by the current configuration and considered the fiscal impact of splitting the circuit. The Board voted to reaffirm its longstanding position to oppose splitting the Ninth Circuit.

I would like to ask that these letters also be included in the file.

Chairman SESSIONS. We will make them a part of the record.

Senator FEINSTEIN. So unless somebody can guarantee me that there will be 21 new judges and an equal caseload spread, this thing doesn't even get to first base with me because I think we hurt the administration of justice, we create new costs, and we don't even the caseload, and I thank you very much.

Chairman SESSIONS. Thank you, Senator Feinstein. They are not all equal now, that is for sure, but we probably should look at that more.

[The prepared statement of Senator Feinstein appears as a submission for the record.]

Chairman SESSIONS. Senator Kyl, and Senator Ensign, did he come in? Oh, there you are. Do you want to stay there or would you like to join us? You can stay right there, if you would like.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Mr. Chairman, I will just be very brief because we really do want to hear from our witnesses and also because after I have heard an argument such as that just delivered by Senator Feinstein, my lawyer juices flow. I immediately want to take the other side.

I would like, first of all, Senator Feinstein, to assure you that as of right now, I guarantee you that there will be an equal number of judges with a caseload that is essentially identical. Are we on first base?

Senator FEINSTEIN. Well, it is—

[Laughter.]

Senator KYL. You don't need to answer that. I am not the cross examiner and you are not the witness. Senator Feinstein, I just—

Senator FEINSTEIN. If you make the guarantee—

Senator KYL. Yes, if I can make the guarantee. I just conducted a—

Chairman SESSIONS. You two have made good partners on a lot of matters and maybe you yet can make partnership on this one.

Senator KYL. Let me just speak to that for a moment, because we are—Senator Murkowski, Senator Ensign, and the two of us, of course, all have a dog in this hunt, being that we represent Ninth Circuit States. It is important to us. We do listen to our lawyers and judges, although I would say polls of lawyers and judges, while probative, aren't necessarily dispositive given our responsibilities that extend beyond representing our colleagues in the bar or on the bench.

But we have worked together on a lot of things and I have made it clear that I understand that Arizonans are of two minds on this. I have, at one time or another, had different views on this subject. I find that a lot of the arguments just remind me of when I practiced law. When a lawyer passionately believes in the cause of a client, you can make great arguments on both sides.

But I think there is a lot about the arguments that is not so great. What I have told Senator Feinstein privately, I will tell all of you, and that is that she has a big stake in this. California is the big elephant in the room, if you want to put it that way, and it cannot be—we can't override the interests of a State like California, nor should one State dominate over all others. There is going to be a lot of give and take here. We are all going to work with each other and try to come to a conclusion that represents the best interests of our constituents.

So I don't view this as just a majority-minority thing in terms of political parties, nor do I think one State should dominate, nor do I think all the other States should join and pick on California. And I do believe that if there is to be a division, it needs to be done fairly, and since caseload is one of the dominant factors here, there does need to be an appropriate relationship between the judges and the caseload and that would mean a fair division along the line that Senator Feinstein suggested.

But here is what I will close with. I know that for many of you, this has been going on a long time, and when I first came to the Senate, we immediately began hearings on this subject. So I have been involved in it for a long time. But don't take the fact that there are a couple of bills out here as evidence that this is all locked in stone. For example, arguments about cost are not very persuasive to me because I don't think you have got it right in terms of what the costs are. You do have to take what is in front of you in terms of a bill's language, and I understand that, and so you have to figure out, all right, if that is where the head of the circuit is and lawyers are going to be arguing in these two other cities or whatever, what might that cost? But there isn't a single new courthouse that has to be built.

So let us be realistic about costs. I know opponents love to talk about costs. I would just recommend to you that you get a little bit more realistic about that. Just like proponents talk about the politics of it, I would suggest we get the politics out of it right now. I don't know what the politics of two new circuits are going to be, and in one sense, that ought not to be the consideration here. So there are things that advocates love to talk about that I think on the Committee here we need to cull out of the discussion.

Let me just say that I see this as a process involving both Houses of Congress, both parties. I really commend the Chairman for having this Subcommittee hearing. He and his staff have done a lot of work, and all of us, I think, are going to have to discuss this. We are going to have to visit with all of you. We are going to have to take your arguments on board and think it through very carefully and try to come out with what we think is the right answer and the fairest answer if there is to be a division. If everyone will just take a deep breath and look at this in a realistic and not an advocate way, I think we just might be able to come to some conclusions that are agreed to, for the most part, by most people.

And finally, I thank everybody for being here. I know it was very difficult, especially in the case of Chief Judge Schroeder, who not only has personal matters but other matters to attend to and I think it involves a red-eye either last night or tonight. So I know how important this is to all of you and I really do appreciate the

interest that you have had. Please continue to talk to us. I appreciate your being here today, and let us all just handle this in a problem solving way. How is that? Thank you, Mr. Chairman.

Chairman SESSIONS. Well said.

Senator Murkowski?

STATEMENT OF HON. LISA MURKOWSKI, A U.S. SENATOR FROM THE STATE OF ALASKA

Senator MURKOWSKI. Thank you, Mr. Chairman, and thank you—

Chairman SESSIONS. I will also note Senator Murkowski is a practicing lawyer in Alaska and has herself quite a bit of experience in these matters.

Senator MURKOWSKI. Thank you.

Senator KYL. Might I, with your indulgence, correct the record? I would not want the record to go uncorrected. I have briefed a lot of cases to the Supreme Court. Only three have seen oral argument. However, all three of my clients were the prevailing party.

[Laughter.]

Chairman SESSIONS. Let me ask you, Senator, is there any other Senator who has argued three cases in the U.S. Supreme Court?

Senator KYL. No, I don't think so, but—

Chairman SESSIONS. Well, then I wasn't incorrect.

[Laughter.]

Senator MURKOWSKI. Humility and modesty gets you everywhere.

I want to thank you, Mr. Chairman, for the invitation to be with you in this Committee today. I also want to welcome all of the judges that have taken the time to be with us and I want to extend a special welcome to my judge representing us in Alaska, Judge Andrew Kleinfeld. I appreciate you making the long trek down.

As Senators from the West, this is an issue that has been discussed a great deal. I think there has long been a focus on the Ninth Circuit and its effectiveness and its efficiency as a circuit court of appeals. Senator Ensign and I have come at this issue, both of us with a little different approach and joined together in introducing S. 1824, the Circuit Court of Appeals Restructuring and Modernization Act of 2005. I don't know whether this is a nudge to California, but I will note that the acronym is CCARMA, so for whatever that is worth.

[Laughter.]

Senator MURKOWSKI. You ought to appreciate that in California.

But Senator Ensign and I looked at this issue, as I say, perhaps from a little different perspective, but we recognize that in order to advance this, in order to get to a place where I think we can see real efficiencies and see real effectiveness within the court in addressing the ever-increasing caseload, that we must do something to move forward with a division of the Ninth Circuit.

Mr. Chairman, you have noted all of the statistics, the geographic size, nearly 40 percent of the geographic area of the United States, the population serving 58 million people more than double the size of the other circuits, and then the emphasis and the focus on the caseload, and the fact that the Ninth Circuit docket is ever increasing.

Last year, it had nearly a 60 percent higher caseload than the next largest circuit. Immigration cases alone—and I find this figure absolutely staggering—immigration cases alone have increased by an astounding 463 percent. This causes delays in the circuit, and as you have noted, the average time for final disposition of a case is 5 months longer than the national average.

Now, some on this panel may argue that the Ninth Circuit is not inefficient. They will defend the court. They will say that the State improvements have been made to the lengthy period in which a case is dispensed, and I truly do applaud the efforts of the court, the very hard work and all that has gone into that. But we need to recognize, you can tread water for a while, but I think in the instance of the Ninth Circuit, the tidal wave is coming and it is a tidal wave that can't be stopped. It is a tidal wave called population growth.

Mr. Chairman, I have got a couple charts here. The Ninth Circuit—I have already said this—has a population more than double of most of the circuits, but it doesn't stop there. The Ninth Circuit also contains the fastest-growing States in the nation. So if you look at the chart, California is the first largest, Hawaii is the third, Arizona the fourth, Nevada the fifth, Idaho the sixth, Alaska the eighth. The numbers speak for themselves.

Right now, we have a caseload that is overwhelming, but with the population and the demographics in the area, we can only anticipate that it gets worse. We can't sit back and watch these warning signs without acting. It would be irresponsible for us not to act, and I believe it would misuse Congress's constitutional authority to effectively manage the courts if we do not act.

So what we have done with CCARMA is what I believe is sensible reorganization of the Ninth Circuit, dividing it into the Ninth and into the new 12th. The distances and populations will be more proportionate. It creates circuits with more manageable populations and more manageable travel distance, which I think will reduce wasted time and money spent on judicial travel.

The caseload will be more manageable, and this is a point that goes directly to Senator Feinstein's concern, and very real and very legitimate. We must do what we can to make the caseloads more manageable. A smaller circuit will mean a lower volume of caseload. The reality, as has been said, California, as the largest State, and California, as the fastest growing State, is going to have an exceedingly large caseload. But anything that we can do to help reduce that is a step that we should take. Reductions in caseload will improve the uniformity and the consistency in case law.

So this legislation that Senator Ensign and I have moved forward may not be the only way to divide the circuit, but I do believe that it is a sensible division. I think it is a solution that is long overdue. As you mentioned, we have had precedents in dividing both the Fifth and the Eighth Circuits and the reasons for doing that were just exactly what we are faced with today in the Ninth, responding to a caseload and a population growth.

We must recognize that the direction that we are taking in the West with our growing population, recognizing the huge caseload, the 58 million people that are being served right now, we have got a responsibility. We cannot wait. We have all heard the phrase,

"Justice delayed is justice denied," and I think in the Ninth Circuit it is time we figure out how we make that accommodation, make the split to provide for justice in the Western States.

So I appreciate the Committee taking the time to review this and look forward to working with you and all the other members as we move this forward.

[The prepared statement of Senator Murkowski appears as a submission for the record.]

Chairman SESSIONS. Thank you, Senator Murkowski. You have put forth legislation. You have talked with other Senators and been accommodating and tried to work with other Senators to develop the best possible legislation. You have been open minded about that and we thank you.

Senator Ensign, likewise, has felt strongly about this issue and has worked diligently to consider every possible suggestion. I guess you and Senator Murkowski are together now on your suggestions, so Senator Ensign, we are delighted to have you to talk about your circuit, the Ninth Circuit.

STATEMENT OF HON. JOHN ENSIGN, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator ENSIGN. Thank you very much, Mr. Chairman and Senator Feinstein. I appreciate the comments that you made. I want to associate myself with the comments of the Senator from Alaska. A lot of the points that she had made, I think are right on target. But I also want to address to Senator Feinstein that this is not about attacking the Ninth Circuit. It is not about attacking the State of California.

The reality is, we have to ask ourselves why do we have the circuits that we have today? Why don't we just have one or two or just a few circuits around the country? The reason we add circuits or we divide circuits is for more efficient management. Companies do this. There are all kinds of reasons for efficiencies, and what has been laid out today, whether it is delays, whether it is number of caseloads, whatever it is, whatever is happening today, I mean, we understand.

My State is the fastest growing rate-wise. California is the fastest growing as far as total population. The number of people, that is not going to change. The West is going to continue to be the fastest growing area in the United States. When we have the populations that we have today, and knowing that this situation is going to continue to get worse, it seems to me that without splitting the circuit, the burden that is going to be put on the courts, and therefore the burden on our citizens for delaying their justice is going to continue to get worse in the future.

Senator Murkowski and I, we had different approaches. Her approach last time was a reasonable approach. I thought my approach last time was a reasonable approach. I obviously liked my approach last time better than this time, but we have been willing to compromise. We came together on legislation and we are both open to changing the legislation if people have better ideas. We want to be open to the marketplace of ideas on restructuring the Ninth Circuit. But to be wed to say that it is functioning well today and cannot be improved by splitting it up, I think is closed minded.

When I first was elected to the House of Representatives, this was being talked about back then because the West was so fast growing back then. And I remember talking to the judges in the State of Nevada, and unanimously, they were opposed to splitting the Ninth Circuit. Well, today, as far as the District of Nevada, every single one of the judges is for splitting the Ninth Circuit, every single one of them. And one of the two on the Ninth Circuit are for splitting from my State.

So the judges have come a long way in changing their minds because they are seeing the realities of the way that the court is functioning. So I know there are differences of opinion. I guess being the only non-lawyer here, I don't have the experience in the courtroom, but I have the experience listening to my constituents and I am here to represent them to say that we would like to see faster justice done in the courts through a more efficiently run Ninth Circuit. I believe that the legislation that we have put forward would achieve that, and once again, I am glad that Senator Kyl said, let us put ideology out the door. Let us put a lot of those other arguments out the door, because just based on the merits to make it more efficient, to reflect the population growth of today, there is plenty of justification for splitting up the Ninth Circuit.

So I thank you, Mr. Chairman, and I know we have a vote coming up on budget reconciliation in the Budget Committee, so I have to get back there, as well, so I thank you for the time and allowing me to testify today.

Chairman SESSIONS. I guess Chairman Gregg would like me to be back for that vote, perhaps—

[Laughter.]

Chairman SESSIONS [continuing]. Since there is no proxy voting in the Budget Committee and it might be attacked without me.

We have got two panels of witnesses today. The first, we will discuss the judgeship caseload numbers that seem to evidence a continuing need to divide the Ninth Circuit. We will also discuss whether a two-way split or a three-way split would be better and we will address the recent cost estimates for a division. Very interesting to me will be the discussion concerning currently empty Federal courthouses in Seattle and Portland, each of which are able, clearly, it appears, to serve as a seat for the 12th.

The witnesses on this panel, starting from my left, are Judge Diarmuid O'Scannlain, who was appointed to the Ninth Circuit in 1986; Judge Richard Tallman, appointed in 2000; Chief Judge Mary Schroeder, appointed in 1979; and Judge Alex Kozinski, appointed in 1985.

On the second panel, we will gain more insight into the Ninth Circuit as we explore the possibility of housing a new 12th Circuit in Phoenix, again, without, we believe, having to build a new courthouse to do so. We will again hear from four witnesses on that panel.

So, ladies and gentlemen, we are delighted to have you here. Judge O'Scannlain, we are delighted to let you start off.

STATEMENT OF DIARMUID O'SCANNLAIN, CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, PORTLAND, OREGON

Judge O'SCANNLAIN. Thank you very much, Mr. Chairman and members of the Subcommittee of the Senate Committee on the Judiciary. My name is Diarmuid O'Scannlain, United States Circuit Judge for the Ninth Circuit with chambers in Portland, Oregon. I am very much honored to be invited to participate in this hearing on revisiting proposals to split the circuit. Indeed, the urgency of restructuring the largest judicial circuit in the country is even more evident today, in my view, by the number of Ninth Circuit reorganization bills pending in both Houses of Congress this session, perhaps the highest number in Congressional history.

As you know, Senator Ensign, who has just appeared before you, on behalf of Senators Kyl and Murkowski and five other sponsors, recently introduced the latest Senate Ninth Circuit reorganization bill, which is S. 1845, which is, I understand, the central focus of your hearing today.

Although I have this prepared statement to make, I do want to be able to respond to the very kind invitation from my good friend, Senator Feinstein, with whom I have started a dialog of sorts, to pursue the questions which she raises, which I am very happy to do and which I hope I can do after I finish my prepared statement, or when it is time for questions and answers, if that is appropriate, Senator.

It is inevitable that Congress must restructure the Ninth Circuit and I think S. 1845 is a perfectly legitimate vehicle for accomplishing that goal. It bears emphasis, however, that since I last appeared before you on April 7 of 2004, the Judicial Conference of the United States, the policymaking arm of the Federal judiciary, has now gone on record as expressing neutrality on splitting the Ninth Circuit. This is a most significant change, indeed.

Also, the Attorney General of the United States, Alberto Gonzales, announced that the United States Department of Justice now supports a split of the Ninth Circuit without specifying which particular configuration it prefers.

The passage by the House of Representatives of a Ninth Circuit split bill last year and recent indications of its doing so again very shortly, the newly expressed non-opposition by the Judicial Conference, and the support of the Attorney General, and the widening support across the country for splitting the Ninth Circuit auger well for Congressional action this year.

Let me emphasize that S. 1845, like any restructuring proposal, should be analyzed solely on the grounds of effective judicial administration, grounds that remain unaffected by Supreme Court batting averages and public reaction to any of our individual high-profile decisions. My support of the fundamental restructuring of the Ninth Circuit has never been premised on the outcome of any given case. I believe that the sheer magnitude of our court and its responsibilities negatively affect all aspects of our business, including our solidarity, our consistency, our clarity, and even, sadly, our collegiality.

Simply put, the Ninth Circuit is too big. It is time now to take the prudent, well-established course and bring the Ninth Circuit

into line with the rest of the circuits in the Federal judicial system. Restructuring large circuits is the natural process of judicial evolution, as you can see if you would look at the appendix part of my testimony, beginning at page 17, you will see Exhibit 1, which runs for two or three pages. This shows the history of the evolution of circuits since 1789, and starting with the Evarts Act, you, Congress, have restructured circuits four times since 1891, most recently the Fifth Circuit just 25 years ago. I believe that the legislation today before you represents a workable restructuring plan and I urge you to give it serious consideration.

From a purely numerical perspective, the enormity of my court is undeniable, and none of the comments today have refuted the numbers that are so oppressive to us as we look at this issue. That doesn't matter whether you measure by number of judges, population, or caseload. If you would turn to Exhibit 4 on page 24, you will see that at 28 authorized judgeships, our court of appeals has 11 more authorized judgeships than the next-largest circuit.

Exhibit 5 indicates that the Ninth Circuit has more than double the average number of judgeships of all other circuit courts of appeals. The Ninth Circuit has 22 more total judges than the next-largest circuit. At 51 authorized and senior judgeships, the Ninth Circuit has more than double the average number of total judges of all other circuits, as demonstrated by Exhibit 7 on page 27.

By population, also, our circuit dwarfs all others. More than 58 million people, almost exactly one-fifth of the entire population of the United States, live within our circuit.

And the caseload is killing us. Even with the lumbering number of judges on our circuit, we can hardly keep up with the immense breadth and scope of our circuit's caseload. As you can see from Exhibit 12 on page 32, the Ninth Circuit has 6,000 more filings in 2005 than the next busiest circuit, and at 15,600 appeals, the Ninth Circuit had more than triple the average number of appeals filed of all circuits in 2005.

Sadly, this caseload has taken its toll on the litigants within our circuit. Looking at Exhibit 16 on page 36, the Ninth Circuit is now, regrettably, the slowest circuit in the disposition of appeals. And the numbers on Exhibit 17 show that the Ninth Circuit takes 40 percent longer to dispose of its appeals than the average of other circuits, although you will probably hear from some of my colleagues, which is absolutely true, that we have a very good record in terms of disposing of cases. Once the case gets to argument until it is decided, we probably have one of the best records in the country. But the problem is getting it from a notice of appeal to the scheduling it for oral argument and that is what the fundamental problem is.

So no matter what metric one uses, the Ninth Circuit dominates out of all proportion to the structure of the rest of the Federal judicial system. From any reasonable perspective, the Ninth Circuit already equals at least two circuits in one.

Now, I am not alone in my conclusions. Several Supreme Court Justices have commented—

Chairman SESSIONS. Judge O'Scannlain, I think I failed to start you off on time, so you have had an extra minute or so and—

Judge O'SCANNLAIN. Oh, OK.

Chairman SESSIONS. I guess one of the pleasures of a lawyer is to be able to cutoff a judge, having the light go off.

Judge O'SCANNLAIN. All right.

[Laughter.]

Chairman SESSIONS. That is a very rare privilege, but anyway, if you would just wrap up so we can give everybody a similar amount of time.

Judge O'SCANNLAIN. All right, Mr. Chairman. I submit to you that the tide has now turned and the burden of persuasion has plainly shifted. Indeed, the whole paradigm has shifted. As long as one accepts the underlying premise of the appellate circuits in the first place that discrete decisionmaking units provide absolute benefits to the administration of justice, there is no denying that the Ninth Circuit must be reorganized. I challenge any opponent of reorganization to articulate a reasonable justification for placing one-fifth of our citizens, one-fifth of the entire Federal appellate judiciary, and one-fifth of all of the appeals filed by all of the Federal litigants into this country into one of 12 regional circuits.

In closing, let me say that Chief Judge Schroeder and her predecessors have done a truly admirable job with the limited tools that they have had, chipping away at the mounting challenges to efficient judicial administration. However, I do not believe that long-term solutions to long-term problems come from tinkering at the edges. The time has come when cosmetic changes can no longer suffice and a significant restructuring is necessary.

Thank you, Mr. Chairman, and I will be very happy to take questions at the appropriate time.

[The prepared statement of Judge O'Scannlain appears as a submission for the record.]

Chairman SESSIONS. Thank you.

Judge Tallman?

STATEMENT OF RICHARD C. TALLMAN, CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, SEATTLE, WASHINGTON

Judge TALLMAN. Good afternoon, Mr. Chairman and distinguished members of the Subcommittee. My name is Richard C. Tallman. I am a United States Circuit Judge with chambers in Seattle. Thank you for the invitation to appear here this afternoon to discuss why the reorganization of our court is overdue to bring about a new era of judicial efficiency in the circuit courts of the Western United States.

I join eight other circuit judges on our court who are listed in Footnote 1 of my written testimony who also support a split, and Mr. Chairman, I would ask that that written testimony be made a part of the record.

Chairman SESSIONS. We will make that a part of the record.

Judge TALLMAN. I can also say that there are other judges on our court who support reorganization but who prefer, for various reasons, not to identify themselves.

Mr. Chairman, the statistical evidence is overwhelming. Unmentioned in the previous numbers is the fact that we are forced to borrow visiting circuit and district judges from all over the United States. In this year alone, we brought in 137 visitors.

Next year, we expect around 200. That has an impact on the development of the jurisprudence in the Ninth Circuit. That is in addition to the 51 active and senior circuit judges who continue to hear cases on the Ninth.

We should not be deterred by overstated arguments of short-term financial costs. Instead, we should view the cost of splitting the court as a necessary investment which will pay great dividends in the delivery of justice to the people we serve.

If Congress prefers a two-way split, the most readily available, cost effective, and geographically desirable location for the 12th Circuit's headquarters is the now empty ten-story William K. Nakamura United States Courthouse located at 1010 Fifth Avenue in Seattle, Washington. It is pictured in Exhibit 1 and is up on the chart. This building, rich in history, where many great men and women have served our Nation, is the perfect building to begin a new era in our reorganized judiciary, and Senator Feinstein, we can lop off $84 million from the AO's letter that you just marked in the record by using the Nakamura Courthouse. Congress has already approved the $53 million in renovation costs and that work is underway by the General Services Administration. That building, with 104,000 usable square feet, is more than adequate to physically house the judges' chambers, the courtrooms, and all of the clerks and administrative space for the new 12th Circuit with plenty of room for future growth.

The architectural drawings for its renovated courtrooms are shown in Exhibits 3 and 4 to my testimony. That is a typical three-judge panel hearing room, and the next one is the en banc courtroom which is designed and will be built out to handle 15 judges so that the full court could sit en banc.

Congress has already approved the $53 million in repairs and renovation costs in GSA's budget for fiscal year 2005 and preparing it to serve as the headquarters for the 12th Circuit will not add excessive work or cost to the ongoing renovation. Most importantly, the renovation work will be completed in plenty of time to allow the 12th Circuit to begin operations, hear oral arguments, and carry out other judicial functions upon the effective date of the split.

Seattle is centrally located for the States that would make up the 12th Circuit. That is a substantial cost to taxpayers in lieu of having current Ninth Circuit judges and staff regularly travel these great distances. Flights to and from Seattle are more convenient, more frequent, would be shorter in duration, and are less expensive, allowing for cost savings, less time wasted in airports, and more time spent in chambers handling appellate work.

If Congress prefers another Pacific Northwest location, the Gus Solomon U.S. Courthouse in Portland, Oregon, stands ready to answer the call. It is shown in Exhibit 5 to my testimony, another empty, available courthouse.

With these existing facilities, it is clear that we do not need to build new courthouses. We also ought to try to avoid arrangements in which the new circuit headquarters would be housed in separate buildings within the same city. Either Nakamura or Solomon can do the job in one building.

Because California is producing 70 percent of the Ninth Circuit's 16,000 cases, a substantial amount of time and money is spent sending judges from outside the Golden State to hear cases in California, while California judges travel to hear cases in other States of the Ninth Circuit. This past year, I heard cases in Seattle for only five days for the entire year. It is wasteful to pay judges to play this game of judicial musical chairs, traveling to one another's States when the job could easily be done by local judges working at their home duty stations.

By adding new judges in California and splitting many of the current Ninth Circuit States into the 12th Circuit, all judges will spend less time traveling and more time working on cases within their own State or States closer in proximity. Those are real cost savings of millions of dollars annually and countless hours of travel.

With or without a split, it is absolutely necessary to add additional judgeships in California and fill empty seats already authorized, but it is unfair to attribute the cost of doing so to the cost of splitting the Ninth Circuit. Those judges are needed now. We have to address this growth problem, which is rapidly growing and getting worse by the day. The startup costs have been inflated in past discussions because it was assumed that brand new courthouses would have to be constructed. Nor was there any offsetting credit based on the financial gain from cost savings resulting from separating the States and enjoying judicial resources closer to home.

The transaction costs of investing in improving the delivery of justice are far less than the opportunity costs of simply maintaining the status quo. That is unacceptable. Justice delayed is justice denied. It is hard to quantify the benefits of speedier resolution of appeals, which will surely follow the creation of more manageable, smaller appellate courts.

In the end, our citizens, both as taxpayers and consumers of our court services, will greatly benefit from the a split of the Ninth Circuit. It will provide them with better service, litigants with prompt decisions, and a full en banc review of the most important cases to reach the court. The time is now to make the investment in improving the delivery of justice in the Western United States. Thank you, Mr. Chairman.

[The prepared statement of Judge Tallman appears as a submission for the record.]

Chairman SESSIONS. Thank you, Judge Tallman.

Chief Judge Mary Schroeder, we are delighted to have you here again and look forward to hearing from you.

STATEMENT OF MARY M. SCHROEDER, CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, PHOENIX, ARIZONA

Judge SCHROEDER. Thank you so much, Mr. Chairman, and good afternoon. My name is Mary Schroeder and I am the Chief Judge of the United States Court of Appeals for the Ninth Circuit. I am very pleased to be with you. My husband is a little less enthusiastic about my being here—

[Laughter.]

Judge SCHROEDER [continuing]. But I hope to join him later in the day.

I have served in the capacity of Chief Judge of the Ninth Circuit since December of 2000. My home chambers are in Phoenix, Arizona, and Senator Kyl and I practiced law together in Phoenix at the same time and we have been together on many projects for a long time.

I would like to introduce our colleague, Carlos Bea. Judge Bea and his wife, Lucille, are here from San Francisco, and our wonderful Clerk of Court, Cathy Catterson, who is also here today. I notice that the Clerk of Court of the District of Arizona is also here, Rich Weir.

As you know, technology has improved rapidly. We now have BlackBerrys, we have cell phones, laptops. We can communicate instantly with each other wherever we are on the planet. It is now easier to administer this circuit than it was when I took over as Chief in 2000.

Moreover, it is the view of the overwhelming majority of our circuit judges, bankruptcy judges, and the lawyers who practice within the circuit that a division of the circuit would not improve the administration of justice in the West. We are not just talking about the Court of Appeals. We are talking about the entire circuit and this includes magistrate judges, district judges, everyone.

There are only three active circuit judges who support division and they are all here today and you will hear from them.

What I would like to focus upon this afternoon, however, is not how well the circuit is operating but how harmful a circuit division would be, especially now. There are three principal reasons.

The first is the unprecedented devastation wrought by Hurricane Katrina, which the AO has already asked for $65 million in additional appropriation.

The second is the temporary but unprecedented increase in immigration appeals to our court from the Board of Immigration Appeals in the Justice Department that cannot provide sufficient meaningful administrative review, and we hope to work with them so that they get the resources that they need, as well.

The third reason that this is such a bad time to consider splitting the circuit is the need for court resources to prepare for new litigation spawned by the Bankruptcy Act that went into effect last week and new immigration legislation that you are struggling to formulate, and we would like to work with you to make sure that whatever policies you come up with in the immigration field work.

I was in Houston after Katrina last week and their circuit executive's offices in rented space, their clerk's office on rented furniture, their entire clerk's office, 100 people, is on per diem and working in Houston. They are worried about their children, their homes, and what the future will bring. The Federal Appellate Court for the Fifth Circuit is at least functioning, thanks to those efforts of the Chief Judge and its administrators, but I understand there are trial courts there that are not functioning at all.

We don't think this is the time to create an unnecessary and costly bureaucratic court structure in the West, especially when there is no legal system in one area of the country right now.

With respect to the immigration case deluge, those cases are nearly all from California. Splitting the circuit would exacerbate administrative burdens because the judges from the rest of the circuit would no longer be there to help and staff resources would be cut. The Judicial Conference of the U.S. has taken a position of neutrality with respect to the merits of the split. That has always been the position. They have never taken a position in favor of circuit splitting or opposed. They do oppose linking new judgeships to the issue of circuit splitting.

Let me speak for a moment about staffing. The new Circuit Court of Appeals has to be staffed and a new circuit has to be staffed. They would need a clerk of court, circuit executive, technology folks, staff attorneys. We have all of that now very effectively in the Ninth Circuit and we have services that are not matched because of the expertise that we are able to provide in a circuit executive's office and a clerk's office that serve a lot of folks out there.

Finally, about administration, the existing circuit has a hub. It is easily administered because nearly all of the judges can get to San Francisco within 2 hours and they don't have to lose more than a day in the office. I happen to follow college athletics and the headquarters of the PAC 10 and the Ninth Circuit are within seven BART stops from each other because that is the hub of that area of the lower 48, and when Hawaii and Alaska were added, they were added to the Ninth Circuit. Nobody thought a thing because there was nowhere else for them to go and I don't think there is now.

Neither of the circuits that were created by S. 1845 would have such a hub. One would cover the whole Pacific and the other would stretch from the border of Mexico to the Arctic Circle. Judges would have to change planes in San Francisco in order to get from Phoenix to Seattle. So the courthouse in Phoenix, we can look at, but it is fully occupied and it has ten courtrooms. You would have to fill in those courtrooms—that is very, very expensive—and move the bankruptcy court out.

So given the stress on the administration of justice right now by all of the things we are seeing, all of the movement in this country, fracturing the administrative structure of the courts of the West is not a good idea.

I thank you for the opportunity to appear before you and I would be happy to answer any questions later. Thank you.

[The prepared statement of Judge Schroeder appears as a submission for the record.]

Chairman SESSIONS. Thank you. Thank you, Chief Judge Schroeder.

Judge Kozinski, it is a pleasure to have you with us and see you again. I am not uninterested in your comments and will be studying your record, but unless Senator Kyl is leaving—he just disappeared. I have to go vote in just a minute. Senator Kyl says that he would be pleased to preside, so we are delighted to hear from you at this time.

STATEMENT OF ALEX KOZINSKI, CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, PASADENA, CALIFORNIA

Judge KOZINSKI. Thank you, Mr. Chairman, members of the Committee. My name is Alex Kozinski. I am a judge on the Ninth Circuit. I have been a judge on the Ninth Circuit for 20 years. I am resident in Pasadena.

I have written testimony and rather than summarizing it, which I planned to do, what I would like to do is address some points raised by the other witnesses, but partly because Senator Feinstein did such a fine job of saying most of the points that I did and there is no point repeating them here.

On this matter of whether there is a consensus that the Ninth Circuit ought to be split, I think the Committee ought to think seriously about this. Who knows more about what is good for the people in the Ninth Circuit insofar as the Ninth Circuit is concerned than the lawyers, the people who represent the litigants who appear before us? I think it is significant. I think it is a fact that can't be brushed aside that the State bars of Arizona, Hawaii, and Montana have all voted against the split. These are States that would be split away from the Ninth Circuit, that would get the supposed benefits of a split, and yet the lawyers representing the litigants that appear before us are against the split.

Also, the judges know quite a bit about this and I think the Committee ought to find it significant that of the judges on our court, there are only three active judges, who are all present, who voted in favor of a split. We had a court meeting. We had a discussion. We had a vote. Only three active judges, all present here, voted in favor of the split. It is significant that of the circuit judges from Montana, Arizona, Nevada, and Hawaii, there was not a single circuit judge, active or senior, who voted in favor of the split. Not a single judge from one of those States voted in favor of the split.

Now, I heard Senator Ensign say to the contrary, that he believed that one of the circuit judges from Nevada voted differently. I have here a vote tally sheet of the vote we have taken. It includes the list of all the judges who voted for and against, who abstained. It shows that—

Chairman SESSIONS. Do we have a voting rights case here?

[Laughter.]

Judge KOZINSKI. Well, I think it is important, Senator, to have the record straight—

Chairman SESSIONS. Well, it is.

Judge KOZINSKI. and the record is that the Judge Rawlinson from Las Vegas voted in favor of a split and Judge Hugg, former Chief Judge, a great Chief Judge, a wonderful Chief Judge, voted against the split and the two judges abstained. Judge Brunetti and Judge Bybee abstained. I am aware, as I stand here and I am under oath, I am aware of no colleague of mine from Nevada who voted—who believes that the split is appropriate.

Now, these are judges and lawyers from the States that would be affected by the split, the split that supposedly is inevitable. I think the Committee ought to think very carefully about why those people most intimately familiar with it and those who are most involved with our litigation process have voted against the split.

Now, Judge O'Scannlain raised, as well did the Chairman, the business about delay in deciding cases in the Ninth Circuit. Judge O'Scannlain, a fine colleague of mine, and Judge Tallman, a wonderful colleague—one of the worst things about this proposed split is I really would miss them, and Judge Kleinfeld. I really would hate to see them go, and I am going to hold on to them as hard as I can.

But Judge O'Scannlain was quite fair. He said, oh, they will tell you that once the cases get to the judges, we are the fastest, one of the fastest courts in the country to decide. Well, isn't that the test of the circuit, of how the circuit is working? The reason cases are delayed is because we have four vacancies. Up until two or 3 years ago, we had eight vacancies and ten vacancies in our court. The reason we have visiting judges from other courts is we don't have the judges. Judges have not been confirmed.

Once the cases get to the judges, once the judges get to decide the cases, once the decisionmaking process comes within our control, we are the second fastest court in the country. It doesn't matter that some of our colleagues are in Alaska and others are in Montana and others are in Hawaii because I can talk to Judge Kleinfeld and I can talk to Judge Thomas in Montana, I can talk to my colleague, Judge Clifton, in Honolulu by picking up the phone or by sending an e-mail, and you know what? E-mail to Montana is just as fast as e-mail to downtown Los Angeles, believe it or not.

We are unified as a court and at no time in the history of the United States has a circuit court been split over the strong opposition of a majority of the judges. The only time that we know about is the Fifth Circuit was split when the judges unanimously voted to split. Now, I don't think we have a veto. I don't think we are entitled to deference in the sense that you can't do it. Of course, you can do it. It is your job to do it. But you need to think carefully about the people who actually deal with the lives and fortunes of the litigants before us, the judges and the lawyers, and the judges and the lawyers have spoken and by overwhelming margins they have said no.

I think this Committee should accept that verdict, after close study, and should reject once and for all the proposals to split the Ninth Circuit, and what they should do is commend the court and help us with technology, help us with resources, help us here in the Senate with confirming our judges. Give us the judges to do the job for you. You do that and we are not going to see those numbers. We are going to see the fastest court in the country.

Thank you, members of the Committee and—and Mr. Chairman.

[The prepared statement of Judge Kozinski appears as a submission for the record.]

Senator KYL. [Presiding.] Thank you. I don't mean to confuse things—

[Laughter.]

Judge KOZINSKI. Excuse me, sir, I do have this vote tally sheet. I know in court we would say, may I have it marked as an exhibit—

Senator KYL. Without objection. Any written material that any of you would like to have appear in the record will be included in the record.

Since Senator Feinstein is ranking, Senator Feinstein, would you like to begin the questioning? Are you prepared?

I will tell you what. Let me just ask one question first and then I will turn to you, how is that? It was occasioned by, Judge Kozinski, one of the comments you just made. I don't know why it takes the Ninth Circuit so long to get to oral argument. Your suggestion was, Judge Kozinski, that that was because there are four vacancies. On the other hand, isn't it possible to set oral argument and if there are two judges set and a third that has to be filled in, to simply fill it in with a visiting judge or district court judge? In other words, why should the fact that there are four vacancies mean that it takes a long time to get to oral argument? I don't understand that. And Judge Schroeder might be able to answer that, as well.

Judge KOZINSKI. Since you directed the question to me, there is always a balance on a court between speed and getting the work done by bringing in more judges—being short of judges. Of course, there is not an unlimited number of visiting judges you can get. Other judges have their own work to do. But in terms of maintaining consistency in the law of the circuit, what you want to do is to have as many of the local judges, as many judges from the home circuit as possible because they see the same cases again and again.

Now, the balance can be struck in various ways, but I believe it will be irresponsible for a court to promiscuously bring in visiting judges when there are vacancies. I think we try to do our job, but at the same time we don't want to muck up the law by having too many hands in the pot.

Judge SCHROEDER. What we like to do is to bring in our own district judges who are familiar with the circuit law. It is not helpful particularly to bring in a lot of judges from other circuits who are not familiar with the circuit law.

One of the things that came out in the White Commission hearings that they had in the late 1990's when they studied the circuit structure throughout the country was a dissatisfaction on the part of lawyers in some other parts of the country with some other circuits that relied more heavily on visiting judges than the Ninth Circuit does, because they would like to have the cases decided by those who are familiar with the law and not in Atlanta by a senior judge from Indiana.

Senator KYL. And, by the way, let me make it clear that if it were up to me, there wouldn't be any vacancies in any court, and, in fact, we would have more judges to be filled in the form of new judgeships, both district and circuit, but I don't control all of that and I understand that that is a deficiency.

Do, Judge Tallman or Judge O'Scannlain, do you have a view on this question of why it takes so long to get to oral argument?

Judge TALLMAN. I should say, and I think you can appreciate this as a former practicing lawyer, it doesn't matter to the litigants what the reasons are. All they know is that it takes 15.4 months on average to get their cases decided. We do have problems in im-

migration cases getting the record, the administrative record together, and that is a problem on the government's side of the equation. But we have got a whole basement full of pending court cases in San Francisco that are waiting for oral argument panels to become available to which they can be assigned and that takes more judges.

To respond directly to Senator Feinstein's concerns expressed at the outset, Senator, there is no way to equalize the caseload with California unless the State itself is split and no one is advocating that. But none of the circuit caseloads are mathematically equal and there will always be variations from one to another.

The logical result of the opposition argument is that there is no limit to the size to which this court may grow. Do we really want an appellate court of 75 active and senior circuit judges? That is not a court, it is a legislature.

Senator KYL. By the way, the senior judges are available for designation on panels to the extent that they devote time to judging, so I presume they are included within the panel?

Judge TALLMAN. Technically, they are not designated. As a senior judge of the court, they continue to hear cases. They just hear a reduced caseload. Some of them are handling caseloads that are equal to or greater than an active judge.

Judge SCHROEDER. We rely on them.

Senator KYL. Actually, my preliminary question has turned into a whole 5 minutes, but Judge O'Scannlain, do you want to conclude—

Judge O'SCANNLAIN. I would just simply concur with my colleague, Judge Tallman, and suggest that that figure of 47 judges today, including seniors, includes 23 seniors, and if I am not mistaken, at least 20 or maybe even 22 of those 23 seniors are actively sitting on panels, so that if we were stuck with just the 28, we would be at a total loss.

But from the standpoint of the litigant, it doesn't matter how fast we are, and I totally agree with Judge Tallman on this, in terms of deciding cases as long as his case is waiting. So the problem is that notwithstanding all of these vaunted programs that we have, especially, for example, the screening panel, ironically, the cases that get the quickest treatment in our court are the ones that have the least complex issues to deal with. Those sometimes get in and out within six or 8 months, compared to 15 months as an average, and we do that with a screening panel. But notwithstanding that, we are still the slowest court in the entire country and that is a statistic which cannot be gainsaid.

Judge KOZINSKI. Senator, if I may just followup, my colleagues are absolutely right. It doesn't matter to the litigant why the delay is, but it certainly matters in figuring out the swiftness. If the problem is we don't have enough judges, then the solution is give us more judges. Splitting a circuit is not going to solve the problem that is created by the absence of judges.

What it will do is exactly as Senator Feinstein pointed out, because the judges in the new proposed 12th Circuit would have a much lower caseload, yes, those cases would get their judges more quickly. But the cases in California and cases in Hawaii, and Senator Kyl, Senator Murkowski, you are representing the nation, not

just your own State and I submit that it is not fair to have a solution that makes the problem of delay so much worse in important parts of the country in other States, Hawaii and California. The problem being created by lack of judges, give us the judges. That will solve the problem.

Judge O'SCANNLAIN. Mr. Chairman, Senator Kyl, if I can call you Mr. Chairman at the moment, there is a little disingenuousness going on here, if I may say so, and I say so with a certain amount of regret. But we had the opportunity in 1990, the last major judgeship bill, to ask for new judges. We were entitled by the numbers to close to ten, maybe actually ten new judges, and we asked for zero. So the fact that we don't have enough judges is to a certain extent a product of our own making.

And at the very least, what this bill does is give us seven new judges. In my view, and I repeat what I shared with Senator Feinstein in our meeting, I think the number of seven judges for California is too low. I think California justifies significantly more than that. And the fact that we never asked for them until now, I think is unfortunate, to say the least.

Senator KYL. Let me just conclude this and then, Mr. Chairman, Senator Feinstein should probably have the next opportunity since I basically took your spot here by asking a question that opened a bit of a can of worms. But let me just conclude with my thoughts, because I think both sides in this debate make a good point.

Judge Kozinski, I think you are absolutely right that it is critical that we fill all of the vacancies and, I believe, create new judgeships consistent with the caseload and fill those as well and that that can have the effect of reducing the time to argument. That, therefore, helps to relieve the pressure that has been building for a split.

But I also agree with the proposition that carried to not a logical extreme, day after tomorrow, we are going to have how many judges on this court? That makes the argument that, for any semblance of collegiality and ability to conduct en banc hearings and the other things which make for an effective court, there is going to be a point at which we either have to have a very different view of what a circuit court is with 75 judges or agree that at some point there does have to be a split.

So it seems to me that there is validity in both points that have been made here.

Judge KOZINSKI. I hop I will have a chance to speak to you privately at some point on all of those issues. I will be happy to come back to Washington or to Arizona to do that.

Senator KYL. Let us do it in Arizona. I said before, I view this as not perhaps the beginning of a conversation, but the continuation of a conversation that is going to take us a while. Everyone can breathe easy that this isn't going to pass tomorrow in exactly this form and there is plenty of time for conversation and I welcome, and I really do again appreciate the time that all of you have put in and the difficulty that it has created for some of you.

Judge SCHROEDER. May I say, Senator, that Judge Thomas will also address these issues that you are concerned about.

Senator FEINSTEIN. I am not going to ask a formal question. Let me just for a moment have a bit of a discussion.

I think there is more actually underlying this than just, well, let us shorten the time that a case can get to a judge because that is pretty simple, as Judge Kozinski pointed out. Increase the number of judges.

The fact of the matter is, it has been increasingly difficult to get new judge positions to the Ninth Circuit, and the fact of the matter is, I believe, and I can't make any accusations, but I believe that there is an effort to starve the circuit to bring it to the point of a split. The points I have been trying to make is the very real need for parity in caseload.

I think there are political reasons here. People say they aren't. I believe there are. Clearly, there are travel reasons. Some judges, I guess, don't want to travel as much, and I can understand that and I don't blame you for it. I am not at all critical.

But I don't think the case should be made on the timeliness or the delay in getting the case, because if that is really the argument, then get the judges. When it comes to judges being active in lobbying, and I say this to both sides, nobody helps, really. The Chief Judge does, but that is somewhat limited. But while we are judges, we don't lobby is kind of the answer that comes back. Consequently, the Ninth Circuit has been seriously disadvantaged.

Now, any split—I told you, 72 percent of the caseload remains in California and the rest of it, I mean, if you look at the actual numbers, they are de minimis. I won't do Guam. Hawaii, 247 cases are filed in a year. Alaska, 136 cases. that is all. Arizona, 1,195. Idaho, 161. Montana, 355. Nevada, 827. Oregon, 638. Washington, 1,130. So the big States of those are Washington and Arizona. But California, 10,985 cases.

Therefore, it seems to me that a decision has to be made whether there is enough, and I can't answer this because I don't know, judicial interest in having the kind of cosmopolitan Western circuit that exists there with interaction for trade laws, kind of a richness of law because of the geographical composition of the circuit, or if not, I mean, if California could get 21 new judges on the line and be its own circuit, we could try and see how that would work.

Judge O'SCANNLAIN. Well, there is precedent for—if you look at Judge O'Scannlain's Exhibit 1, back at the beginning days of the republic, there was a United States Court of Appeals for the California Circuit and it—

Senator FEINSTEIN. I saw it, but it didn't last long.

Judge O'SCANNLAIN. No, because the West grew and there needed to be more judges.

Senator FEINSTEIN. It grew and there was a synthesis of interests within the States. And as you know, no circuit except for the D.C. Circuit is less than three States. So the circuits have been devised on the basis that a number of States together is a good thing. So the question of size, in my view, is strictly related to numbers of judges. Go ahead, take me on. I am happy for you to take it on.

Judge O'SCANNLAIN. I would have to say that on this particular point, maybe Judge Kozinski, you, Senator, and I are in total agreement, and that is we need more judges. I certainly feel that very strongly. I thought we needed them in 1990 when we failed to ask for them, but we need them certainly today.

The problem is, how large can a court of appeals grow and still be a court of appeals? That is the nub of it. And if you read the White Commission report of 1998, that is the central piece they make. They recommended that we split into three separate divisions. Keep the circuit structure, but split into three semi-autonomous divisions, one of which would—well, two of which would split California.

Now, I realize, Senator, that you have some concerns about the optics of that and—

Senator FEINSTEIN. Forum shopping, yes.

Judge O'SCANNLAIN. And that is a very respectable point and one which I share, as well. But the key here is that if we are looking at some modifications to this bill, in my personal view, I think the new 12th Circuit gets too many judges and the new Ninth does not get enough. So even with 35 judges to be reallocated, I think you could pick up two more judges just by shifting from the 12th to the Ninth in this bill, and then, as I said in my earlier testimony, I think you could justify ten or more judges at least to go with the number of California judges there are.

So I think—but I think that is just a matter of adjustment. The principle, though, is the key, and the principle is you cannot let a court of appeals grow so large that the number of judges sitting around making law—now, we are not talking about making law in a legislative sense, in which there are much less limitations, but here, we have to speak as a unifying body which declares the law. The White Commission recommended nine to 17 as the ideal range. Over 17, it becomes cumbersome. We are at 28. If we go to 35 or 38 or 45 or 55, it is impossible and we cannot function as a court of appeals with that number.

Senator FEINSTEIN. Does everybody agree that if you grow like that, it is impossible? Judge—

Judge SCHROEDER. No. No.

Senator FEINSTEIN. Wait. Judge Schroeder, just a second. I will go down the line. Judge Tallman?

Judge TALLMAN. I do agree with that, and it gets back to what we talked about at the last hearing, which is the importance of maintaining consistency and predictability in the law. The problem that we have now with 50 judges resident, active and senior, and 150 to 200 visiting judges is that it is like going to Las Vegas in terms of what the outcome is going to be. Tell me who the three judges are going to be on the panel and I might be able to predict how that particular panel is going to go.

That is not supposed to be the way circuit courts of appeal operate. They are supposed to apply the same legal principles, the same body of law to similar sets of facts that come before them, and the en banc process exists to correct those panels who wander off the reservation because they didn't follow the law.

With a court of 75 judges trying to have a functioning en banc process, even on a limited basis as we do now in the Ninth Circuit, would be virtually impossible. You are talking about the ability to review less than 3 percent now with the limited en banc process of errant cases that have gone awry. You couldn't do it with a court of 25,000 cases and 75 judges.

Senator FEINSTEIN. Judge Schroeder?

Judge SCHROEDER. I am not sure why we are talking about 75 judges when we have never had the 28 for more than five minutes, but the truth is that it used to be that nine judges was considered the ideal size of a court. Now, all the circuits except the First are larger than nine. We have seen by technology that it is easier to operate when you have larger courts as we get bigger in our ability to communicate.

You referenced the community of interest of the West. That is very important. We have a community of interest in the West. We have Microsoft, for example, in Seattle. We have the Silicon Valley. We have Intel. All of these are looking toward the Pacific. We all think of ourselves as Pacific Rim. We need to keep that community together. It is very important.

And we will, if we ever get to 35 or 40 judges and it turns out that there are problems, we will deal with them. But no one has ever, in studying the circuit, has ever concluded that it would be more efficient to divide the circuit.

Senator FEINSTEIN. Judge Kozinski?

Judge KOZINSKI. Well, it seems to me Judge O'Scannlain is giving up the game. He favors a split, but he says, oh, California should get ten more judges. Well, under the CCARMA bill, it is 16 judges plus he said we should get two more. That is 18. Ten more is 28. We are back at 28 active judges.

Now, it seems to me the reality is we are all getting bigger. The country is getting bigger. Courts are getting bigger. Cases are getting bigger. Litigation is getting bigger. Simply throwing out—and law firms are getting bigger. Simply throwing out a number, saying, oh, 75 is a very big number, you know, ten judges was a very big number for a circuit in 1960. There was not a single circuit in the country that had as many as ten judges. It was horrible, the very though.

I remember 1960 and I am sure—

Senator FEINSTEIN. I do, too.

Judge KOZINSKI. There we go. It was not such a long time ago. We live in a different world. And just to answer the question that Senator Kyl asked and the thing I want to talk to him about in his office when I get a chance, yes, you can run a court with 75 judges. It is not ideal, but it is done and this bill is about collegiality. I love my colleagues. I get along well with my colleagues. We josh around here. But as I say to Judge Tallman every time I see him, I say, you bad guy. Do I not say that to you?

Judge TALLMAN. You do.

Judge KOZINSKI. And the reason I say, you bad guy, is because he wants to leave me and I don't want to lose him.

Judge SCHROEDER. Well, he is—

Judge KOZINSKI. And that is how we relate to each other.

Senator FEINSTEIN. Let me just say one thing about justice. I am not a lawyer, so it is easy for me to say. But it seems to me that—I have always thought, to some extent, small is better because small is human. Judge Schroeder, I have a problem with doing things by BlackBerrys, probably because I am not of the generation, really. For me, it is the human interaction. It is the ability to take the time. It is having people feel really satisfied that they had their justice and that it was human, that it wasn't mechanical,

and that cases weren't just sorted in bulk and dealt with in bulk and that kind of thing, that there was an individual quality to the justice that is meted out.

I do think that as a circuit gets bigger, if this one is going to continue to grow, it is inevitable that 1 day, we are going to be there. I don't pretend to know what is the size when we are going to be there, but for me, as I look at this and try to see the forest for the trees, it is parity. It is bringing down the number of cases per judge so that the individual case has a certain prominence and isn't just in a batch that is dispensed with in a certain way.

Judge SCHROEDER. I don't disagree with that at all, but as you have pointed out, the reality is that California is very large and that it is going to have to have a certain number of judges and that any circuit with California is going to be larger than 20 judges. That is just the reality of the world in which we live.

Judge O'SCANNLAIN. Perhaps, Senator Feinstein, the time has come to give some consideration, I am not sure where I would stand on it personally, but some serious consideration to the rule that we kind of followed, an unwritten rule that there has to be three states to make a circuit. The District of Columbia is an exception to that rule, but that didn't occur until 1948. Maybe because of the population pressures of California, the time has come to consider whether California, like it was in 1855, should once again become its own circuit. Certainly, the numbers in every way justify it. I am not suggesting that as a solution here, but I am suggesting that we have to do something with these numbers because these are pressures which need a response.

Senator FEINSTEIN. I haven't seen a proposal that treats California fairly in terms of judges, candidly.

Judge O'SCANNLAIN. OK.

Senator FEINSTEIN. Clearly, it knocks down the caseload to, like, 325 for the other States per judge with the judges that accompany the proposals, but it leaves California judges with over 500 cases. I can't—

Judge TALLMAN. Mr. Chairman, Senator, I think you are overlooking the fact that the bills also provide for continuing exchanges of circuit judges between the 12th and the Ninth to address that problem. We will continue to be sitting in California for some time to come as the bills are currently drafted.

Senator FEINSTEIN. Then what is the point of doing it?

[Laughter.]

Judge TALLMAN. Because at some point, the thought was that California would get the additional permanent judgeships that it needs so that you wouldn't need to be borrowing all these judges from the rest of the country.

Senator FEINSTEIN. Let me just say, I have been here now for almost 13 years. I don't think California will get the judges it needs. The only way for California to get the judges it needs is to get them before there is any split and have them, because I think California will be slighted, and I greatly respect Senator Murkowski. I think she does a super job. We serve together on Energy and Water. But the proposal doesn't treat California fairly in terms of number—I leave out the word "fairly," but doesn't treat California adequately in terms of the number of judges and I have to fight for my State.

Judge KOZINSKI. Mr. Chairman, may I just have 30 seconds to address this. Judge O'Scannlain put in this idea of a single State circuit for the first time and I just want to address it. There has been a philosophy in the Federal courts, and it is a very important philosophy and this Committee ought not to reconsider it lightly or casually or on an ad hoc basis. The idea is that trial courts, trial courts, for very good reasons, trial courts tend to be local. The judges are drawn from the local community. They have the approval of the local senators or the State senators.

Appellate courts in this country in the Federal system have been regional and national, regional for the circuits, national for the United States Supreme Court. It is a very important principle that ought not to be slighted or overlooked, and that is that you have regional interests in the application of facts, but when it comes to application of the law, you want regional consistency and you do want views from outside the State.

I am very happy when Judge Kleinfeld comes and sits on California cases or when Judge Thomas does and our colleagues from Arizona. It is very important to have that and to continue with that. A single State circuit would go contrary to that long-established principle. I would beg this Committee not to do so without a very careful thought to it.

Chairman SESSIONS. [Presiding.] Well, it is a big circuit. California is a big State. Some call it a nation-state. It is further from San Diego to San Francisco than it is from Mobile to Atlanta, and maybe further culturally, I don't know. We have got a whole bunch of circuits on the East Coast. We have got several on the Gulf Coast.

I think these things don't make much sense to me, frankly. I think it is just angst. There was a lot of angst when they split the Fifth Circuit. It went on, every kind of fear and concern, voting rights were going to be denied, it was just awful, but somehow, it was done and everybody is so happy.

Look at these numbers, Senator Feinstein. Now, I know this is a busy circuit. It has got 6,000 immigration cases. But trust me, an immigration case is not as big as a multi-defendant conspiracy cocaine case or an antitrust case. Those can be handled in a larger number. But even then, the existing caseload per judge that is being handled is not the highest. The Ninth handles 560 per judge, which is large, but the 11th has 642. The Fifth has 567. And the Second has 524, and that is as of June 2005 from the Administrative Office of the Courts statistics.

True, some others, you say that the 12th would not have that many judges, but it would be about 326, I believe. But here, the First Circuit has 314 per judge. The Third, 307. The Fourth, 355. The Sixth, 316. The Seventh, 337. The Eighth, 322. And the D.C. Circuit, which I have been trying to take a judge from—

[Laughter.]

Chairman SESSIONS [continuing]. Has 114, but they act like the roof is going to fall if you take one of their judges, but they only have 114 per judge and you have 560. But they say theirs are big cases.

But anyway, so I think the numbers are important here. But I have—

Judge O'SCANNLAIN. Mr. Chairman, if I could just make one point with respect to that, and that is that perhaps the most successful circuit of all is your circuit, the 11th Circuit, which has the highest number of cases per judge. They have made the decision, they do not want additional judges because they feel to do so would be to affect their decisionmaking ability and to create precisely the kinds of problems we have been hearing about during this hearing. So they have elected to stay at whatever it is, 12 or 13 or something like that, and yet take a huge burden, which, God bless them, they do a terrific job. They have all of the same bells and whistles that we do, pretty much. There are differences, of course. But they are a much more efficient circuit than we are and their backlog, or at least their lag time, isn't as bad.

I am glad you pointed out the disparity between the circuits, which run from 100-and-something to well over 600. The key to me when I hear all of that is that the 11th Circuit can do it with fewer judges and be very effective.

Chairman SESSIONS. I know there perhaps have been ideological and judicial philosophy concerns about the Ninth Circuit. We know it is the most reversed circuit in the country. I think some of the reasons for that is not ideological, but as I think some of you suggested, these panels of three being selected out of a very large number, you have more likelihood of an aberrant panel than you would in a smaller court, perhaps.

But at any rate, I am concerned about the size of this court. I think 28 judges is breathtaking. I would note that the bill that has been proposed would add seven new judges to the old Ninth Circuit and add no new judges to the 12th. So all the new judges in their proposal, which should be a pretty noticeable increase in judges and at least keep those caseload numbers more reasonable, perhaps, than they are today.

I want to discuss this question of whether we are dealing with a court or the House of Lords.

[Laughter.]

Chairman SESSIONS. I mean, to have an en banc that 28, 35, 51—well, 51 judges counting the senior judges, but an en banc, you would just have, say, 28 if you were fully stocked in the Ninth, would you share with me—I think, Judge O'Scannlain, you wrote, or was it you, Judge Tallman, that emphasized that most—the practical problems of maintaining uniformity, maybe the psychological pressures on judges to try to conform to a circuit that they can identify with, how that is impacted as you get larger and larger?

Judge TALLMAN. Mr. Chairman, you are recalling, I think, both my oral and my written testimony from the April 2004 hearing, where I laid out the case for why the limited en banc process has not worked very well. I know Judge Roll is prepared to address that in his testimony, as well. But there certainly is a practical limit to how many judges can effectively hear a case en banc.

We are now, as you know, going to experiment starting January 1 with 15 judges, which I understand is about what the Fifth does when they sit en banc, but I also understand, and I believe Judge Tjoflat touched on this when he testified in April of 2004 that that was one of the deciding factors that pushed the judges of the old

Fifth into agreeing that it was time to divide. They had an en banc hearing with 25, I think it was at that time, and it was just unmanageable. It was too many judges to try and wrestle with the issue effectively.

Chairman SESSIONS. Perhaps—

Judge SCHROEDER. Could I just respond?

Chairman SESSIONS. I will say this, and then I will recognize you, that I am not aware in the Western world of a court this big, in the Western heritage of law that we have a court this big. It ceases—I think the question is, is it a court anymore? Is it just a vote, you know, some sort of who can get the most votes in this big to-do? So I think that is a legitimate concern.

Chief Justice Schroeder, I will hear from you and then we will go to Senator Murkowski.

Judge SCHROEDER. I just wanted to respond briefly with respect to size that we should keep this in perspective. There are fewer judges in the entire Ninth Circuit than there are in the State court system of Arizona. The former Chief Justice of the Arizona Supreme Court has testified previously—he was not Chief Justice at the time, but in opposition to a split of the circuit because in relation to other court systems in the court, we are not that big.

Chairman SESSIONS. The Supreme Court of Arizona?

Judge SCHROEDER. The Supreme Court of Arizona has five, but there are over 20 appellate court judges, intermediate appellate court judges in Arizona.

Chairman SESSIONS. Well, we have those, too. I think we have nine on our Supreme Court, but as you said, I think traditionally it has been seven or nine. Some have had five. But I have never seen this one as large as the Supreme Court—

Judge SCHROEDER. Of course, we are not a supreme court.

Chairman SESSIONS. Well, that is true—

Judge KOZINSKI. You could make us.

[Laughter.]

Chairman SESSIONS. Do you want to make that?

Judge KOZINSKI. It is OK with us.

[Laughter.]

Judge O'SCANNLAIN. Well, Mr. Chairman, we are indeed the court of last resort for something like 97.6 percent of all Federal appeals, at least in our circuit, and it is pretty much the same in every other circuit.

Chairman SESSIONS. In our court of appeals, I don't know how they do the en banc.

Judge Kozinski, and then—Senator Murkowski.

Judge KOZINSKI. I think if you make us—

Chairman SESSIONS. Senator Murkowski?

Senator MURKOWSKI. Mr. Chairman, before I begin my questions, I have got a question to you. I understand we have got a group of five stacked votes that have just begun. Can I ask what your intention is in terms of the second panel and what you—

Chairman SESSIONS. My intention would be for you to, I guess, finish with this panel. I think we need for—these judges have come so far, I think we need to make it complete today.

Senator MURKOWSKI. OK. I appreciate that. I will be quick, then, with my questions.

Judge Schroeder, you had indicated in your testimony the three reasons why it is imperative that we not move forward now. One of them was what we are facing with Katrina. The second was the immigrations appeals issues. And then the third you noted was the new litigation from bankruptcy reform and immigration reform.

Last year, in April, I had also introduced legislation that would split the court. This was pre-Katrina, this was pre-bankruptcy reform, although we were certainly talking about bankruptcy reform and immigration reform and the immigration cases are certainly escalating. I guess my question to you is, you are saying, not now. In your mind, is there ever a point when it is appropriate, when demographics or whatever issues within the court would merit a division of some sort?

Judge SCHROEDER. Senator, I am not religious on the subject. I think that times change, that things happen. I think that if we have experience with a court of 35 or of 40 active judges, if we do have that experience and find that that is too large and that it should not function, we should reconsider. I think that we can always look at what we are doing and benefit from our own experience and from the possibility of change.

As I have indicated, we have moved from a court of 11 on an en banc to 15 because we are trying to respond to criticisms that the 11 was too small. We—actually, our court liked the 11 because we thought it was an efficient use of resources, but we want to respond to criticisms and to adjust, and we are willing to work to see what changes may be constructive. We will work with you, what changes might be constructive in helping us deal more effectively with the caseload.

Senator MURKOWSKI. I appreciate that openness and we do, I am sure, look forward to working with you and the others who have testified here today as we try to resolve these issues.

You had also indicated—your comments were more to the stress on the administrative structure and I think, certainly in the presentation that I made and the Chairman here, our concern was more to the delay to the litigants, the justice delayed is justice denied approach. And I can appreciate that from an administrative point of view, we do need to be conscious of the costs. We do need to look to administrative efficiencies.

But my constituents, again, are more concerned about when is my case going to be heard? We want to be able to answer to them and to respond to them.

You have indicated that you had used to the court's benefit technology, and that is necessary and it is important, but I recognize that even with all the advantages of the technology that I have at my disposal, I still have to read my clips. I still have to read my briefs. I still have to do that work. There are things that technology cannot make efficient. All of you judges sitting there know that you have to do the listening, you have got to do the reading, and no amount of BlackBerrys or computers are going to speed that up.

Have we gotten to the point where we have utilized t technology as much as we can, but still, because of the nature of our courts and because of the process that requires that we have a human brain to process it at the final outcome, how much more can we squeeze out of the Ninth?

Judge SCHROEDER. Oh, we have learned to work smarter, Senator, and we have learned that when you have a volume of cases that have repetitive issues, that there are ways to deal with them that give adequate consideration, full consideration to those issues and yet still permit similar cases to, once the critical issue is decided, to be handled expeditiously. And there are ways that we have been able to do that and we can continue to do it.

Other courts have done the same, because the volume of cases both in the State courts and the Federal courts has increased and we have adjusted to it and we have been aided greatly by technology and by new means of communication. But we also are very concerned, as Judge Kozinski has said, about maintaining very good relations with each other and I think we have superb relations with each other in the Ninth Circuit.

Senator MURKOWSKI. It makes you wonder, though, when we count cases, it is just one, two, three, four five. But, in fact, one immigration case might be very similar, an Alaska lands issue that relates to laws that judges who have an expertise in immigration cannot be possibly able to prepare in a quick time period and I think this is where some of the frustration lies, is that all cases are not equal in terms of counting for caseload purposes. You have some, as was mentioned, whether it is an antitrust case or whatever the issue is, where we are trying to say in looking at a caseload that a number is a number and that there is some equivalency there and I don't think that that is necessarily the situation that we are faced with.

It is something that when we are looking to Senator Feinstein's concerns about how we get to parity with caseload, that might be something that we need to review, as well, is the types of cases that are coming to us. If the types of cases that are coming out of Arizona and California are 85 percent immigration-type cases, how does that mean we might want to account for and move those cases around? Any comments on that?

Judge KOZINSKI. There is no doubt about it, Senator, that Arizona and Nevada have a great deal more in common with California than they do with Alaska. That raises the question of what sense it makes to have a circuit that starts out at one end of the Mexican border and ends at the other end of the North Pole.

The beauty of the current Ninth Circuit is that there is not a single State that has a common interest with no one in the circuit. We have California. California has a border with Mexico, but so does Arizona. We have water problems, issues which I understand is not a big issue—

Senator MURKOWSKI. We want to solve your water problems.

Judge KOZINSKI. Senator, you do that and you can take away a judgeship.

[Laughter.]

Senator MURKOWSKI. Is that a promise?

Judge KOZINSKI. But it is not a big issue in Montana. It is not a big issue in Alaska. It is a huge issue and a huge shared issue in Nevada, Arizona, and California.

Timber, frankly, is not a big issue in Arizona, I don't think, but it is a big issue in Washington and Oregon—it is not in Nevada, either—and in California.

The beauty of the current makeup of the Ninth Circuit is that all of us have to be experts in some areas. I am very proud to say that sitting right here at the front table and behind us, including Judge Kleinfeld, each of us, I think—and again, I don't want to brag for myself, but just to speak for my colleagues—I consider each of them an expert in immigration law. Now, this may seem a simple subject to you, but believe me, it is an intricate field that requires a great deal of expertise and a great deal of understanding. And each of my colleagues, and I hope I also include myself, is not simply just familiar with it, but actually knows it quite well.

Now, I think it would be a great loss, and I think that experience learned from, in Judge O'Scannlain's case, 19 years on the court, Judge Kleinfeld, 15 years on the court, would be lost because there would not be very many immigration cases coming out of the 12th Circuit. What we are doing is then having a bunch of rookie judges deciding these cases. It may seem easier than your conspiracy cases and than your no-conspiracy cases, but trust me, Mr. Chairman, they are hard. They are much harder than you would imagine.

What we have in the circuit now, where each of the judges is a generalist and at the same time is an expert. But we have no case, no State that has a single interest that isn't shared by at least one other State. This is a strength, Senator. This is a strength we should not give up.

Senator MURKOWSKI. Let me ask you just very quickly down the line—

Chairman SESSIONS. Go ahead, if you will be brief and—

Senator MURKOWSKI. I will be very quick and I will ask everyone to, as well.

Chairman SESSIONS [continuing]. If you ask your question and the answers will be brief—

Senator MURKOWSKI. You all have years and years of experience on the bench. Since coming to the Ninth Circuit, what has the increase in caseload done to your quality of life? Judge Schroeder, we already know that you are giving up your anniversary to be here to testify and we do appreciate that, but what does it mean to your day?

Judge O'SCANNLAIN. Well, a very practical answer in my case, I came on in 1986 when we were doing about 180 cases per judge per year, which meant that I was responsible for about 60 decisions, 60 opinions per year in the late 1980's. Now, we are well past 500 cases per judge. We have tripled our productivity and we have enormously expanded the amount of time that it takes to get to maintain that.

The one thing that I will say is common to this court, but it is no different to any other court, is that I think we have an enormously strong work ethic and we really work very, very hard to try to bring those numbers down. That is why it is so embarrassing for us to be known as the slowest circuit in the country, because it is not from any lack of effort on our part, at least in terms of the judges that are here now.

The problem is the load. It has tripled in my lifetime. If you go back to Judge Browning, who was appointed in 1960, it is probably a tenfold increase in load.

Senator MURKOWSKI. So yours has tripled?

Judge O'SCANNLAIN. Yes.

Senator MURKOWSKI. Judge Tallman?

Judge TALLMAN. The biggest supporter of the split is my wife and it is because she never sees me. I travel, on average, between case and court Committee work, at least half of each month, two out of 4 weeks. And the caseload has increased by 70 percent in the 5 years that I have been on the court, 2000 to 2005. You bet that has an adverse impact on the family life of our judges. There is a limit, there is a breaking point beyond which machines cannot replace human endurance and families suffer. I know your families pay a high price, as well, for your sacrifice.

Senator MURKOWSKI. Did you say you live in Seattle?

Judge TALLMAN. I do.

Senator MURKOWSKI. And yet you said you only had 5 days last year—

Judge TALLMAN. Five days. I sat hearing cases in Seattle 5 days last year. The rest of the time was in California or some other part of the circuit, and that does not make my wife very happy.

Senator MURKOWSKI. Judge Schroeder or Kozinski?

Judge SCHROEDER. The tip of the iceberg is the time that we spend in court hearing cases, because we do our work in the chamber, and the court does not sit in Phoenix, so I spend all of my time in hearing cases outside of my home chambers, but I am able to do that because I am able to travel and I have learned to do it.

I regard it as the greatest honor and privilege one can have, to be a United States Circuit Judge. I regard being a United States Circuit Judge of the Ninth Circuit as the best job that the law has to offer. I regard the diversity of the geography, the people, the joy of working with colleagues who are smarter than I am is wonderful, and one of the greatest experiences I have is when I am able to travel to Alaska. I have done so with my husband several times. It is a wonderful place and it—

Chairman SESSIONS. Judge Schroeder, our vote is down to one minute, I think—

Judge SCHROEDER. Excuse me.

Senator MURKOWSKI. Thanks for the compliment. I appreciate it.

Chairman SESSIONS. and they are not going to carry them much longer. They are getting serious. Obviously, we don't think they are real serious, but they are more serious, and so the extra time that we sometimes have—and Judge Kozinski, thank you—

Judge KOZINSKI. My answer is very simple. When I got appointed 20 years ago, I got about 4 hours' sleep and I still get about 4 hours' sleep. I insist on it. I don't care how hard the work is. I am going to get my 4 hours no matter what.

[Laughter.]

Chairman SESSIONS. One thing I would note under the bill as I see it that Senator Murkowski has proposed, a new Ninth Circuit, yes, the new 12th Circuit would have 340 cases per judge, but the new Ninth Circuit with their new judges would have its caseload

fall from 560 to 511, and that would not be out of line with at least half a dozen other circuits.

I wish we could continue this. Our other panel, let me tell you, sometimes we have been able to work back and forth between the votes. I don't think—they are keeping the time tighter now. We are supposed to have five votes. That can mean almost an hour. Our goal would be to be back here in about 45 minutes to have the next panel, but I am sure it will be at least 30 before we get back. I apologize.

[Recess.]

EVENING SESSION[6 p.m.]

Chairman SESSIONS. The Committee will come to order.

That spasm called a series of votes took longer than it should. While Senator Murkowski and I were working away, they were voting and we missed the first of the votes. It wasn't close, it didn't affect any outcome, so you have to get there. But then they slowed down. If they had moved on at that same speed, we would have been here sooner and I apologize very much for interrupting what has been a remarkably interesting and important hearing, I think.

So we have our second panel. Senator Feinstein told me she will be here. She was just voting when I was and perhaps some of our other members will be able to return.

On this panel, we will gain more insight into the Ninth Circuit as we will explore the possibility of housing a new 12th Circuit in Phoenix, again, without having to build a new courthouse to do so.

We will hear from four witnesses. The first witness will be Judge Andrew Kleinfeld, appointed to the Ninth Circuit in 1986. Judge Kleinfeld traveled all the way from Fairbanks, Alaska. I saw Senator Stevens just a moment ago and told him you were here.

The second witness will be District Judge John Roll, appointed to the United States District Court in Tucson in 1991, and we will hear from Judge Sidney R. Thomas, appointed to the Ninth Circuit in 1995, and from Chief Judge Emeritus Marilyn Huff, appointed to the U.S. District Court for the Southern District of California in 1991.

Senator Murkowski, we are glad you are here. Thank you for coming back.

Judge Kleinfeld, we will start with you, and we will try to keep this to 5 minutes. It is getting late. But if you need time to wrap up, that will be all right.

STATEMENT OF ANDREW J. KLEINFELD, CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, FAIRBANKS, ALASKA

Judge KLEINFELD. Thank you, Mr. Chairman. I very much appreciate your inviting us and allowing us to be heard on this, and I am especially proud and grateful as an Alaskan to see my fellow member of the Alaska Bar Association, Senator Murkowski, in this august body. I really appreciate it.

The basic theme of my colleagues who oppose a split is if it ain't broke, don't fix it. It has been just the way it is since 1891, except that we added Hawaii to it, and that is not that long a time and nothing much has changed that requires a change of the Ninth Circuit.

My basic theme is, there is no reason to hold the other States hostage to California. California is so big that it cannot be part of a traditional appellate court. Any appellate circuit that California is a part of has to be different from a traditional appellate court. There is no help for that, but there is no reason to impose it on everybody else.

The big question, I guess, if you are trying to decide which advice to take is, is it broke? Has anything changed since 1891? Well, five Supreme Court Justices, disinterested persons who are more expert than anyone else in the quality of our work, say that it is broke, the late Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, Justice Stevens, and Justice Kennedy, who served on our court. Now, that is a very broad spectrum of the Supreme Court. There is nothing ideological about that group of five.

What I think is notable to them is not even the rate of reversals, but the rate of nine-zero reversals. If a court gets reversed five-four, there may be philosophical differences. When you get reversed nine-zero, that is not a philosophical difference, that is a mistake, and we are a real leader in nine-zero reversals. That is a bad thing.

The White Commission also said that, after its considerable study, the Ninth Circuit was too big to be a practical appellate body. It recommended that for appellate decisionmaking purposes, the Ninth Circuit be divided into three divisions. My impression is that the White Commission report—I don't really know anything about politics and you do, but my impression is that it was dead on arrival because it proposed to split California and it was terribly complicated, but they just didn't think it was practical to have such a big circuit all sitting together.

Judge Richard Posner of the Seventh Circuit did one of those quantitative economics analyses that he is famous for and concluded and demonstrated in his article about it that the high error rate of the Ninth Circuit, and by error, he is thinking nine-zip reversals, is caused by excessive size. He looked at all courts, and basically, bigger court, more mistakes.

Why? It is plain and simple. We are too big to rehear cases en banc and we are too big to read each other's decisions. What Senator Murkowski said is absolutely right. The technology doesn't do you any good. The problem isn't getting it into our computers, it is getting it from our computers into our heads. They say your head size grows when you become a judge, but it doesn't grow enough to hold everything that is coming from all the other judges.

I suggest to you that the draws on our court, combined with its size and its partial en banc, make the law a game of chance in the Ninth Circuit and law should not be a game of chance, and the Supreme Court can't fix our mistakes. Eighty cases a year, their docket, isn't enough to fix whatever mistakes are in 8,000 decisions of the Ninth Circuit. Too many balls are flying at them.

As for how to split it, my own view is you have got two choices. You can split it into two like the bill pending and it is just like the split of the Fifth into the Fifth and the 11th, perfectly practical, but we will be back because Nevada and Arizona are growing so fast.

You can split into three, Alaska, Washington, and Oregon in one circuit and the remaining States in the other, or you could add

Montana and Idaho to the Northern Circuit. It doesn't much matter. Adding them to the Northern Circuit makes some sense because Arizona and Nevada are the fastest growing States in the country. If you do that, then both of those circuits become very much like the Tenth Circuit in size.

Senator Feinstein is right that California needs a lot more judges. We need 21 judges for California's caseload now. We asked for ten in the fall of 1992, after asking for zero in 1990. In the fall of 1992, we asked for ten. Our caseload is vastly greater than it was then. But it can't be a traditional court with so many judges. It is just an address list or a data base from which you draw courts.

Even though it has to be different from the other circuits, there is no reason that the law and the legal system has to be different in all those other States. What is worse is, if you try to keep everything together, it can't be done right. Right now, a judge on the Ninth Circuit sits in Alaska about once in eight years. There is no way that a Ninth Circuit judge can be sufficiently knowledgeable in the unique Federal law applicable to Alaska, sitting that infrequently. The Alaska National Interest Lands Conservation Act, the Alaska Native Claims Settlement Act, Indian law is totally different in Alaska from every place else. It can't be done. The cases are especially big and complex.

And as for the size, I can't even call people in Phoenix on the phone for a lot of the day because there is a 1-hour time difference and a 2-hour time difference for half the year.

Finally, to wrap up, I have never understood why this is so controversial. We are not talking about seceding from the Union. This is more like splitting up a regional office of the Veterans' Administration. If Congress split a regional office, you would expect some squawks from the present and the future regional administrators, whose fiefdoms were reduced, and from people who feared a RIF or a relocation. But if it was a good idea for the veterans, you would do it.

This is a good idea for America, and it is entirely up to you. The stuff about how you are attacking judicial independence, it is nonsense. It says right here in the Constitution that the judicial powers for cases and controversies, and it says that the power to ordain and establish inferior courts is Congress's. You don't need our advice and consent.

So I urge you to do it. It has been 114 years. It is about time, now that those other States have filled in population, lots of it, that they have a traditional appellate court to go to.

[The prepared statement of Judge Kleinfeld appears as a submission for the record.]

Chairman SESSIONS. Thank you.

We did go over, so if you could stay with us on the time. Judge Roll?

STATEMENT OF JOHN M. ROLL, DISTRICT JUDGE, U.S. DISTRICT COURT, DISTRICT OF ARIZONA, TUCSON, ARIZONA

Judge ROLL. Good evening, Mr. Chairman and Senator Feinstein and Senator Murkowski. First of all, on behalf of all the members of the panel, I want to express our appreciation for the chance to

be heard. I know that the first panel was very invigorating and I know what an inconvenience it had to be to come back and hear us and we appreciate the opportunity to speak to you.

I am John Roll. I am a District Judge in the District of Arizona. I am next in line to become Chief Judge. That will be next year. Attached to the materials that I submitted in my written testimony is a letter from former Chief Judge Robert C. Broomfield, and he joins with me in strongly supporting the formation of a new 12th Circuit Court of Appeals.

He also adopts the conclusions contained in the report concerning available space for courtrooms in Phoenix. There are two courthouses in Phoenix, the Sandra Day O'Connor Courthouse at 401 and the 230 North First Courthouse in Phoenix. Both of those courthouses have adequate room to house a circuit executive's headquarters immediately, for the immediate future. There is not a need to construct new courthouses, and the significance of that is, of course, the figures from the Administrative Office which were offered earlier today describe the need for an $84 million new courthouse in the event of a circuit split.

For the short term and even likely for the mid-term, that is not true. For the long term, of course, the West is growing, and as one witness has already mentioned, Nevada is the fastest growing State in the country by percentage and Arizona is second, so there will be growth that will ultimately require in the long term, perhaps, a new courthouse, but not in the short term.

Judge Browning, another former Chief Judge from the District of Arizona, testified before you 6 years ago. In his testimony, he said in his work with the White Commission, he repeatedly asked split opponents, how big is too big, and when Judge Browning testified before you 6 years ago, the population in the Ninth Circuit was 51.4 million people. It is now 58 million people. When Judge Browning testified before you 6 years ago, the caseload of the Ninth Circuit was under 9,000. It is now about 16,000 cases. When he testified, the median time for decision was 14.4, and it was among the slowest. It is now the slowest at 15.4 months.

When he testified before you, there were 28 circuit judges that were authorized for the Ninth Circuit. There are still 28, but another seven are being requested and really are needed. If seven more are added, the Ninth Circuit will become three times the size of the average circuit, active judge circuit size for the other circuits.

This creates some problems, all related to the limited en banc, and I would respectfully submit and incorporate my comments on that. I think that it is structurally flawed. The limited en banc results in only 11 judges sitting. It will be 15 after the first of the year. The votes, as I included in my appendix to my testimony, indicate that currently, since the White Commission, one-third of the en banc votes are by six-to-five or seven-to-four votes. That means six or seven judges are speaking for a court of 28. When 15 judges sit, it will be eight or nine judges speaking for a court of 28.

It results in some odd results. First of all, because whether a case goes en banc is determined by whether a majority of the judges on the court vote for the case to be heard en banc. Our court is so large, it takes 15 votes for that to happen. There weren't 15

votes for medical marijuana, for euthanasia, for any number of other cases that I point out and they were never heard.

There is, in fact, a recent case, the *Bactine* v. *Bayer case*, that was recently decided by two-to-one. There was a ruling by a panel that the Supreme Court's *Crawford* v. *Washington* case would be retroactive. Nine judges, including four circuit judges who appeared before you here today, voted for rehearing. They said five other circuits have looked at this already and they have concluded it is not retroactive. We should take this en banc. They didn't have enough votes. It will probably become one of the latest cases by the Supreme Court to be unanimously reversed when it was decided by a panel but never heard by the full en banc.

Justice Kennedy in his letter to the White Commission said a circuit that wants to be outside the normal scope of a regular circuit court in the United States should bear the heavy burden of showing that, in fact, there is a reason for that, that there are compelling reasons, and Justice Kennedy, who served on the Ninth Circuit, said there has been no such showing.

If the Senate and the House leave it up to the Ninth Circuit to decide when it is time for a split, I submit that, as Judge Browning said, when will a circuit be too big? The answer from the circuit will either be never or the answer will be, we will tell you, and respectfully to the Ninth Circuit, it is not a Ninth Circuit decision. It is a Congressional call. Thank you.

[The prepared statement of Judge Roll appears as a submission for the record.]

Chairman SESSIONS. Thank you, Judge.

Judge Thomas?

STATEMENT OF SIDNEY R. THOMAS, CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, BILLINGS, MONTANA

Judge THOMAS. Thank you, Mr. Chairman. I want to also thank you and the other Senators for coming back from the vote. We appreciate your time today and also appreciate the extra time you are giving.

My name is Sid Thomas. I am a Circuit Judge. I have chambers in Billings, Montana. I presently serve as the en banc coordinator for the Ninth Circuit, the death penalty coordinator. I sit on the Executive Committee. As I testify here, my views are, of course, my own.

You have my written testimony and I will not repeat that, but I did want to address a couple of issues today, and I want to take perhaps Senator Kyl's challenge to step back a bit and see what kind of judicial administration we want for the—how to administer justice best in the West. If you look at the data and step back, I think you will find that the Ninth Circuit, and a large circuit, is the best way to administer justice effectively.

There has been a tremendous change in the case mix of the Federal courts, not only in the Ninth, but in particular the Ninth, over the last 20 years. It used to be that population growth and caseload growth were correlated. They are not. In fact, you take away the immigration cases, our caseload has actually decreased in the last 5 years. Every other category of cases is decreasing. Partially, that

is due to reforms from Congress in the Prison Litigation Reform Act, the Anti-Terrorism Act, and others. But the fact is, the caseload is decreasing in the Ninth Circuit that is non-immigration-related.

For some areas of the country, this has been a long-term trend. In the Northwest, it has been completely flat for about 20 years. It has not increased, even though the population has increased.

The reason is that we have a lot more "pro se"s filing. We have a lot more administrative appeals. So we cannot assume for the future that we are going to have population increase, caseload increase justification for additional judges.

What the case mix now means is that we need to have a strong central staff to engage in triage and let judges do judging. If the Ninth Circuit is split, we will take valuable resources, we will replicate them, we will significantly increase delay. We will not solve delay. Let me explain why that is.

Right now, 80 percent of our cases are dealt with through nonjudicial panels, that is, cases processed through our staff attorneys. The Ninth Circuit, because it has been able to aggregate resources, has saved judges an enormous amount of time in ways that other circuits have been unable to duplicate. Let me give you a couple of examples.

We have an appellate commissioner. No other circuit has that because they can't afford it. The appellate commissioner resolved 4,600 motions that would have been heard by judges last year, about 1,200 fee petitions.

Our circuit mediators resolved about 900 appeals. Now, to put that in context, the entire output of the D.C. Circuit on merits cases was 500 cases last year. Our mediators resolved 900 cases, and they enjoy success much greater than any other circuit because they have critical mass.

Our staff attorneys resolved 6,000 procedural motions, and that is done by triage to make sure that we don't have procedural waivers, by focusing in on that. That centralized staff is critical to handle volume.

If the Ninth Circuit is divided, no matter how it is divided, those resources will be lost, and we know that because we can look at other circuits and see what kind of staff resources they have. We track cases by inventory, and so therefore when a precedential case is made, we have resolved up to 200 cases at a time. No other circuit has that sort of resource.

So what is the issue now? We are looking at delay. The Ninth Circuit hasn't been the slowest circuit over the last 10 years. The Sixth Circuit generally has, and the Second Circuit. The White Commission found that delay is not related to size.

Our delay problem started in the early 1990's when a third of our court was vacant. We built up a delay in that period that Senator Kyl was talking about between submission of briefs and oral argument. We were able to bring that fairly current until the onslaught of immigration cases. Immigration cases have increased 570 percent in the last few years. As I said, our other caseload has only increased 1 percent.

If you take the resources available to us and you divide them and you strip them, it is sort of like if you have a restaurant where you

have a slow wait staff and you think the solution is to divide the restaurant, hire more chefs, fire a lot of the wait staff in the kitchen, it is going to be slower. It will be significantly slower in terms of delay.

So I think we need to put this in a broader context and look at the assets. Now, can we do things better? Of course, we can. If you take a look at spot delays, for example, if you take the States of Montana and Alaska with low caseloads, we can eliminate the spot delays in those areas fairly quickly, and those are solutions we can do without restructuring the Ninth Circuit.

But what will happen with the Ninth Circuit is you won't solve any of the problems. We will still have a limited en banc system in California because that will have over 20, 25 judges. You will still have all of the other attendant problems that people are discussing today. You won't have solved anything.

The better approach is to, I think, reinvent the judiciary, make it more effective. We try to do that every year. We try to be responsive to what your concerns are and we certainly want to work with you in the future. But I think for the present, if you look at the data carefully, it only supports keeping the Ninth Circuit together. Thank you, Mr. Chairman.

[The prepared statement of Judge Thomas appears as a submission for the record.]

Chairman SESSIONS. Thank you, Judge Thomas.

Judge Huff?

STATEMENT OF MARILYN L. HUFF, CHIEF JUDGE EMERITUS, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SAN DIEGO, CALIFORNIA

Judge HUFF. Thank you. Last but not least, I am Marilyn Huff, the former, immediate past Chief Judge of the Southern District of California District Court and I am also speaking for our current Chief Judge, Hon. Irma Gonzalez. Together, we oppose the split of the Ninth Circuit because the split will reduce resources for the district courts, hurt administrative sharing, result in a waste of taxpayer money, and further splinter enforcement of our borders.

There is a reason I am passionate on the resource issue. Senator Feinstein knows me well, as perhaps many of you do on this issue.

Senator FEINSTEIN. May I interrupt you for just a moment? I didn't have a chance to introduce Judge Huff. She is a bright star. She is an amazing judge. I have had occasion to talk with her and to watch her and California is very proud of her. I just want you to know that.

Judge HUFF. Thank you. I share the respect for Senator Feinstein because she is right on this issue. This is lose-lose on the resource issue, and this is why.

Our court already experienced a tremendous increase in caseload and then a tragic loss of judges due to illnesses and death and we clamored for help. We were forced to rely on volunteer judges, which is the proposal of this split. The volunteers are helpful, but you can only do crisis management with volunteers. You can do no long-term planning and it doesn't work.

The split proposals, all of them, end up with 72 percent of the work in the circuit with California, and so the split is not fair and it is not equitable. Because of our experience, this is a problem.

Next, splintering enforcement of our borders. We share the border with Arizona. This would only further exacerbate the problems. Right now, Border Patrol can bring cases either in Arizona or in California and we have an administrative sharing agreement. That, on one of the split proposals, would go out the window.

Next, the issue of administrative sharing. Because of size, the Ninth Circuit has actually done some positive things. The Jury Committee, one of our critical components, improving service for jurors. Our Capital Case Committee has saved millions of taxpayer dollars by instituting rigorous case budgeting requirements for the lawyers. It has been wonderful. Our Fairness Committee has promoted equal justice of the law. And then finally, we believe our Wellness Committee has resulted in promotion of health for our most important resource, our people.

And then, finally, the issue of cost. Because we are going to end up with too many cases, 72 percent of the cases in one circuit, then it is going to unnecessarily waste taxpayer funds to duplicate the administrative staff necessary to handle a new circuit.

So in conclusion, I believe that it is improper at this time to have a split of the Ninth Circuit and I note that I am ahead of my time.

[Laughter.]

Chairman SESSIONS. Thank you very much, all of you.

[The prepared statement of Judge Huff appears as a submission for the record.]

Chairman SESSIONS. I guess I want to say, everybody has got numbers and everybody has facts. I remember one time in Alabama there was a dispute within the Republican Party about whether the Presidential electors should be given based on a winner-take-all or a proportional representation. We heard the other day California is still winner-take-all. So they had this big fight and they made the most eloquent arguments. But when it was over, everybody that was for Ronald Reagan voted for winner-take-all because they knew he was going to get the most votes, and everybody that was for George Bush voted the other way because they wanted at least a few of the votes. I don't know why that made me think of that.

[Laughter.]

Chairman SESSIONS. I almost want to say, why are you really for splitting and why are you really against splitting?

Let me ask a few questions and I will pass on my time. Judge Thomas, both you and Judge Huff say that you think somehow there would be—you say in your written statement there would be an increase in delays and a reduction in access to justice.

Judge THOMAS. Yes.

Chairman SESSIONS. That did not happen when the Fifth split, and, in fact, they have the most efficient circuit, the 11th and the Fifth, too, are two of the most efficient, productive circuits there are, both of which, if I am not mistaken, the Fifth has 567 case per judge, more than the Ninth, and the 11th has 642 cases per judge, 40 percent more than the Ninth Circuit per judge.

So I guess I am going to ask you really honestly, why do you all think this is going to be some bureaucratic, expensive deal?

Judge THOMAS. Well, I do really believe that and it is not a partisan issue on our court. On a bipartisan basis, the vast majority of our judges want to keep the circuit together and we are talking appointees from Kennedy through Carter through Reagan, Nixon, and George Bush.

Chairman SESSIONS. But is it all because of money?

Judge THOMAS. No, it is not just all—and the reason, if you look back to what happened when the Fifth was split, as I mentioned, the case mix was so different. Every case was argued. Every case was a real case. Now, 40 percent of our cases are pro se and it takes a lot of staff to get through those cases. If you have a pro se case in chambers, it takes a lot of time for judges and for the law clerks, the available law clerks. We have an effective pro se unit and we require every pro se case to go through that. That is 40 percent of our cases. That is about 5,000, 6,000 cases last year in the Ninth Circuit alone.

So things are far different, and what I think the 11th Circuit figures suggest is that we have some room on our court to be even more efficient before you need to split. If you can get those numbers up, we still have a substantial reduction—

Chairman SESSIONS. You want more judges, I mean—

Judge THOMAS. Well, we do, but, you know, it is not the key to get more judges. I think if—it is like too many chefs, really, at the restaurant. If you have more judges and they are forced to—

Chairman SESSIONS. Well, why do you not want to split it? I mean, OK, you are saying we can be more efficient and we don't need a lot more judges. But what is it that causes you to draw back from what from my perspective is the perfectly logical thing?

Judge THOMAS. If it would solve the problems and if I thought it would, I certainly would support it. But, in fact, it is going—

Chairman SESSIONS. What problems? I mean, I am just saying collegiality, coherence in your opinions, less reversals by the Supreme Court, perhaps more ability to hold—we heard from the Chief Judge—she is back there shaking her head, but we heard from the chief judges of the Fourth Circuit, the chief judges of the 11th Circuit passionately argue that they think 12, 13, is really getting large, and if you get much larger than that, you can't operate a court effectively, and they would never—

Judge THOMAS. They didn't have our experience, though. We are able to get along collegially quite well. I see my friends and colleagues much more than I do the district court judges who are across the alley from me. We talk all the time. We do have a fairly close-knit circuit. So despite those fears, we have—the 11th Circuit has survived because of their very heavy reliance on visiting judges. That is the tradeoff they made. They have a third of their published opinions involve visiting judges and they decided to expand that way, which, of course, is an option to us, but we haven't used visiting judges to the extent that the 11th Circuit has.

Why am I really against it? Because I think we understand that if this is split, California and the Arizona-Nevada sections, we will be in such a deep hole, we can't dig out in our judicial lifetime, both administratively—

Chairman SESSIONS. What do you mean, you can't dig out?

Judge THOMAS. The caseload. Right now, we are doing quite well with the caseloads, but if take away—

Chairman SESSIONS. I have already gone beyond my time, so—

Judge THOMAS. But if you take away those essential tools that we have to deal with the case management now—

Chairman SESSIONS. Why would they take those away?

Judge THOMAS. Because they aren't available. Those resources aren't available in smaller circuits. The judiciary budget is based on—

Chairman SESSIONS. Well, let us stop there. Why would they take away what you have already got, and why would we take money from a district court that has no real—I mean, you are just going to try the same number of cases and they are going to appeal the same number and it is going to go up there. Why are you worried? I don't understand this.

Judge HUFF. Could I answer?

Chairman SESSIONS. I think there is something more at stake here.

Judge HUFF. Could I answer that? Because of our experience, the formula for funding the judiciary primarily comes from number of authorized judges, not from your caseload. So if the California circuit has 72 percent of the cases, they will not get the same proportion of resources and so you are not able to then have staff—

Chairman SESSIONS. What does that have to do with the District Court in the Southern District of California, your district?

Judge HUFF. If the circuit is—we care about delays of our caseload.

Chairman SESSIONS. Well, all right. So you are speculating that they are not going to get enough, but this bill calls for seven more judges for the—

Judge HUFF. You could pass seven more judges tomorrow with delinkage, which the Judicial Conference says, don't link the two together.

Chairman SESSIONS. OK. So that is what you would prefer. OK. My time is up and we have got—

Judge THOMAS. May I finish, just one quick additional answer—

Chairman SESSIONS. All right.

Judge Thomas [continuing]. Is that we have been talking about the circuit court, but I think Judge Huff makes an excellent point on the district courts because you are splitting up the district courts, as well, and from—

Chairman SESSIONS. They don't work together. District courts don't—

Judge THOMAS. If I might, one of the reasons it is important to district courts is that we have the flexibility now, which you don't have with intracircuit—as easily with intracircuit honing of judges. We sent judges down to help out when they had problems in the border States in Arizona and San Diego. We were down to one active judge in Montana and we were parachuting judges in at the last minute, and we could do that because we would pick up the phone and people could call judges.

On the other hand, dealing with another circuit is entirely different. The Tenth Circuit—Montana borders Wyoming on the Tenth and we border the Dakotas on the Eighth. We couldn't get

any judges out of those circuits and they didn't want to come for a lot of reasons, but one of them is, well, they say that is different circuit law. It was too cumbersome to get through the administrative procedure.

But because judges have relationships, they can pick up the phone and do it, and we know there are going to be spot problems, whether it is on the border States, whether it is caused by the Exxon Valdez, whether it is caused by simple judicial vacancies.

So for the district courts, it has been a great resource. And the other thing for the district courts is smaller circuits don't have the resources in terms of courtroom management architects and so forth. In Montana, we have benefited greatly because we have a circuit architect who came in and said—

Chairman SESSIONS. Well, those are reasons, but I don't know. I remember that one of the best judges we used to get was from California. He would come down to Mobile to try cases every year because he was a National Fellow of the Camellia Society, and when we had the camellias in season, he came down and contributed wonderfully.

Judge THOMAS. Yes. We entice people up with fly fishing in Montana.

Chairman SESSIONS. People go all over the country, I know that. They go to Miami. They line up sometimes to go try cases there.

But my time is over. Senator Feinstein?

Senator FEINSTEIN. Thank you, Mr. Chairman.

See, this has become so difficult because the feelings are so strong about it and it is very hard to ferret it out. I mean, I have two concerns. One is, anyway, let us say California ends up with Hawaii, Guam, and the Marianas. It still is essentially one big State with 72 percent of the circuit, and even with the new judges, 60 percent of the resources. That is a problem that has to be worked on. That is unacceptable on its face.

But the thought, Judge Thomas, that you would lose those appurtenances and technology and assets that you have as part of a split, I don't quite—how would that happen? I mean, you could draft a bill so that you keep them.

Judge THOMAS. Well, let me explain why, and that is because there is a formula that drives judiciary budgets and we know what circuits can afford and what they can't afford and we know what they can afford based on their size, and you look at what other circuits have been able to afford and what they can't. They have to fund essential services, clerks' offices, circuit executive offices, human resources, procurement, so forth.

We have been able to aggregate resources and economize because we don't need to duplicate all of those positions. You look around the United States. No other circuit tracks cases in inventory.

Senator FEINSTEIN. So no other circuit—

Judge THOMAS. No other circuit tracks their cases with an inventory system. No other circuit has an appellate commissioner. No other circuit has the success of our mediator's office because they have some critical mass. So we do have a model and—

Senator FEINSTEIN. Could you put that in writing for me?

Judge THOMAS. Yes.

Senator FEINSTEIN. In other words, what the circuit believes they would lose that they have that is indispensable with respect to the 72 percent of the cases they would have.

Judge THOMAS. Well, sure. And then to go on, it is not just the caseload, too, it is the type of case, as you discussed before. The death penalty cases pose a significant resource problem for us and those would be inequitably distributed in any circuit split.

Senator FEINSTEIN. How many death penalty cases do you have in a year?

Judge THOMAS. Well, it varies from year to year, but I can talk in the aggregate because we can look in the future. Obviously, there are over 600 inmates on death row in California. There are about 125 in Arizona. There are perhaps 70 in Nevada.

If you look at the division of the death penalty cases alone between the different circuit configurations, if you take the present cases that are in the Federal system, 50 percent of the load would be California, 50 percent in Arizona, probably 1 percent or so in the Northwest if you split it that way. Long-term, you have got 60 percent or more cases—65 percent, I think, is the figure that will come out of California, 35 percent or so in Arizona, and those cases by our weighting system are weighted 24. They are very complicated cases.

So it is not just the caseload. There is a disparity in terms of case complexity and the resources needed to have that. We are fortunate enough to have death penalty law clerks and death penalty assistants. Judge McNamee and others, Judge Moskowitz out of your district, have monitored the budgets of those cases and they have saved us millions of dollars and that is on their own time, and those are the district judges who give of their time. Those are the kind of resources we lose because people just don't have time anymore, and that has been a tremendous cost savings.

So, yes, it is going to be imbalanced on the death penalty side and also, I think it is going to be a lot more poorly administered.

Senator FEINSTEIN. So essentially, what you are saying is because of your size, you have built a system which is irreplaceable and on which you depend for any modicum of efficiency—

Judge THOMAS. Precisely.

Senator Feinstein [continuing]. So that becomes important. Let me ask you another question. In terms of community of interests, are the community of interests between California greater with Arizona and Nevada or Oregon and Washington?

Judge THOMAS. I think it depends on the issue involved. Of course, California was the source of all of the law for the Ninth Circuit originally, so they started with the field code. But if you talk about, for example, the fisheries issue, the issues concerning—any of the coastal issues, California has more in common with those in the Northwest, going up to Alaska. If you are talking about Native American issues, those issues involve not only Nevada and Arizona, but in Montana. Alaska is, as Judge Kleinfeld said, somewhat different.

Senator FEINSTEIN. How do you respond to Judge Kleinfeld's argument that Alaska has issues that no one else shares?

Judge THOMAS. We all have issues that are unique to our States and we take time and a lot of study to make sure that we under-

stand it because we are administering national law as it affects those issues. There are acts particular to Alaska, to be sure, but we are administering and interpreting national statutes.

Senator FEINSTEIN. How about water in terms of the community of interest?

Judge THOMAS. Well, there are water issues in Montana all the way down through. The water is a critical issue that unifies the States. Grazing issues, forestry issues, we have a lot of issues in common among the States in the West that aren't shared perhaps in the East but are common to all of our States. And so the resolution of those issues in California or Arizona or Nevada or Montana are very important and needs to be consistently applied.

Senator FEINSTEIN. My time is up. Thank you. Thank you very much. Thanks, Mr. Chairman.

Chairman SESSIONS. Senator Murkowski?

Senator MURKOWSKI. Thank you, Mr. Chairman.

I want to continue along the line of questioning in terms of the resources and the concern that if we were to split, there would be a loss of resources. Under the legislation that I am proposing, the new Ninth, which California would stay, would still be the largest circuit in terms of caseload, in terms of population area, and in terms of judges. So we are going from a situation of being really, really, really big to just being really big.

But you still have access, and I appreciate how the formula works. It is complex and we are not going to try to explain it here other than to acknowledge that there is a formulaic equation that is out there and the authorization of the judges is very critical in terms of the funding. But you would still be the court or the circuit with the highest authorized number of judges, and from what I have heard, Mr. Chairman, I think if there is one thing that both the proponents of a split and the opponents of a split can agree to is that more judges in the areas of the country where we are growing the fastest would be helpful and it is something that we should work to do.

I appreciate what you are saying about the complexity of the cases and it goes to my point to the first panel that we really just can't count the number of cases in looking at a caseload, that there is a weighting that would be appropriate depending on complexity. I think it again goes to the issues that we have before us. We can't just look at the pie charts and the graphs and say, well, this is what we need to do. It is complicated. It is complex.

But I guess I will be leaving this hearing today with three kind of findings that I have written down, and I think you articulated this, Judge Roll. Is it broke? I think that there are enough people in the Ninth Circuit and across the country that are looking at this and saying, yes, it is broke. I do not feel good telling my constituents that it is an accepted fact that, on average, you will have to wait 15-plus months for disposition of your case and that is just the way it is because we happen to live in the West. I don't think we should accept that as a given. I think we should try to do better. So how do we do better?

And then the second thing I am walking away with is, how big is too big, because I did hear Chief Judge Schroeder say, maybe we are not there yet, but that she would retain an open mind that we

might 1 day get to that point in her opinion where it was too big, too unwieldy. But when we are at a circuit that is at 58 million and growing, and if we were to split that circuit, you still have a circuit that has close to 38—it is 37.5 million in the new Ninth and 20 million in the 12th. The numbers, I think, are staggering, in my opinion.

And then the third point that I am leaving with, Mr. Chairman, is certainly the recognition and the need to do more to assist to get additional judges out in the West.

I am talking rather than asking a question and I think we are probably at that point in the evening where we are ready to call it a day, but I thank you for the hearing this afternoon, and to each and every one of you that has traveled so far and who gives so much, who gives so much to your State, to your circuit, to this country, I really appreciate what you do. I do hope that we are able to sit down and really evaluate what the options are. If this split doesn't work, doesn't make things better, then let us look at other options, but let us not just close the door and say, no further discussion. I think that this has been very productive and I appreciate the testimony that we have heard.

Thank you, Mr. Chairman.

Chairman SESSIONS. Thank you, Senator Murkowski.

I would just like to ask a couple of quick things before we wrap up. Judge Roll, you studied, I know, carefully the Hruska and the White Commission reports. Would you share with us your comments, particularly as they relate to Judge Thomas' evaluation of those reports? Do you have a different perspective on them?

Judge ROLL. I do, Mr. Chairman, and I believe that it was also referred to in one of the other written statements in opposition to the split. Senator Hruska's commission recommended a split of the Ninth Circuit. This was previously recommended. This was in 1973. They recommended two splits, the Fifth Circuit and the Ninth Circuit. Only the Fifth Circuit ended up being split.

The White Commission recommended three semi-autonomous divisions. I think it is important to recognize that Chief Judge Hugg, who was the chief at the time that the White Commission's report was issued, said this is a de facto split of the Ninth Circuit and there is no reason, there is no need to do this. The White Commission, in fact, Judge Hugg wrote, and I think it was the University of California-Davis Law Review article that was published in the winter of 2000, said the White Commission didn't meet its burden in showing that we needed to make these changes.

I think it shows two things. First of all, I think it shows that the White Commission was not a clean bill of health for the Ninth Circuit and, in fact, recognized there were serious problems. I think it also represents the attitude of some of the people who oppose the split, which is we will tell you when it is time for a split of the circuit.

Chairman SESSIONS. It is interesting, and I believe it was Judge Kleinfeld or one of the other witnesses—the day is long—that indicated that the Judicial Conference has moved from opposing the split to being neutral on the split, is that correct?

Judge ROLL. That is correct.

Judge SCHROEDER. No, it has never opposed the split.

Chairman SESSIONS. Oh, it has not opposed it?

Judge SCHROEDER. It didn't take a position.

Judge ROLL. I am sorry, Senator. My recollection is, and I believe that it is cited in the materials, the Judicial Conference previously did oppose a split. It is in the White Commission report. If you look in the White Commission report, it indicates that the Judicial Conference opposes a split. That is my recollection.

Judge KLEINFELD. I think they said no court should be split without its consent, but this time, they said—

Chairman SESSIONS. They read the connotation subsequent to that?

Judge ROLL. Yes.

Chairman SESSIONS. Let me ask you, Judge Roll, about a housing plan in Phoenix. Your Appendix E is very helpful on that subject. It lays out four alternatives that could be pursued at very little cost. You also include your letter from Judge Broomfield, which agrees with the findings of the housing plan alternatives report. Why would Judge Broomfield's report be worthy of particular weight?

Judge ROLL. Well, Judge Broomfield was the Chair of the Space and Facilities Committee at the time that the U.S. Courthouse Design Guide was actually formulated and he is intimately familiar with it. As the presiding judge in Maricopa County on the Superior Court and also the Chief Judge in the District of Arizona, he has been involved in courthouse construction projects, including in the Sandra Day O'Connor Courthouse. And, of course, he has gained great familiarity with courthouse construction projects and courthouse needs through his work as the Chair of the Space and Facilities Committee.

I can't imagine anyone deserving of more weight when he says, first of all, that there is available space in either 230 or 401 in Phoenix, and secondly, that the estimates that were previously given about how much space was required are about 20,000-plus square feet high.

Judge KLEINFELD. Senator Sessions, could I add just a word to that?

Chairman SESSIONS. Yes, and would you, if you would like to share a thought about the AOC's report—

Judge KLEINFELD. I do.

Chairman Sessions [continuing]. Which I thought breathtakingly tilted.

Judge KLEINFELD. I do. I—

Chairman SESSIONS. Would you agree with that?

Judge KLEINFELD. Well, here is the thing. You have got a unique opportunity right now for an odd, coincidental reason. Three district courts in critical places—Seattle, Portland, and Arizona—have just moved into new courthouses. What that leaves you with is three empty or nearly empty courthouses in the critical places to put circuit headquarters, whether you split it two ways or three ways. You can do it basically for free, or close to it by Federal Government standards.

[Laughter.]

Chairman SESSIONS. Well stated.

Judge KLEINFELD. If you look at page six of the AO's report, of the exhibits attached to it, here is the gem. Bottom line, $94,698,936. Line if you go up a ways, new courthouse construction, $84,394,500. You will need to do that if you split the Ninth Circuit in 5 years because those abandoned courthouses, either they are going to be filled up or they are going to be excessed. My chambers is in a former Federal district courthouse that was excessed. It is now commercial space. But if you do it now, you don't need to spend $95 million. You can spend $5 or $10 million.

Chairman SESSIONS. I also was frankly troubled by the fact they threw in the proposal of seven new judges, which are probably needed for the circuit anyway, as a cost of the split. I mean, I don't think you—so there are several things that made those costs look high.

Judge Kleinfeld, tell me, as I understand it mathematically, there are 15,000 possible combinations of judges on the Ninth Circuit today who might become a panel to hear a given case. Would you share with us your thoughts about why that makes uniformity and coherence in the circuit more difficult?

Judge KLEINFELD. Well, the greatest scholar of the common law process was Carl Lewellen, a professor at the University of Chicago. What he explained in his treatise and his many other writings was that the key to it is reckonability. All the law cannot be made by a court for any jurisdiction.

Now, when I was a practicing lawyer in Alaska, I could predict what our Supreme Court would do, not just on the basis of its precedents, but because by reading its opinions, I knew the minds of each of the justices and I knew what they were going to do when they didn't have a precedent and I knew when they were going to abandon a precedent. So it means that my clients could avoid paying me a lot of money to litigate things because the outcomes were very predictable. Good lawyers were not surprised much.

When you have got these tens of thousands of possible combinations of judges and a gigantic, philosophically disparate court, when you basically just have a data base from which judges are drawn randomly, until you know your panel, you don't know the outcome.

As far as consistency and coherence goes, if we can't even read each other's decisions, how can we be consistent and coherent, and for the unpublished ones, it wouldn't matter if we did read them because they are so terse. We don't put in the explanations and the facts. You wouldn't know if they were consistent or not.

Chairman SESSIONS. But you publish 670 a year. Is it realistically practical for a practicing attorney who wants to keep up with the circuit to read those advance sheets, read those opinions?

Judge KLEINFELD. Justice Kennedy said that when he was then Judge Kennedy on the Ninth Circuit, it was impossible, and that was back when we were a lot smaller. The other justices who wrote letters said they didn't see how it was possible.

Chairman SESSIONS. Well—

Judge THOMAS. If I might add one thing, Senator, though, the Eighth Circuit has more published opinions than we do total and only 11 judges, and the Seventh Circuit just has about the same number. So size isn't necessarily related to number of opinions. The

attorneys and the judges on both the Eighth and the Seventh Circuit have to read the same number of opinions we do.

Chairman SESSIONS. But it would be rather obvious that they are publishing more opinions than you are—

Judge THOMAS. On a percentage basis.

Chairman Sessions [continuing]. Which I salute you for not overpublishing. I think it is a bane on the law to have too many cases published. I really do. But I assume you pare that number down pretty close to as low as you can get. Maybe you could reduce the number of public opinions, but a published opinion does have value, and as big as you are, you are going to have to have a lot.

Thank you for all of your interest. I absolutely believe that the American rule of law is the basis for our liberty and our economic prosperity, our freedom, and it sets us apart from the rest of the world. We can have international corporations come into Alabama or California and feel like they will get a fair day in court, that nobody is going to be able to demand a bribe, nobody is going to be able to confiscate their property or take their profits without due process of law. They feel comfortable investing here, coming to this country. American citizens feel like if they get in trouble with the law, they will have a fair day in court. We need to protect that heritage.

I believe personally that we could probably reach those goals with smaller circuits, but we obviously have a different opinion on it. I have enjoyed the hearing very much. I thank each of you for the hard work you have gone to to give us the best information that you can.

Senators Murkowski and Ensign and Kyl have all said that they want to be open to how to do this. I think they are pretty firmly convinced we need to do something, but they are open-minded about how to do it. I will be looking to the Senators from the circuit to give us leadership, but at some point, we just need to do the right thing for the American people and that is about all we can do.

Thank you very much. Have a good day. The Subcommittee is adjourned.

[Whereupon, at 7:01 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

[Additional material is being retained in the Committee files.]

SUBMISSIONS FOR THE RECORD

News from . . .

Senator Dianne Feinstein

of California

FOR IMMEDIATE RELEASE:
Wednesday, October 26, 2005

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Statement of Senator Dianne Feinstein Opposing Proposals to Split the 9th Circuit Court of Appeals

***Washington, DC** – At a hearing of the Senate Judiciary Committee Subcommittee on Administration and the Courts, U.S. Senator Dianne Feinstein today raised major concerns about proposals to split the 9th Circuit Court of Appeals.*

Senator Feinstein, who served as the ranking member of the hearing, said that such a split would incur significant financial costs and raise major obstacles to the administration of justice in the West. The following is the prepared text of Senator Feinstein's statement:

"Let me welcome and thank each of the judges here today for taking time out their busy schedules and traveling across the country to share their insights regarding the 9th Circuit Court of Appeals.

The 9th Circuit is the largest Circuit Court of Appeals in the nation in both population and caseload. Advocates for splitting the 9th Circuit often cite the 9th Circuit's size as a basis for dividing it. However, what matters is not the size of the 9th Circuit, but whether the 9th Circuit meets its charge of providing justice to those living in the 9th Circuit. The current 9th Circuit achieves this goal.

Splitting the 9th Circuit is a lose/lose proposition. There are clear financial costs to splitting the 9th Circuit, and there are clear and dramatic costs to the administration of justice.

The uniformity of law in the West is a key advantage of the 9th Circuit, providing consistency among western states that share many common concerns. For example, splitting the Circuit could result in one interpretation of a law governing trade with Mexico in California and a different one in Arizona, or in the application of environmental regulations one way on the California side of Lake Tahoe, and another way on the Nevada side.

The efficiency of the 9th Circuit is also a significant consideration. As presently constituted, the 9th Circuit is one of the most efficient Courts of Appeals in the nation. Splitting the 9th Circuit into two or even three Courts of Appeals would require the creation of new and costly bureaucracies to administer these new courts, thereby losing the economy of scale achieved by having a single administration tending to the federal courts of the 9th Circuit.

Dividing up the 9th Circuit also would require additional federal funds for new or expanded courthouses and administrative buildings, as existing judicial facilities would be insufficient for the new Circuit or Circuits.

Yesterday, the Administrative Office of the United States Courts provided me with a letter estimating the costs for splitting the 9th Circuit under S.1845, which would split the 9th Circuit into the 9th and 12th Circuits. The Administrative Office estimates that the split would have start-up costs of $95,855,172 and would have $15,914,180 in annual recurring costs. These are substantial costs, particularly considering that the judiciary budget is already stretched thin. I ask that this letter be made part of the record.

Finally, one must consider what organization of the 9th Circuit will be fair to **all** the states of the current 9th Circuit.

The plans to split the 9th Circuit leave the states remaining in the 9th Circuit with far, far higher caseloads per judge than those states that would move into a new 12th or 13th Circuit.

Under the current proposals, California and Hawaii would be left in the 9th Circuit, while Arizona, Nevada, Idaho, Montana, Oregon, Washington, and Alaska would move into a new Circuit or Circuits.

These proposals would create nice sinecures with low caseloads for judges in a newly created 12th or 13th Circuit, but would substantially disadvantage what would remain the largest Circuit Court in the nation.

The 'new' 9th Circuit would include 72% of the caseload of the 'old' 9th Circuit. However, even with the addition of the 5 permanent and 2 temporary judgeships proposed in the bills before the Senate, the new 9th Circuit would have only 60% of the judges in the newly created Circuits.

The caseload in the new 9th Circuit would be 536 cases per judge, as opposed to 317 cases per judge for the proposed 12th Circuit. This would leave judges in the 9th Circuit with 219 more cases per judge. This is not a fair distribution of judicial resources.

For the judges in a new 9th Circuit to have comparable caseloads to judges in a new 12th Circuit, the 9th Circuit would need an additional 14 judges, on top of the 5 permanent and 2 temporary judges created by the bills before the Committee. In total, 21 new judges would need to be added to the 9th Circuit for the split to be fair. This would entail its own problems and costs, and highlights the difficulties created by proposals to split the 9th Circuit.

Opposition to splitting the 9th Circuit comes from judges and state bars associations that would move into a proposed new Circuit, as well as those that would remain in the 9th Circuit. Only 3 of the 24 active judges on the 9th Circuit favor splitting the Circuit. The Bar Associations of Arizona, Washington, Montana, and Hawaii all have voiced their opposition to breaking up the 9th Circuit.

I ask that the letters and resolutions from these Bar Associations opposing a split be entered into the record, and I look forward to hearing from this distinguished panel."

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Statement of Judge Marilyn L. Huff
Senate Judiciary Committee
Subcommittee on Administrative Oversight and the Courts
Hearing on Revisiting Proposals to Split the Ninth Circuit

October 26, 2005

I am Marilyn Huff, the immediate past chief judge of the Southern District of California, and I am also speaking for the Honorable Irma Gonzalez, our current chief judge. Together, we oppose legislation to split the Ninth Circuit as the split would reduce available resources for the district courts in California, further splinter enforcement of our borders, reduce administrative sharing, and waste taxpayer funds to duplicate the buildings and staff necessary to administer another circuit.

I speak from experience on the resource issue. While I was Chief Judge, our court experienced a dramatic increase in its caseload–number one in the country for need-- at a time when we experienced a decrease in our judges due to tragic illness and death. We clamored for help. During that time, we relied on over thirty visiting judges, primarily from our circuit, to help with our overwhelming caseload. The size of the Ninth Circuit maximized the available judicial resources to assist with the caseload. It took several years and a bipartisan effort of several dedicated senators and representatives to finally secure the judges that we needed to properly administer justice. On resources alone, the proposed split of the circuit results in a disproportionally large caseload for the circuit with California compared to the other circuit. As a result, it is a mistake to reduce the resources for the district courts by a split of the Ninth Circuit.

The split would further splinter the enforcement of our borders by placing California and Arizona in different circuits. Today, our courts have an agreement that permits the magistrate judges in Yuma, Arizona and El Centro, California to assist each other with their caseload and permits the agents to bring cases in either district. This helps our border cases to be handled efficiently and

effectively. Aside from the loss of resources, a split of the circuit may lead to inconsistent law based on region, further diminishing the enforcement of our borders.

The size of the Circuit does not warrant a split. Instead, the size of the Circuit is one of its many strengths. The size allows a wide and diverse range of views for improvement in the administration of justice. Let me share four examples: 1) the jury project, 2) the capital case committee, 3) the fairness committee, and 4) the wellness committee. The jury committee studies ways to improve service for jurors, a critical role in our system of justice. The capital case committee saves millions of taxpayer dollars by implementing an effective and efficient budgeting system for capital cases. The Fairness Committee promotes equal justice under our law. I am proud of the fact that when I was Chairperson of the Gender Fairness Committee, the Ninth Circuit improved its Employment Dispute Resolution process even before Congress passed the Congressional Accountability Act. Finally, the wellness committee attempts to preserve the health of our most valued resource–our people. These improvements to the administration of justice are made possible by the size of the Ninth Circuit.

Finally, the split of the Ninth Circuit would result in unnecessary and significant costs to taxpayers without justification. No study of the Ninth Circuit has recommended that it be split. The Ninth Circuit already has in place the infrastructure needed to support the court. A split of the Ninth Circuit is not warranted based on the dissatisfaction of some with the results of particular decisions. Indeed, permitting a split to influence the results of decisions would be contrary to our system of government and judicial independence. Rather, a split would require the duplication of buildings and staff at a time that precious resources should be directed where they are needed, not wasted on a Circuit split. In sum, we oppose the split of the Ninth Circuit.

United States Senate
Committee on the Judiciary
Subcommittee on Administration Oversight and the Courts

Hearing on:
"Revisiting Proposals to Split the Ninth Circuit:
An Inevitable Solution to a Growing Problem"
Wednesday, October 26, 2005
Dirksen Senate Office Building, Room 226
Washington, D.C. 20510

Written Testimony of
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Mr. Chairman and members:

I recommend that you divide the United States Court of Appeals for the Ninth Circuit, just as Congress divided the Fifth and Eighth Circuits when they became too large to function well. Our court long ago passed that size. These remarks will address why the Ninth Circuit should be divided, how it should be divided, and how division will affect cost.

I. Why the Ninth Circuit Should Be Divided

Our court is bigger and more powerful than any federal appellate court in American history. That is a very bad thing for the American people, and they know it. During the en banc rehearing in the California recall case, the ACLU's lawyer called us the "Ninth Circus." He was mortified by his slip of the tongue, but we were amused rather than offended by his use of the sobriquet that we know is often repeated when we're not there. Nevertheless, it is no joke when a court is widely viewed as presenting a quality problem, even by Supreme Court Justices

and Circuit Court Judges.

There are two reasons why an excessively large court of appeals cannot function well. First, the court cannot reconsider its decisions effectively by means of en banc rehearings. Second, the judges on the court cannot read the decisions of their own court. These failings lead to unpredictable, incoherent law, with too many errors.

As for how to divide our court, it is less important ***how*** it gets done than ***that*** it gets done. Any division will be an improvement. In my view, the better division is a three-way split and not the two-way split currently on the table. As for cost, Congress will save the American people money by abandoning the giantism we now have on the Ninth Circuit and restoring the smaller units typical of other circuits.

A. Rehearing en banc

Traditionally, appellate courts in the English speaking world sit in panels of three. To rehear the most important cases, and cases where precedents conflict, all the judges on a court sit together. That is called rehearing en banc. That way, a majority of all the active judges on the entire court can speak with a unified voice and settle the matter.

There is one, and to my knowledge only one, exception to this method in the entire English speaking world. That exception is the United States Court of Appeals for the Ninth Circuit. We are a 28 judge court when all of our seats are filled, a 24 judge court at this time. Our court has long understood that it would be impractical for the full court to rehear a case en banc. The suggestion to sit together has been made internally from time to time but has always been quickly and firmly rejected.

There are good reasons why all of us do not sit for rehearing en banc. The oral argument would go all day if each of the judges pursued their lines of questioning, and the conference would go all night if all of the judges debated their views. And then we might well wind up with plurality opinions instead of

majority opinions, leaving the law as unsettled as before.

On the Ninth Circuit, when the full court purports to speak, it doesn't. We use what has been called a "short" en banc, consisting of the Chief Judge and ten others drawn by lot. A majority of an en banc panel—six judges—is not even one-fourth of the full court when fully staffed. Calling six judges out of 28 the voice of the court is a legal fiction. At our most recent court meeting, we increased the size of the en banc court to fifteen: the Chief Judge plus fourteen judges drawn by lot. But this was to make the court look better, not to make it work better. The idea was that we could say that an en banc consisted of a majority of the judges on the court. That is an empty public relations gesture.

What matters is not that the **panel** should be a majority of the court, but that an en banc **majority** should be a majority of the court. A majority of a fifteen judge en banc panel is eight, but eight is less than one-third of a 28 judge court. We will not and cannot have true rehearing en banc because of our size. Calling eight judges out of 28 the voice of the full court is still a legal fiction, and like six

out of 28, it is bad fiction.

This lack of a true en banc is a critical failing. The possibility of rehearing en banc acts as a check on the three-judge panels, helping ensure that they will apply precedent soundly. Because our court is so huge, many panels consist of judges who are all at one end of the philosophical spectrum of our court. Panels without a philosophical mix have less internal discipline and more temptation to push precedent one way or another. To paraphrase a famous public remark by a judge on our court, the Supreme Court can't catch us every time. Courts need a true en banc to catch themselves.

Where a minority drawn by lot controls the en banc, the entire process is a crapshoot. First the litigants have a crapshoot on which three-judge panel will be drawn from the thousands of possible combinations, with a huge potential impact on the result. Then the full court has a crapshoot on who will be drawn for the en banc, again with a huge potential impact on the result. This not uncommon process became obvious in the California recall case, where a unanimous panel

went one way, and a unanimous en banc—on which no member of the panel sat—went the other. Before the en banc decision came down, a member of the three-judge panel publicly remarked: "You know who's on the [en banc] panel, right? Do you think it's going to have much of a chance of surviving? I wouldn't bet on it."

An en banc is supposed to speak for the full court. When it doesn't, luck, rather than law, controls the outcome. About one- third of our en banc votes are six to five, or seven to four. Six or seven judges on a court with 28 seats can't be anything but a crapshoot. And because the Supreme Court can grant certiorari in only a tiny proportion of Circuit Court cases, we are usually the last word for one-fifth of the whole country.

More impressive voices than mine have already pointed out the inadequacy of our "short" en bancs. Justice O'Connor, our Circuit Justice who is especially familiar with the workings of our court, has written that our short en bancs "cannot serve the purposes of en banc hearings as effectively as the en banc panels

consisting of all active judges that are used in other circuits."[1] She wrote that the numbers of our Supreme Court reversals and summary reversals "suggest that the present system in CA9 is not meeting the goals of en banc review."[2]

Justice Scalia has written that

> the function of en banc hearings -- which the current size of the Circuit discourages, and the incomplete and random nature of its en banc panel deprives of predictability -- is not only to eliminate intra-circuit conflicts, but also to correct and deter panel opinions that are pretty clearly wrong . . . . The disproportionate segment of [the Supreme] Court's discretionary docket that is consistently devoted to reviewing Ninth Circuit judgments and to reversing them by lop-sided margins, suggests that this error-correction function is not being performed effectively.[3]

It is a fact, not an opinion, that a short en banc allows a random minority of the circuit to make law that falsely purports to be the shared and considered judgment of the full court. It is an opinion shared by the most qualified and knowledgeable

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[1] Letter June 23, 1998, from Justice Sandra Day O'Connor to Hon. Byron R. White, Chairman, Commission on Structured Alternatives for the Federal Courts of Appeals at 2.

[2] Id.

[3] Letter of August 21, 1998, from Justice Antonin Scalia to Hon. Byron R. White, Chairman, Commission on Structured Alternatives for the Federal Courts of Appeals at 1.

judges that the Ninth Circuit's short en banc does not and cannot perform its function well.

B. Reading opinions

Another fact, unavoidable and fatal to the soundness of so gargantuan a circuit as ours, is that we do not and cannot read all the opinions of our own court. Without reading all of our court's opinions, we cannot catch all of our important mistakes and call them en banc. And we cannot develop a coherent, sound body of predictable precedent. A careful, critical reading of a decision takes anywhere from ten minutes to an hour, and can ordinarily be accomplished in twenty to forty minutes depending on length, complexity, and range of authorities cited. Even though we only publish about 10% of our decisions, we have issued nearly 700 opinions in the last year. Multiply that by 20 minutes each, and you get about a month and a half of every judge's time just reading opinions. You can't do that and still have time to read the briefs and records, hear the arguments, and write the opinions. And that's forgetting about the more than 5,000 decisions each year

that we do not publish and, by and large, do not read when other panels issue them.

This isn't a problem you can solve by adding judges. Each judge adds to the reading load of all the others. More judges, more opinions. That is why this problem, like our en banc problem, can't be solved by enlarging the court, but only by dividing it.

We've tried to solve this problem with technology. We have an elaborate system for getting everything onto our computers right away. But the problem is not getting opinions from the other panels onto our desks, it's getting them from our desks into our heads. And staff summaries do not suffice. A judge must read an opinion to learn all that it says.

As with the en banc deficiencies, greater voices than mine have pointed out the impossibility of reading what it is our duty to read. Justice Stevens wrote that our court is "so large that even the most conscientious judge probably cannot keep

abreast of her own court's output."[4] Justice Kennedy, who served on our court before his elevation to the Supreme Court, wrote that "[s]oon after the ten judges were added in 1978, not to mention the five additional judges in 1984, . . . I found I could not read all the published dispositions of my own court."[5]

Thus, it is a fact and not an opinion that, on a court as large as the Ninth Circuit, the judges cannot and do not read even the tiny proportion of our decisions that are published, let alone the vast sea of unpublished decisions. This fact compels the conclusion that the judges cannot reliably catch important mistakes and cannot develop a clear, coherent jurisprudence.

II. How to Divide the Court

As for how to divide the Ninth Circuit, I think any division is better than

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[4] Letter of August 24, 1998, from Justice John Paul Stevens to Hon. Byron R. White, Chairman, Commission on Structured Alternatives for the Federal Courts of Appeals at 1.

[5] Letter of August 17, 1998, from Justice Anthony M. Kennedy to Hon. Byron R. White, Chairman, Commission on Structured Alternatives for the Federal Courts of Appeals at 2.

none. If the two-way division now on the table is the one that can be accomplished as a political matter, you will be improving the quality of justice in the United States by bringing it about.

But a three-way split would be much better than a two-way split. A court consisting of Arizona, Nevada, Montana, Idaho, Oregon, Washington, and Alaska remains very large. Nevada and Arizona are the two fastest growing states in the union,[6] so any circuit with them in it is going to have a rapidly expanding caseload. Washington and Arizona each already generate over a thousand cases per year.[7] The seven-state circuit contemplated by S. 1845 would currently have a caseload of nearly 4,500 cases per year, already larger than half of the existing circuits. I fear that a two-way split will not put an end to this issue, and we will soon be back in Congress spending your time and ours talking about another split.

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[6] See U.S. Census Bureau, Press Release CB03-197 (available at http://www.census.gov/Press-Release/www/releases/archives/population/001624.html) (Dec. 18, 2003). From 2000 to 2002, the five fasting growing cities with over 100,000 people were all in Arizona and Nevada. See U.S. Census Bureau, Press Release CB03-106 (available at http://www.census.gov/Press-Release/www/2003/cb03-106.html) (July 10, 2003).

[7] See United States Court of Appeals for the Ninth Circuit, Court Year Filings Ending June 30, 2005.

The fundamental reason why a three-way split is better than a two-way split is geography. Airplanes shorten distances compared to the time when judges and lawyers traveled by stagecoach, but even in airplanes it takes me two days to get to Pasadena. Phoenix will take just as long. The airplane routes between Phoenix and the northern states in the new circuit will impose tremendous travel time on staff and judges going back and forth.

The burden of this travel falls on the people of the United States, not just the judges and staff. We do it, but you pay for it. The people of the United States pay the air fares and hotel bills. And the people of the United States pay for the time we spend flying around instead of working. Our salaries and overhead make the wasted time much more expensive than the air fares and hotels. No matter how hard we try to work on planes, all the time spent packing, standing in security lines, getting seated, listening to the explanations of how the seatbelts work, getting cabs and so forth, is wasted. The people are paying an enormous hourly amount for our rent, our staff salaries, and our judicial salaries during all that time, but we cannot get much work done on our cases.

When I was in practice, my clients did not like spending more money than they had to on my high hourly rates for the time that I was flying around and staying in luxury hotels instead of working on their cases. But I had to charge them for it because I could not work on other clients' cases much when I was traveling around on their cases. Now, the people of the United States are our clients. We are still expensive lawyers with a lot of overhead, and it's still a bad deal to pay us for a lot of time when we are not working on the peoples' cases.

Excessive judicial travel time imposes another burden on the people. When the work piles up and we don't have enough time to do it, there is pressure on judges to delegate too much authority to staff. My colleague Judge Kozinski recently wrote in an article that "we do occasionally get opinions circulated that read like they were written by someone a year out of law school with no adult supervision." The adult was likely on an airplane.

To avoid the colossal waste of time on travel, circuits ought to be oriented around air routes. Alaska, like a lot of states, drew its state judicial districts based on the river routes throughout our huge territory. That made sense at that time.

The old emphasis on contiguity of states in federal judicial circuits made sense for the same reason, because judges got from one place to another on roads or rails. Now air is generally how we get from one place to another, so it makes sense to draw circuits based on air routes. For the northern states in the new circuit, Seattle is the convenient hub, though Portland is also not impractical; for the southern states, it is Phoenix. Two new circuits headquartered in these two cities will save the people of the United States a tremendous amount of expensive judicial and staff time that would otherwise be wasted.

If you split us three ways, you can be done with the Ninth Circuit split issue for fifty years. A northern circuit of Alaska, Washington, and Oregon would have more cases than the District of Columbia Circuit or the First Circuit. If the northwest circuit included five states—Alaska, Washington, Oregon, Idaho and Montana—it would be comparable in caseload to the Tenth Circuit. Nevada and Arizona already generate a caseload greater than the District of Columbia Circuit or the First Circuit. And because Arizona and Nevada are the fastest growing states in the union, they would soon become comparable in caseload size to the Tenth Circuit. A small circuit does not mean under-worked judges. Congress can

avoid that problem by allocating proportionate numbers of judges so that judicial caseloads stay reasonable.

A big advantage of a three-way split would be that judges would be far more likely to understand what they were doing. Opponents of splitting the Ninth Circuit like the bromide that federal law should be uniform, but much federal law is localized. The Alaska National Interest Lands Conservation Act, Alaska Native Claims Settlement Act, Bonneville Power Administration Act, Hopi-Navajo legislation, and numerous other geographically localized federal statutes give us many of our most complex and difficult cases. Yet on the present Ninth Circuit, a judge might sit in Alaska once in eight years. Judges on the present Ninth Circuit deal mainly with California law, and it is unlikely that they will *ever* become sufficiently knowledgeable about the law of each state, except for California and their own. I constantly surprise judges and law clerks on my court by telling them that Alaska Natives, except for Metlakatla, do not have reservations, that we do not have Indian casinos, and that Alaska Natives are organized as state corporations pursuant to the Alaska Native Claims Settlement Act. My court has

been the subject of tremendously important Supreme Court reversals because it is too big for its judges to sit in Alaska often enough to learn about it and properly construe the federal statutes applying only to Alaska. The same thing happens to other states. A three-way split of the Ninth Circuit would make all the judges of each circuit much more knowledgeable about each states and its applicable law.

III. Cost

A major objection to splitting the Ninth Circuit has been the claimed expense. But splitting the Ninth Circuit into two or three circuits will save money, especially as time goes on. And given the vacant courthouses in Seattle and Portland and available courthouse space in Phoenix, even the initial costs could be relatively small.

One considerable saving has already been discussed. After a split, more of what the people spend on judges will buy time working on cases instead of flying around. The money wasted on unproductive time is a huge invisible cost. No one writes a separate check for it, so it tends not to be noticed in government

expenditures. But clients would certainly notice it in private practice. Give us smaller circuits, and we can spend more of our time working on our cases. Then you can get what you pay for. At present, when I hear lawyers from New York argue a case in Pasadena, my trip was further than theirs and took twice as long. Phoenix will be the same. The people deserve more bang for their judicial buck.

Second, we would not need to build new courthouses because of a split. Judge Roll has laid out space estimates in great detail. We have tremendous space available in both the Nakamura Courthouse in Seattle and the Gus Solomon Courthouse in Portland, because the District Courts there have moved into new courthouses. Judge Roll and Judge Tallman have explained in detail how we can fit all of our administrative functions into the Nakamura Courthouse and available space in Phoenix. Ordinarily the biggest initial expense for a new court is a new courthouse, but our new circuit or circuits would not need one.

Third, with the Ninth Circuit greatly reduced in size, you should be able to substantially reduce its administrative cost. Staff in San Francisco, for example, will not need to manage space, staff, and libraries for Alaska, Washington,

Oregon, Montana, Idaho, Nevada, and Arizona. The Ninth Circuit has already outgrown its space. We remodeled a large courtroom into a meeting room with an enormous, custom-made oval table, but at our last court meeting the judges who did not get there early could not sit at the table. They had to sit around the edges with staff. And staff offices have taken over much of the space that used to be judges' chambers. The Ninth Circuit is already bulging at the seams of its headquarters building. By splitting it, you can use empty space in Seattle, Portland, and Phoenix, and not be faced with the need for more money for San Francisco.

Fourth, it is a lot easier to manage a smaller unit economically. A court as huge as the Ninth Circuit poses many of the same management problems as a huge corporation with offices over a vast area and multiple time zones. You need a lot more middle management and information coordination with so large a unit.

IV. Conclusion

None of my remarks so far have addressed the problem of how big a

federal circuit court California needs. The remaining Ninth Circuit, after any of the proposed splits, will nevertheless need to be enlarged. We need a lot more judges for the California caseload. The only reason not to add judges to the Ninth Circuit is that it is already too big. Frankly, any circuit that serves California will have to be too big. The problems I have described cannot be cured for whatever circuit California is in, because the state itself is so large. But there is no sound reason to inflict those problems of excessive size on the other states. The immigration caseload alone is more than 40% of the Ninth Circuit's filings, and 88.5% of those cases comes from California. Justice Kennedy wrote, considering the Northwest split proposal, that "Alaska, Washington, Oregon, Idaho, and Montana have a community of interest and a geography that justify assigning them to their own Circuit. There is no reason to hold these Northwest states hostage to the difficulty of determining a proper circuit for California, Arizona, Hawaii, and Nevada."[8] Nevada and Arizona should not be held hostage either.

As Justice O'Connor explained seven years ago, the Ninth Circuit

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[8] Letter of August 17, 1998, from Justice Anthony M. Kennedy to Hon. Byron R. White, Chairman, Commission on Structured Alternatives for the Federal Courts of Appeals at 5.

> is simply too large. It embraces nearly one-fifth of our nation's population. It handles roughly one out of every five appeals in the federal system. With 28 appellate judges, it is nearly twice the size of the next largest circuit.[9]

Things have only gotten worse since then. When a court controlling so huge an empire makes a mistake, the mistake harms too many people. Our size makes us more likely to make mistakes than smaller circuits. Excessive size that produces both more mistakes and greater consequences from those mistakes is bad for the country. It is easy to see why judges would enjoy working with so large a share of the nation's most significant cases, traveling to and working in great cities, and having access to huge pools of money and personnel. The Ninth Circuit really is grand. But its excessive size isn't good for the country. I urge you to split it up.

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[9] Letter June 23, 1998, from Justice Sandra Day O'Connor to Hon. Byron R. White, Chairman, Commission on Structured Alternatives for the Federal Courts of Appeals at 2.

STATEMENT OF CIRCUIT JUDGE ALEX KOZINSKI
TO THE SENATE JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS
October 26, 2005
Re: Revisiting Proposals to Split the Ninth Circuit

I appreciate the opportunity to appear before you today. My name is Alex Kozinski. I was appointed to the Ninth Circuit in 1985 by President Ronald Reagan, and I maintain my chambers in Pasadena, California. I am here today to speak in opposition to pending proposals to split the Ninth Circuit.

The title for today's hearing, as posted on the Judiciary Committee's web page, is *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem.*

I believe the more appropriate question for the Subcommittee is how best to administer justice in the region covered by the Ninth Circuit. Dividing a circuit should only take place when: (1) there is demonstrated proof that a circuit is not operating effectively; and (2) there is a consensus among the bench and bar and public that it serves that division is the appropriate remedy. Neither of those conditions exists today. Dividing a circuit should not take place to make the lives of some judges or lawyers easier or cozier, or to reduce travel burdens, or to remove immigration cases from its docket.

With regard to the first point, there is a consensus among the bench and bar about the operation of the Ninth Circuit, and that consensus is that the Circuit works well and should remain intact. Of the Court's 24 active judges, only three, all here today, favor division of the Circuit.

It might be useful for the Subcommittee to learn the views of some of the Court's more recent appointees about the administration of justice in the Ninth Circuit Court of Appeals. I will therefore quote from a letter written by Circuit Judge Carlos Bea of San Francisco, who was appointed to this Court by President Bush in September 2003. Judge Bea writes on behalf of his colleagues Judge Johnnie Rawlinson of Las Vegas, appointed by President Clinton in July 2000; Judge Richard Clifton of Honolulu, appointed by President Bush in July 2002; and Judge Consuelo Callahan of Sacramento, appointed by President Bush in March 2003. Among them, they have accumulated about ten years of Ninth Circuit experience.

The letter reads in part:

. . . Some of us took the Bench with some trepidation that the size of the Circuit and the volume of cases would result in inefficiencies; that the number of judges would result in lack of collegiality. Others had no such skepticism.

Regardless our views before joining the Ninth Circuit, all of us have been

impressed with the efficiency with which the court dispatches its business and our procedures for maintaining a uniform federal jurisprudence in our Circuit.

Additionally, whether we were appointed by Democratic or Republican presidents, our experience is that the number of judges, the varied panels and the several locations in which we sit enhances rather than diminishes the enthusiasm and collegiality we have encountered.

It is all too easy to look at the Ninth Circuit's size and case load from the outside and summarily conclude changes are needed. But take it from some recent arrivals who are on the inside its administrative efficiency is second to none.

. . . .

I will next month be celebrating my 20th anniversary on the Ninth Circuit. I, too, started out skeptical that a circuit this size could be run efficiently and fairly. And I, too, came to the view so clearly stated by Judges Bea, Rawlinson, Clifton and Callahan in this letter.

In addition, a number of bar associations have weighed-in recently on the issue. Most notably, the State Bar of Washington, which had for many years favored division, now opposes a split. At its April 2005 meeting, its Board of Bar Governors voted to *unanimously* oppose division. The State Bar of Arizona, on

August 19, 2005, voted to reaffirm its longstanding opposition to splitting the Ninth Circuit. The Hawaii State Bar Association in April 2005 advised of its continuing opposition. On September 16, 2005, the Montana State Bar Association passed a resolution opposing the passage of any bill directed at splitting the Ninth Circuit. The Federal Practice and Procedure Committee of the Oregon State Bar voted to oppose a split in early 2005, though its governing body has not acted on its recommendation, as far as I know. Scores of other local and specialized bar associations continue to express their opposition.

Joe Russoniello, who served as United States Attorney for the ND CA during the Reagan Administration, at roughly the same time Senator Sessions served as US Attorney for Alabama, has expressed and continues to express his long-standing opposition to circuit division, and I ask that a copy of his statement be made part of the record along with the Bar Resolutions noted above.

Any institution or organization can improve its operation and effectiveness. And the Ninth Circuit is always striving to improve how it operates. We have been under the spotlight of Congress, the media, the legal community and the public for many years. And those who have taken the time to study and understand the issues—rather than reacting to a sound bite, or an unpopular decision—have concluded that the court is functioning well.

Right now, our current challenge is dealing with the incredible growth of administrative agency appeals from the Board of Immigration Appeals. Along with the Second Circuit, which has experienced a 1400% increase in its immigration workload in the last five years, the Ninth Circuit has had about a 500% increase in these cases. My colleague, Judge Thomas, will be addressing this further in his testimony.

As technology has changed the world, it has changed the courts, and will continue do so in the coming years. The Ninth Circuit was the first circuit to institute an automated docketing system; we are now on the verge of an electronic web-based filing system. The use of instantaneous electronic mail has allowed circuit judges over wide geographic distances to communicate as if they were in the same courthouse. Videoconferencing for motion panels and administrative meetings has become commonplace. The Court's web page contains the court's decisions as soon as they are filed, along with other useful information, including digital recordings of oral arguments.

The Court uses an automated issue identification system to keep track of the common issues pending in these cases. The Court must be able to recognize potential or perceived conflicts early and address them directly and immediately. To that end, the Court established a system of inventorying cases to make sure that

issues are identified in each case, placed in a database and monitored to make sure that panels are alerted as to all other pending cases in which the same issue is being raised. This system of identifying issues and grouping cases, which is unique among the circuits, allows for efficient resolution of scores of cases at a time once the central issue is decided by a panel. Here are a few examples in the immigration field: After a final decision issued in *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999), which the Court had designated as the lead case raising immigration law issues regarding the retroactivity of a section of the Antiterrorism and Effective Death Penalty Act, one three-judge panel was able to resolve approximately ninety cases involving the same issues in a single sitting. In *Falcon-Carriche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003), the Court upheld the legality of streamlining regulations being used at the BIA. In *Romero-Torres v. Ashcroft*, 327 F.3d 887 (9th Cir. 2003), the Court held that it lacked jurisdiction to review hardship determinations. These two latter decisions resulted in the disposition of literally hundreds of pending immigration appeals, many prior to the completion of briefing.

Also, through the use of this automated inventory and issue identification system, our Court issues pre-publication reports circulated to members of the Court to advise them two days in advance of the filing of every published opinion,

and to identify cases pending before the Court that might be affected by the lead opinion.

Nevertheless, some judges complain about the difficulty in keeping up with reading the number of published opinions from our Circuit. That problem, if there is one, is not confined to our Circuit. Other circuits with fewer judges also have a high number of published opinions. For example, both the Seventh and Eighth Circuits issued roughly the same number of published opinions as the Ninth Circuit—about 600 published opinions last year. The sheer number of judges and law clerks examining our opinions makes it unlikely that any opinion will evade scrutiny for consistency and legal soundness. More important, with the advances of computer-aided legal research as well as the court's internal issue tracking system, one can get up-to-the-minute information on the state of the law in a given subject matter with the stroke of a few keys.

I would urge the Senate to spend its limited time and resources in addressing those areas of the government that merit serious attention, e.g., immigration reform, disaster preparedness issues, problems within the intelligence communities and the like.

Thank you for allowing me the opportunity to testify.

Statement of Senator Patrick Leahy
Ranking Member, Judiciary Committee
Hearing Before the Subcommittee on Administrative Oversight and the Courts
on "Revisiting Proposals to Split the Ninth Circuit"
October 26, 2005

With less than two weeks remaining before the Supreme Court nominations hearings for Harriet Miers are scheduled to begin, I am disappointed that the Chairman has scheduled this hearing. Today's hearing, scheduled to coincide with a hearing on similar legislation in the House, is the latest in a series of unnecessary and partisan distractions that have diverted our attention at a time when the committee is working at break-neck speed to prepare for the Supreme Court hearings.

There are currently three proposals before the Senate to split the Ninth Circuit, one of which that goes so far as to divide the circuit into three. We reviewed similar legislation before this subcommittee last Congress and I continue to view attempts to alter the structure of our federal judiciary with skepticism. None of the proposals will result in a fair distribution of workload among the newly-created circuits or among the existing judges. Worse yet, some allege that these proposals to split the Ninth Circuit are partisan attempts to gerrymander our federal courts by making geographical alterations to suit the political winds.

The most pressing concern over these proposals is the substantial costs the judiciary would incur should the circuit be split. Yesterday, in a response to a request by Senator Feinstein, the Administrative Office of the United States Courts sent a cost estimate for implementing S. 1845 and H.R. 4093, two proposals that split the Ninth Circuit into two separate circuits. Their estimate concluded that start-up expenses alone could cost as much as $95,855,172, with recurring costs ranging from $13,140,049 to $15,914,180. In a similar estimate in May 2004, the AO determined that judiciary could not sustain these crippling costs without receiving significant additional funding. At a time when the third branch is undergoing major budget cuts and the nation is coping with the enormous costs of war, rebuilding regions of our nation devastated by natural disasters and a growing deficit, I find the substantial costs of this legislation problematic.

Proponents of splitting the 9th Circuit into two or three circuits argue that smaller, rural states are at a disadvantage being lumped together with larger, heavily populated states like California. While I understand this argument, I am concerned that this legislation could be an attempt to manipulate the outcome of cases. Additionally, unlike the 1980 division of the 5th Circuit, this proposed division has very little support from the judges of the 9th Circuit. In a letter to this Subcommittee last year, Chief Judge Schroeder revealed the results of a mail ballot she sent to all 47 judges on the court. Only 9 of the Court's 47 judges favored a split, and only 3 of the 24 active judges favor a split. If these proposals to split the circuit were truly about the weight of the circuit's caseload, I would expect at least a majority of the judges would endorse one of these legislative proposals. The judges' overwhelming opposition should be taken seriously as we consider this legislation.

During the confirmation hearings of Chief Justice John Roberts, we all emphasized the importance of judicial independence. Unfortunately, the Ninth Circuit has been a convenient scapegoat for partisan critics of the judiciary. It would be a shame to see my Republican colleagues betray their own call for an end to the politicization of our judiciary by supporting legislation that would split the 9th Circuit as part of a campaign promise. I thank all our witnesses for traveling so far to be with us.

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NEWS FROM THE OFFICE OF
SENATOR LISA MURKOWSKI
United States Senate

For Immediate Release:
October 11, 2005

Contact: Elliott Bundy or Kristin Pugh
202/224-4513 or C236-1037;202/224-9301or C997-5358

SENATORS MURKOWSKI AND ENSIGN INTRODUCE UNIFIED LEGISLATION TO SPLIT THE NINTH CIRCUIT COURT OF APPEALS

WASHINGTON, D.C.- In order to present a unified plan for reorganizing the Ninth Circuit Court of Appeals, Sen. Lisa Murkowski yesterday in Anchorage announced that she and Sen. John Ensign (R-NV) have introduced the Court of Appeals Restructuring and Modernization Act (CARMA), S.1845.

CARMA, co-sponsored by Alaska Senator Ted Stevens, will improve the effectiveness and efficiency of the Ninth Circuit by reducing its size and creating a new Twelfth Circuit. The new Ninth Circuit would be comprised of California, Hawaii and the Pacific Islands and the new Twelfth Circuit comprised of Alaska, Washington, Oregon, Idaho, Montana, Nevada and Arizona.

Earlier this year, Murkowski had introduced similar legislation, S.1296 that would have effected a two-way split of the current 9th Circuit. At the same time, Sen. Ensign introduced legislation that would have effected a three way split of the 9th Circuit, creating new Twelfth and Thirteenth Circuits.

CARMA reflects Senator Ensign's original concerns, by increasing the number of judges in the new Twelfth Circuit from 19 to 20 and adding the cities of Las Vegas and Seattle to the judicial rotation of the new Twelfth Circuit (as well as Phoenix, Portland and Missoula) and the city of Pasadena in the new Ninth Circuit (along with San Francisco and Honolulu).

"It's always been both Senator Ensign's and my strong belief that there are many ways to divide the Circuit effectively and, that it's equally important for the Senate to speak with one voice on this important issue. The new Murkowski/Ensign bill represents that unified voice," Murkowski said.

The Ninth Circuit encompasses nine states and extends over 1.4 million square miles. It is the largest of all U.S. Circuit Courts and larger than the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eleventh Circuits combined. The Circuit also contains the fastest growing states in the nation. By 2010, the Census Bureau estimates that the Ninth Circuit's population will be more than 63 million.

NEWS FROM THE OFFICE OF
SENATOR LISA MURKOWSKI
United States Senate

The massive size and daunting caseload of the Ninth Circuit result in a decrease in the ability of judges to keep abreast of legal developments within the Circuit. Because of its size, the Ninth Circuit is the only circuit where all judges do not review panel decisions *en banc*, or full court. The limited en banc allows a full court to be comprised of 11 members, rather than the full contingent of 28. Every other Circuit requires a review by its full panel. Therefore, only six members of the 28 are needed for a majority opinion.

"The 58 million residents of the Ninth Circuit are suffering from the size and ineffectiveness of the Circuit. The current make-up of the Ninth Circuit leaves its judges unable to effectively review opinions, take up cases in an appropriate length of time and makes the management of the court burdensome," Murkowski said. "This legislation creates a circuit which is more geographically manageable, thereby significantly reducing wasted time and creating manageable caseloads."

The Ninth Circuit now handles more cases than any other Circuit. Last year alone 14,272 cases were filed. The average time to get a final disposition of an appellate case in the Ninth Circuit is nearly five months longer than the national average.

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United States Senate
Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts

Hearing on:
"Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem"
Wednesday, October 26, 2005, 2:30 p.m.
Dirksen Senate Office Building Room 226
Washington, D.C.

Written Testimony of
DIARMUID F. O'SCANNLAIN
United States Circuit Judge
United States Court of Appeals for the Ninth Circuit
The Pioneer Courthouse
Portland, OR 97204-1396
503-326-2187

Good afternoon, Chairman Sessions and Members of the Subcommittee. My name is Diarmuid F. O'Scannlain, United States Circuit Judge for the Ninth Circuit with chambers in Portland, Oregon. I am honored that you invited me to participate in this hearing on "Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem." Indeed, the urgency of restructuring the largest judicial circuit in the country is even more evident by the number of Ninth Circuit reorganization bills pending in this session of Congress, perhaps the highest in congressional history. As you know, Senator Ensign, on behalf of Senators Kyl, Murkowski, and five other sponsors, introduced the latest Ninth Circuit reorganization bill, S. 1845 "The Circuit Court of Appeals Restructuring and Modernization Act of 2005," which is, I understand, the central focus of your hearing today. It joins at least six other bills that have been introduced in the 109th Congress, including those sponsored by Congressman Simpson of Idaho, who has taken the lead on similar efforts in the House of Representatives. Indeed, since your last hearing on this subject, April 7, 2004, the House passed and sent to you a Ninth Circuit split bill late in the last session, but too late for you to consider before adjournment.

S. 1845 is laudable for recognizing and directly responding to the public concerns of those who have opposed restructuring until now, and for replying with uncommon sensitivity to the concerns of judges on my Court, the United States Court of Appeals for the Ninth Circuit. I remain steadfast in my belief that it is inevitable that Congress must restructure the Ninth Circuit, and S.1845 would go a long way to accomplish that goal.

Most significantly, since April 7, 2004, the Judicial Conference of the United States, the policy-making arm of the federal judiciary, has gone on record as expressing neutrality on splitting the Ninth Circuit. The passage of a Ninth Circuit split bill in the House last year, the newly-expressed non-opposition of the Judicial Conference, and the widening support across the country for splitting the Ninth Circuit augurs well for Congressional action this year.

I

I have served as a federal appellate judge for almost two decades on what has long been the largest court of appeals in the federal system (now 47 judges, soon to be 51).[1] I have also written and spoken repeatedly on issues of judicial

[1] I previously served as Administrative Judge for the Northern Unit of our Court and for two terms as a member of our Court's Executive Committee.

administration.[2] Therefore, I feel qualified to share these perspectives on our mutual challenge to address the judiciary's 800-pound gorilla: The United States Court of Appeals and the fifteen District Courts which comprise the Ninth Judicial Circuit.

I appear before you as a judge of one of the most scrutinized institutions in this country. In many contexts, that attention is negative, resulting in criticism and controversy. Some view these episodes as fortunate events, sparking renewed interest in how the Ninth Circuit conducts its business.[3] But a restructuring proposal like S. 1845 should be analyzed solely on grounds of effective judicial administration; grounds that remain unaffected by Supreme Court batting averages and public perception of any of our decisions. However one views our jurisprudence, I want to emphasize that my support of a fundamental restructuring

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[2] See Statement of Diarmuid F. O'Scannlain, Hearing before Subcommittee on Administrative Oversight and the Courts, United States Senate, Improving the Administration of Justice: A Proposal to Split the Ninth Circuit (April 7, 2004); Statement of Diarmuid F. O'Scannlain, Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property, United States House of Representatives, Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003 (October 21, 2003); Statement of Diarmuid F. O'Scannlain, Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property, United States House of Representatives, Ninth Circuit Reorganization Act of 2001 (July 23, 2002); Statement of Diarmuid F. O'Scannlain, Hearing Before the Committee on the Judiciary, United States Senate, Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and S. 253, the Ninth Circuit Reorganization Act (July 16, 1999); Statement of Diarmuid F. O'Scannlain, Hearing Before the Committee on the Judiciary, United States House of Representatives, Oversight Hearing on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (July 22, 1999); Diarmuid F. O'Scannlain, Should the Ninth Circuit be Saved?, 15 J. L. & Pol. 415 (1999); Diarmuid F. O'Scannlain, A Ninth Circuit Split Commission: Now What?, 57 Mont. L. Rev. 313 (1996); Diarmuid F. O'Scannlain, A Ninth Circuit Split Is Inevitable, But Not Imminent, 56 Ohio St. L. J. 947 (1995).

[3] See, e.g., Blaine Harden, O'Connor Bemoans Hill Rancor at Judges, Wash. Post, July 22, 2005, at A15; Bruce Ackerman, The Vote Must Go On, N.Y. Times, Sept. 17, 2003, at A27; Adam Liptak, Court That Ruled on Pledge Often Runs Afoul of Justices, N.Y. Times, June 30, 2002, at A1.

of the Ninth Circuit has never been premised on the outcome of any given case.

Restructuring the circuit is the best way to cure the administrative ills affecting my court, an institution that has already exceeded reasonably manageable proportions. Nine states, almost sixteen thousand annual case filings, forty-seven judges, and fifty-eight million people are too much for any non-discretionary appeals court to handle satisfactorily. The sheer magnitude of our court and its responsibilities negatively affects all aspects of our business, including our celerity, our consistency, our clarity, and even our collegiality. Simply put, the Ninth Circuit is too big. It is time now to take the prudent, well-established course and restructure this circuit. Restructuring large circuits is the natural evolution of judicial organization. Restructuring has worked in the past as you can see from Exhibit 1, pages 17-21 of the appendix to this testimony. Restructuring will work again. For these reasons alone, I urge serious consideration of S.1845.

I did not always feel this way. When I was appointed in 1986 I opposed any alteration of the Ninth Circuit. I held to this view throughout the '80s, largely because of the widespread perception that dissatisfaction with some of our environmental law decisions animated the calls for reform.

I changed my views in the early '90s while completing an LL.M. in Judicial Process at the University of Virginia. The more I considered the issue from the judicial administration perspective, the more I rethought my concerns. The objective need for a split became obvious. One could no longer ignore the compelling reasons to restructure the court, whether or not one agreed with anyone else's reasons for doing so.

Since then, I have learned a great deal about the severe judicial administration problems facing the Ninth Circuit. I have studied them and experienced them first hand, and I would like to share my thoughts and conclusions.

II

When the circuit courts of appeals were created over one hundred years ago by the Evarts Act of 1891, there were nine regional circuits. Today, there are thirteen total circuits: twelve regional circuits, including the D.C. Circuit, and the Federal Circuit. For much of our country's history, each court of appeals had only three judges. Indeed, the First Circuit was still a three-judge court when I was in law school. Over time, in an effort to stave off an explosion in appellate litigation, the circuits expanded as Congress added new judgeships.

At a certain point, larger circuits became unwieldy because of their size. Lawmakers recognized that adding new judges served only as a temporary anodyne rather than a permanent cure. Instead, Congress wisely restructured larger circuits. The District of Columbia Circuit can trace its origin as a separate circuit

to a few years after the enactment of the Evarts Act.[4] Part of the Eighth Circuit became the Tenth Circuit in 1929, while portions of the Fifth begat the Eleventh in 1981. The next year saw the creation of the Federal Circuit.[5] And, in due course, I have absolutely no doubt that the Twelfth—and even, perhaps, the Thirteenth—Circuit will be created out of the Ninth.

Congress formed each new circuit, at least in part, to respond to the very real problems posed by overburdened predecessor courts. That same rationale applies with special force to the Ninth Circuit, as many experts acknowledge. Indeed, the White Commission of 1998,[6] and the Hruska Commission of 1973[7] before it, both concluded that the Court of Appeals for the Ninth Circuit is too big. Regardless of which party controlled Congress when the commissions were authorized, each concluded that the Ninth Circuit needs restructuring because of its unsustainable size.

A

From a purely numerical perspective, the sheer enormousness of my court is undeniable, whether one measures it by number of judges, by caseload, by population, or by geographic area. Our official allocation is 28 active judges—more than the total number of judges, active and senior combined, on any other circuit save one.[8] Currently, 24 of those active judgeships are filled, and we have an additional 23 senior judges, who are in no sense "retired," with each generally hearing a substantial number of cases ranging from 100 percent to 25 percent of a regular active judge's load. There are forty-seven judges on our court today. And when the four existing vacancies are filled, our court will have 51.[9]

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[4] The original name of this court was the Court of Appeals for the District of Columbia. In 1934, this court was renamed the United States Court of Appeals for the District of Columbia.

[5] See Federal Courts Improvement Act of 1982, Pub. L. 97-164, 96 Stat. 25.

[6] See White Commission Report.

[7] See Commission on the Revision of the Federal Court Appellate System, Final Report (1973) [hereinafter "Hruska Commission Report"].

[10] The Sixth Circuit has 29 total judges.

[9] See Appendix. All the numerical data used in this testimony can be found in the appendix, unless otherwise noted, so from here on out I do not footnote this data.

I should pause to put that figure in perspective. When vacancies are filled, the number of judges in the Ninth Circuit will approach twice the number of total judges of the next largest circuit (the Sixth with 29), and will already have more than five times that of the smallest (the First with 10). Indeed, there are more judges currently on the Ninth Circuit than there were in the entire federal judiciary at the birth of the circuit courts of appeals. And every time a judge takes senior status, we grow ever larger. Meanwhile, compared to our 47 judges (soon to be 51), the average size of all other circuits today remains at around 20 judges.

Even with the lumbering number of judges on our Circuit, we can hardly keep up with the immense breadth and scope of our Circuit's caseload. During the year ended June 30, 2005, 15,685 appeals were filed—over triple the average of other circuits, and 6,000 more cases than the next busiest court, the Fifth. In fact, our total appeals exceed the next largest circuit's by more than the entire annual dockets of the First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits. Unfortunately, such disparity has only increased, for the Ninth Circuit's caseload has increased more rapidly between 2000 and 2005 than has any other circuit's. In fact, the Ninth Circuit's caseload increased 70% during that period, nearly five times that of the average of all other circuits. The statistical details are set forth in the Appendix. Along with yearly double-digit percentage growth in overall filings,[10] we have also seen a huge upswing in immigration appeals, as the Board of Immigration Appeals' streamlined review procedures continue to add to our Circuit's caseload.

By population, too, does our circuit dwarf all others. The Ninth Circuit's nine states and two territories range from the Rocky Mountains and the Great Plains to the Sea of Japan and the Rainforests of Kauai, from the Mexican Border and the Sonoran Desert to the Bering Strait and the Arctic Ocean. This vast expanse houses more than 58 million people—almost exactly one fifth of the entire

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For most of my numerical data, I use caseload statistics provided by the Administrative Office of the United States Courts. U.S Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html. When statistics are publicly unavailable, I use the Ninth Circuit's internally generated statistics. Unless otherwise noted, all caseload statistics reflect appeals filed from July 1, 2004 to June 30, 2005, and, I use population statistics compiled by the United States Census Bureau for the year 2004.

[10] Seven circuits posted double-digit year-over-year filing increases for the year ended June 30, 2005, and the Ninth Circuit's growth rate of 14.9% was third-fastest. Administrative Office of the United States Courts, U.S Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html.

population of the United States. Indeed, there are almost 27 million more people in the Ninth Circuit than in the next most populous circuit, the Sixth. As a result, our population exceeds the next largest circuit's by more than the total number of people in each of the First (encompassing Boston), Second (encompassing New York), Third (encompassing Philadelphia and Pittsburgh), Seventh (encompassing Chicago and Indianapolis), Eighth (encompassing St. Louis, Kansas City, and Minneapolis/St. Paul), Tenth (encompassing Denver and Salt Lake City), and D.C. Circuits (encompassing, of course, Washington, D.C.). And as with the number of appeals filed, the Ninth Circuit's population is growing at an exceptional rate. Of the 10 fastest-growing cities of over 100,000 residents, seven are located in the Ninth Circuit.[11] Similarly, three of the five fastest-growing cities of over 1,000,000 residents are also found within the borders of the Ninth Circuit.[12]

No matter what metric one uses, the Ninth Circuit dominates. Compared to the other circuits, we employ more than twice the average number of judges, we handle more than triple the average number of appeals, and are approaching three times the average population. It makes very little sense to create a structure of regional circuits, and then place a fifth of the people, a fifth of the appeals, and almost a fifth of the judges into one of twelve regions. From any reasonable perspective, the Ninth Circuit already equals at least two circuits in one.

B

Numbers alone cannot tell the whole story. I have concluded as a firsthand observer that our court's size negatively affects the ability of us judges to do our jobs. For example, we all participate in numerous week-long sittings on regular appellate oral argument panels. The composition of those panels often changes during a given week. Thus, presuming I sit with no visiting judges and no district judges—a mighty presumption in the Ninth Circuit, where we often enlist such extra-circuit help to deal with the overwhelming workload—I may sit with around

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[11] Cumulative Estimates of Population Change for Incorporated Places over 100,000, Ranked by Percent Change: April 1, 2000 to July 1, 2004, http://www.census.gov/popest/cities/SUB-EST2004.html. The ten fastest growing cities of over 100,000 residents during that time period are: (1) Gilbert, AZ; (2) Miramar, FL; (3) North Las Vegas, NV; (4) Port St. Lucie, FL; (5) Roseville, CA; (6) Henderson, NV; (7) Chandler, AZ; (8) Cape Coral, FL; (9) Rancho Cucamonga, CA; (10) Irvine, CA.

[12] See id. The five fastest growing cities of over 1,000,000 people between 2000 and 2004 are: (1) San Antonio, TX; (2) Phoenix, AZ; (3) Los Angeles, CA; (4) San Diego, CA; (5) Houston, TX.

twenty of my colleagues on three-judge panels over the course of a year. That is less than half of the total number of judges on my court. Because the frequency with which any pair of judges hears cases together is quite low, it becomes difficult to establish effective working relationships in developing the law.

Consistency of law in the appellate context requires an environment in which a reasonably small body of judges has the opportunity to sit and to conference together frequently. Such interaction enhances understanding of one another's reasoning and decreases the possibility of misinformation and misunderstandings. Unlike a legislature, an appellate court is expected to speak with one consistent, authoritative voice in declaring the law. But the Ninth Circuit's ungainly girth severely hinders us, creating the danger that our deliberations will resemble those of a legislative rather than a judicial body.

If we had fewer judges, three-judge panels could circulate opinions to the entire court before publication, which is the practice of many other appellate courts. Pre-circulation not only prevents intra-circuit conflicts, it also fosters a greater awareness of the body of law created by the court. As it now stands, I read the full opinions of my court no earlier than the public does—and frequently later, which can lead to some unpleasant surprises. Even with our pre-publication report system, we do not get the full implications of what another panel is about to do. For, in addition to handling his or her own share of our 15,000 plus appeals, each judge is faced with the Sisyphean task of keeping up with all his or her colleagues' opinions—not to mention all the opinions issued by the Supreme Court along with the relevant public and academic commentary.

Without question, we are losing the ability to keep track of the legal field in general and our own precedents in particular. From a purely anecdotal perspective, it seems increasingly common for three judge panels to make initial en banc requests because they have uncovered directly conflicting Ninth Circuit precedent on a dispositive issue. This is as embarrassing as it is intolerable. It is imperative that judges read our court's opinions as—or preferably before—they are published. This is the only way to stay abreast of circuit developments. It is the only way to ensure that no intra-circuit conflicts develop. And it is the only way to ensure that when conflicts do arise (which is inevitable as we continue to grow), they are considered en banc. This task is too important to delegate to staff attorneys, and, as it now stands, too unwieldy for us judges adequately to do ourselves.

Many point to the en banc process as a solution to some of these problems, but it is nothing more than a band-aid. Theoretically, the ability to rehear en banc promotes consistency in adjudication by resolving intra-circuit conflicts once and for all. In my practical experience, however, this has not been the case in the Ninth Circuit. Only a fraction of our published opinions can receive en banc review. Last year we reexamined only about three percent of our published dispositions. Such a small fraction cannot significantly affect the overall consistency of a court

that issued 691 published dispositions in 2004 alone.[13]

C

The Ninth Circuit's enormous size not only hinders judicial decisionmaking, it also creates problems for our litigants. In my court, the median time from when a party activates an appeal to when it receives resolution is over 15 months—four months longer than the average for the rest of the Courts of Appeals.[14] No Circuit takes longer than the Ninth, and whatever point in the process to which this delay may be attributed, the striking length of time our circuit takes to dispose of cases is alarming. No litigant should have to wait that long to receive due justice. But at the same time, judges need time to deliberate and to ensure that they are making the correct decision. This backlog increases the pressure on us to dispose of cases quickly for the sake of the litigants, which, in turn, can only inflate the chance of error and inconsistency. I believe our unreasonable size is directly responsible for this serious problem.

Also, because of the circuit's geographical reach, judges must travel on a regular basis from faraway places to attend court meetings and hearings. For example, in order to hear cases, my colleagues must fly many times a year from cities including Honolulu, Hawaii, Fairbanks, Alaska, and Billings, Montana to distant cities including Seattle, Washington and Pasadena, California. In addition, all judges must travel on a quarterly basis to attend court meetings and en banc panels generally held in San Francisco. A certain amount of travel is unavoidable, especially in any circuit that might contain our non-contiguous states of Alaska and Hawaii, and our Pacific island territories. But why should any one circuit encompass close to 40% of the total geographic area of this country when the remaining 60% is shared by eleven other regional circuits?[15] Traveling across this much land mass not only wastes time, it costs a considerable amount of money.

D

I am not alone in my conclusions. Several Supreme Court Justices have commented that the risk of intra-circuit conflicts is heightened in a court that

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[13] This is not to mention the over 5,000 non-precedential, unpublished dispositions we circulate each year. See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2004 Annual Report of the Director.

[14] See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2004 Annual Report of the Director.

[15] See U.S. Census Bureau, State and County "QuickFacts," available at http://quickfacts.census.gov/qfd/.

publishes as many opinions as the Ninth.[16] Furthermore, after careful analysis, the White Commission concluded that circuit courts with too many judges lack the ability to render clear, timely and uniform decisions,[17] and as consistency of law falters, predictability erodes as well. The Commission pointed out that a disproportionately large number of lawyers indicated that the difficulty of discerning circuit law due to conflicting precedents was a "large" or "grave" problem in the Ninth Circuit. Predictability is clearly difficult enough with 28 active judgeships. But this figure mightily understates the problem, for it fails to consider both senior judges (most of whom continue to carry heavy workloads), and the large number of visiting district and out-of-circuit judges who are not even counted as part of our 47-judge roster. Notably, the White Commission also concluded that federal appellate courts cannot function effectively with as many judges as the Ninth Circuit has.

What the experts tell us—and what my long experience makes clear to me—is that the only real resolution to these problems is to have smaller decisionmaking units. The only viable solution, indeed the only responsible solution, is to restructure, and to carve out a new Twelfth, or even new Twelfth and Thirteenth Circuits.

III

The question then becomes how to split the circuit: nine states and two territories offer a wealth of possibilities. As I mentioned, there are several current House and Senate proposals, each of which restructures our circuit in a different way. The special virtue of most of the recent restructuring efforts is that they address substantially all of the arguments against previous proposals advanced by Chief Judge Schroeder and other opponents in recent years, clearly demonstrating that the continuing dialogue between Congress and the judiciary has led to positive results for all. These reorganization plans correct many of the problems currently facing our court by creating smaller decisionmaking units, which in turn fosters greater decisional consistency, increased accountability, collegiality among judges,

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[16] See White Commission Report, supra note 2, at 38.

[17] The White Commission's principal findings told us: (1) that a federal appellate court cannot function effectively with a large number of judges; (2) that decisionmaking collegiality and the consistent, predictable, and coherent development of the law over time is best fostered in a decisionmaking unit smaller than what we now have; (3) that a disproportionately large proportion of lawyers practicing before the Ninth Circuit deemed the lack of consistency in the case law to be a "grave" or "large" problem; (4) that the outcome of cases is more difficult to predict in the Ninth Circuit than in other circuits; and (5) that our limited en banc process has not worked effectively.

and responsiveness to regional concerns. And, of course, the new circuits created by these proposals would remain bound by pre-split Ninth Circuit precedent, helping to minimize confusion in interpreting the law.

Despite such similarities, each of the recent proposals offers separate restructuring plans, in turn presenting distinct sets of pros and cons. I firmly believe that the Ninth Circuit must be divided, but the particulars appropriately remain in Congress's hands. I have previously testified with respect to other configurations, and I will not repeat those views here.

S. 1845 creates a new Twelfth Circuit comprised of the Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington. The "new" Ninth Circuit would contain California, Hawaii, and the Pacific island territories of Guam and the Northern Mariana Islands.

This bill adds five new judgeships and two temporary ones, all located in the "new" Ninth Circuit with duty stations in California. Total active judges would increase for at least the next ten years to 35, with 22 allocated to the new Ninth Circuit and 13 to the Twelfth (although I think there is a technical glitch as to the latter which should be cured in mark-up). This increase in judgeships is particularly notable, for in the past, one of the primary objections to restructuring proposals was that they did "not address the growing need for additional judgeships."[18] As Chief Judge Schroeder has pointed out, these additional judgeships are sorely needed, as there have been no additional judgeships added to the Circuit since 1984.[19] It is truly regrettable that we failed to request new judgeships in 1990 notwithstanding our statistical eligibility for perhaps as many as 10 new judges at the time.

I also commend S. 1845 for placing all of the new judges in California in the reconfigured Ninth Circuit. In the past, critics have condemned other proposals because they did not result in a proportional caseload distribution. This proposal directly addresses those criticisms.

The caseload of the newly created Twelfth Circuit would place it squarely within the normal operating range of the other existing circuits. The Twelfth Circuit would process more litigation than the current First, Third, Seventh, Eighth,

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[18] Statement of Mary M. Schroeder, Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property, United States House of Representatives, Ninth Circuit Reorganization Act of 2001 (July 23, 2002).

[19] In 1984, Congress added new judges to every circuit save the very recently created Eleventh and Federal Circuits. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. In 1990, Congress added new judges to the Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

Tenth, and D.C. Circuits. And at 341 appeals filed per authorized judgeship, the new Twelfth Circuit's caseload would compare favorably to ten of the twelve current circuits.

Of course, the new Ninth Circuit would still remain the largest circuit in the country by judges, population, and case filings—although complete parity is impossible, of course, and there will always be one "largest" circuit. However, the two new circuits would have populations of approximately 37 million and 21 million respectively. The Twelfth Circuit would be of roughly average size when compared to the other circuits, and the new Ninth Circuit would be closer to the sizes of the Fifth, Sixth, and Eleventh Circuits, which have populations of around 30 million.[20]

What is more important, however, is that S. 1845's new Ninth would be significantly better off, with fewer appeals, fewer judges, and a smaller population and geographical area to cover. As a result, the benefits of reorganization should be immediately apparent to all involved.

In sum, S. 1845 offers a unique solution by separating the Ninth Circuit into two and provides immediate help with the caseload crunch.

IV

Some objections inevitably survive even the most generously conciliatory restructuring proposals. Alas, these are the same arguments that no reorganization bill can answer, as they amount to nothing more than a plea to keep the gigantic Ninth Circuit intact.

For example, one suggestion is that the Ninth Circuit should stay together to provide a consistent law for the West generally, and the Pacific Coast specifically. This is a red herring, as is the "need" to preserve a single maritime law for the Pacific Coast. The Atlantic Coast has five separate circuits, but freighters do not appear to collide more frequently off Long Island than off the San Francisco Bay because of uncertainties of maritime law back East. The same goes for the desire to adjudicate a cohesive "Law of the West." There is no corresponding "Law of the South" nor "Law of the East." The presence of multiple circuits everywhere else in the country does not appear to have caused any deleterious effects whatsoever. In fact, our long history with Circuit Courts of Appeals demonstrates that more discrete decisionmaking units enhance our judicial system. We should not be treated differently based on the assumption that our borders were fixed inviolate in 1891. Indeed, naturally coherent geographic divisions separate the highly distinct areas scattered throughout the West, each with their own climates

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[20]Without dividing California, any reorganization plan will result in at least one Circuit with a population over 35 million.

and cultures: there are the inter-mountain states, the Pacific Northwest states, the non-contiguous states and territories, as well as our California megastate.

Nor should cost alone be a reason to maintain the status quo. I respectfully disagree with my Chief's conclusion that any reorganization would require a new courthouse and administrative headquarters with wild cost estimates in the hundreds of millions of dollars. First, it utterly ignores the substantial savings necessarily arising from any reorganization, not to mention the smaller staff requirements of the new Ninth. Second, there are far simpler—and far cheaper—solutions. The Gus J. Solomon Courthouse in Portland has remained unoccupied since the construction of the Mark O. Hatfield Courthouse for the District of Oregon. Likewise, the William K. Nakamura Courthouse in Seattle sits empty with plenty of room for circuit operations, the Western District of Washington having moved to its newly constructed building in August 2004. Either of these physical plants would be appropriate for an administrative headquarters, and neither would require new building construction, aside from relatively modest design and remodeling expenses—expenses that must be borne regardless of what use the buildings will take. Perhaps similar alternatives may be found elsewhere throughout our circuit, such as the two federal courthouses in Phoenix which Judge Roll will discuss. Either way, these costs are much more modest than opponents claim—and pale in comparison to the administrative costs imposed by a megacircuit such as ours.

I concede that there are judges on the Ninth Circuit Court of Appeals who believe the disadvantages of splitting the circuit outweigh the advantages. But as a member of that court, I must take issue with the innuendo that they represent an overwhelming majority. Some judges are neither for nor against restructuring: they decline to express any view, feeling the matter is entirely a legislative issue. And a great number of judges on our court do indeed favor some kind of restructuring, many strongly so. Perhaps our Chief Judge will make a good-faith effort to determine the breadth and scope of our judges' views on the issue, especially in light of the new approaches taken by both the House and the Senate and the increased probability of Congressional action. So far, she has neglected to do so. It is my earnest hope that we will be permitted, on a court-wide basis, to respond to Chairman Sensenbrenner's open invitation to suggest the most appropriate configuration from the standpoint of the existing judges.

Our circuit judges are not the only ones who may support a restructuring. Each of the five Supreme Court Justices who commented on the Ninth Circuit in letters to the White Commission "were of the opinion that it is time for a change."[21] The Commission itself reported that, "[i]n general, the Justices expressed concern

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[21] White Commission Report, supra note 2, at 38.

about the ability of judges on the Ninth Circuit Court of Appeals to keep abreast of the court's jurisprudence and about the risk of intra-circuit conflicts in a court with an output as large as that court's."[22] An increasing number of district judges have expressed support for restructuring, as well, with many practitioners concurring. Still, some bar members do not seem to care who gets appointed to this large circuit—by the luck of the draw they can get a friendly panel, or if not, a randomly selected en banc panel can give them a second shot. In any event, I truly believe that support for a split is not so thin as many objectors suggest.

Finally, I would like to reiterate my belief that these proposals to split the Ninth Circuit do not represent "a threat to judicial independence." Such a view is directly contradicted by over a century of Congressional legislation on circuit structure. Bills such as S. 1845 incorporate many provisions directly responding to the concerns voiced by split opponents, and these proposals demonstrate the good-faith efforts made by the House and Senate reasonably to restructure the judicial monstrosity of the Ninth Circuit. Calling for a circuit split based on particular decisions is counterproductive and unacceptable, and, in my view, the case for the split stands on the grounds of effective judicial administration, supported by the statistics which show the ongoing caseload explosion.

There is nothing unusual, unprecedented, or unconstitutional about the restructuring of judicial circuits. Federal appellate courts have long evolved in response to the public interest as well as natural population and docket changes. As geographic or legal areas grow ever larger, they divide into smaller, more manageable judicial units. No circuit, not even mine, should resist the inevitable. Only the barest nostalgia suggests that the Ninth Circuit should keep essentially the same boundaries for over a century. But our circuit is not a collectable or an antique; we are not untouchable, we are not something special, we are not an exception to all other circuits, and most of all, we are not some "elite" entity immune from scrutiny by mere mortals. The only consideration is the optimal size and structure for judges to perform their duties. There can be no legitimate interest in retaining a configuration that functions ineffectively. Indeed, I am mystified by the relentless refusal of some of my colleagues to contemplate the inevitable.[23] As loyal as I am to my own court, I cannot oppose the logical and inevitable evolution of the Ninth Circuit as we grow to impossible size.

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[22] Id.

[23] See, e.g., Ninth Circuit in "Very Good" State, but Needs More Judges, Schroeder Tells Federal Bar Association Chapter, Metropolitan News-Enterprise, April 4, 2002, at 3; Procter Hug, Jr. & Carl Tobias, A Split by Any Other Name..., 15 J.L. & Pol. 397 (1999); Procter Hug, Jr., The Ninth Circuit Should Not Be Split, 57 Mont. L. Rev. 291 (1996).

After denying these concerns, our past official court position straddles the fence by arguing that we can alleviate problems by making changes at the margin. Chief Judge Schroeder and her predecessors have done a truly admirable job with the limited tools they have had, chipping away at the mounting challenges to efficient judicial administration. However, I do not believe that long-term solutions to long-term problems come from tinkering at the edges. Courts of appeals have two principal functions: Correcting errors on appeal and declaring the law of the circuit. Simply adding more judges may help us keep up with our error-correcting duties, but as things now stand, it would severely hamper our law-declaring role. 28 judges is too many already, and more judges will only make it more difficult to render clear and consistent decisions. The time has come when such cosmetic changes can no longer suffice and a significant restructuring is necessary.

Whatever mechanism you choose, ultimately Congress will restructure the Ninth Circuit. This task has been delayed far too long, and each day the problems get worse. I do not mean to imply that our circuit as a whole is beyond the breaking point. I want to emphasize that our Chief Judge and our Clerk of the Court are doing a marvelous job of administering this circuit. Instead, my focus is on where we go from here. If the Ninth Circuit Court of Appeals has not yet collapsed, it is certainly poised at the edge of a precipice. Only a restructuring can bring us back from the brink.

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Unfortunately, the Ninth Circuit's problems will not go away; rather, they continue to get worse. This issue has already spawned, both within and outside the court, too much debate, discussion, reporting, and testifying, and for far too long. We judges need to get back to judging. I ask that you mandate some kind of restructuring now. One way or another, the issue must be put to rest so that we can concentrate on our sworn duties and end the distractions caused by this never-ending controversy. I urge you to give serious consideration to the reasonable restructuring proposals before you, and any others that might be offered.

Thank you, Mr. Chairman, for allowing me to appear before you today. I would be happy to answer any questions you have.

United States Senate
Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts

Hearing on:
"Revisiting Proposals to Split the Ninth Circuit:
An Inevitable Solution to a Growing Problem"
Wednesday, October 26, 2005, at 2:30 p.m.
Senate Dirksen Office Building
Dirksen 226
Washington, D.C. 20510

Written Testimony of
John M. Roll
United States District Judge
District of Arizona
Evo A. DeConcini U.S. Courthouse
405 W. Congress, Suite 5190
Tucson, Arizona 85701-5053

INTRODUCTION

I enthusiastically support S. 1845, which would divide the Ninth Circuit into two circuits–a new Ninth Circuit consisting of California, Hawaii, Guam and the Mariana Islands and a new Twelfth Circuit consisting of the remaining seven states in the current Ninth Circuit, *i.e.* Alaska, Arizona, Idaho, Montana, Nevada, Oregon and Washington. No split of the Ninth Circuit short of dividing California in half and placing those halves in different circuits will accomplish near parity. S. 1845 is far better than the existing structure of the Ninth Circuit.

Congress is quite appropriately concerned with addressing the unchecked growth of one of the nation's 12 geographical circuits. I have served in the judiciary for the past 18 years; nearly 14 of those years have been as a district judge. I recognize and appreciate the importance of the judiciary being an independent and co-equal branch of government. S. 1845 is not an assault on judicial independence. I applaud Congress for exercising its Constitutionally-entrusted responsibility of creating such inferior courts "as the Congress may from time to time ordain and establish."[1]

[1] U.S. Const., Art. III, § 1.

ISSUE BEFORE CONGRESS

The Ninth Circuit is dearly in need of at least 7 new judgeships. Accordingly, the question is not whether to divide the Ninth Circuit or leave it unchanged. The choice is between compounding existing problems by adding yet another 7 judgeships to the Ninth Circuit or dividing the Ninth Circuit and adding new judgeships. House Judiciary Committee Chairman James Sensenbrenner's statements that no new judgeships should be created until the Ninth Circuit is split merely represent recognition that it would be unwise to add more judgeships to an already oversized circuit.[2]

The Ninth Circuit's immense size is largely a result of 8 other states being joined to California with its population of 36 million. The western United States has experienced a population growth unlike that of any other area of the country and there is no reason to believe the growth will subside. The strain on the Ninth Circuit has only increased as states and territories have been added to its jurisdiction over the past century.

SIZE HAS CREATED INSURMOUNTABLE PROBLEMS

The Ninth Circuit is disproportionate to the rest of the federal circuits in virtually every respect. Despite the valiant efforts of the circuit judges of the Ninth Circuit and the circuit executive's office, the Ninth Circuit's overgrown size simply makes it impossible for it

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[2] *See* Jonathan D. Glater, *Lawmakers Trying Again to Divide Ninth Circuit*, N.Y. Times, June 19, 2005, at § 1, p. 16.

to function on a par with the other federal circuits.

For reasons described in more detail herein, the Ninth Circuit's size undermines the administration of justice. The late Chief Justice William H. Rehnquist expressed his concern that the size and poor functioning of the Ninth Circuit have caused an erosion of public confidence in the judiciary.[3] One-half of the Associate Justices of the United States Supreme Court have publicly expressed concern regarding the functioning of the Ninth Circuit, as have many other knowledgeable individuals. The Department of Justice, which previously opposed a split, now favors a division of the Ninth Circuit. (See appendix A). The U.S. Judicial Conference, which has traditionally opposed any circuit split unless supported by the circuit judges of the affected circuit, recently declined to take a position regarding a split of the Ninth Circuit. This is a retreat from its 1995 opposition to a split.[4] United States Senior District Judge William D. Browning, who served as one of the five members of the Commission on Structural Alternatives for the Federal Courts of Appeal ("White Commission") and is one of four surviving members, submitted a joint letter to Congress (signed also by former Chief Judge Robert C. Broomfield and me) in April 2004 in which he stated that if the option is between adding new judgeships to the Ninth Circuit and dividing

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[3]Letter from Chief Justice William H. Rehnquist, United States Supreme Court, to Justice Byron R. White, Chair, Commission on Structured Alternatives for the Federal Court of Appeals 1 (October 22, 1998).

[4]Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* 5, 33-4(1998) (citing Report of the Federal Courts Study Committee Ch. 6 (1990); Judicial Conference of the United States, Long Range Plan for the Federal Courts 45 (1995)) [hereinafter *White Commission*], *available at* http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf.

the Ninth Circuit, he supports a circuit split.[5]

Notwithstanding statements to the contrary, I am aware of no overwhelming opposition to a circuit split among Ninth Circuit district judges. The last circuit-wide survey of district judges regarding this issue occurred prior to the White Commission Report, which was issued in 1998. My perception is that there is much support for a split of the circuit among district judges, particularly among the judges of the proposed new Twelfth Circuit.

S. 1845 is much-needed remedial legislation.

STUDIES AND COMMISSIONS

Clearly, no further study of this matter can be justified.

In 1973, the Commission on Revision of the Federal Court Appellate System ("Hruska Commission"), after exhaustive study, recommended that both the Fifth and Ninth Circuits should be split. In 1980, the Fifth Circuit was split. The Ninth Circuit, of course, was not.

In 1998, the White Commission studied the need for dividing the Ninth Circuit and recommended that the Ninth Circuit be subdivided into three semi-autonomous divisions. This proposed solution constituted an extraordinary accommodation to keep the Ninth Circuit

[5]Letter from William D. Browning, Senior Judge, Robert C. Broomfield, Senior Judge, and John M. Roll, District Judge, United States District Court, District of Arizona to Senator Jeff Sessions, Chairman, Subcommittee on Administrative Oversight and the Courts (April 29, 2004).

intact, creating a multi-tiered system unlike that of any other circuit. This recommendation was greeted with disapproval by the Ninth Circuit.[6]

After these two exhaustive, congressionally-authorized studies, the issues have been crystallized. No further study is needed.

IMPACT OF S. 1845 ON THE CURRENT NINTH CIRCUIT

Population

The Ninth Circuit now has a population of 58 million people.[7] This represents 20 percent of the nation's population, even though the Ninth Circuit is but one of the 12 geographical circuits in the country.[8] (Fig. 1).

S. 1845 would result in 37 million people (36 million from California) residing in the new Ninth Circuit and 21 million people residing in the new Twelfth Circuit. The population of the new Twelfth Circuit would approximate the populations for the Second, Third and

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[6]*Final Report of the Comm'n on Structural Alternatives for the Fed. Courts of Appeals, Hearing Before the Subcomm. on Courts and Intellectual Prop. of the Comm. on the Judiciary, House of Representatives*, 106th Cong. (1999).

[7]U.S. Census Bureau, *Table 1: Annual Estimates of the Population for the United States and States, and for Puerto Rico: April 1, 2000 to July 1, 2004*, Population Estimates (2004), *at* http://www.census.gov/popest/states/tables/NST-EST2004-01.pdf; U.S. Central Intelligence Agency, *The World Fact Book* (2005), *available at* http://www.cia.gov/cia/publications/factbook/.

[8]The Federal Circuit is also a circuit court. However, its jurisdiction is based not on federal appeals arising from a specific geographical circuit but rather from specific types of federal litigation, such as patent litigation.

Seventh Circuits and would exceed the populations in the First, Eighth, Tenth and D.C. Circuits. (Fig. 2).

Figure 1: Existing Circuit Populations (in millions)

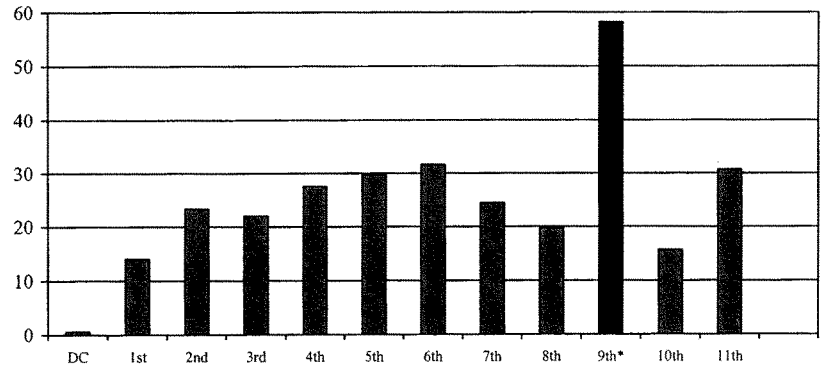
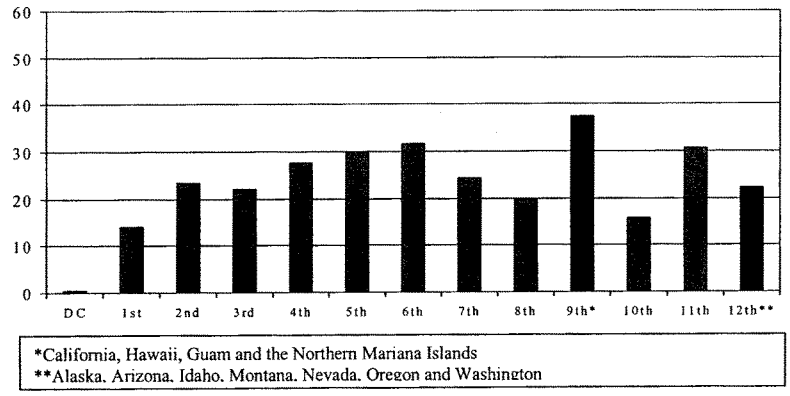


Figure 2: Circuit Populations Under S. 1845(in millions)



Number of Active Judges

The 12 geographical circuit courts are authorized a total of 167 active circuit judges. The Ninth Circuit is authorized 28 of these judgeships, 11 more than the next largest circuit. (Fig. 3). However, the Judicial Conference has concluded that the Ninth Circuit is in need of 7 more active circuit judges.[9] The Ninth Circuit also has 23 senior circuit judges, 110 authorized district judgeships, 50 senior district judges, 68 authorized bankruptcy judgeships and 94 authorized full-time magistrate judgeships.[10] With a caseload that has increased 12 times faster than that of the average circuit over the past five years, the need for more judgeships is genuine. The addition of 7 more judgeships to the existing Ninth Circuit would result in the Ninth Circuit having 35 active circuit judges - more than twice as many as the next largest circuit (the Fifth Circuit) and, excluding the Ninth Circuit, nearly three times as many as the average of all other circuits.

The Ninth Circuit's disproportionate number of authorized judgeships (28 authorized active circuit judges and 23 senior circuit judges) results in nearly 20,000 possible three-judge panel combinations.[11] The Ninth Circuit also frequently invites district judges, judges

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[9]Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States*, March 18, 2003, at 18-19, *available at* http://www.uscourts.gov/judconf/marc03proc.pdf.

[10]*2003 Ninth Circuit Annual Report*, at 4.

[11]Interview by Howard Bashman with Diarmuid F. O'Scannlain, Circuit Judge, United States Court of Appeals for the Ninth Circuit (March 3, 2003) (stating that 50 circuit judges result in

from other circuits, and a judge from the Court of International Trade to sit on three-judge panels. This enormous pool of judges creates the very realistic possibility of inconsistent results.[12]

S. 1845 would result in the new Ninth Circuit having 22 active circuit judgeships (consisting of the existing 14 California and 1 Hawaii judgeships and 7 new judgeships). The next largest circuit for active judgeships would be the Fifth Circuit with 17. The new Twelfth Circuit would have 14 active circuit judgeships. (Fig. 4). This would place the new Twelfth Circuit tied for fifth among the 13 geographical circuits in number of authorized active circuit judgeships.

19,600 possible three-judge panel combinations), *at* http://legalaffairs.org/howappealing/20q/.

[12]*See* Letter from Justice Anthony M. Kennedy, United States Supreme Court, to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals (August 17, 1998).

Figure 3: Existing Active Circuit Judges

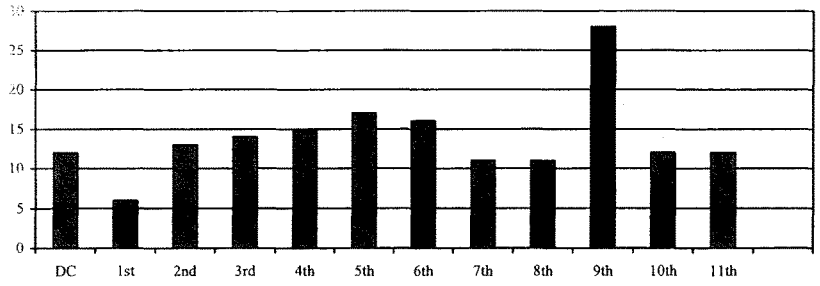
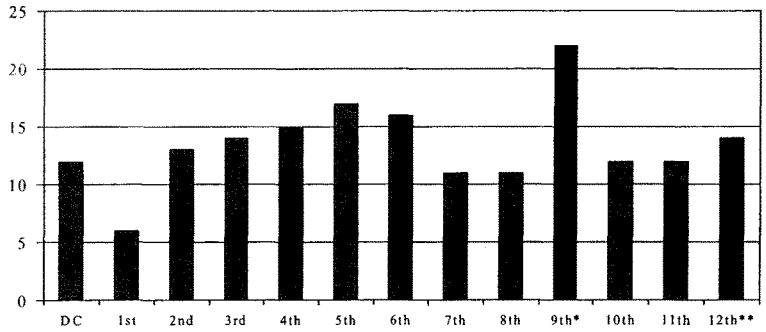


Figure 4: Active Circuit Judges Under S. 1845

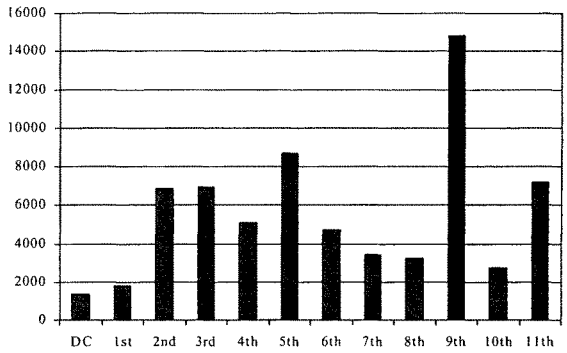


*California, Hawaii, Guam and the Northern Mariana Islands
**Alaska, Arizona, Idaho, Montana, Nevada, Oregon and Washington
***Proposals under consideration allot between 12 and 14 judges to the new Twelfth Circuit.

Number of cases

The combined number of filings in 2004 for all federal circuit courts was 63,634 and 14,842 of these filings, 23 percent, were in the Ninth Circuit. (Fig. 5). This represents 6,000 more filings than the next largest circuit.

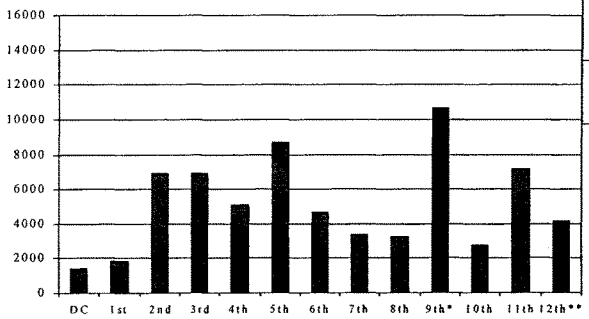
Figure 5: Existing Circuit Caseloads (December 2004)*



Cases Filed Per Year	
United States	63,634
D.C. Circuit	1,314
1st Circuit	1,737
2nd Circuit	6,835
3rd Circuit	3,874
4th Circuit	5,066
5th Circuit	8,678
6th Circuit	4,686
7th Circuit	3,399
8th Circuit	3,247
9th Circuit	**14,842**
10th Circuit	2,746
11th Circuit	7,176

*Based on United States Courts Statistical Tables, December 2004 and statistics from Ninth Circuit AMS Database.

Figure 6: Circuit Caseloads Under S. 1845 (December 2004)



Effects of S. 1845	
New 9th (CA, HI, Guam, NMI)	**10,649**
New 12th (AZ, ID, MT, NV, AK, OR, WA)	4,171

*California, Hawaii, Guam and the Northern Mariana Islands
** Alaska, Arizona, Idaho, Montana, Nevada, Oregon and Washington

S. 1845 would create a new Twelfth Circuit with a caseload comparable to or larger than all but 4 of the other Circuits. Under S. 1845, using statistics for the year 2004, the new

Ninth Circuit would have had 10,652 cases filed for the year and the new Twelfth Circuit would have had 4,171 cases filed for the year. (Fig. 6).

The White Commission acknowledged in 1998 that Ninth Circuit judges do not have the time to read all of the decisions issued by that court.[13] Justice Anthony M. Kennedy, who sat on the Ninth Circuit before being appointed to the Supreme Court, wrote to the White Commission in 1998 that "I found I could not read all of the published dispositions of my own court. This in turn causes intra-circuit conflicts."[14] In 2004, Ninth Circuit Judge Richard C. Tallman offered written testimony as follows:

> As we struggle to keep pace with the thousands of dispositions, including hundreds of published opinions, and more than 1,000 petitions for rehearing filed by disappointed litigants urging us to rehear their case en banc or amend the panel's decision, I find that there are simply not enough hours in the day for even the most conscientious and hardworking judge to remain current.[15]

Number of States

The current Ninth Circuit encompasses 9 states, 1 territory and 1 commonwealth. The

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[13] *White Commission, supra* note 3, at 35.

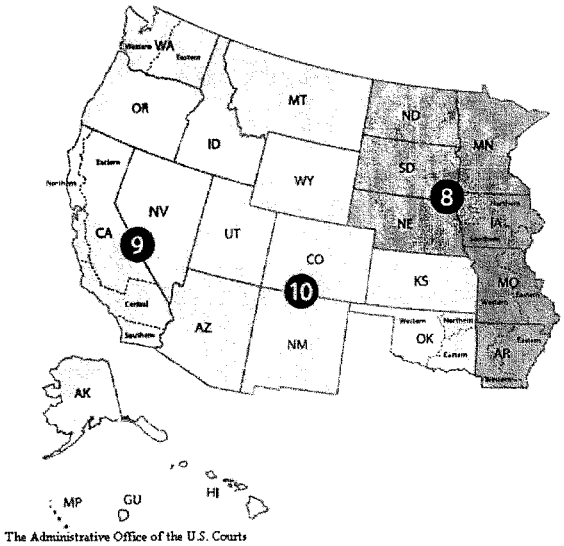
[14] Letter from Justice Anthony M. Kennedy, United States Supreme Court, to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals (August 17, 1998).

[15] Written testimony of the Honorable Richard C. Tallman, Circuit Judge, United States Court of Appeals for the Ninth Circuit, to the United States Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, (April 7, 2004), *available at* http://judiciary.senate.gov/testimony.cfm?id=1141&wit_id=3264.

average circuit, not counting the Ninth Circuit, consists of just over 4 states per circuit.

S. 1845 would result in a new Ninth Circuit consisting of 2 states, a territory and a commonwealth. The new Twelfth Circuit, with 7 states, would equal the number of states in the Eighth Circuit and have one more state than the Tenth Circuit. (Fig. 7).

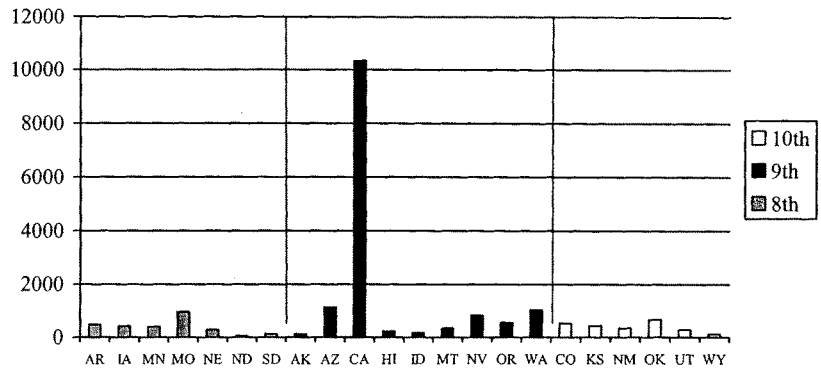
Figure 7: Map of the 8th, 9th and 10th Circuits



The Administrative Office of the U.S. Courts

Without California (and Hawaii), the caseloads of the Twelfth Circuit states would compare favorably to the caseloads of the Eighth and Tenth Circuit states.(Fig. 8).

Figure 8: Annual Circuit Appeals by State (December 2004)



PROBLEMS ENDEMIC TO THE SIZE OF THE EXISTING NINTH CIRCUIT

The disproportionately high population, caseload and number of judges in the Ninth Circuit have resulted in endemic, systemic, structural flaws in the Ninth Circuit's decisional process.

Decisional time

The true measure of the time that an appellate court takes to decide a case is the time between the filing of notice of appeal and the issuance of a disposition. By this standard, the Ninth Circuit is the second slowest circuit in the nation in deciding cases. Only the Sixth

Circuit, which has operated under an extraordinary judgeship shortage, is slower.[16]

En Banc Hearings in Federal Court

Although all federal appeals are initially heard by three-judge panels, a party may seek en banc review of a panel's decision. Until 1978, by statute every circuit's en banc hearings involved all active circuit judges participating.[17] In 1978, Congress authorized circuit courts with more than 15 active circuit judges to hear cases en banc with fewer than all active circuit judges.[18] In 1980, the Ninth Circuit became the first circuit, and to this day remains the only circuit, to opt for this "limited en banc" procedure.[19] The Ninth Circuit chose to have only 11 of its 28 authorized active judges participate in limited en banc review of panel decisions. Recently, in the face of legislation to split the Ninth Circuit, the Ninth Circuit voted to increase the limited en banc panel from 11 to 15 judges.[20]

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[16]The Administrative Office of the United States Courts, Table B4, December 2004, *at* http://jnet.ao.dcn/img/assets/4647/1204AppealsTables.pdf.

[17]28 U.S.C. § 46(c) (1948), *amended by* Pub. L. No. 95-486, 92 Stat. 1633 (1978).

[18]Pub. L. No. 95-486, § 6, 92 Stat. 1633 (1978).

[19]Circuit Rule 35-3 of the Rules of the United States Court of Appeals for the Ninth Circuit.

[20]News Release, Public Information Office, United states Courts for the Ninth Circuit, Ninth Circuit to Increase Size of *En Banc* Courts (Oct. 1, 2005) [hereinafter *En Banc Courts*], *available at* http://www.ca9.uscourts.gov/ca9/Documents.nsf/54dbe3fb372dcb6c88256ce50065fcb8/2c6819f99f6bc7038825708f006aa2d7/$FILE/9thCircuitEnBanc.pdf.

Ninth Circuit's procedure - composition of limited en banc court

Currently, in the Ninth Circuit, only 11 of the 28 authorized active circuit judges sit en banc. The 11 judges consist of the chief judge of the Ninth Circuit and 10 other active circuit judges drawn randomly.

The active circuit judges who participate in the three-judge panel initially hearing the case may or may not be selected to sit en banc. It has happened that the 11-judge en banc court has included no member of the three-judge panel from which appeal en banc is being taken. In the California gubernatorial recall election case, a unanimous three judge panel voted to enjoin the election from being held, but an 11-judge en banc court, which did not include any of the three panel judges, unanimously reversed the three-judge panel.[21]

Beginning January 2006, the Ninth Circuit has chosen to increase the number of active circuit judges sitting on the limited en banc panel from 11 to 15.[22] Ninth Circuit Chief Judge Mary M. Schroeder stated in a press release that this action "is intended to respond to criticism that we should have a majority of our active judges sit on each en banc." While this change *will* result in a majority of active circuit judges sitting on each en banc case, it *will not* result in a majority of the active circuit judges agreeing on a particular result. Close votes will be 8-7 and 9-6 rather than 6-5 and 7-4. A bare majority of active circuit judges will

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[21] *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, *rev'd en banc by* 344 F.3d 914 (9th Cir. 2003) (en banc).

[22] *En Banc Courts*, *supra* note 20.

participate; nearly one-half of the court will still be denied participation in the actual decisions. Nothing short of full participation by all active circuit judges will cure this structural flaw.

It is most unfortunate that because the 7 states that would comprise the new Twelfth Circuit are currently tethered to California, those 7 states must have their en banc federal appeals reviewed by a fraction of all active circuit judges.

Large number of votes for rehearing en banc - Consequences

Although the limited en banc process in the Ninth Circuit results in only 11 active circuit judges (soon to be only 15) hearing cases en banc, a federal appellate rule requires that a majority of all active circuit judges vote to hear a given case en banc.[23] This means that when the Ninth Circuit is at full strength, at least 15 active circuit judges must vote for rehearing en banc. Of course, besides the Ninth Circuit with its 28 active circuit judgeships, only the Sixth Circuit (with 16 active circuit judgeships) and the Fifth Circuit (with 17 active circuit judgeships) even have more than 15 active circuit judges on the entire court. In most circuits, no more than 6 or 7 votes are sufficient to obtain rehearing en banc. In the Ninth Circuit, from 2000 to June 2005, on at least 24 occasions 6 or more active Ninth Circuit judges voted for rehearing en banc but rehearing en banc was denied because less than a majority of Ninth Circuit active judges voted for rehearing en banc. (See appendix B).

[23]Fed. R. App. P. 35(a).

The consequences of this high threshold for rehearing en banc have been shocking. Many of the most important cases heard by three-judge panels of the Ninth Circuit were never reheard en banc. These include cases involving the detention of prisoners at Guantanamo Bay, a state euthanasia law, and medical marijuana.[24] Because of the Ninth Circuit's failure to hear these important cases en banc, the Supreme Court has become the de facto en banc court of the Ninth Circuit. In the past five years, 33 Ninth Circuit decisions decided by three-judge panels but never reheard en banc were reversed unanimously by the Supreme Court in written opinions. (See appendix C).

Close votes in En Banc Hearings

The Ninth Circuit's limited en banc procedure oftentimes results in very close votes. Because only 11 judges sit in the Ninth Circuit's abbreviated en banc system, only 6 judges are required to decide a case "en banc" for the court of 28. With the January 2006 increase to 15 judges, 8 judges will be able to speak for a court of 28.

In 1998, the White Commission wrote that "[v]ery few en banc decision are closely divided, so it is unlikely a full-court en banc would produce different results."[25] This is no longer true. From 1999 through June 2005, 38 of 114 Ninth Circuit limited en banc decisions were by 6-5 or 7-4 votes. (See appendix D). Ninth Circuit Judge Stephen

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[24] *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004); *Oregon v. Ashcroft*, 368 F.3d1118 (9th Cir. 2004); *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003).

[25] *White Commission*, *supra* note 4, at 35.

Reinhardt, who opposes a split of the Ninth Circuit, has acknowledged that "[o]ccasionally, the en banc vote does not reflect the true sentiment of the majority of the court."[26]

The Limited En Banc of the Ninth Circuit has been Roundly Criticized

The Ninth Circuit's unique (though authorized) limited en banc procedure has been singled out for criticism from knowledgeable sources. For example, Justice Sandra Day O'Connor, who serves as the Circuit Justice for the Ninth Circuit, wrote to the White Commission that the Ninth Circuit's limited en banc panels "cannot serve the purposes of en banc hearings as effectively as do the en banc panels consisting of all active judges that are used in the other circuits."[27] Justice Antonin Scalia, in his correspondence to the White Commission, pointed to the "incomplete and random nature of [the Ninth Circuit's] en banc panel . . . ."[28] The late Chief Justice Rehnquist wrote to the White Commission that "the en banc review process in a court so large is problematic."[29] Former Chief Judge Richard A. Posner of the Seventh Circuit has described the Ninth Circuit's limited en banc process as a

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[26]*Nunes v. Ashcroft*, 375 F.3d 810, 818 (9th Cir. 2004) (Reinhardt, J., dissenting).

[27]Letter from Justice Sandra Day O'Connor, United States Supreme Court, to Justice Byron R. White, Chair, Commission on Structured Alternatives for the Federal Courts of Appeals (June 23, 1998).

[28]Letter from Justice Antonin Scalia, United States Supreme Court, to Justice Byron R. White, Chair, Commission on Structured Alternatives for the Federal Courts of Appeals (August 21, 1998).

[29]Letter from Chief Justice William H. Rehnquist, United States Supreme Court, to Justice Byron R. White, Chair, Commission on Structured Alternatives for the Federal Court of Appeals 1 (October 22, 1998).

"bobtailed en banc procedure."[30]

The current Ninth Circuit limited en banc procedure that allows 6 judges (or 8 in 2006) to speak for a court of 28 active judges and bind 9 states, a territory and a commonwealth should be simply unacceptable.

S. 1845 Solves the Limited En Banc Dilemma for 7 States

S. 1845 would result in a new Twelfth Circuit with 14 active circuit judges. This would permit a circuit encompassing Alaska, Arizona, Idaho, Montana, Nevada, Oregon and Washington to have traditional full en banc hearings, as enjoyed by every other circuit but the current Ninth Circuit.

Whether the new Ninth Circuit created by S 1845, with its 22 active circuit judges, would wish to continue with the current Ninth Circuit's limited en banc practice or convene with a full en banc court would affect two states, not nine.

[30]Interview by Howard Bashman with Richard A. Posner, Circuit Judge, United States Court of Appeals for the Seventh Circuit (December 1, 2003).

The Current Ninth Circuit is Under-Represented in Judicial Matters

Each circuit is represented in the U.S. Judicial Conference by the circuit's chief judge and a district judge from the circuit.[31] Normally, all circuits are represented on certain Judicial Conference committees, including committees on Codes of Conduct, Court Administration and Case Management, Judicial Resources, and Security and Facilities.[32] The Judicial Conference is also responsible for approving the recommendations of advisory committees on rules of civil, criminal, appellate, and bankruptcy procedure.

Although one-fifth of the nation lives within the Ninth Circuit and the Ninth Circuit hears almost one-fourth of all federal appeals, the nine states of the Ninth Circuit have only two representatives to the Judicial Conference committee–"the principal policy-making body for the federal court system."[33] This woefully under-represents the judiciary of the western United States on committees that assign priorities and recommend and implement changes to the business of the federal courts.

By creating two circuits from the current Ninth Circuit, S. 1845 would double the current Ninth Circuit's representation on the Judicial Conference.

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[31]28 U.S.C. § 331.

[32]Judicial Conference of the United States, The Judicial Conference of the United States and its Committees 9 (October 2005), *available at http://jnet.ao.dcn/Judicial_Conference/procsandinfo.html.*

[33]News Release, Administrative Office of the United States Courts, Conference Memorializes Late Chief Justice, Acts on Administrative, Legislative Matters (Sept. 20, 2005).

S. 1845 IS THE SOLUTION

S. 1845 is an entirely appropriate form of split. It does not result in an even split of cases and population and judges. No such split is possible without dividing California. However, S.1845 would result in a modest return to regional circuit courts. The mega-circuit experiment, despite the best efforts and good faith of the judges and executive staff of the Ninth Circuit, does not serve well the inhabitants of one-fifth of the United States.

To demand a perfectly even division of the Ninth Circuit is to require something of the Ninth Circuit not found in the other federal circuits. No two circuits are identical. However, the federal circuits are regional courts. The split proposed by S. 1845 would result in a Twelfth Circuit that would parallel other circuits in the most important respects--population, caseload, number of judges, and, most importantly, quality of justice.

COST

In light of the overwhelming evidence that the quality of justice for nine states depends upon a split of the Ninth Circuit, it would seem unnecessary to dwell on whether the cost of such a split is affordable. It would seem that justice could not afford anything less than a circuit split. However, it has been suggested that the immediate cost of a split of the

Ninth Circuit is $100 to $125 million for a new circuit headquarters in Phoenix.[34]

However, closer analysis shows that either the Sandra Day O'Connor U. S. Courthouse at 401 W. Washington ("401") or the 230 N. 1st Avenue U.S. Courthouse ("230"), have adequate space to serve as a Circuit Headquarters in Phoenix for the midterm.

As reflected in the attached materials, 401 can initially house a new Twelfth Circuit headquarters at a cost of approximately $5,821,282.76 and 230 can initially house the headquarters at a cost of $9,683,597.29. Attached to my written testimony are executive summaries, courthouse floor plans and conceptual estimates developed by HBJL Collaborative, LLC ("HBJL") (see appendix E) and a letter from former Chief Judge Robert C. Broomfield. (See appendix F). Judge Broomfield concurs with HBJL's conclusion that adequate space exists at both 401 and 230. Judge Broomfield's evaluation of the HBJL analysis is deserving of great weight because of his extraordinary credentials both as a district judge and as an individual with expansive knowledge of building and space requirements for federal courthouses.

Judge Broomfield has been a judge for almost 35 years, 14 ½ on the Superior Court of Arizona in Maricopa County and nearly 20 ½ years on the U.S. District Court in Arizona. While serving on the Superior Court (then one of the nation's largest general jurisdiction trial

[34]Roxie Bacon, *Retain the Ninth Circuit An Efficient and Excellent Bench*, Arizona Attorney, Sept. 2005, at 45; *see also* Bill Blum, *The Bottom Line: How Much Will it Cost to Break up the Ninth Circuit?*, California Lawyer, June 2005, at 13.

courts), Judge Broomfield was its presiding judge for over 11 years. On the U.S. District Court, he served as chief judge for over 5 years. He has been involved in the planning, design, and oversight of the construction of several state and federal courthouses.

Judge Broomfield served on the Space and Facilities Committee of the U.S. Judicial Conference from 1987-95 and served as chair from 1989-95. During his chairmanship, the Judicial Conference directed that the committee be combined with the then-Committee on Security, which resulted in a new Committee on Security and Facilities ("Space and Facilities"). Recently, the Judicial Conference split that committee into their original committees. The U.S. Courts Design Guide was formulated during his tenure on the Space and Facilities Committee.

In addition, in 1997 Judge Broomfield was appointed to the Judiciary's Budget Committee and chaired its Economy Subcommittee for several years. As members of this subcommittee know, the Budget Committee interrelates with the Appropriations Committees of the Senate and the House. The Economy Subcommittee seeks better and more economical ways of carrying out the constitutional and statutory obligations of the judiciary and its component parts.

As the HBJL attachments and Judge Broomfield's letter reflect, a Twelfth Circuit headquarters can be attained in Phoenix now without a new circuit headquarters building.

CONCLUSION

There is no other circuit that rivals the Ninth Circuit in population, caseload, number of states or number of judges. These have contributed to numerous obstacles to the administration of justice in the Ninth Circuit. One structural flaw arising from the enormous caseload is the limited en banc procedure—impacting 9 states and one-fifth of the nation's population. I respectfully urge you to proceed with S. 1845. It is time.

Thank you for the privilege of appearing before you.

STATEMENT OF CHIEF JUDGE MARY M. SCHROEDER
TO THE SENATE JUDICIARY SUBCOMMITTEE ON COURTS
Wednesday, October 26, 2005, 3:00 p.m.
Subcommittee on Administrative Oversight and the Courts
Hearing on Revisiting Proposals to Split the Ninth Circuit

Good afternoon. My name is Mary M. Schroeder and I am Chief Judge of the United States Court of Appeals for the Ninth Circuit. I have served in that capacity since December 2000. My home chambers are in Phoenix Arizona, where I practiced law and served on the Arizona Court of Appeals before being appointed to the federal bench.

The judiciary has changed a great deal in the last 100 years, and many of these changes were described in the 1998 report of the Commission on Structural Alternatives (the White Commission) that recommended against dividing the circuit. It concluded we were administered well. Since that time, technology has improved rapidly. We have Blackberries, cell phones, and lap tops so we can communicate instantly with each other, wherever we are on the planet. It is now easier to administer the circuit than it was when I took over in 2000.

Moreover, it is the view of the overwhelming majority of our circuit judges, bankruptcy judges, and lawyers who practice within the circuit, that a division of the circuit would not improve the administration of justice in the west. There are only three circuit judges who support division. They are all here today.

What I would like to focus upon this afternoon, however, is not how well the circuit is operating but on how harmful a circuit division would be, and especially now.

There are three principle reasons. The first is the unprecedented devastation wrought by Hurricane Katrina that has created an urgent need for resources to restore and operate courts along the Gulf Coast. The second is the temporary but unprecedented increase in the administrative immigration appeals to our court from a Board of Immigration Appeals that cannot provide sufficient, meaningful administrative review. The third is the need for court resources to prepare for new litigation spawned by the Bankruptcy Act that went into effect last week and new immigration legislation you are striving to formulate.

Katrina was serious. I was in Houston last week and visited my good friend, Carolyn King, the Chief Judge of the Fifth Circuit. She has moved the entire staff of the Clerk's Office and Circuit Executive's office of the Fifth Circuit from the courthouse in New Orleans to temporary quarters in the Houston courthouse. They are all on per diem and using rented furniture. They are receiving crisis counseling, for they are worried about their damaged homes in Louisiana, their uprooted children in new schools, and what the future holds. They are allowed to return twice a month to New Orleans to deal with insurance

adjusters. All of this is very costly, not in just in money, but in time and human suffering.

The Federal Appellate Court for the Fifth Circuit, is, however, at least functioning, thanks to super human efforts on the part of its chief judge and its administrators. I understand there are trial courts that are presently not functioning.

This is clearly not the time to create an unnecessary and costly bureaucratic court structure in the west, when every bit of our very limited resources are necessary to rebuild the legal system in an area of the country where one no longer exists.

With respect to the immigration cases, they are nearly all from California. Splitting the circuit would exacerbate administrative burdens because the judges from the rest of the existing circuit would no longer be there to help. Staff resources would be cut.

Let me speak for a moment about staffing. A new circuit and new circuit court of appeals has to be staffed. They need a clerk of court, a circuit executive, technology folks, staff attorneys. We have all of that now, and very effectively so, in the Ninth Circuit. Our Clerk of Court, Cathy Catterson, is famous throughout the country for her efficiency, good humor, and ability to deal with sometimes

testy folks in all three branches of government. Our Circuit Executive's office, headed by Greg Walters, is superb. They provide services to all of our judges throughout the circuit with expertise that can't be matched by smaller circuits. Their effectiveness is greatly appreciated by our district courts which they principally serve. Creating a new set of administrators of their quality is not possible.

Finally, a few words about administration. All of our living chief judges, past, present, and future oppose circuit division. This is because the existing ninth circuit has a hub and is thus easily administered by judges who may be located outside San Francisco. Nearly all of our judges and lawyers can get to San Francisco within two hours' flight time. This means that we can fly in and out for an important meeting without losing more than one day out of the office.

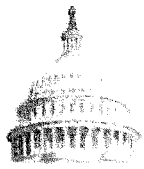
I happen to follow college athletics. It is not a coincidence that our courthouse in San Francisco and the headquarters of the Pacific Ten Athletic Conference are only a few bay area transit stops away from each other. We cover much the same territory in the lower 48 states. The bay area is the natural hub for us both.

Neither of the two circuits created by S. 1845 would have a similar hub. In one circuit, Hawaii would be an appendage of California, with its disparate

metropolitan areas. The other circuit would extend from the Arctic Circle to the Mexican border with no central administrative hub. Judges would have to change planes in San Francisco to travel between Seattle and Phoenix, its major metropolitan areas. There is no building in Phoenix that could house a court headquarters without displacing existing federal tenants and destroying costly and recently renovated courtrooms. Millions would be required in Seattle as well.

Given the stress on the administration of justice created by the combined forces of budgetary and natural disasters, this is not the time to consider fracturing the administrative structure of the courts of the west.

Thank you.



JEFF SESSIONS

U.S. SENATOR • ALABAMA

October 26, 2005

Contact: Michael Brumas or Emily Mathis
202-224-4124

U.S. Sen. Jeff Sessions, Chairmam
Subcommittee on Administrative Oversight and the Courts
"Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem"
Opening Statement
October 26, 2005

The Subcommittee on Administrative Oversight and the Courts will come to order. I am pleased to convene this hearing to consider a division of the Ninth Circuit. It has been a year and a half since we last discussed this topic in the Subcommittee, and I am looking forward to hearing from our witnesses, all of whom have traveled a long way and who have dedicated countless personal hours to developing their well researched opinions on the topic before us today.

WHY ARE WE HAVING THIS HEARING?

While we are eager to hear from the distinguished jurists before us, it is the Constitutional duty of Congress to oversee the administration of the Judicial Branch and to create such inferior courts "as the Congress may from time to time ordain and establish." [Article III Section I.] It is with this Constitutional duty in mind that we convene today's hearing. Our question is whether the enormous size of the Ninth Circuit is an impediment to the administration of justice and whether a division of the Circuit would enhance justice. The division of circuits is a normal and natural evolution of judicial organization and it has succeeded time and time again in our nation's history.

Most recently, Congress recognized this need when it decided to split the Fifth Circuit Court of Appeals into two separate Courts of Appeals. In 1973 the Commission on Revision of

the Federal Court Appellate System (The "Hruska Commission") recommended that the Fifth and Ninth Circuits be split. In 1980, Congress split only the Fifth Circuit, carving out a new Eleventh Circuit largely because the old Fifth Circuit had become too large. The recommendation to split the Ninth Circuit was never acted upon.

The split of the Fifth Circuit proved to be a great success. In the year prior to the split, the old Fifth Circuit's 26 judges disposed of 4,717 appeals. In 1995, the 29 combined authorized judgeships of the new Fifth and the Eleventh Circuits disposed of nearly triple that number of appeals (12,401 appeals). As a Montana Law Review article by Ninth Circuit Senator Conrad Burns points out, "Tripling the output of the Fifth Circuit while only adding three new judgeships certainly indicates that splitting the Fifth Circuit yielded a long-term benefit for all." I will add that the testimony before this subcommittee several years ago by then Chief Judge Gerald Tjoflat was unequivocal. He said that their current level of harmony and collegiality would not be possible with a much larger court.

THE NINTH CIRCUIT'S SIZE AND CASELOAD EVIDENCE A NEED FOR CONGRESS TO AGAIN EXERCISE ITS CONSTITUTIONAL DUTY AND ESTABLISH AN ADDITIONAL INFERIOR CIRCUIT COURT OF APPEAL

Today, we must face the problem of the unprecedented size of the Ninth Circuit and consider actions to improve the administration of justice. [SHOW CHART – exhibit 2] The Ninth Circuit covers 40% of the country's landmass and stretches from northern Alaska to the Mexican border. It encompasses more states than any of the other eleven circuits and manages almost one-fourth of the caseload (14,842 of 63,634 filings in 2004 were in the Ninth) of the United States.

[SHOW CHART – exhibit 10] The Ninth Circuit claims a vast one-fifth of the nation's population (58.2 million of 297.9 million) within its jurisdiction. That is almost three times the average population of the other circuits. (Ninth has 58.3 million / Average is 21.7 million). [SHOW CHART – exhibit 11] Though the Fifth Circuit was split 25 years ago largely due to its size, the Ninth Circuit currently has almost the same population as the current Fifth and Eleventh Circuits (which have grown since the 1981 split) combined. Today, the Ninth Circuit has 58.3 million people while the Fifth and Eleventh Circuits have 60.6 million people combined.

At our April 2004 hearing, we learned dramatic statistics about the Ninth Circuit. Today, those numbers are still as dramatic. The Ninth Circuit has 28 authorized judgeships (24 active judges and 4 vacancies) and 23 senior judges for a total of 51 judges. [SHOW CHART – exhibit 4] That amounts to 11 more active judgeships than the next largest circuit. (Ninth has 28 / Sixth has 17) [SHOW CHART – exhibit 5] And it is more than double the average number of authorized judgeships in the other circuits (Ninth has 28 / Average is 12.6). [SHOW CHART – exhibit 6] If you add senior judges to the authorized judgeship numbers, the Ninth Circuit has 22 more total judges than the next-largest circuit (Ninth has 51 / Sixth has 29).

[SHOW CHART – exhibit 13] As of June 30, 2005, the Ninth Circuit had more than triple the number of appeals filed in 2005 than the average of all other circuits (Ninth had 15,685 filings as of June 30th / Average was 4,753) [SHOW CHART – exhibit 12] and has had 6,000 more filings in 2005 than the next busiest circuit. Though the average caseload increase between 2000 and 2005 for a circuit court was just over 14%, the Ninth Circuit's caseload increased by

almost 70% during that same time (Ninth's increased 69.6% / Average increase was 14.1%). And the rate of increase has continued steadily. From 1997 to 2003, the Ninth Circuit's caseload bore a 48.1% increase in filings, over 4,000 more appeals, in just six years (8,700 appeals were filed in 1997 / almost 13,000 were filed in 2003).

The large number of judges and the caseload do appear to have impaired the administration of justice. The Ninth Circuit's efficiency in deciding appeals — that is, the time the court takes between the filing of a notice of appeal and the final disposition of a case – has consistently lagged behind other circuits. [SHOW CHART – 3 months] In 2003, for instance, the Ninth Circuit had 418 cases pending for three months or more almost the same as the next five circuits *combined*.[1] The next highest circuit had 98 such cases. [SHOW CHART - year] The next chart shows that 138 cases were pending in the Ninth Circuit for over a year. This was more than *every* other circuit in the federal system *combined*, with the next highest circuit at a mere 19 cases.[2]

[SHOW CHART – exhibit 17] According to the latest statistics, the Ninth Circuit takes almost 40% longer to dispose of an appeal than the average of all other circuits (The Ninth takes 15.4 months / The Average is 11.1 months). Please note, this delay cannot be explained by a lack of judgeships; although the caseload is high, several other circuits have higher caseloads per judge than the Ninth Circuit.

INCONSISTENCY IN NINTH CIRCUIT LAW

The limited en banc procedures employed by the Ninth Circuit, coupled with the large number of published opinions issued each year make it impossible for the Ninth Circuit to speak with clarity and consistency. A circuit with as many judges as the Ninth loses collegiality and unity.

Additionally, the Ninth Circuit's limited en banc procedure has permitted a random draw of 10 judges, plus the chief judge, to be the final review of three-judge panel decisions. This can result – and has resulted – in a mere six judges making the law for the entire circuit. Even though the Circuit recently voted to increase the number of judges that sit en banc to 15, that number still allows a mere eight judges to make the law for the entire circuit. In all other circuits, en banc means en banc – what it has always meant— the full court.

Finally, with so many cases decided each year, it is hard for any one judge to read the decisions of his or her peers. And it is virtually impossible for lawyers who practice in the circuit to stay abreast of the law. In 2004 alone, the Ninth Circuit published 691 decisions.

These factors – loss of collegiality, the limited en banc, and an inability to monitor new law – undermine the goal of certainty in the law. I hope that each of the Ninth Circuit judges testifying before us today will speak to these factors and tell us how they affect the Ninth Circuit's ability to maintain a clear and consistent law of the circuit.

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[1] *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 2003 Annual Report of the Director*, Table S-5 at 38.

[2] *Id.*

WELCOME NINTH CIRCUIT SENATORS:
KYL, ENSIGN, MURKOWSKI AND FEINSTEIN

Three of my Ninth Circuit colleagues are here today to help us explore the issues surrounding the decision to split the Ninth Circuit. Senator Lisa Murkowski of Alaska and Senator John Ensign of Nevada have been leaders in addressing reorganization of the Ninth Circuit, and have introduced legislation to restructure the circuit both in this Congress and the last. Their comments, based on their experiences as a senators from the Ninth Circuit will give us a useful context for understanding the issue.

I also would like to commend my colleagues, Senator Dianne Feinstein and Senator John Kyl for their interest in Ninth Circuit reorganization. Senator Feinstein has long advocated that the Congress look at objective measures in determining whether to split the circuit, and has rightly insisted that a split serve administrative, not political, purposes. Senator Kyl has been active this year in negotiating the most recently introduced Ninth Circuit restructuring proposal (S. 1845) authored by Senator Ensign, and cosponsored by nine Ninth Circuit Senators – the largest number of Ninth Circuit Senators to sponsor a split proposal to date.

INTRODUCTION OF THE WITNESSES

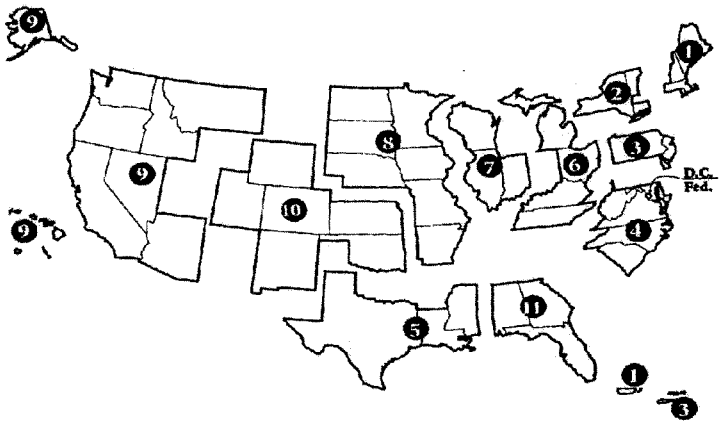
We will hear from two panels of witnesses today. On the first, we will discuss the continued judgeship and caseload numbers that seem to evidence a continuing need to divide the Ninth Circuit. We also will discuss whether a two-way split or a three way split would be the better choice and we will address the recent cost estimates for splitting the Ninth Circuit. Very interesting to me will be the discussion concerning currently empty federal courthouses in Seattle and Portland that are clearly able to serve as a seat for a new Twelfth Circuit. The witnesses on this panel, starting from my left, are Judge Diarmuid O'Scannlain, appointed to the Ninth Circuit by President Reagan in 1986; Judge Richard Tallman, appointed to the Ninth Circuit by President Clinton in 2000; Chief Judge Mary Schroeder, appointed to the Ninth Circuit by President Carter in 1979; and Judge Alex Kozinski, appointed to the Ninth Circuit by President Ronald Reagan in 1985.

On the second panel, we will gain even more insight into the Ninth Circuit and we will explore the possibility of housing a new Twelfth Circuit in Phoenix, again without having to build a new courthouse to do so. We will again hear from four witnesses. The first witness will be Judge Andrew Kleinfeld, appointed to the Ninth Circuit by President Reagan in 1986. Judge Kleinfeld traveled all the way from Fairbanks, Alaska – a trip that takes two days -- to be with us here today. The second witness will be District Judge John Roll, appointed to the U.S. District Court in Tucson, Arizona by former President G.H.W. Bush in 1991. We will then hear from Judge Sidney R. Thomas, appointed to the Ninth Circuit by President Clinton in 1995 and from Chief Judge Emeritus Marilyn Huff, appointed to the U.S. District Court for the Southern District of California by former President G.H.W. Bush in 1991.

With that, I turn to my colleague, Senator Feinstein, for her opening statement.

Exhibit 2

The Twelve Regional Circuits Today: The largest by far is the Ninth with about a fifth of the total population and close to 40% of the total land mass of the United States.

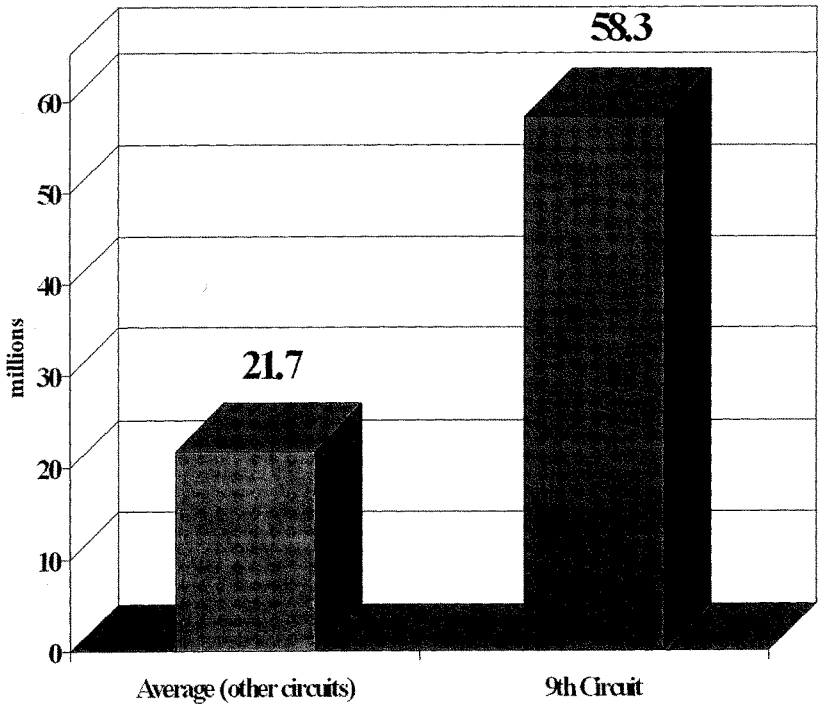


Changes since the Evarts Act of 1891:

1929 - Tenth Circuit carved out of Eighth Circuit
1948 - D.C. Circuit carved out of Fourth Circuit
1981 - Eleventh Circuit carved out of Fifth Circuit
1982 - Federal Circuit created

Exhibit 10

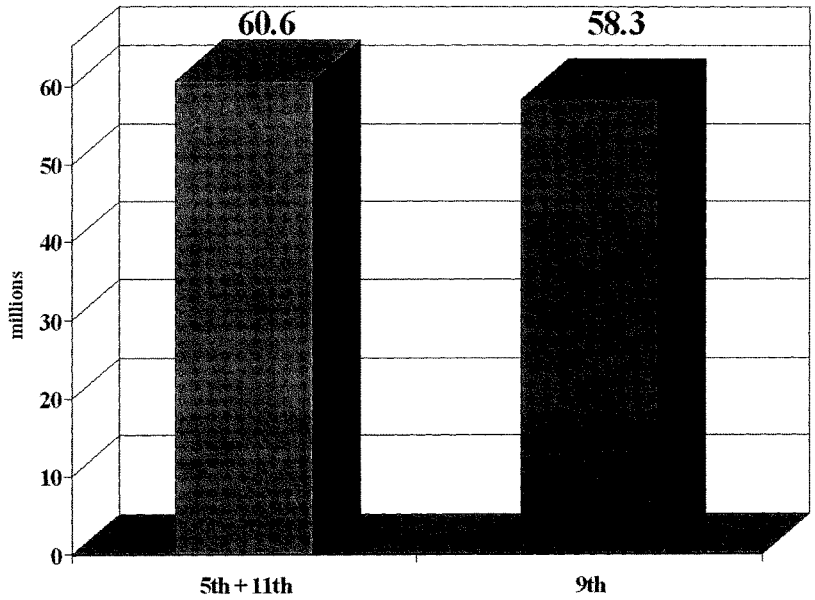
The Ninth Circuit has almost three times the average population of all other circuits.



SOURCE: U.S. Census Bureau, Estimated 2004 Population, http://www.census.gov/Press-Release/www/releases/archives/CB04-246.pdf; Central Intelligence Agency, The World Factbook, http://www.cia.gov/cia/publications/factbook/.

Exhibit 11

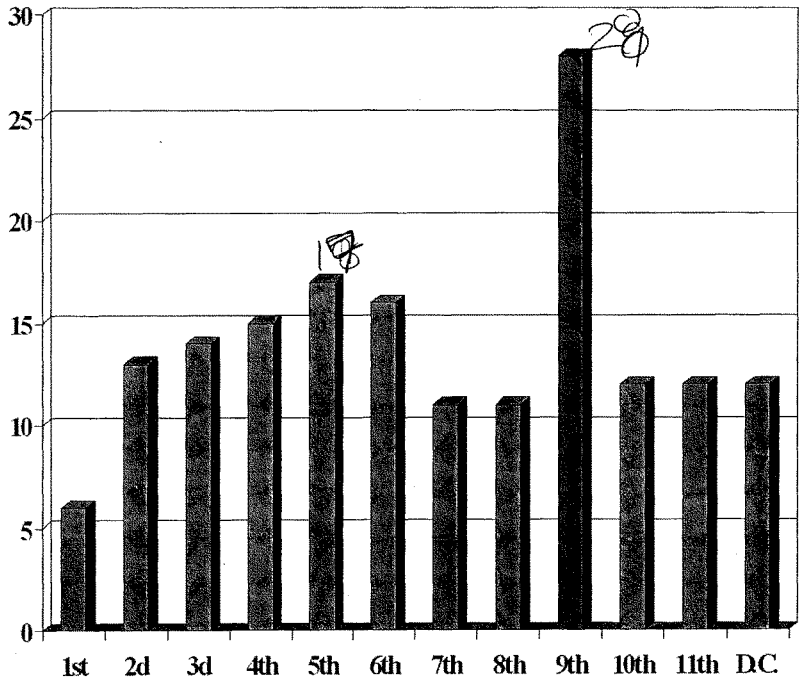
The Eleventh Circuit was carved out of the old Fifth Circuit in 1981 largely because of size. Today's Ninth Circuit has a population that is over 96% of the size of the current Fifth and Eleventh Circuits combined!



SOURCE: U.S. Census Bureau, Estimated 2004 Population, http://www.census.gov/Press-Release/www/releases/archives/CB04-246.pdf; Central Intelligence Agency, The World Factbook, http://www.cia.gov/cia/publications/factbook/.

Exhibit 4

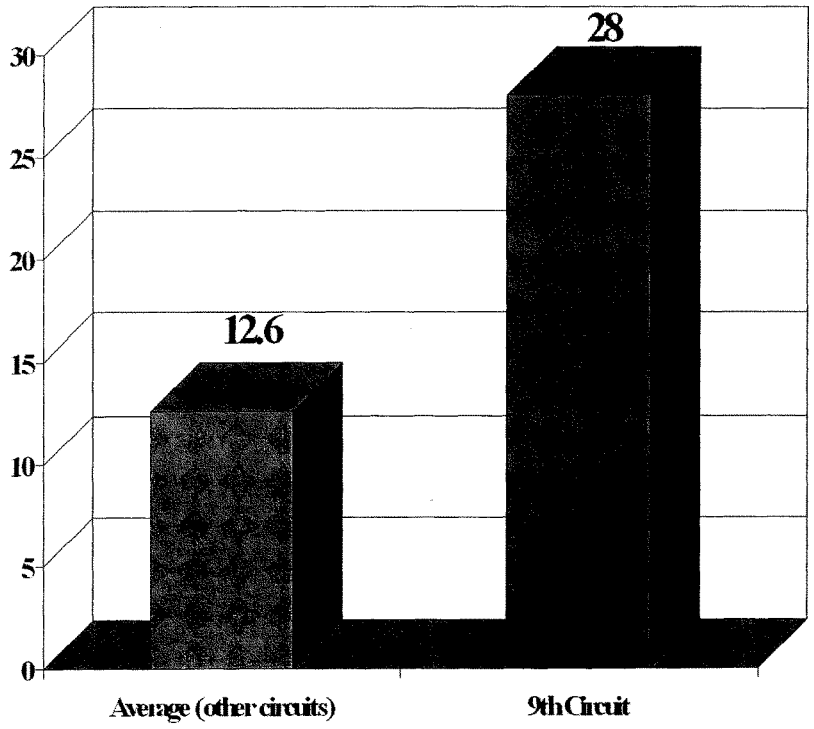
The Ninth Circuit has eleven more authorized judgeships than the next-largest circuit.



SOURCE: 28 U.S.C. § 44 (2004).

Exhibit 5

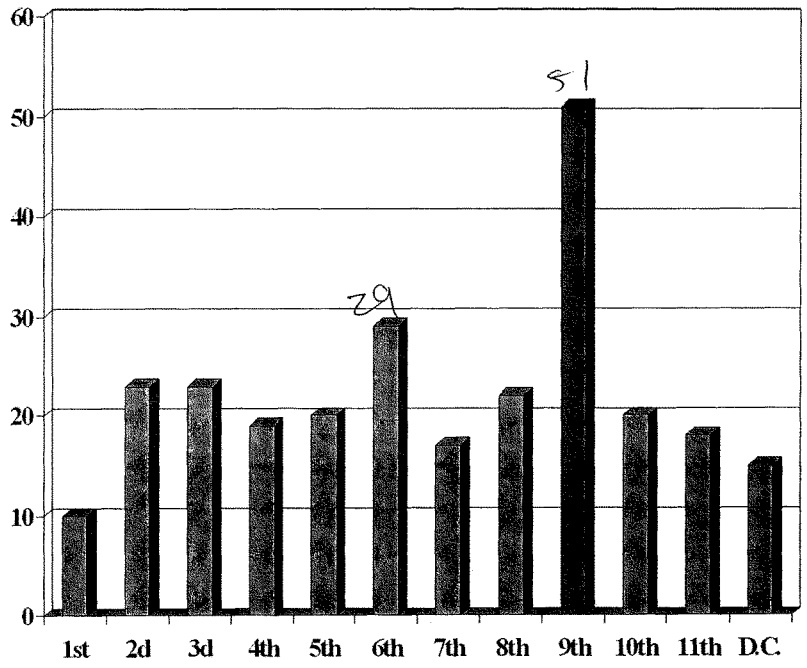
The Ninth Circuit has more than double the average number of authorized judgeships of all other circuits.



SOURCE: 28 U.S.C. § 44 (2004).

Exhibit 6

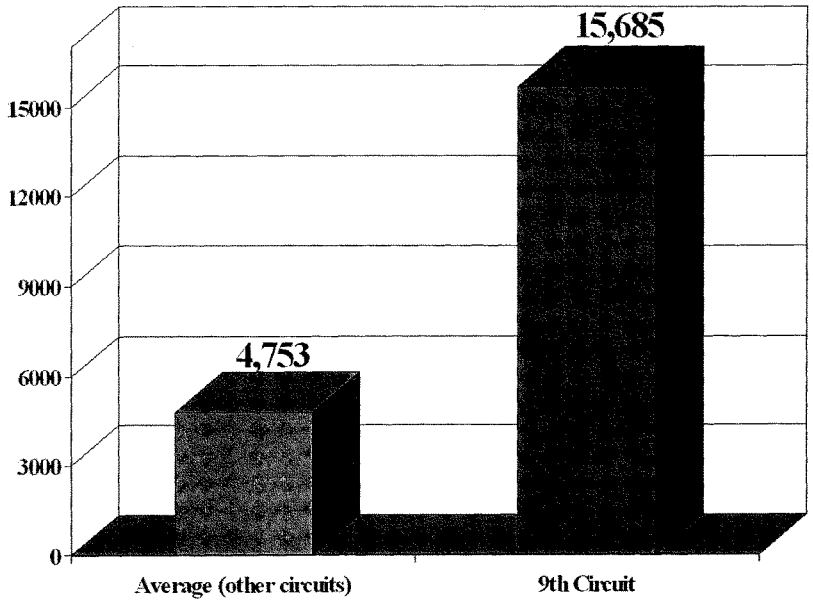
The Ninth Circuit has twenty-two more total judges (authorized + senior) than the next-largest circuit.



SOURCE: 28 U.S.C. § 44 (2004); Administrative Office of the United States Courts, Court Links, http://www.uscourts.gov/allinks.html#1st (links to circuit court websites).

Exhibit 13

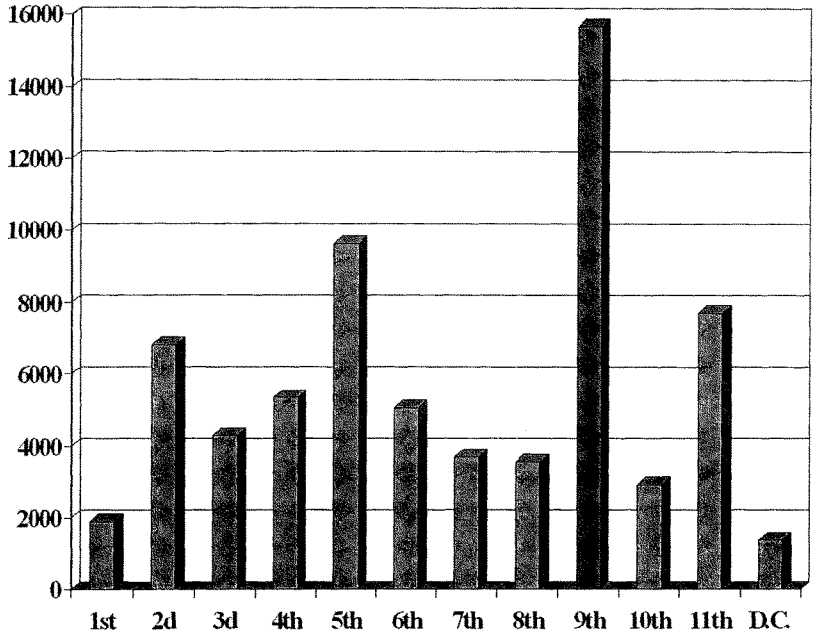
The Ninth Circuit had more than triple the average number of appeals filed of all other circuits in 2005.



SOURCE: Ninth Circuit AIMS database, July 1, 2004 to June 30, 2005; Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html.

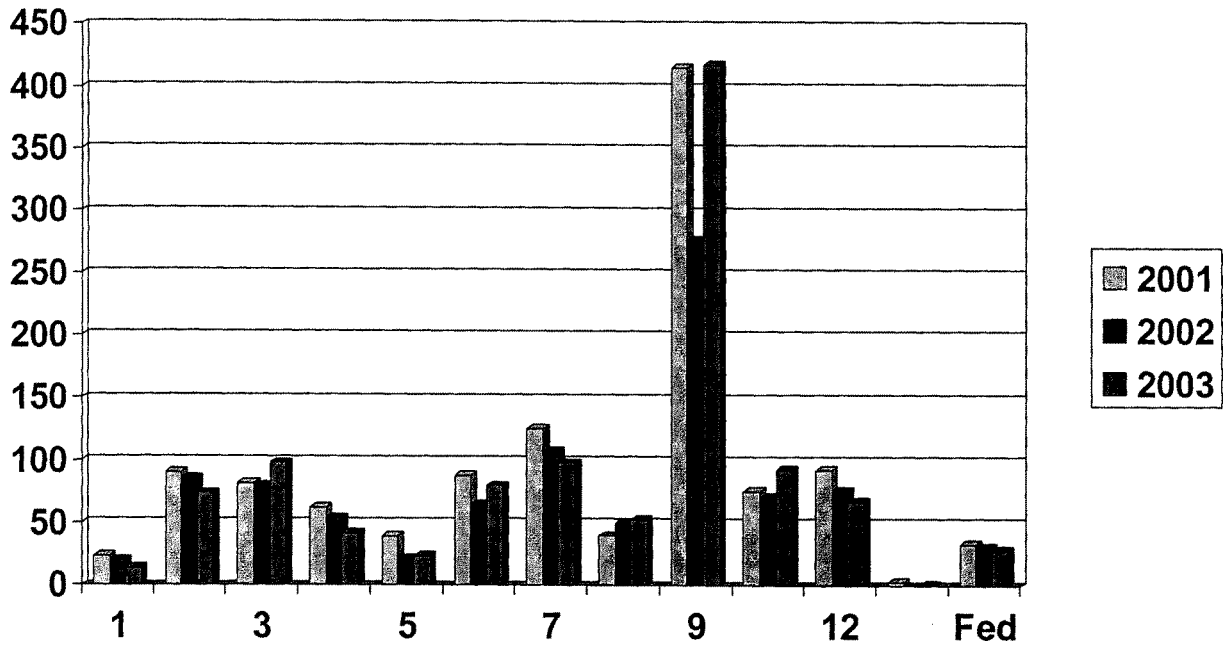
Exhibit 12

The Ninth Circuit had 6,000 more filings in 2005 than the next-busiest circuit.



SOURCE: Ninth Circuit AIMS database, July 1, 2004 to June 30, 2005; Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://inet.ao.dcn/Statistics/Caseload_Tables.html.

CASES PENDING THREE MONTHS OR MORE, BY CIRCUIT (2001-2003)



CASES PENDING ONE YEAR OR LONGER, BY CIRCUIT (2001-2003)

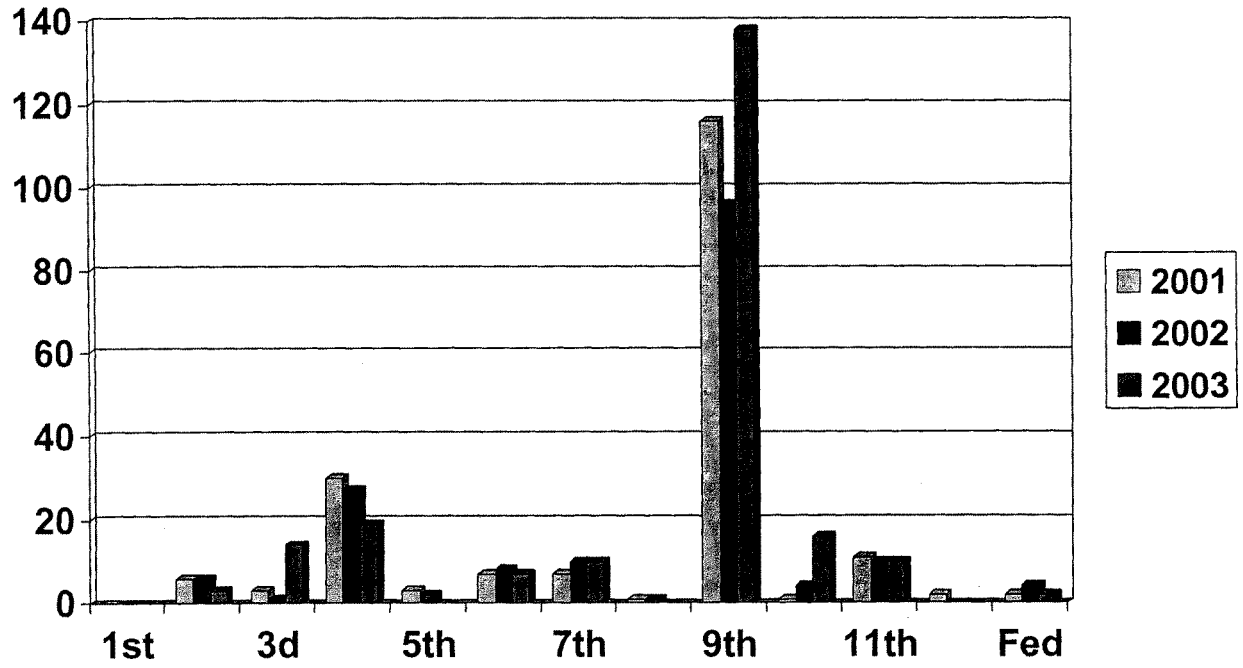
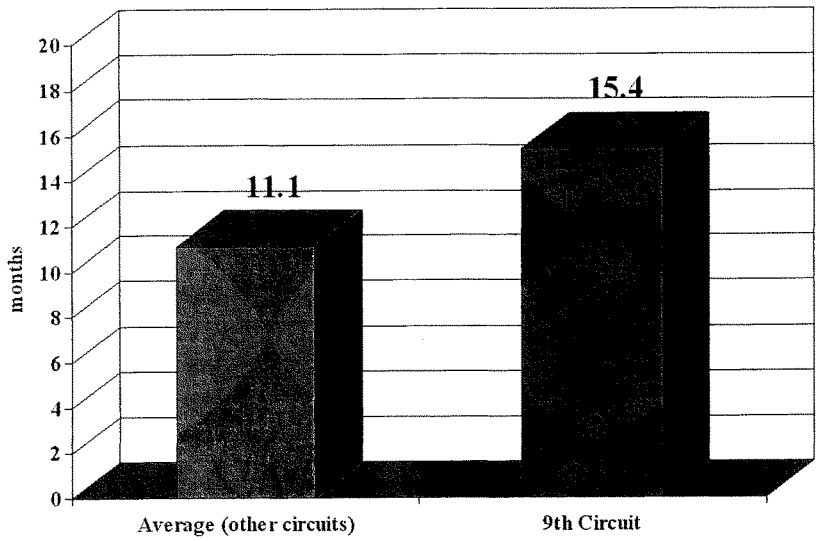


Exhibit 17

The Ninth Circuit takes almost 40% longer to dispose of an appeal than the average of all other circuits.



SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html. Exhibit represents the median time from filing of the notice of appeal to final disposition.

United States Senate
Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts

Hearing on:
"Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem"
Wednesday, October 26, 2005
Dirksen Senate Office Building, Room 226
Washington, D.C. 20510

Written Testimony of
Richard C. Tallman
United States Circuit Judge
United States Court of Appeals
for the Ninth Circuit
Park Place Building
1200 6th Avenue, 21st Floor
Seattle, Washington 98101

Good afternoon, Mr. Chairman and Members of the Subcommittee:

My name is Richard C. Tallman, and I am a United States Circuit Judge on the United States Court of Appeals for the Ninth Judicial Circuit with chambers in Seattle, Washington. I was appointed by President Clinton in May 2000. I am honored to appear before you to discuss the reorganization of the Ninth Circuit. I join my colleagues, Circuit Judges Andrew Kleinfeld and Diarmuid O'Scannlain and District Judge John Roll, and other judges throughout the Ninth Circuit, who publicly favor splitting our court to bring about a new era of judicial efficiency.[1]

I previously testified before this Subcommittee regarding my reasons for supporting a reorganization of the Ninth Circuit.[2] To avoid repeating it now, I will simply incorporate my prior written and oral testimony. I understand the

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[1]Although I currently sit as a member of the Executive Committee of our court, I do not purport to speak on its behalf here today. I do, however, join my colleagues who have publicly endorsed reorganization of the Ninth Circuit in the past, and who continue to support a split in some form. They include Circuit Judges Joseph Sneed of California, Robert Beezer of Washington, Cynthia Hall of California, Stephen Trott of Idaho, Ferdinand Fernandez of California, T.G. Nelson of Idaho, and Judges O'Scannlain and Kleinfeld. There are a host of United States District Judges, Magistrate Judges, and Bankruptcy Judges throughout the Ninth Circuit who also support reorganization and whose names are too numerous to mention.

[2]*Improving the Administration of Justice: A Proposal to Split the Ninth Circuit Before the S. Subcomm. on Admin. Oversight and the Courts*, 108th Cong. 18-21, 207-28 (Apr. 7, 2004) (oral and written testimony of Richard C. Tallman, Circuit Judge for the United States Court of Appeals for the Ninth Circuit).

Subcommittee's interest here today is to discuss how to best reorganize the Ninth Circuit. The need to do so is even more compelling today than it was when I first appeared before you. The benefits of a split far outweigh the cost—both in finance and in efficiency. The Ninth Circuit is too big, too spread out, and too overworked to continue in its present form because we fear a short-term financial impact. I am keenly aware that we cannot get something for nothing, and that the precious taxpayer dollars to fund this reorganization are subject to competing needs. However, over the long term, we can gain a great deal by splitting a circuit that has become too unwieldy to properly handle the nearly 16,000 cases docketed this past fiscal year.[3]

In the more than five years I have served as a United States Circuit Judge on the Ninth Circuit, our caseload has increased by more than 68 percent, from 9,500 to almost 16,000 cases. This equates to a double-digit increase each year of my service. These growth trends show no sign of abating. Yet in the past five years we have never had our full complement of 28 authorized judges and the United States Judicial Conference has annually supported our request to increase the number of active judges to 35. I am pleased to see that the pending circuit split

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[3]2005 Appellate Judicial Caseload Profile Report for the United States Court of Appeals for the Ninth Circuit, fiscal year ending September 30, 2005.

bills all call for adding seven additional appellate judges in the West, particularly to California where they are most needed. It should be noted that the Judicial Conference has declined to take a position either for or against dividing the Ninth Circuit.[4]

1. Housing the Twelfth Circuit in Seattle

I turn to the question of how we should be reorganized. If the Congress prefers a two-way split, the cheapest, most readily available, and most geographically desirable location for the Twelfth Circuit's headquarters is Seattle, Washington. A significant amount of money and time can be saved if we house the headquarters in the now empty ten-story William K. Nakamura United States Courthouse, located at 1010 Fifth Avenue in Seattle. I have included pictures of the building in Appendix A to my testimony. EXHS. 1 & 2. It was the first building in the West designed exclusively as a federal courthouse.[5] The Nakamura

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[4]Judicial Conference of the United States, Preliminary Report on Judicial Conference Actions (Sept. 20, 2005), *available at* http://jnet.ao.dcn/img/assets/4580/Prelimrept-905.pdf.

[5]General Services Administration, Washington Buildings, *available at* http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&contentId=16061&noc=T. The plans follow the same architectural mold of the 312 Spring Street Courthouse in Los Angeles, its even larger sister courthouse, also built in the 1940s. The Spring Street Courthouse is still in use by the United States District Court for the Central District of California, housing district and circuit judges.

Courthouse and its grounds are on the National Register of Historic Places, having been home since 1939 to the United States District Court for the Western District of Washington and appellate judges for the United States Court of Appeals for the Ninth Circuit whose duty stations are based in Seattle.[6] It has also housed United States Senators Warren Magnuson and Scoop Jackson, as well as many other federal agencies since 1940. This building, rich in history, where many great men and women have served our nation, is the perfect building in which to begin a new era in our reorganized circuit judiciary.

Repairing and renovating the Nakamura Courthouse for use as a court of appeals building is already underway by the General Services Administration (GSA). It was vacated in August 2004, when the United States District Court moved out to occupy the new 23-story United States Courthouse at 700 Stewart Street in downtown Seattle.

The old Nakamura Courthouse, with 104,000 usable square feet, is more than adequate to physically house the necessary courtrooms, judges' chambers, clerk's office, circuit executives, staff attorneys, mediators, and other administrative employees of the Twelfth Circuit. During the renovation, GSA is

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[6] *Id.*; National Park Service, National Register of Historic Places, *available at* http://www.cr.nps.gov/nr/.

converting old district court chambers into seven resident circuit judge and nine visiting circuit judge chambers. Two of the five old district court trial courtrooms will be configured to accommodate three-judge appellate panels. EXH. 3. The other two trial courtrooms will house the court library and a large conference room sufficient to hold at least 35 people.

In addition, there is a large 15-judge en banc and ceremonial courtroom which is more than sufficient to handle an en banc panel consisting of all judges who would serve on the Twelfth Circuit. EXH. 4. As you know, the current Ninth Circuit is too large to accommodate the entire court sitting en banc. Currently, only 11 of the 24 active judges in the Ninth Circuit sit en banc. Starting January 1, 2006, we will enter a two-year trial period where 15 of the 24 judges will sit en banc.

With or without a split, the Nakamura Courthouse renovation will be finished by late 2007. Congress has previously approved the $53 million in seismic repairs and renovation costs in GSA's budget for fiscal year 2005,[7] and preparing it to serve as the headquarters for the Twelfth Circuit will not add excessive work or financial expenditure to the planned renovation. I understand

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[7]MAKING APPROPRIATIONS FOR FOREIGN OPERATIONS, EXPORT FINANCING, AND RELATED PROGRAMS FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2005, H.R. Rep. No. 108-792 (Nov. 20, 2004) (Conf. Rep.).

from informal talks with GSA's regional office in Washington state that a relatively modest adjustment in the final architectural plans, costing not more than five-million dollars, would be required. This additional expenditure would allow the GSA to expand and relocate the clerk's office to a ground floor and to build out additional space available for use by circuit executives, staff attorneys, mediators, and their support staff—keeping them all conveniently together in one building. There will be plenty of future space available for growth over the next 30 years. Thus, it will be relatively easy to set up the Nakamura Courthouse as the Twelfth Circuit's headquarters, and all the construction should easily be finished by the time a split becomes effective. This would allow the new circuit to begin operations, hear oral arguments, and carry out other judicial functions upon the effective date of the Twelfth Circuit.

2. Alternate Headquarters for the Twelfth Circuit in Portland

If Congress prefers another Pacific Northwest location, the Gus Solomon United States Courthouse in Portland, Oregon, stands ready to answer the call. EXH. 5. It has even more square footage available, though it too requires seismic repair and renovation similar to that underway at the Nakamura Courthouse. EXH. 6. The plans to upgrade and renovate the old Portland courthouse have not been prepared nor have the costs of renovation and upgrades been determined, so I

cannot say how much it would cost or how long it would take to be ready for business. What is clear, however, is that we do not need to build new courthouses. We also ought to avoid arrangements in which the new circuit would be housed in separate buildings within the same city. Seattle's Nakamura Courthouse or Portland's Gus Solomon Courthouse would easily accommodate the space requirements of the Twelfth Circuit's headquarters for decades to come.

3. Travel Costs

Seattle not only has a courthouse that will be newly renovated, seismically upgraded, and ready to house the Twelfth Circuit, it is also centrally located within the states that would make up the new circuit. The current Ninth Circuit consists of nine western states, plus the United States Territory of Guam and the Commonwealth of the Northern Mariana Islands. While I enjoy deciding cases from all over the western United States and the Pacific Territories, the sheer size of the circuit requires me and my colleagues to spend countless hours in airports and on airplanes. Additionally, there is the cost to taxpayers of having current Ninth Circuit judges, and their support staff, regularly travel these great distances. And although I am located in the Pacific Northwest, I spend very little time actually hearing oral argument in Seattle or other northwestern states. Much of my time is now assigned to hearing appeals primarily from California.

My time, and the time of all the other circuit judges in the current Ninth Circuit, would be better spent processing work in chambers. Seattle is easily reached by convenient air service from all of the states in the Twelfth Circuit. Flights to and from Seattle to other states are more frequent, would be shorter in duration, and are less expensive, allowing for less time wasted in airports, and more time spent in chambers handling appellate work. Seattle is the closest port to Alaska, and Washington is contiguous to Oregon and Idaho, and easily accessible from Montana, Arizona, and Nevada. The small incremental cost we will incur on administrative start-up expenditures will be in part offset by the substantial savings resulting from reducing the expense now incurred by all Ninth Circuit judges who must travel throughout the massive existing Ninth Circuit.

Right now, because California is producing 70 percent of the current Ninth Circuit's caseload, a substantial amount of time and money is spent sending judges from outside the Golden State to hear cases in California. I spend the bulk of my time on cases originating in California. This past year, I heard cases at my home base of Seattle for only one week of the entire year. By adding new judges based in California and splitting off many of the current Ninth Circuit states into the Twelfth Circuit, judges outside California will spend less time traveling and more time hearing cases within their own state or within states closer in proximity.

Those are real savings of hundreds of thousands of dollars annually and many hours of travel.

4. Additional Judgeships

Our workload and the time it takes the Ninth Circuit to process appeals are two key reasons why the Ninth Circuit must be split.[8] It is necessary to add additional judgeships and to fill empty seats already authorized. However, with or without a circuit split, California requires these new judgeships to handle its overwhelming caseload. Eight years ago, the Judicial Conference approved the addition of six permanent and two temporary circuit judgeships to the existing Ninth Circuit,[9] and it is unfair to attribute the cost of creating these positions to the cost of splitting the Ninth Circuit, as at least one study has suggested.[10] The true cost of splitting the circuit is in administrative and start-up expenditures—both of

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[8]In 2004, the median time interval from the filing of a notice of appeal to the final disposition in the Ninth Circuit was fourteen months, almost 30 percent longer than the national average. Federal Court Management Statistics 2004, Court of Appeals, *available at* http://jnet.ao.dcn/cgi-bin/cmsa2004.pl. The testimony of Judges O'Scannlain and Roll contain detailed statistics to substantiate the need for reorganization and I respectfully refer the Subcommittee to those statements in support of a split.

[9]Report of the Proceedings of the Judicial Conference of the United States (Mar. 11, 1997), *available at* http://www.uscourts.gov/judconf/jccrpt397.html.

[10]*See* Administrative Office of the Courts, *Cost Estimate Summaries for Ninth Circuit Split Legislation* (S. 2278, H.R. 2723, S. 562) (May 4, 2004).

which can be reduced by using existing court facilities and sharing administrative functions between the two circuits.

Those expenditures were inflated in past discussions on the cost of the split because it was assumed that brand new courthouses would have to be constructed and there was no offsetting credit based on the financial gain from cost savings resulting from separating the states. A reduced Ninth Circuit, consisting of California, Hawaii, Guam and the Northern Mariana Islands, would cost less to operate than the old Ninth Circuit and the savings should be offset against the anticipated costs of the Twelfth Circuit. In addition, the new Ninth and Twelfth Circuits could easily initially share certain administrative tasks, such as library resources, judicial conferences, and some functions of the clerk's and circuit executive's offices. Shared cost-saving solutions of this nature can be found for many of the problems opponents have raised regarding how much it will actually cost to split the Ninth Circuit.

5. Review of Specific Provisions of Pending Legislation

Attached as Appendix B is a memorandum dated October 17, 2005, to the principal sponsors in Congress of S. 1296, S. 1845, and H.R. 3125 containing specific comments, section by section, for consideration by the Judiciary Committee in markup. EXH. 7.

6. Conclusion

History has proven that splitting an overly large circuit can result in other efficiencies and benefits to the court and to litigants that far outweigh any initial expenditures necessary to set up a new circuit.[11] Justice delayed is justice denied, and it is hard to quantify the benefits of speedier resolution of appeals that will surely follow creation of more manageable, smaller appellate courts. In the end, our citizens, both as taxpayers and consumers of our court services, will greatly benefit from a split of the Ninth Circuit into two manageable circuits. It will provide our citizens with better service, litigants with prompt decisions, and a full en banc review of the most important cases to reach the court.

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[11]The split of the Fifth Circuit in 1981 into the new Fifth Circuit and the Eleventh Circuit was a great success. In the year prior to the split, the old Fifth Circuit's 26 judges disposed of 4,717 appeals. In 1995, the 29 combined judges of the new Fifth and the Eleventh Circuits disposed of nearly triple that number. *See* Senator Conrad Burns, *Dividing the Ninth Circuit Court of Appeals: A Proposition Long Overdue*, 57 MONT. L. REV. 245, 254 (1996). Judge Gerald Tjoflat of the old Fifth Circuit, and now with the Eleventh Circuit, gave eloquent testimony to the favorable results of that reorganization when he appeared before this Subcommittee at its 2004 hearing on splitting the Ninth Circuit. *Improving the Administration of Justice: A Proposal to Split the Ninth Circuit before the S. Subcomm. on Admin. Oversight and the Courts*, 108th Cong. 43-45, 244-67 (Apr. 7, 2004) (oral and written testimony of Gerald Bard Tjoflat, Circuit Judge for the United States Court of Appeals for the Eleventh Circuit).

APPENDIX A

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Exhibit 1	Nighttime view of the William K. Nakamura United States Courthouse, Seattle, Washington
Exhibit 2	Daytime view of the Nakamura Courthouse
Exhibit 3	Nakamura Courthouse three-judge appeals panel courtroom
Exhibit 4	Nakamura Courthouse en banc courtroom
Exhibit 5	Exterior view of the Gus J. Solomon United States Courthouse, Portland, Oregon
Exhibit 6	Solomon Courthouse courtroom

APPENDIX B

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Exhibit 7 — Memorandum to Senator Ensign and others from Judge O'Scannlain and others, dated October 17, 2005

CHAMBERS OF U.S. CIRCUIT JUDGE
RICHARD C. TALLMAN **MEMORANDUM**

October 17, 2005

TO: Senators Ensign and Murkowski, and Congressman Simpson

FROM: Judges O'Scannlain, T.G. Nelson, Kleinfeld and Tallman

RE: Review of S. 1296, S. 1845, and H.R. 3125 Circuit Split Bills

In our capacity as individual United States Circuit Judges who would be directly affected by the proposed legislation to split the existing Ninth Circuit Court of Appeals, we offer the following comments. We do not purport to speak on behalf of our Court. We have noted the following considerations in reviewing the draft S. 1296 as introduced by Senators Murkowski, Stevens, Burns, Craig, Crapo, Kyl, and Smith on June 23, 2005; H.R. 3125 as introduced by Congressman Mike Simpson on June 29, 2005; and S. 1845 as introduced by Senators Ensign, Murkowski, Burns, Craig, Crapo, Inhofe, Kyl, Smith, and Stevens on October 6, 2005:

1. In Section 3 of S. 1296, the 's' should be struck from the end of "Marianas." We note that this is corrected in S. 1845, Section 3.

2. In Section 4 of all the bills, we note that five new circuit judgeships and two temporary judgeships are created. We want to alert you to a recent U.S. Judicial Conference report from the Committee on Judicial Resources which states that seven new judgeships are inadequate to address the imbalance in workload of the New Ninth Circuit to meet the need generated by California cases. Opponents of the split may argue that there is a pressing need to increase the number of new circuit judgeships for California to equalize the workload per circuit judge as between the New Ninth and the Twelfth Circuits that would require more than seven new judgeships for the New Ninth Circuit. Thought should be given to increasing the number above seven.

3. Section 4 of both Senate bills, S. 1296 and S. 1845, guaranty that any judges appointed to the Former Ninth Circuit before the split are to go to the New Ninth Circuit (it places their official duty stations in California). However, under the House bill, H.R. 3125, two of the five new judges could end up in the Twelfth Circuit (Arizona or Nevada). Therefore, if there is a concern about keeping enough judges in the New Ninth, the House bill will need to be amended in that respect.

4. In Section 4 of H.R. 3125, under Temporary Judgeships, the two additional circuit judges appointed for the Former Ninth Circuit prior to the split may have their official duty stations in Arizona, California, or Nevada. S. 1296 and S. 1845 place these appointees solely in California. The bills should be reconciled to provide that all new circuit judgeships, permanent or temporary, will be assigned to California (or whatever states comprise the New Ninth Circuit).

5. In Section 5, H.R. 3125 lists the number of judges in the New Ninth as 24 and the number of judges in the Twelfth as 9. S. 1296, Section 5, lists 19 judges and 14 judges, respectively. S. 1845, Section 5, lists 20 judges and 14 judges, respectively. These numbers should be reconciled so that all the bills conform with one another once it is made clear where the new judgeships will be established. Ideally, Title 28, United States Code, § 44, should be amended to provide that there are 19 positions (plus 2 temporary judgeships, for a total of 21 positions) in the New Ninth, and 13 positions in the Twelfth Circuit.

6. Section 6 of S. 1296 leaves out Pasadena as an authorized place for the holding of court for the New Ninth Circuit. S. 1845 corrects this omission.

7. Section 6 of S. 1296 leaves out Las Vegas, Seattle, Boise, and Anchorage as authorized places for the holding of court for the Twelfth Circuit. Section 6 of H.R. 3125 leaves out Las Vegas, Anchorage, Boise, Portland, and Missoula as places for the holding of court for the Twelfth Circuit. S. 1845 leaves out Anchorage and Boise. The bills should be amended so that it is clear that the Twelfth Circuit is authorized to sit in Phoenix, Las Vegas, Boise, Portland, Seattle,

Anchorage, and Missoula.

8. S. 1296 and S. 1845 include a provision, in Section 7, that the Twelfth Circuit's headquarters will be in Phoenix, Arizona. H.R. 3125 does not specify where the Twelfth Circuit's headquarters will be. Perhaps the H.R. 3125 version is preferable given the current uncertainties over cost.

9. In Section 8 of S. 1296, the 's' at the end of "Marianas" should be struck. We note that this is corrected in S. 1845, Section 8.

10. Section 9 of S. 1296 and S. 1845, and Section 8 of H.R. 3125, give senior circuit judges the right to elect assignments to either circuit. The bills should require that senior judges elect to which circuit they wish to be assigned before the effective date of the Act. Consideration should also be given to permitting Chief Judge Schroeder to remain as Chief of the New Ninth Circuit while maintaining her resident chambers in Phoenix. Perhaps active judges should be permitted to elect as well.

11. Section 11, sub-paragraph (3) of S. 1296 and S. 1845, and Section 10, sub-paragraph (3) of H.R. 3125, should be consistent. In S. 1296 and S. 1845, petitions for rehearing and petitions for rehearing en banc would be considered by the court of appeals to which they would have been submitted had the Act been in effect at the time the appeal or other proceeding was filed with the court of appeals. In H.R. 3125, these petitions are treated as if the Act had not been enacted. These provisions must be reconciled.

12. Section 12 of S. 1296 and S. 1845, and Section 11 of H.R. 3125, should make clear that circuit judges may also be assigned by the respective chief judges of each circuit to sit on the district courts of each circuit. That will cover three-judge voting rights panels and routine designations when a district needs temporary or emergency staffing on the district court (as has recently been the case in Montana, Idaho, Arizona, Southern California, Guam, and Hawaii). Circuit judges have helped handle district court cases when judicial vacancies have

created judicial emergencies or when district judges have had to recuse themselves.

13. The language to be inserted in Section 292 of Title 28, United States Code, contained in Section 13 of S. 1296 and S. 1845, and Section 12 of H.R. 3125, are substantively the same, but worded differently in each bill. S. 1296 and S. 1845 seem to articulate a more complete version of the language.

14. In S. 1296, there is no omnibus appropriations authorization or reference to covering the cost of reorganization in a separate piece of legislation. Thought should be given to doing so in S. 1296, as H.R. 3125 has included such appropriation authorization language in Section 16. S. 1845 has included this language in Section 15.

15. In Section 4 of S. 1296 and S. 1845 the judgeships become effective upon the passage of the Act, but, under Section 15 of S. 1296 and Section 16 of S. 1845, the amendments do not become effective for another twelve months. Under the proposed House bill, H.R. 3125, the judgeships also become effective upon passage; the amendments are not effective until the first day of the fiscal year beginning not less than nine months after five judges are confirmed. It is unclear how long that would take. The House bill requires at least three judges to be appointed after January 2006. It does not give any indication as to when the other two judges must be appointed. In fact, there is no provision for filling subsequent vacancies in existing judgeships before the new judgeships would be filled under the bill. Conceivably, the bill could pass and the circuit never be split. The Senate version seems preferable.

16. S. 1296 and S. 1845 give no attention to authorizing shared circuit conferences or shared administrative services (such as a Main Court Library in San Francisco or Circuit Executive staff assistance for space and security issues). H.R. 3125 does mention administrative coordination in Section 16. Thought should be given to addressing those subjects in S. 1296 and S. 1845.

Senators Ensign and Murkowski, and Congressman Simpson
October 17, 2005

Thank you for considering our comments regarding the various legislative proposals supporting a reorganization of the current Ninth Circuit.

Senate Judiciary Committee
Subcommittee on Administrative Oversight and the Courts

Hearing on Revisiting Proposals to Split the Ninth Circuit

Testimony of Judge Sidney R. Thomas

October 26, 2005

Mr. Chairman and Committee members. My name is Sidney R. Thomas. I serve as a Circuit Judge on the Ninth Circuit Court of Appeals, with chambers in Billings, Montana. I presently serve as En Banc Coordinator and Death Penalty Coordinator for the Circuit. I also serve on the Executive Committee of the Circuit. I thank the Subcommittee for the opportunity to testify on the various proposals to divide or restructure the Ninth Circuit Court of Appeals. The views I express are my own.

I oppose restructuring the present Ninth Circuit to create two or more circuit courts. Division of the Ninth Circuit at this time would have a devastating effect on our Court. It would increase delay in case processing substantially and would decrease access to justice. It would create unnecessary and expensive duplication of core functions, while substantially reducing vital services. The most effective means of administering justice in the federal courts in the states comprising the Ninth Circuit is a centralized administration and staff support.

The impact of a division of the circuit would be especially harmful at the present time, when the United States Courts are faced with static or decreasing budgetary resources and when the Ninth Circuit has been forced to face an unprecedented, but probably temporary growth in its appellate caseload.

To explain my reasoning fully, I would like first to address the real world administrative impact of any split, then address some of the underlying concerns expressed by those promoting a structural division of the circuit.

Budgetary and Administrative Impact

1. Caseload trends.

The Ninth Circuit's appellate caseload from the district courts of the Circuit has stabilized during the past few years. In 2001, we faced a backlog of cases that developed from 1994-1998, during a period when the Court was operating with only eighteen of its twenty-eight judgeships filled. To address this, we adopted an aggressive case management plan. The plan was successful. At the end of 2001, the Administrative Office reported a median time from Notice of Appeal to disposition in the Ninth Circuit of 16.1 months. At the end of 2003, the median time was 13.7 months, a 14% decrease in two years. Our internal statistics showed an approximate 50% decrease in the time between the filing of the last brief and oral argument hearing during the same period. This statistic is important to us because it provides a good measure of how fast attorneys are able to get their case heard.

The Circuit would be current in its workload, except for an unusual and unanticipated circumstance: the unprecedented growth in immigration administrative petitions for review during the last several years.

The following graph shows the progress the Ninth Circuit made from 2001-2004, despite the increase in immigration cases:

Changes in Filing and Delay (2001-2004)

Circuit	% Caseload Change	% Delay Change
11th Circuit	- 6.2%	- 16.2%
9th Circuit	+ 38.0%	- 11.4%
5th Circuit	- 1.5%	- 10.5%
8th Circuit	+ 2.2%	- 8.4%
10th Circuit	- 4.1%	0.0%
3rd Circuit	+ .3%	+ .9%
4th Circuit	- 6.5%	+ 4.2%
7th Circuit	- 2.3%	+ 6.2%

1st Circuit	- 2.2%	+ 6.7%
6th Circuit	- .2%	+ 9.8%
2nd Circuit	+ 55.1%	+ 29.9%
D.C. Circuit	- .8%	+ 38.2%

Given the increased immigration caseload, we would expect the delay figures to increase over previous years. However, the point is that application of Ninth Circuit case management techniques has been quite successful despite the increase in volume.

The present caseload challenge is the enormous increase in immigration petitions for review. The increase in immigration caseload stemmed from a decision of the Attorney General to eliminate the backlog of 56,000 cases that existed in the Board of Immigration Appeals. That decision resulted in the resolution of tens of thousands of cases by the BIA in a matter of months. Over half of the petitions for judicial review from those cases were venued in the Ninth Circuit.

The statistics available through June 30, 2005, indicate a net decrease of 1% of the total appellate caseload from the district courts and non-immigration administrative petitions for review during the period 2001-2005. In contrast, petitions for review from administrative immigration decisions increased 570% during the same period.

The following numbers illustrate the point:

Year	Immigration Appeals	Non-Immigration Appeals
2001	954	9,388
2002	2,670	8,751
2003	4,206	8,666
2004	5,368	8,906
2005 (thru 6/30/05)	6,390	9,327

Whether the increase in caseload is temporary or not remains open to question. The BIA has reported that it is has reduced its backlog to 29,000 cases, indicating that, while the courts can expect continued volume for the next several years, the volume of immigration cases should decrease as the BIA becomes current in its case processing. Recent statistics bear this out. The rate of filing of petitions for review of the decisions of the Board of Immigration Appeals has been declining. The Second Circuit, the other circuit most affected by an increase in immigration caseload (experiencing a 1312% increase in its immigration caseload from 2001-2005), has noticed a 9% decrease in petitions for review this year. The Real ID case may also have an effect in decreasing immigration caseload. The fact that immigration caseload is likely to decrease seems probable. The question is the level to which immigration caseload will ultimately stabilize.

Temporary spikes in caseload are nothing new. From time to time, our Circuit and others have experienced temporary increases due to particular circumstances. A recent example is the caseload spike experienced by the border states. The California energy crisis causes the filing of a large number of petitions for review from decisions of the Federal Energy Regulatory Commission. Temporary increases in caseload due to unique circumstances are to be expected. However, the clear trend over the past five years in the aggregate is that the non-immigration caseload of the Ninth Circuit has stabilized.

The key question is how best to administer this specialized caseload. A careful examination of the cases indicates that the best method is through intensive staff review, prior to judicial involvement. The reason is that immigration relief is procedurally complex. Many petitioners fail to comply with procedural requirements; and many others file petitions over which the court of appeals lacks jurisdiction. Our current statistics indicate that well over 80% of the immigration petitions for review are resolved through centralized staff review. Less than 20% of the cases are ultimately presented to judges during the normal oral argument calendars. This statistic underscores the critical function of court staff in handling these cases.

Division of the circuit during this time would seriously disrupt the Court's ability to resolve this temporary spike in administrative immigration cases. Because of unnecessarily duplicated functions and reduced budgets, the net available staff would be significantly decreased. The marginal increase in judges

would not, even in the most remote sense, compensate for this loss.

Perhaps more importantly, the disruption to judges and court staff of managing a transition to a divided circuit would slow case processing or bring it to a temporary halt. Delays in adjudicating cases would increase substantially, and it would be quite difficult to eliminate the increased backlog caused by the transition in addition to the existing backlog.

In sum, the best method of addressing the spike in immigration filings is to maintain the centralized administrative structure of the Ninth Circuit. The rate of appeal in every other category has stabilized or is declining. When the present bulge in immigration cases has been resolved, the Ninth Circuit should be current in its case processing.

2. Present budgetary posture.

At the present time, as the Subcommittee members are undoubtedly aware, the federal courts are facing a budgetary crisis. In 2004, Ralph Mecham, Executive Director of the Administrative Office of the United States Courts wrote a memorandum to all federal judges observing that: "The entire judicial branch of government faces the most serious funding challenge that I have seen during my 19 years as Director of the Administrative Office." Last year, all federal courts – including the courts of the Ninth Circuit – prepared contingency plans involving significant personnel layoffs and other cost-saving measures. Fortunately, most of those measures did not have to be implemented. However, we face a similar potential this year. Given recent budgetary history, it would be unrealistic for the Courts to plan for substantial budgetary increases, especially given the other important budgetary demands given the tragic loss of life and property due to Hurricane Katrina, and the budget demands due to the military operations in Iraq.

In short, unless there is some unforseen change in the near term, the Courts must plan to live within their present budgetary means, and to administer justice in the most efficient manner possible within those means.

Merely increasing the judiciary budget to add operating revenue will not solve the problem, for two reasons. First, as the Subcommittee is also undoubtedly aware, the Judiciary budget is prepared and allocated based on

formulas that are, in great measure, caseload driven. Thus, circuit division will not necessarily mean greater funding for the federal courts in the reconfigured Ninth Circuit; it will essentially take existing funding and divide it. Any additional funding will be allocated to all circuits based on the formula. Therefore, it would take a substantial multiple of any dollars added to the judiciary budget to produce an equal amount to the bottom line of any circuit's budget. The alternative would be to take money from other circuits. This remedy might be required on the basis of the revised formulas for new circuits, but it would have an unfair and disastrous effect on other circuits that are currently experiencing severe budget crises of their own.

Second, new circuits created would have to replicate essential core functions. There will be multiple Clerks of Court and Circuit Executives, along with other top administrative staff positions. Even if funding were equalized, unnecessary duplication would cause a net budgetary effect of reduced available staff and other resources. Circuit division would reorganize the current staff resources into a more administratively top-heavy organization, less able to deliver needed services.

3. Administrative impacts of Circuit division.

Division of the Ninth Circuit would be costly, disruptive and would create enormous inefficiencies. The present structure of is designed to efficiently resolve questions that need not be decided by judges, and to present questions that require judicial resolution in the most effective manner. Division would deprive the remaining circuit courts of these resources, resulting in judges wasting time on matters that could be resolved without spending valuable judge time.

These administrative efficiencies are unique to the Ninth Circuit and only available because we have been able to aggregate our resources. To take a few examples:

- **Appellate Commissioner.** The position of Appellate Commissioner is unique to the Ninth Circuit. Last year, the Appellate Commissioner resolved 1,125 Criminal Justice Act fee vouchers that otherwise would have been handled by judges. He resolved 4, 062 substantive motions previously heard by judges. This position likely be

eliminated in any division and most certainly would not be available to smaller units.

- **Circuit Mediator.** The Circuit Mediator's office settled 881 appeals last year out of 977, a 90% success rate. In contrast, the Sixth Circuit had a success rate of 42% and resolved far fewer cases on a comparative basis. The Mediator's office has also been successful in resolving highly complex cases, in which settlement depends on the participation of non-parties, such as CERCLA cases. The Mediator's office has also had success in organizing complex litigation, such as the recent high number of petitions for review filed in connection with the California energy crisis. The Mediator's office would be significantly reduced with a circuit division. Most small circuits have only one mediator and settle relatively few cases. The settlement success rates are also lower. A mediator's office needs critical mass to achieve success.

- **Staff Attorneys.** The staff attorneys were critical in the termination of a large volume of appeals – well over half the appeals filed in the Circuit. The staff attorneys presented 1,421 habeas petitioners' requests for a Certificate of Appealability. Panels denied 89% of the requests, terminating 1,265 appeals at that stage. In addition, staff presented 2,182 merits cases to screening panels, resulting in termination of another 2,029 appeals. Put in perspective, in its entirety, the First Circuit terminated 1,643 cases in 2004. The D.C. Circuit terminated a total of 1,155 cases. In addition, staff motions attorneys disposed of 10,948 motions through clerk orders. The staff attorneys office would be considerably reduced in a smaller circuit.

- **Bankruptcy Appellate Panel.** The BAP resolved almost 700 appeals last year. It would not exist after a circuit division. Those cases would fall back on the district courts for resolution. The loss of the BAP would come at a particularly disadvantageous time, as the courts struggle to interpret the extensive amendments to the Bankruptcy Code recently passed by Congress.

- **Case tracking and batching.** Because it has the resources to do it,

> the Ninth Circuit inventories each filed appeal for issues. The Circuit then tracks the case and the issue. Cases involving similar questions are grouped together for oral argument to promote consistent treatment. Cases are also stayed pending resolution of dispositive issues in published opinions. It is not uncommon for a published decision to result in the immediate resolution of hundreds of cases that were dependent on its outcome. This inventory and tracking system is unique to the Ninth Circuit and would not survive a circuit division given the significantly reduced staff resources.

These administrative efficiencies are especially important given the case mix of the Ninth Circuit. Over 40% of total appeals in the Ninth Circuit are filed by *pro se* litigants. Last year, for example, there were 5,802 *pro se* appeals filed in the Ninth Circuit out of 14,274 total cases. These appeals are processed by a special Pro Se Unit in the Ninth Circuit staff attorneys' office. The vast majority of these appeals are then resolved by presentation to screening panels made up of Article III judges. Very few of these cases are referred to judges' chambers for consideration by oral argument panels. The significance of this given the current case mix is multiplied with we consider that approximately half of the *pro se* volume consists of immigration cases.

The vast majority of immigration cases, which account almost all of the increased volume of the circuit in the last several years, are resolved through the staff process. In fact, our current statistics show that 80% of the immigration petitions for review are resolved through the staff screening process rather than on oral argument calendars.

To put this into total perspective, in an average year, approximately 50% of the filed cases are procedurally terminated through staff efforts before they reach a merits panel; of the remaining merits terminations, one-third were resolved by judicial screening panels deciding the cases based on staff presentations. Taking this all together, the Circuit staff provided the primary assistance in the resolution of approximately 80% of appeals; the remaining 20% were resolved by judges and their chambers staff on oral argument calendars.

A division of the circuit will mean far fewer staff resources available to handle the non-oral argument calendar appeals, which account for 80% of the

volume of circuit work. Splitting the circuit will not create budget increases; rather it will likely take existing resources and divide them. Moreover, core functions will be replicated, and additional management positions required. Thus, there will be far less staff available for case processing.

The current case mix in the Ninth Circuit is best addressed by retaining a strong, coordinated, central staff that can perform essential case triage and resolve the vast majority of appeals. Circuit division would reduce or eliminate many of these critical personnel resources available. The inevitable result will be inefficiency, waste of judicial time, loss of services, and increased delay.

4. Loss of other cost-saving devices.

Aside from those issues that are unique to the Court of Appeals, there are other, significant cost savings that would be lost if the Ninth Circuit would be divided. For example, one of the most expensive aspects of the judiciary budget is the payment for defense of capital cases. We have been cognizant of this problem and have created a committee to review budgets for the prosecution of such cases. Chief Judge Stephen M. McNamee of the District of Arizona and Judge Barry T. Moskowitz of the Southern District of California have done remarkable work in analyzing capital case budgets. Their work has saved hundreds of thousands, if not millions, of dollars. These efforts would be significantly lost or reduced under a new division. There simply would not be enough of a critical mass of judges to serve these functions in a small circuit.

Likewise, the smaller circuits would have significantly fewer resources in space and facility planning, a division in the Ninth Circuit Executive's office which has also saved taxpayers significant sums of money and assisted in the construction of courthouses that are more efficient and less costly. An excellent example of effective planning is the new district courthouse in Seattle, which utilizes courtrooms space in an innovative and efficient manner. The planners of the Circuit Executive's office have been invaluable to smaller states like Montana and Idaho, to assist in courthouse planning given those states' very unique needs.

In short, there are enormous costs – both direct and indirect – that would be created by circuit division. Administrative duplication and waste would be substantial. Circuit division would result in a significant decrease in the services

that the Circuit now provides. This effect would be compounded by our current budget situation.

5. Judicial efficiency.

The current structure of the Ninth Circuit also provides judicial economy. Administrative tasks are shared among the judges. Creation of one or more new circuits would force judges in all of the reconfigured circuits to assume greater administrative loads.

In addition, resolution of issues in a circuit means that judges need not revisit the issues. Reconfiguring the Ninth Circuit into two or more circuits would mean that the same issue would have to be analyzed and decided in both circuits, causing a net loss of judicial efficiency.

Further, the large number of judges in the Ninth Circuit means that it is better able to handle the problems causes by persistent judicial vacancies or by judicial disability. In a circuit with a small number of circuit judges, any problems encountered by an individual judge would have far more ramifications than in a larger circuit. If a judge on a small became temporarily or permanently disabled, it would have a much greater impact than a judge experiencing problems on a larger court. Likewise, if problems developed in the confirmation of a judge who was to serve on a smaller circuit, then it would have a significant impact on the functioning of that circuit.

The Flawed Arguments for Division of the Circuit

Despite the advantages of the present structure and the significant disadvantages of imposing a circuit split at the time, given the growth of immigration cases and the budge crisis, some critics have persisted in their view that the Circuit should be divided. When the arguments are examined closely, they are not persuasive. Indeed, most of the arguments are based on faulty factual premises.

1. Caseload Growth in the Ninth Circuit

One of the major arguments justifying structural division of the Ninth

Circuit is that population growth throughout the region will cause increased appellate caseloads, and that division is the only means of accommodating the uniform increase in appellate filings. This argument is based on a faulty premise. In fact, there is no correlation between population growth and federal appellate filings. Rather, increases in appellate work have been primarily based on discrete, specific circumstances that tend to be transitory. As I have indicated the non-immigration caseloads have actually decreased over time. These are the cases that emanate from the geographic regions of the Circuit, rather than external sources. If there were a correlation between population grown and caseload growth one would expect to see a growth in caseload that corresponded with population growth. However, the Circuit has not experienced such growth.

When one examples individual geographic circumstances, the point is amplified. For example, Alaska's population grew 8.5% between 1991 and 2002. However, the number of appeals filed in the Ninth Circuit from Alaska actually *decreased* during the same period by 88.7%. Similarly, Oregon's population increased 17% between 1991 and 2002; its federal appellate caseload *decreased* during the same period by 13%. Indeed, if one examines the states comprising the Northern division of the Ninth Circuit (Alaska, Washington, Oregon, Idaho, and Montana), the appellate caseload has been virtually flat for over a decade. From 1993 to 2002, while the aggregate population grew 17%, the total appellate caseload from the region *decreased* by 3.2%.

Creating new circuits as proposed cannot be justified based on purported growth of cases within the areas covered by the new circuits. The simple fact is that federal appellate caseload is not related to population growth. Rather, it is more influenced by other factors that tend to be transitory. For example, the federal courts in the states bordering Mexico have experienced enormous caseload growth in recent years. However, last year appeals from the Southern District of California – one of the judicial districts most affected by the problem – decreased from the previous year. The current appellate caseload challenge in the Ninth Circuit is not based on geography or population, but rather the actions of a single administrative agency.

The fact that judicial caseload emergencies tend to be transitory and driven by unique problems is also demonstrated by examining caseload in the various judicial districts. In my home state of Montana, for example, we recently

experienced a judicial emergency because only one of Montana's three judgeships had been filled. To avoid dismissal of criminal cases for lack of a speedy trial, district judges were flown in from throughout the Ninth Circuit to try cases. Eventually, two more judges were confirmed and the crisis abated. This is a familiar story in our Circuit, and the judges of our Circuit have demonstrated a remarkable willingness to assist their colleagues during these critical times. That is a luxury of a larger Circuit – to be able to have the flexibility to reallocate judicial resources during times of need.

In short, if one examines the data carefully, one can quickly discern that there is no independent justification for creating new federal circuit courts in the Western United States based on population projections or the intuitive notion that caseloads are uniformly increasing throughout the region. Rather, the data indicates that caseload spikes have been driven by unique circumstances that tend to be short-lived. To address these problems, the best solution is a larger Circuit that has the flexibility to reallocate resources internally, rather than to erect structural barriers to the allocation of judicial resources.

2. Delay.

The second major faulty premise upon which the proponents of a circuit division rest their case is delay in case processing. Proponents of a split assume, without explaining, that any division of the Ninth Circuit will improve case processing time. The opposite is true. Circuit division will increase, not decrease delay.

First, as I have discussed, by use of case management techniques over the past several years, we have substantially reduced delay. The major present problem, as I have discussed, is the increase in administrative immigration petitions for judicial review. It is not only the sheer number of cases that increase the delay statistic, it is the inability of the government to file the appeal record in a timely fashion. In thousands of cases, the government has requested open-ended extensions of time – for a year or more – so that it can prepare the administrative record. Although there is virtually nothing that the Ninth Circuit can do about this, short of granting the alien summary relief – that time is charged to the Circuit in the form of an increase in the delay statistics. However, it distorts our comparative case processing time statistics. The increase in case processing time

due to the increased immigration caseload cannot be regarding as reflecting on the effectiveness of judicial administration.

Case processing delay is not related to caseload, or size of circuit. The Commission on Structural Alternatives for the Federal Courts of Appeal, more popularly known as the "White Commission," studied the subject of delay thoroughly in 1998 and concluded that circuit size was not a critical factor in appellate delay. Specifically, the White Commission wrote:

> We have reviewed all of the available objective data routinely used in court administration to measure the performance and efficiency of the federal appellate courts, but we cannot say that the statistical criteria tip decisively in one direction or the other. While there are differences among the courts of appeals, differences in judicial vacancy rates, caseload mix, and operating procedures make it impossible to attribute them to any single factor such as size.

Commission on Structural Alternatives for the Federal Courts of Appeal, Final Report, p. 39 (1998).

In addition to a lack of relationship between circuit size and delay, there is no statistical relationship between total caseload and disposition time.

Perhaps the real question is what the goal is in terms of case processing time, what structure best achieves it, and at what cost. For example, the difference between median case processing time for all circuits and the Ninth last year was 3.3 months. We were not the slowest circuit. If, by using management techniques, the Ninth Circuit could reduce total case processing time by 2.4 months in just two years, is there a compelling reason to cause serious disruption in the federal courts with the hope of reducing total case processing time by a few more months? Or is it better to continue to improve effectiveness and efficiency within the current structure?

If one examines the administrative structure of the Ninth Circuit and its efficiencies, I believe the only conclusion that can be drawn is that a circuit split

will increase delay, rather than decrease it. A division of the circuit will cause the loss of a large number of administrative tools to reduce appellate caseload, and will place more cases and administrative tasks on judges.

Circuit division does not eliminate caseload; it merely reallocates it. The cases still need to be decided. There is no evidence that demonstrates that the present caseload could be more effectively or efficiently managed by dividing the Ninth Circuit. In terms of efficient case processing, the best model at the present time is a strong, central administrative staff to examine cases for procedural and jurisdictional defects before the cases are referred to oral argument panels. If the ability to handle 80% of the Ninth Circuit's cases is impaired, and if circuit judges are forced to spend much more time with administrative matters, then the inevitable result will be increased delay to the litigants.

The best solution to resolving case processing delay is within the existing institution. Circuit division will not eliminate delay; it will create unnecessary delay.

3. En Banc Procedure

The Ninth Circuit's limited en banc procedure has been cited as a rationale for circuit division. However, a close examination will dispel the notion that circuit division is justified in order to guarantee a full court en banc hearing.

First, this involves an extraordinarily small number of cases. Out of 5,783 cases decided in the Ninth Circuit between September 2003 and September 2004, only 13 (or .2%) were reheard en banc. This experience is consistent with the practices of other circuits. Of 27,438 cases decided nationally within the same period, only a total of 59 (or .002%) were heard en banc. The following chart for the time period:

En Banc Hearings: All Circuits (9/2003-9/2004)

District of Columbia	2
First Circuit	1
Second Circuit	0
Third Circuit	2

Fourth Circuit	7
Fifth Circuit	13
Sixth Circuit	6
Seventh Circuit	2
Eight Circuit	5
Ninth Circuit	13
Tenth Circuit	4
Eleventh Circuit	4

Second, very few of the decisions made by the en banc panels involved close votes. Since 1996, almost 70% of the en banc cases were decided by margins of 8-3 or more. Forty-two percent of the cases were decided unanimously. Only 15% of the decisions – 20 in the last 9 years – involved a one vote margin.

Third, the worry that a minority of the Court could determine the outcome of an en banc case has been ameliorated by the Court's recent decision to increase the size of the limited en banc court to 15. `In addition, that argument neglects two significant facts: (1) well over 99% of the cases decided by the Ninth Circuit – and all the circuit courts for that matter – are decided by three judge panels, in which the votes of two judges bind the entire Circuit and (2) the Ninth Circuit allows for a full court en banc rehearing. As yet, there has not been an occasion in which a majority of the eligible judges has voted to rehear a case before the entire court.

Fourth, although fifteen judges are ultimately drawn to serve on a Ninth Circuit en banc court, the determination whether to take a case en banc remains with the full court. By statute (28 U.S.C. § 46(c)), a vote in favor of en banc rehearing by a majority of non-recused active judges is required to take a case en banc. Moreover, any active or senior judge may call for en banc rehearing, and all may participate in the exchange of views – often extensive – that precedes the vote.

Fifth, the Court has taken concerns about the representative nature of the limited en banc panel seriously and studied the question. Prompted by issues raised during the White Commission hearings, the Ninth Circuit formed an Evaluation Committee to examine some of the issues raised more closely,

including the limited en banc procedure. To answer the questions relating to en banc procedures, the Evaluation Committee consulted with a number of outside academic experts. One of the experts consulted was Professor D.H. Kaye of the College of Law, Arizona State University, a noted expert in the field of law and statistics, who conducted a statistical analysis of the size of the limited en banc court in relation to a full court of 28 judges. Professor Kaye calculated the probability that the outcome of the limited en banc court vote would be the same as that of a full court of 28. He posited a binary issue (judges would vote either to affirm or to reverse), and he considered the possible divisions among 28 judges. He found that expanding the en banc court would result in only a trivial gain in the degree by which an en banc court decision would represent the views of all judges of the court. The largest gain would occur when there were 28 active judges who divided 17 to 11 in their views as to whether the panel opinion was correct. Yet even in that situation, if the limited en banc court were expanded to 13, the gain in accuracy of "representativeness" would be only 3.5 cases per hundred, and only 7 cases per hundred if the limited en banc court were expanded to 15.

The Evaluation Committee also met with a number of other scholars to discuss this issue, including Professor Linda Cohen, Department of Economics, University of California, Irvine; Professor John Ferejohn, Hoover Institute, Stanford University; Professor Louis Kornhauser, New York University School of Law; Professor Matt McCubbins, Department of Political Science, University of California, San Diego; and Professor Roger Noll, Department of Economics, Stanford University, CA. These scholars consulted by the Committee confirmed the import of the calculations done by Professor Kaye in concluding that the current random draw is effective in providing a representative en banc court of 11 judges.

To supplement the analysis by Professor Kaye and the other consultants, the Evaluation Committee requested Professor Arthur Hellman of the University of Pittsburgh School of Lawto conduct an empirical study of actual en banc outcomes. His conclusion was that the evidence strongly indicates that in a substantial majority of en banc cases the limited en banc court has reached the same result that a majority of active judges would have reached. He also concluded that in the cases in doubt, expanding the limited en banc court would have added to the judges' burdens without enhancing the "representativeness" of the outcome. He observed:

> It is true that enlarging the size of the en banc court would make it more "representative" in an abstract sense. But the more important question is whether it would produce decisions, with majority, concurring and dissenting opinions, that better represent the views of the court's active judges. Probability analysis and empirical data both indicate that the gains would at best be marginal.

Sixth, none of the bills would totally eliminate the limited en banc court. Under any scenario, the circuit containing California would eventually have too many judges for a permanent full court en banc panel. So, to the extent that the procedure is view as problematic, none of the pending legislation addresses it fully.

Seventh, when all factors are considered, the limited en banc court is a valuable tool. Rehearing a case en banc uses up significant circuit resources. It is a time and energy consuming process. The limited en banc system employed by the Ninth Circuit should be analyzed as to its legitimacy, representativeness, and deliberative quality. The limited en banc panel has rarely, if ever, reversed the decision of a prior en banc panel. Indeed, it is rarely requested to do so. There is no compelling evidence that the decisions of the limited en banc panel are not accepted as the binding decisions of the Court. Our internal studies, and all external studies, have concluded that the composition of the panel is sufficiently representative. Having too many judges can interfere with the deliberative process; limiting the panel number to eleven strikes an appropriate balance between the number required for legitimacy and representativeness and the number required for effective deliberations. It also strikes the proper balance of resources needed to resolve en banc-worthy issues.

Finally, and perhaps most importantly, the question of size of the en banc panel is a matter within the administrative control of the Ninth Circuit. No legislation is required to either increase the size of the panel, or to mandate a full court en banc panel. That can be accomplished by vote of the judges of the circuit.

For all of these reasons, the limited en banc system employed by the Ninth Circuit does not justify a circuit division.

4. Case conflict.

All academic studies of the Ninth Circuit have concluded that conflict in panel decisions is not a significant problem. The Ninth Circuit Evaluation Committee studied this in detail and concluded that there was no credible evidence that the Ninth Circuit experienced conflict problems in a greater proportion thatn that of other circuits.

We have employed a number of techniques to avoid case conflicts.

First, as I have previously discussed, the Ninth Circuit uses a case tracking system that identifies issues involved in each appeal. An inventory sheet is prepared for each case prior to its transmittal to a panel listing all potential cases that might have a bearing on the case.

Second, prior to the issuance of the opinion, each judge receives a pre-publication report that describes the holding and also identifies each case that the tracking system indicates may be affected by the opinion.

Third, we have an extensive en banc process in which off-panel judges raise questions about published opinions. This process often results in the modification of the opinions without the necessity of rehearing en banc. The parties also participate in the process by filing petitions for rehearing en banc, which are reviewed by each chambers.

5. Reversal rate.

Supreme Court review affects only a handful of cases. For example, in 2003, the Ninth Circuit had 12,151 appeals filed. In the same period, there were 1,462 petitions for a writ of certiorari filed seeking Supreme Court review of Ninth Circuit decisions. The Supreme Court granted 25 of those petitions, or 1.7% of total petitions sought. The Court reversed the Ninth Circuit in 19 cases. Supreme Court reversals affect a minuscule number of cases, and cannot serve as a meaningful point of evaluation of judicial administration. Thus, the Supreme Court reversal is not particularly instructive concerning structural division of a circuit court.

Further, in recent years, the reversal rate of the Ninth Circuit has not deviated much from the rest of the Circuits. In the 2003-2004 term, the national reversal rate was 77%; the reversal rate for the Ninth Circuit was 76%. In the 2002-03 term, the national reversal rate was 73%; the Ninth Circuit's was 75%.

6. Number of Opinions.

A small minority of judges on the Circuit have complained that the Circuit produces too many opinions, and that the judges of the Court cannot keep up with the state of the law. At the onset, I emphasize that the majority of the members of the Court do not share this view and are able to keep up with Circuit law. More importantly, the Ninth Circuit is not the largest producers of opinions. The latest statistics show that the Eighth Circuit produced more opinions than the Ninth Circuit last year. Other Circuits are quite close in production of opinions. If division of a circuit is justified on this basis, other circuits will have to be divided.

The following chart shows that the Ninth Circuit does not produce an inordinate amount of circuit opinions relative to other circuits and that the number of opinions produced is not a function of court size:

Number of Published Opinions/Circuit: 2004

Circuit	Number of Opinions	Authorized Judgeships	% Opinion per Auth. Jdshp
Eighth Circuit	701	11	63.7%
Ninth Circuit	691	28	24.7%
Seventh Circuit	608	11	55.3%
Sixth Circuit	453	16	28.3%
Second Circuit	425	13	32.7%
Fifth Circuit	412	17	24.2%
Eleventh Circuit	378	12	31.5%
First Circuit	372	6	62.0%
Tenth Circuit	326	12	27.2%
Third Circuit	320	14	22.9%
D.C. Circuit	240	12	20.0%
Fourth Circuit	222	15	14.8%

The chart suggests that there is no relationship between the number of judges in a circuit and the number or rate of opinions produced. Further, a high volume of circuit opinions is an asset to circuit administration because precedential opinions settle circuit law. This is of great assistance to district judges, as Chief Judge John Coughenour testified to this Subcommittee last year. Further, circuit division would create the need for multiple panels in each new circuit to revisit issues, creating an enormous waste of judicial resources.

7. Collegiality

Collegiality is often cited as a reason to create smaller circuits. In many cases, judges on smaller circuits have enjoyed a strong rapport. This doesn't mean, however, that judges on a larger circuit cannot achieve a similar rapport. Indeed, as most judges on our Court have testified repeatedly, we enjoy a very collegial atmosphere on our Court, despite differences of opinion. In some ways, a larger court is better able to absorb strong personality differences. When personal differences arise on a smaller court, a court may become rapidly dysfunctional. There are many examples of this. My point is not to argue that a larger circuit is more, or less, collegial than a smaller circuit; only to point out that a close working environment does not always produce collegiality.

Some proponents of a split have argued that the judges on our Court do not sit in panels as often as these observers believe they should. However, a careful look at other circuits should show that this is an exaggerated problem. For example, the Eleventh Circuit, which was touted as an example to the Committee employs a large number of visiting judges. Indeed, 66% of the published opinions of the Eleventh Circuit involved a visiting judge on the panel. In contrast, only 33% of the published opinions of the Ninth Circuit involved a visiting judge. This is not to criticize the practice of the Eleventh Circuit, by any means. However, the point is that paring the size of a Circuit does not necessarily mean that judges will be sitting with each other more often. Indeed, as caseload increases, more visiting judges will be required, and the so-called collegiality created by frequency of sitting will be diminished.

On our Court, we have daily substantive interchanges of opinions and ideas through e-mail, some of them quite spirited. We sit often together on en banc panels. We have frequent contact. One excellent measure of collegiality is the

degree to which judges resolve differences. Well over 90% of the cases are decided by unanimous vote. Further, there has been an increasing trend on our Court for off-panel judges who have concerns about panel opinions being able to work out differences with the panel without proceeding to a vote on whether to rehear the case en banc. During 2003, there were thirteen en banc calls or potential en banc calls that did not result in a ballot because the panel agreed to amend its opinion. This amounted to almost a quarter of the en banc calls. Given the frequency of communication and the internal indicia of collegiality, additional panel sittings would not materially improve our understanding of each other, at least in my opinion.

Nor would a circuit division necessarily produce a closer working environment. The geography of the Ninth Circuit, regardless of how it might be divided, precludes daily person-to-person contact. A single judge located in Hawaii, Alaska, or Montana is not going to have daily in person contact with other circuit judges, regardless of circuit configuration. In any circuit, for example, my chambers would not be located within driving distance of any other chambers. The daily in person interaction between judges will not change with a circuit split. The primary contact of the judges in any circuit division would remain as it is now, primarily by e-mail and telephone. Personal contact would be limited to court meetings and oral arguments. The illusion of increasing personal contact is not a reason to divide the Circuit.

8. Connection with Community

Coming from a less populated state, I feel strongly that a court must have a strong connection with the community it serves. Part of the premise for change is that smaller circuits would promote that. However, attorneys in states like Montana are unlikely to feel a significantly more intimate connection with a Circuit whose headquarters is in Seattle or Las Vegas or Phoenix, as opposed to a Circuit whose headquarters is in San Francisco. Likewise, no circuit division would place all circuit judges in an intimate environment; they would still maintain chambers hundreds or thousands of miles apart.

The best method of establishing and maintaining a sense of community is through the use of technology and through continued contact between the Circuit and community it serves. To that end, we have made enormous strides over the

past several years. Ninth Circuit opinions are immediately posted on the Circuit's website, which contains an enormous amount of useful information. Digitized audio files of Ninth Circuit arguments are available on the website the day after argument. The Clerk's office has made briefs, orders, and audiofiles of cases in which the public has expressed an interest immediately available via the internet. Video argument will soon be available to litigants who cannot afford to travel in person for oral argument. Many of these advances were hastened as a result of conferences between the bench and bar of the states in the Ninth Circuit. Technology allows the Circuit to stay in close contact with the community it serves. However, technology is not always cheap. Because the Ninth Circuit has pooled resources, it can continue to improve the service it provides to litigants and the public. However, the resources for doing so would be seriously diminished in a small circuit.

9. Travel.

The costs and personal impacts of judicial travel has also been cited as a rationale for circuit division. However, regardless of how the circuit may be reconfigured, judicial travel is unlikely to be reduced significantly. All of the bills contemplate multiple places of holding court. In some instances, depending on the proposed legislation, judges and attorneys will have to travel more than they do at present. A small handful of judges may personally benefit, but the net savings are negligible, if any.

10. Summary.

None of the critics of the Ninth Circuit have demonstrated how division would improve judicial administration. When the specific critiques are examined, none provides a justification for the radical remedy of circuit division.

Analysis of the Proposals to Divide the Ninth Circuit

In my view, there are six important criterion for the creation of a new circuit: (1) the new circuit must have sufficient critical mass; (2) the division should allocate cases in approximately equal proportions; (3) the new circuit must have geographic coherence; (4) the new circuit should have jurisprudential coherence; (5) division should increase the efficiency of judicial administration,

and (6) the division should be supported by a consensus of the affected court. Unfortunately, each of the proposed structural alternatives fails to meet this criteria; by contrast, the existing structure is satisfies it.

1. Critical mass.

A circuit court of appeals must have sufficient caseload and budget to be viable. Any three-way division of the circuit would create circuits that lack a critical mass of cases and resources. Compounding the problem is the fact that any newly carved out circuit in the western United States would cover vast geographic territory. Limited resources would be stretched to the breaking point. Likewise, any two-way division of the circuit that involves a small subset of states (such as the proposed Northwest division) would suffer from the same infirmity.

2. Proportionality.

None of the current proposals would divide the circuit equally in terms of caseload. The only proposal that has been forwarded in the past that achieves rough proportionality is the Hruska Commission proposal which would divide California and place the Northern and Eastern Districts of California into a Circuit along with the Northwestern states (Alaska, Washington, Oregon, Idaho, and Montana), and place the Central and Southern Districts of California into a circuit with the Southwestern states (Nevada and Arizona) and the Pacific jurisdictions (Hawaii and the territories). That proposal, however, suffers from fatal jurisprudential flaws.

3. Geographic coherence.

The proposed Northwest split and the three-way split have geographic coherence, meaning that there is a sufficient geographic nexus to allow viable geographic governance. The "stringbean circuit" proposal (Alaska, Washington, Oregon, Idaho, Montana, Nevada, and Arizona) lacks geographic coherence. Central administration in either Phoenix or Seattle would prejudice the attorneys not located in those regions. It would also mean that many attorneys would have a greater distance to travel to the circuit headquarters. Even more deficient is the "hopscotch circuit" proposal (Alaska, Washington, Oregon, Idaho, Montana, and Arizona) that passed the United States Senate a few years ago. That configuration

would leave Arizona without a border with any other state in the circuit.

4. Jurisprudential coherence

Any division will disrupt Ninth Circuit jurisprudence. This is not only true because of the development of federal law, but because most of the states which form the Ninth Circuit have strong jurisprudential ties to California. California adopted the Field Code in 1850, followed by Oregon and Washington in 1854; Nevada in 1861; and Arizona, Idaho and Montana in 1864. In addition, all the other Ninth Circuit states have adopted significant aspects of California law, and rely on California judicial construction.

The present configuration promotes judicial coherence by developing consistent federal law in areas affecting business in the West: admiralty, timber, Native American rights, and intellectual property – just to name a few.

The worst configuration in terms of jurisprudential coherence was the Hruska Commission proposal to divide California into two circuits. Adoption of that configuration would meant that California would be subject variant interpretations of federal and state law. Challenges to state law and initiatives could be brought in either circuit, with the possibility of inconsistent results.

5. Efficient judicial administration.

As I have previously discussed, any circuit division will dramatically decrease the efficiency of judicial administration by requiring replication of core functions, and reduction of vital staff functions.

6. Consensus.

To date, Congress has never divided a Circuit unless there was a consensus of the judges on the Circuit that division was required. Not only is there no consensus among Ninth Circuit judges supporting a division, but the vast majority of judges oppose the split. In fact, only 3 of the 25 active judges of the circuit favor circuit division.

Conclusion

For all of these reasons, I oppose a structural division of the Ninth Circuit. The best means of addressing the present challenges is within the existing structure. Division will be costly, inefficient, ineffective, and result in the significant impairment of the administration of justice in the Western United States. I thank the Subcommittee for its consideration of my views and those of my colleagues.

United States Court of Appeals for the Ninth Circuit
Judges' Vote on Circuit Division
April 30, 2004

Seniority	Name	Status	No Division	Yes Division	Abstain
1	Schroeder	Active	No		
2	Browning	Senior	No		
3	Goodwin	Senior	No		
4	Wallace	Senior	No		
5	Sneed	Senior		Yes	
6	Hug	Senior	No		
7	Skopil	Senior	No		
8	Fletcher, B	Senior	No		
9	Farris	Senior	No		
10	Pregerson	Active	No		
11	Alarcon	Senior	No		
12	Ferguson	Senior	No		
13	Nelson, D	Senior	No		
14	Canby	Senior	No		
15	Boochever	Senior	No		
16	Reinhardt	Active	No		
17	Beezer	Senior		Yes	
18	Hall	Senior		Yes	
19	Brunetti	Senior			Abstain
20	Kozinski	Active	~~No~~		
21	Noonan	Senior	No		
22	Thompson	Senior	No		

23	O'Scannlain	Active		Yes	
24	Leavy	Senior			Abstain
25	Trott	Active		Yes	
26	Fernandez	Senior		Yes	
27	Rymer	Active			Abstain
28	Nelson, T	Senior		Yes	
29	Kleinfeld	Active		Yes	
30	Hawkins	Active	No		
31	Tashima	Active	No		
32	Thomas	Active	No		
33	Silverman	Active			Abstain
34	Graber	Active			Abstain
35	McKeown	Active	No		
36	Wardlaw	Active			Abstain
37	Fletcher, W	Active	No		
38	Fisher	Active	No		
39	Gould	Active			Abstain
40	Paez	Active	No		
41	Berzon	Active	No		
42	Tallman	Active		Yes	
43	Rawlinson	Active	No		
44	Clifton	Active	No		
45	Bybee	Active			Abstain
46	Callahan	Active	No		
47	Bea	Active	No		

Total of 47 Judges: (2 vacancies)	30 Opposed to Circuit Division; 9 Favor Division; 8 Abstain.
Active Judges, 26:	15 Opposed to Circuit Division; 4 Favor Division; 6 Abstain
Senior Judges, 21	15 Opposed to Circuit Division; 5 Favor Division; 2 Abstain

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