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S. HRG. 109–1035

# EXAMINING THE PROPOSAL TO RESTRUCTURE THE NINTH CIRCUIT

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

SEPTEMBER 20, 2006

**Serial No. J–109–112**

Printed for the use of the Committee on the Judiciary

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# EXAMINING THE PROPOSAL TO RESTRUCTURE THE NINTH CIRCUIT

**WEDNESDAY, SEPTEMBER 20, 2006**

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The Committee met, pursuant to notice, at 2 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Kyl, Sessions, and Feinstein.

## OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. It is 2 o'clock, and this Committee starts on time, so we are going to proceed. Our first panel is a panel of Senators, and understandably they have other duties.

I am going to go out of turn here and call Senator Wilson first, if Senator Wilson is in the room—I saw him a moment or two ago. May I, Pete?—out of deference to a former colleague. They have you all alone on Panel 4, Senator Wilson. I could call you "Governor Wilson." I could call you "Mayor Wilson."

Mr. WILSON. Some guys just cannot hold a job.

[Laughter.]

Chairman SPECTER. But if you don't mind, I prefer "Senator."

Mr. WILSON. Thank you.

Chairman SPECTER. We have a 5-minute rule, which applies to Senators on this side of the podium as well as Senators on that side, but I guess you are entitled to 15 minutes, Pete, since you have three titles.

[Laughter.]

Chairman SPECTER. Just kidding. Just kidding, Pete. We welcome you here.

Mr. WILSON. I was prepared to accept your generous offer, Mr. Chairman.

Chairman SPECTER. Senator Wilson was elected in 1982, and he was here, re-elected in 1988, and then he became Governor in the 1990 election. It is nice to have you back, Pete, and the floor is yours.



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**STATEMENT OF HON. PETE WILSON, A FORMER U.S. SENATOR FROM THE STATE OF CALIFORNIA, FORMER GOVERNOR OF CALIFORNIA, AND BINGHAM MCCUTCHEN, OF COUNSEL, BINGHAM CONSULTING GROUP, PRINCIPAL, LOS ANGELES, CALIFORNIA**

Mr. WILSON. Thank you very much, Mr. Chairman and members. I am delighted to be back and have the pleasure and privilege of seeing some old friends.

The matter before us is not new. I can offer neither a new face nor a new voice, but I think perhaps I can present an argument which, to my knowledge, the Committee has not considered before.

Historically, of course, the rare splits—there have been only two in the history of the appellate courts—had been predicated upon considerations that were largely logistical, having to do with case load and the ability of the court to perform its duties adequately. Today, my testimony will not echo the powerful arguments relating to the logistical burdens. Instead, those are going to be dealt with by eminent members of the court: Chief Judge Mary Schroeder and Judge Thomas. I will not take the time to simply echo their arguments. I simply subscribe to them. Rather, I would like to focus the attention of the Committee on the scant but very clear precedent, the legal authority that is involved in a very different matter.

Now, I do not think that there has ever been an explicit basis in terms of seeking ideological change for the body of precedent presented to the Committee. And perhaps that time has not yet come. I would like to think so. But in the interest of time, let's focus on that legal authority, the *Bonner* case, which was, in fact, the very first case heard and the very first opinion published by the new Eleventh Circuit when it was created in 1981 from the old Fifth Circuit.

The court in *Bonner* made an extensive analysis. I think it is squarely on point if, in fact, the purpose of the legislation that you are hearing today is to seek to bring about a change in the body of precedent. Because, in fact, what the court in *Bonner* decided was that that was really not a tenable situation, and they came up with very practical reasons as well as some that were purely philosophical. They not only rejected their own procedural rulemaking power as totally inappropriate for establishing a body of precedent, but they went still further, expressing a concern about having to relitigate "every relevant proposition in every case." The risk they saw was that it could involve a requirement for a rehearing en banc under Federal Rule of Appellate Procedure 35 on the ground that each new precedent would involve a "question of exceptional importance." The result, the court felt, would be a "burden that this court could not discharge without seriously damaging its effectiveness," which would "mean years of waiting to determine the law of the circuit." Hardly a way for a court dedicated to achieving predictability and stability to begin.

And so the court said, quite predictably, "We choose instead to begin on a stable, fixed, and identifiable base while maintaining the capacity for change"—which, of course, they have beyond dispute.

Now, that was an eminently practical decision because the burdens of relitigation which it avoided, while preserving the capa-

bility to make responsible change, I think and the court thought cannot be responsible ignored, either by a court conscientiously seeking to decide truly important new issues without inordinate delay or, I respectfully submit, by responsible legislators seeking to avoid imposing those burdens and unconscionable delays on the bench, the bar, and the public of a proposed new Twelfth Circuit. Rather, any evolution in the direction of the Twelfth Circuit ought to occur slowly and by increment.

As the court pointed out, there was not only a compelling motivation in terms of the practical burdens, but this, I think, was really at the basis of their consideration.

The court clearly recoiled from the prospect of injury to the rule of law, were it to be "cast adrift" upon a metaphoric sea of unpredictable precedents, and this was, I think, the very pointed comment they made.

Theoretically this court could decide to proceed with its duties without any precedent, deciding each legal principle anew, and relying upon decisions of the former Fifth Circuit and other circuit and district courts as only persuasive authority and not binding. This court, the trial courts, the bar, and the public are entitled to a better result than to be cast adrift among the differing precedents of other jurisdictions, required to examine afresh every legal principle that eventually arises in the Eleventh Circuit.

What they said was very clearly a defense and an admonition that the law of stare decisis, the doctrine of stare decisis was one—

Chairman SPECTER. Senator Wilson, how much more time would you like?

Mr. WILSON. About 2 minutes, sir.

Chairman SPECTER. Okay.

Mr. WILSON. Thank you.

The court said, "We tend to think of stare decisis as only 'it is decided.' The full phrase is stare decisis et non quieta movere—'to adhere to precedents and not to unsettle things which are established.' The prospect of decades of writing on a clean slate in pursuit of the possibility that in some case or cases we might find a rule we like better (or even conclude that an old Fifth Circuit decision is wrong) is at best unappealing, at worst catastrophic."

Mr. Chairman, I would like to think that that admonition is needless. But just in the event that some future Congress would choose to not only create a split and a new circuit but in the act creating that new circuit instruct it to apply the precedent of a different circuit than that from which it has come, I think that we should understand that that court, the *Bonner* court, regarded that as essentially flouting the doctrine and doing so in flagrant violation of stare decisis and inviting all the ills that would ensure. I can only hope that that does not occur, but that if some future court is going to—or if some future act of Congress creates a new Twelfth Circuit, that the members of that new court will have the same respect for precedent as did the Eleventh when, in their first decision, they decided that they were going to be bound by the decisions of the old Fifth. If indeed there are some who would seek by means the kind of wholesale change that would unsettle established things and undermine the rule of law, then I think they will find that the *Bonner* case is at the table like Banquo's ghost to

haunt them. They will be required to learn patience and respect for stare decisis.

I would also point out that if that new court does create precedent, as it should, it is quite predictable that before such broad change is legitimately achieved by a new circuit court of appeals, several other circuits will have attained the size of the present Ninth Circuit and apply for a split to the Judiciary Committee of the next generation.

Mr. Chairman and members, thank you for your patience and your courtesy.

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

Chairman SPECTER. Thank you, Senator Wilson. I am going to recognize Senator Feinstein for a moment to greet her adversary in 1990, and then recognize Senator Kyl, and then back to Senator Feinstein for an opening statement.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I just wanted to say welcome, Pete, Senator, Governor. I was listening to you, and I could not help but think, because it has been so long ago, 1990, how great a Senator you would have been if you had remained in the Senate.

[Laughter.]

Senator FEINSTEIN. In any event, I want to thank you for coming back for this. It is very important to all of us in California, and I think your views are both critical and important. So thank you very much.

Mr. WILSON. Thank you very much, Senator. That is a generous comment. The only way I can respond is to suggest that you should be grateful that I saved you from the budget I faced in 1991.

[Laughter.]

Mr. WILSON. And 1992 and 1993. Thank you.

Senator FEINSTEIN. Thank you.

Chairman SPECTER. Senator Kyl?

Senator KYL. Thank you, Mr. Chairman. I just wanted also to thank Senator Wilson for being here and the other panelists, and to excuse myself in advance. In about 12 minutes, I have to go to another hearing to introduce the person who I hope will be the new Secretary of Transportation from Arizona, and as soon as that is completed, then I will return. But it means no disrespect to whoever happens to be talking at the time.

Chairman SPECTER. Thank you, Senator Kyl. It is a complex game of musical chairs. I am going to have to excuse myself at 2:20, and Senator Kyl will preside as long as he is here, and then Senator Feinstein will preside if there is no other majority party Senator. Then when Senator Kyl comes back, he will preside. And Senator Murkowski has notified us that she has a commitment and hopes to leave by 2:25, and whoever is presiding, Senator Murkowski, will try to accommodate you. You are in competition with Senators.

And now for an opening statement, Senator Feinstein.

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

Senator FEINSTEIN. Thank you very much, Mr. Chairman. This is a very important matter for the West, and I think it has implications for the Nation as a whole. The Supreme Court reviews less than 1 percent of all of the cases appealed to it, so for most of the Ninth Circuit residents, the Ninth Circuit is the court of last resort. And last year, the circuit reviewed almost 16,000 cases, making decisions on virtually every legal issue there is.

I agreed with many of the decisions. I disagreed with some of them. However, the Framers of the Constitution intended the judiciary to be independent and free from Congressional or presidential pressure or reprisal.

I am very concerned that recent attempts to split the Ninth are part of an assault on the independence of the judiciary by those who disagree with some of the court's rulings. As Governor Wilson has stated, these attempts are judicial gerrymandering, designed to isolate and punish judges whose decisions some disagree with. They are antithetical to the Constitution. Attempting to coerce or punish judges or rig the system is not an appropriate response to disagreements with the court's decisions. It is essential that we preserve our system of checks and balances and make it clear that politicians will not meddle in the work of judges.

The configuration of the Ninth is not set in stone; however, any change should be guided by concerns of efficiency and administration, not ideology. The Ninth is the largest circuit in the Nation. That is measured by both population and case load. Its size alone actually tells us little. The question is whether the size helps or hinders it in providing justice to the people within its boundaries.

After a substantial review of statistics, decisions, and reports from those who know the circuit best, it is clear that splitting the Ninth would hinder its mission of providing justice to the people of the West. When ideologic concerns are set aside, it becomes evident that the proposal before the Committee to split the circuit is a lose-lose proposition. The costs of court administration would rise while the administration of justice would suffer. The uniformity of law in the West is a key advantage to the Ninth. It offers consistency, and it helps share common concerns.

The size of the Ninth is an asset. It offers a unified legal approach to issues from immigration to the environment, and dividing the circuit would make these problems more difficult to solve. Let me just give you a few examples.

Splitting the circuit could result in different interpretations in California and Arizona of laws governing immigration, different applications of environmental regulations on the northern and Nevada sides of Lake Tahoe, and different intellectual property law in Silicon Valley and the Seattle technology corridor. These differences would have real economic costs.

The economy of scale offered by the Ninth has resulted in numerous innovations to increase efficiency: one, a circuit mediator whose office settled 90 percent of the 977 cases that came before it saved both time and money; two, a bankruptcy appellate panel that resolved almost 700 appeals last year; three, a system for case track-

ing that inventories and tracks appeals, groups similar questions of law together to promote consistent treatment.

In a time of tight judicial budgets, splitting the circuit would add significant and unnecessary expense. It would require additional Federal funds to duplicate the current staff of the Ninth and new or expanded courthouses and administrative buildings since existing judicial facilities for a Twelfth are inadequate. The Administrative Office of the U.S. Courts estimates that creating a Twelfth Circuit would have a start-up cost of $96 million, with another $16 million in annual recurring costs.

Those who know the Ninth, know it best overwhelmingly oppose a split. Of the Ninth's active court of appeals judges, 18 oppose the split, 3 support it. The district court and bankruptcy judges of the Ninth also oppose the split. Every State bar that has weighed in on the split—Alaska, Arizona, Hawaii, Montana, Nevada, Oregon, and Washington—oppose breaking up the Ninth. And more than 100 different national, regional, and local organizations have written to urge that the Ninth be kept intact.

Yesterday, I received a letter from 368 law professors representing 49 States and countless legal philosophies counseling against a split. I will put those letters in the record; also, letters from judges, organizations, and individuals opposing the split; as well as the written testimony offered by Senator Richard Bryan of Nevada in opposition to the split.

One last point. The split as proposed grossly, unfairly distributes judicial resources in the West. The Ninth would keep 71 percent of the case load, but only 58 percent of the permanent judges. That is unacceptable. Currently, the Ninth has a case load of 570 cases per judge as opposed to the national average of 381 cases per judge. Under the split, the average case load in the Ninth would actually increase to 600 cases per judge while the new Twelfth would have only 326 cases per judge. This inequitable division of resources would leave residents of California and Hawaii facing greater delays and with court services inferior to their Twelfth Circuit neighbors. Clearly, that is untenable to both Senator Boxer and myself.

Some advocates of splitting the Ninth assert that doing so would reduce delays in court appeals. This bill would actually increase the case load per judge, and with it, increase delays. If our goal is to reduce delays in the Ninth, a better answer is give its judge the case loads comparable to other circuit courts, not splitting the circuit.

New judges for the Ninth are long overdue. Adding judges to bring the Ninth's case load per judge down to the national average would cost far less than splitting the circuit and would have a much greater impact in combating delay.

In addition—and this is an important point—40 percent of the Ninth Circuit's current case load consists of immigration appeals—40 percent. That is an increase of 497 percent in less than 5 years.

Now, I hope that Congress will pay new immigration legislation. I hope we can move through some new judges. But, in conclusion, let me just say splitting the Ninth I believe would create more problems than it would solve. So, Senator Kyl, would you like to make an opening statement?

Senator KYL [Presiding.] Senator Feinstein, all of the submissions for the record will be accepted, in addition to a letter that I am going to submit for the record, dated June 29th.

Senator FEINSTEIN. Thank you.

Senator KYL. And what I would like to do now is to call upon Senator Baucus, Senator Boxer, and Senator Murkowski, in that order, and excuse myself in about 1 minute, and I will turn the gavel over to Senator Feinstein.

Senator Baucus?

**STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM THE STATE OF MONTANA**

Senator BAUCUS. Thank you very much, Mr. Chairman. First, I would like to welcome a member of the next panel, that is, Judge Sid Thomas. He is here to testify. Judge Thomas is one of the most senior judges on the Ninth Circuit. He is the en banc coordinator and death penalty coordinator for the circuit. He also serves on the Executive Committee for the circuit and can explain the real effect that this proposal will have on the country, let alone on the circuit.

I recommended Judge Thomas for the Ninth Circuit many years ago. Montana is very proud to have one of its own on the bench. We are eager to hear what he has to say about the proposal.

In our proposal, let me say this: Yes, the Ninth Circuit is the largest court of appeals in the United States. That is undisputed. It has the largest population and the largest case load. That is because it is so large. But these alone are not good reasons for splitting what is currently a very productive court of appeals.

Some of our colleagues talk about delays in the Ninth Circuit. In reality, the Ninth Circuit is one of the fastest circuits in the Nation in resolving cases once the case is actually heard by the court. The delays in processing are caused by the number of cases referred to the court, and these cases are mostly immigration appeals. Splitting the circuit will not resolve this problem. It will not reduce the number of immigration appeals. We are still going to get immigration appeals. The Federal judiciary, the Ninth Circuit, a circuit is going to have to still take those cases. It makes no sense to have one circuit that only takes immigration cases.

Splitting the circuit would also have a detrimental effect especially on the West, and my home State, to name one. Splitting the Ninth would eliminate uniformity of law in the West. So important. States sharing common concerns, such as environment and Native American rights, would end up with different rules of law. That makes no sense. This would create confusion, cause serious problems, and even animosity among the States in the West.

Splitting the Ninth would impose huge new costs. A split would require new Federal funds for courthouses and administrative buildings. Existing judicial facilities are just not equipped for a new circuit. The Administrative Office estimates the start-up costs to be $96 million additional and then $16 million in annual recurring costs under the proposed split. The judiciary budget is already stretched thin. The creation of a new and costly bureaucracy to administer the new circuit would just add to our growing deficit.

And this proposal does not have the support of the people whom it will most directly affect. Judges on this circuit oppose it. Mem-

bers of the State bars affected by the split oppose it. Almost 100 Federal, State, and local organizations oppose splitting the Ninth Circuit. Only three of the 26 active judges on the Ninth favor splitting the circuit. Many State bars oppose it, including Alaska, Washington, Nevada, Hawaii, Arizona. Even the Federal Bar Association and the Appellate Section of the Oregon Bar feel strongly that we should not split the Ninth Circuit. The State Bar of Montana does not support the proposal. The Montana Bar unanimously passed a resolution opposing division of the Ninth Circuit.

We ought to be listening to the people on the ground who deal with this issue every day, not the hardship from our offices in Washington, D.C. Let's be frank. The motivation behind splitting the circuit is political. It is an attempt to control the decisions of the judiciary by rearranging the bench. It reminds me of FDRs court-packing. The same thing—trying to change results by changing the composition of the court by law and the number of judges and how the lines are drawn. This is, as has been said, judicial gerrymandering. It is not appropriate for the Congress to gerrymander the circuits.

The judiciary is supposed to be an independent branch of Government. It must remain so. Splitting the Ninth is not the right thing to do for Montana, it is not the right thing to do for the country, and I for the life of me cannot understand why anybody thinks this is a good proposal, why we are sitting here today. It is just the wrong thing to do.

Senator FEINSTEIN [Presiding.] Thank you very much, Senator Baucus.

Senator Boxer, I believe you are next, Senator Murkowski, and then Senator Ensign.

**STATEMENT OF HON. BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator BOXER. Madam Chairman, thank you so much for all the work you have done on this subject. I wanted to thank my colleagues here. We are going to have a few disagreements, but so far former Governor and Senator Wilson and Senator Baucus and you, Madam Chair, and I certainly agree that this is not a bill whose time has come. And we need to do everything to stop it, and I hope we can do it right here. And I was wondering if you could call the roll since you are alone right now, and maybe we can dispose of the bill.

[Laughter.]

Senator FEINSTEIN. No such luck, I am afraid.

Senator BOXER. But since that will not work, then I am going to add my voice to this debate. And I am going to try to put most of my comments in the record and summarize, and I know I am going to be repeating some of the arguments, but it is important to fill this record with the facts. So bear with me if I am repeating a bit here.

Opposition to this bill has brought together many Republicans and Democrats—I think it is evidenced here today—liberals and conservatives and moderates. And, again, I want to thank former Governor and former Senator Pete Wilson for taking the time to come before the Committee.

I will not go through the exact change that is proposed because we all know it, but I will say I oppose this legislation for three reasons: first and foremost, it is unnecessary; second, splitting the Ninth would create additional costs without benefits and create administrative problems that do not exist; and, third, the bill is opposed by the majority of the people who would be the most effects—the judges and the attorneys of the Ninth.

The Ninth Circuit is one of the fastest courts in the country in terms of issuing decisions following oral argument, and there are those who would make it sound like that is not the case, but it is the case. To the extent there is delay in the movement of cases in the circuit, it is due to the high case load per judge in the circuit, which can lead to delays in assigning judges to each case. However, this issue can be resolved by adding more judges to the circuit, which would decrease the case load per judge. Adding judges to the circuit would be more effective and less costly than creating a new circuit court. So if the real reason behind this is efficiency, we have got a very clear way to do it. But as you have heard from others, I do not think that is, in fact, the agenda here.

Splitting the Ninth would lead to an interesting result. The new Ninth, with California and Hawaii, would be left with 71 percent of the former circuit's case load, as my colleague stated, just over 11,000 cases spread among 58 percent of the former circuit's judges. So it is going to make matters worse. Splitting the circuit would increase the case load per judge in California and Hawaii, not decrease the case load. So what is the benefit of adding cases to our judges? Does it make sense to claim that the judges in the circuit are overburdened and then propose a fix that increases their case load? That does not make any sense to me.

Also, the bill would require the creation of a new administrative bureaucracy. I thought, you know, some of the people on the other side of the aisle do not like to create new bureaucracies, but, yes, that is what they are doing with the creation of a new Twelfth Circuit. There will be construction costs, and I sit on the Committee with my colleague, Senator Baucus of Montana—we sit on the Environment and Public Works Committee, and the building of these courthouses is no small matter. It costs an absolute fortune, and we do not need that cost right now when we have so many other pressing needs.

And then we have personnel, administrative costs, security costs, all of this going through the roof. Why would we be for a proposal that is unnecessary and which is so very costly? At the end of the day, we will get less judicial efficiency in the courts. It does not make sense.

Only twice in our Nation's history have we divided a Federal judicial circuit. Both times the split was supported by the majority of judges and attorneys in the circuit who would be affected by the split. And again, as was stated, in this case the split is not supported by the majority of judges and attorneys in the circuit. Again, 18 Federal appellate court judges oppose the split, and many of the trial court judges in the circuit whose decisions are reviewed oppose this bill. And the ABA and almost every State bar association oppose the break-up. And yet in the face of this overwhelming op-

position, there is a still a push within the Senate to split the Ninth Circuit Court.

So I urge my colleagues, who are not here right now, but maybe somewhere they are hearing my words, to vote against this bill, which would not only increase the burdens on Federal appellate judges in my home State, Senator Feinstein's home State, and certainly in Senator Baucus', but also send a bad message that we do not respect the independence of our judiciary. And that is key. At a time when we all revere our Constitution, we should respect the independence of the judiciary.

So thank you, Madam Chair. I cannot believe I did this within the 5 minutes, almost.

Senator FEINSTEIN. You did.

Senator BOXER. Almost, 16 seconds, okay. But I really think you have been my hero on this issue, and I thank you so much.

Senator FEINSTEIN. Thank you. Thank you, Senator Boxer.

Senator Murkowski?

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

Senator MURKOWSKI. Thank you, Senator Feinstein. I do appreciate your attention to this matter, and I understand the musical chairs that we are all engaged in here today. But I think we would all agree that this is an incredibly important issue for those of us—and you notice we are all from the West here. This is an incredibly important issue, and the fact that it has finally risen to the level of a full Committee level as opposed to just the subcommittees where you and I have had opportunity to discuss this issue.

We recognize that it is an issue that I believe the time has come to be discussing this, and there is one point that you made that I certainly agree with, and you stated that if there is to be a split, it should be a split that is guided on the principles of efficiency, of administrative effectiveness, and those are the things that we should be looking to as we talk about the need for a split of the Ninth Circuit Court of Appeals.

I have been working with Senator Ensign and Senator Kyl on this, and I think that the proposal that you are looking at is one that, in my opinion, does make sense and does indicate that we have reached a point where we have to do more than just talk about splitting up the Ninth Circuit and move forward on it. And the reasons that I cite are pretty substantive in terms of just numbers.

We talk about the geographic size. We understand that, yes, in the West everything is large. But the Ninth Circuit, encompassing nearly 40 percent of the geographic area of the United States, that is bigger than seven of the other circuits combined. And so when you talk about the ability to produce decisions that have some consistency of laws, some uniformity, just the sheer geographic nature of the district that we are dealing with is one that is almost incredible.

The population factor. The fact that the Ninth serves 58 million people, nearly twice the size of most other districts, again, setting it apart from all of the other circuits.

The case load. We recognize that the Ninth Circuit docket is one that just continues to grow. In 2004, it had nearly 60 percent higher case load than the next largest district. You mentioned, Senator Feinstein, the immigration case load increasing by—my figures put it at 463 percent. I think yours was 490. It is an incredible amount in terms of an increase.

And the delays have been addressed, the recognition that the average time for final disposition of a case is 5 months longer than the national average.

Now, there has been a suggestion that this is all about bringing about an ideological change within the district. That is not what we should be looking at. We should be looking to what is happening within the demographics of the Ninth Circuit itself.

Now, some have suggested that the improvements through technology can help us control the overwhelming case load of the Ninth Circuit, and I have had an opportunity to listen to the chief judge and some of the other judges there talking about those efficiencies that have been introduced. And we appreciate it, we applaud it, and there has been great effort in that regard.

But I guess I look at it and say, you know, we are able to stay on top of it now. We are kind of treading water. But I see literally a tidal wave coming towards the court that technology is not going to help us get around. And this is just simply population growth. And a reference, a couple charts here. As I stated, the Ninth Circuit already has population more than double most circuits, but it does not stop there. The Ninth Circuit also contains the fastest-growing States in the country. So we can see what is happening.

We have got the existing case load now. We know what is happening with immigration. But we also see the population growth in these States. So we cannot sit back and watch these warning signs without acting.

I think our legislation is a sensible reorganization of the Ninth. The distances and the populations will be more proportionate and more manageable, we believe significantly reducing wasted money and time spent on judicial travel. We believe the case loads will be more manageable, which will improve the uniformity and the consistency in the case law.

Senator Boxer mentioned that there have been two occasions where we have split the courts before, so we know that this is not unprecedented for us to consider this. And when you appreciate what happened in the South with the Fifth Circuit, when they made that split, it was because of factors just like we are seeing in the West: population growth booming and predicted to keep on the rise.

With the 58 million residents of the Ninth Circuit that are suffering, if you will, as they are waiting for cases to be heard and decided, perhaps prompting some to forego the appellate process altogether, I think we have looked at this problem now for decades. We have been studying it. I believe that the time is now to move forward with it.

I appreciate your time, your courtesy, and I look forward to the opportunity to address, I believe, a very real issue you have addressed, and that is, the one of the judicial case load and how we better manage that. And I am certainly willing within our legisla-

tion to look at how we might make sure that there is a more equitable allocation there. So I look forward to working with you, and thank you.

Senator FEINSTEIN. Thank you very much, Senator Murkowski. Senator Ensign, welcome.

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

Senator ENSIGN. Thank you, Madam Chair, and I think this is a very important hearing. I have heard that now is not the time to split the circuit, and I think we have to ask ourselves one fundamental question. Why did we ever divide circuits in the first place? Why are there the number of circuits that we have today? Because each got to a certain point where they were not manageable, and they split circuits.

At what point in the future is the Ninth Circuit too large? At what point is it unmanageable? We already have heard the population statistics that we have before us. I live in the fastest-growing State as far as a growth rate is concerned. Senator Feinstein lives in the fastest-growing State as far as true population increase is concerned. The whole West, we know, everybody from the Midwest and the Northeast is moving to the West, and especially the Southwest. Those trends are not going to change. The Western States are going to continue to rapidly increase in population.

I want to point out a couple of the problems with that population growth, because some have suggested that this is purely ideological, the reason for the split. And I think that some would have that as motivation. But I do not think we need to make an ideological argument to justify a split—I think Senator Baucus talked about judicial gerrymandering. Well, the courts are going to be changing and even with this split, you cannot predict the makup of the court. New people will be appointed, and you cannot actually gerrymander the courts as far as ideology because judges are going to be constantly changing. And you cannot say today what it is going to look like tomorrow because of new judges, especially the number of new judges in the fastest-growing area that will continue to be needed. And if you look at the makeup, there are a lot of liberals and a lot of conservatives that will go both ways.

I think that it is very important that we address some of the issues that have been brought up, for instance, the cost. Well, there is additional cost, but it can be held to a minimum. First of all, there are buildings within Portland and Seattle that would take remodeling, that could house the circuit headquarters—I am not going to get in the battle of who is going to choose whether it is Seattle or Portland. For Nevada, as much as I would like to go into Las Vegas, there are GSA buildings that are available. I think there are two buildings within Phoenix that could be used that would just have to be remodeled, and so we could keep the costs down fairly significantly by doing that.

But we also need to consider that the way that the Ninth Circuit is able to handle cases right now—and I have heard this from many, many members on the Ninth Circuit. When they get together to consider cases in what are known as a limited en banc hearing, that is something that is not done the same that it is done

in other courts. They do not have the time to consider the cases. A lot of these decisions, they do not have the time as colleagues to discuss the cases nearly in the detail that they do in other circuit courts. That is a common complaint that I hear.

Well, if they are getting together and they are trying to put together these decisions, they need collegiality. Working together is a very important aspect for the circuit courts that are weighing some of the heavier decisions that are necessary for the functioning of our constitutional republic. The judges need to take more time. And I think that we see this in decisions, because of the large number that are overturned. The number of decisions that are overturned in the Ninth Circuit is high. Judges have related to me that that is one of the reasons they believe the circuit should be split—not because of ideology. The split is justified simply because of the time that is needed to consider the cases.

So for the sake of the administration of justice, not only the efficiency but also in the types of decisions that can be made, I think it is time to split up the Ninth Circuit. It is time for us to go to something that is more manageable where our judges have time to consider the cases in a much more detailed fashion. Is this bill perfect? No. We are willing to work with our colleagues to address their concerns. We are willing to give California the judges that they need and to address any other issues. But I think it is time to split the largest circuit geographically, population-wise, because this situation is only going to continue to get worse. That is why I believe that it is actually time to finally address the splitting up of the Ninth Circuit, and I thank you, Mr. Chairman.

Senator KYL [Presiding.] Thank you very much, Senator Ensign.

Senator ENSIGN. And, Mr. Chairman, could I submit the rest of my statement for the record?

Senator KYL. Your statement will be included in the record.

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

Senator KYL. There are members of the bench who are with us that will not be testifying. I would like to at least recognize your presence here, and we appreciate your interest in these proceedings, all from the Ninth Circuit Court of Appeals: Judge Callahan, Judge Rawlinson, Judge Bea, Judge Clifton, and Judge Kozinski.

The next panel consists of Rachel Brand, and, Rachel, if you would take the dais, I will introduce you. Rachel Brand was confirmed as the Assistant Attorney General for Legal Policy at the U.S. Department of Justice in 2005. From 2003 until her appointment, she served as Principal Deputy Assistant Attorney General in the Office of Legal Policy and before that served as Associate Counsel to the President, before that with the law firm of Cooper, Carvin & Rosenthal. She clerked for U.S. Supreme Court Justice Anthony Kennedy and Massachusetts Supreme Judicial Court Justice Charles Fried; received her J.D. degree from Harvard Law School, where she was Deputy Editor-in-Chief of the Journal of Law and Public Policy; and received her B.A. from the University of Minnesota.

Ms. Brand, nice to have you with us today. The floor is yours.

**STATEMENT OF RACHEL L. BRAND, ASSISTANT ATTORNEY GENERAL FOR LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.**

Ms. BRAND. Senator Kyl, Senator Feinstein, I am happy to be here to testify on behalf of the Department of Justice.

The Department supports legislation creating additional judgeships in the Ninth Circuit. Adequate staffing of the judiciary is essential to the effective administration of justice. Steadily increasing case loads in the Ninth Circuit necessitate additional judgeships there, and we urge Congress to authorize them. The Department also supports splitting the Ninth Circuit. Although we have not taken a position favoring any particular split, we applaud the Committee for focusing on legislation to divide the Ninth Circuit into courts of a more manageable size.

From time to time, Congress has acted to improve the administration of justice by adding or splitting courts of appeals, and we believe the time is right to do so now in the Ninth Circuit. That court bears a strong resemblance to the Fifth Circuit that existed prior to the time Congress split it into the Fifth and Eleventh Circuits. For example, the Fifth Circuit then had 26 authorized judgeships. The Ninth Circuit now has 28 authorized judgeships and will become even larger if new judgeships are authorized there.

Similarly, at the time of the split, the Fifth Circuit had about 18 percent of the nationwide appellate case load. The Ninth Circuit currently is larger with about 23 percent of the nationwide case load.

There are two primary reasons why the Department of Justice is weighing in on the issue of splitting the Ninth Circuit. First, the United States is by far the most frequent litigant in the courts of appeals, and the Department employs thousands of civil and criminal litigators who practice in courts all around the country, including the Ninth Circuit. As such, we have a particular interest in the effective and efficient operation of the Ninth Circuit and all Federal courts.

The Department has directly experienced some of the downsides of the Ninth Circuit's large size. For example, we experience the cost of the relatively long delay in the Ninth Circuit between the time of filing a notice of appeal and the time the court ultimately decides the case.

We have also experienced the downsides of the Ninth Circuit's unusual en banc procedure. The purpose of an en banc proceeding, as you know, is for the entire court to decide a case. In all other courts of appeals, en banc proceedings are heard by all eligible active judges, whereas, in the Ninth Circuit, only 15 of the 28 authorized judges participate. In other courts, then, it is certain that the entire court has spoken when there is an en banc ruling. In the Ninth Circuit, in a closely divided case, only eight judges could bind the circuit, making it possible that a minority of the court had spoken for the court in an en banc proceeding. This defeats the entire purpose of an en banc proceeding.

The United States also has an interest in predictability and consistency in the law. Law enforcement officers need to understand what the constitutional limitations on their authority are. Prosecutors need to understand the rules applicable in criminal trials. Reg-

ulatory agencies need to understand the scope of their authority and how to go about issuing regulations.

The Department of Justice has noticed inconsistencies within the Ninth Circuit's case law. In my written testimony, I describe one such intra-circuit conflict. In that case, the Department attempted to get resolution of the conflict through an en banc proceeding, but our petition for rehearing en banc was denied.

The White Commission, in preparing its 1998 study, surveyed lawyers and judges around the country and reported evidence that reinforced the Department's experiences. It said, for example, that more district judges in the Ninth Circuit than elsewhere reported difficulties stemming from inconsistencies between published and unpublished opinions, and that lawyers in the Ninth Circuit more than lawyers elsewhere reported problems relating to conflicting precedents.

Senator FEINSTEIN. Relating to what? I am sorry.

Ms. BRAND. Conflicting precedents.

As Justice Kennedy noted at that time, it is only natural that a larger number of decisions from a court will result in inadvertent intra-circuit conflicts and legal ambiguity. According to the White Commission, a court of appeals, which must "develop a consistent and coherent body of law, functions more effectively with fewer judges than are currently authorized for the Ninth Circuit." We agree and believe that dividing the Ninth Circuit will alleviate some of the Department's concerns.

Second—this is the second reason why the Department has decided to weigh in—we have a significant public policy interest in ensuring the effective administration of justice for all litigants in all the Federal courts. We regularly engage with Congress and the courts in discussions about how to improve our Nation's civil and criminal justice systems. Just as certainty in the law benefits the United States as a party and makes the Department of Justice's lawyers' jobs easier, consistency and predictability in the law benefit every American. Companies and individuals need to have the ability to know what the law is. They need to know whether a particular action will subject them to liability or will get them arrested.

For these and for the other reasons explained in my written testimony, we support legislation to add new judgeships and to divide the Ninth Circuit, and I would be happy to take your questions.

Senator KYL. Thank you very much.

Let me start with a couple questions. You have just, I think, answered the question that was foremost on my mind as to why the—I gather it is not particularly—that the Justice Department would not ordinarily speak to an issue like this, but the reasons are primarily because of the large number—or the large amount of litigation the Department of Justice has in the Ninth Circuit and its concerns with the way that the decisions can be conflicted, for example; and, second, the Department's general interest in the administration of justice.

I might have not summarized that very well, so I guess I should just ask you the question why the Department of Justice is particularly interested in this issue.

Ms. BRAND. Well, it is for exactly the reasons you state, Senator Kyl. We have a specific, you might say a parochial, interest as a litigant and a litigator in how the courts operate when the United States is sued or when the United States takes enforcement action in the courts. Our lawyers obviously experience the same things that all lawyers experience in the courts. And so it is important to us, as it is to all parties and all lawyers, that the courts operate well.

And that leads into our second interest, which is a general public policy interest in the efficient and effective administration of justice, and we think of that not only in terms of administrative issues such as delay, but also in consistency and predictability in the law. People need to be able to order their primary conduct, they need to know what they can do and what they cannot do, and ambiguity makes that very difficult.

Senator KYL. You heard the testimony of former Senator Wilson, and it prompted another question, and that is, whether we need a consistent body of law in the West or, more precisely, whether you have a concern that the creation of a new circuit might create more precedents and, therefore, be more difficult for litigants to work with.

Ms. BRAND. The Fifth Circuit was split in 1981, as Governor Wilson discussed. The Eleventh Circuit, when it was created, adopted prior Fifth Circuit precedent as its own. So if you litigate now in the Eleventh Circuit and you cite a Fifth Circuit case from 1970, as long as it has not been overturned, it remains good law in the Eleventh Circuit.

Now, the bill that is before the Committee does not specifically address that issue, and it, therefore, would be up to the judges to decide when a new court was created. But I would guess that they would probably handle it the same way, and that would lessen the unpredictability that would result from a circuit split.

Senator KYL. Among the things that your testimony dealt with was the intra-circuit splits, and you talked about en banc hearings. Two questions here. What are some of the effects of intra-circuit splits? And then, second, can you be a little bit more precise as to the reason why you believe the Ninth Circuit is particularly susceptible to these intra-circuit splits or divisions?

Ms. BRAND. The effect of an intra-circuit split is what I discussed earlier. It is the inability to order your conduct. It is the inability to know, if you are an agency, how you go about issuing a regulation. What is the scope of your statutory authority? If you are a prosecutor, you may not know how to argue before the court, what the court should take into account in sentencing, for example, if you have two conflicting panel decisions saying the court must consider this, or, no, the court does not have to consider that. It makes life very difficult, and you are in the position then as a lawyer of not knowing what to argue. You are in the position as a party of not knowing what to do. So that is the problem with an intra-circuit split.

Now, I guess there is no way to empirically prove whether there are more intra-circuit splits in the Ninth Circuit than elsewhere, but when the White Commission did a survey of lawyers and judges in the late 1990's, it found that the perception of lawyers

and the perception of district judges was that there was more ambiguity and more inconsistency in the Ninth Circuit than elsewhere. And it seems logical that, with a greater number of decisions, the risk of inadvertent intra-circuit splits is greater. So the larger the caseload, the more judges there are, inevitably, the more ambiguity and more intra-circuit conflict there will be. And that is what Justice Kennedy pointed out to the White Commission, and that is what the White Commission itself said.

Senator KYL. Thank you. In view of the seconds left here, I will now turn the questioning over to Senator Feinstein.

Senator FEINSTEIN. Thank you very much. Welcome.

I take it you have had Federal agencies complain about intra-circuit splits. Is that correct?

Ms. BRAND. The Department of Justice's lawyers have provided us with a number of examples of intra-circuit splits that affect the criminal justice system and that affect public lands issues. So, yes, we have had folks from around the Government bring this to our attention.

Senator FEINSTEIN. I would request to see them, then, please.

Ms. BRAND. Sure. I can provide you with some more examples in addition to the ones that are in my testimony.

Senator FEINSTEIN. Thank you. I appreciate that.

You also noted that the Ninth Circuit has the longest period of time from notice of appeal to decision. However, as noted by others, the Ninth is the second fastest from hearing to decision. Since once judges receive cases they dispose of them quickly, wouldn't the addition of additional judges speed the Ninth Circuit?

Ms. BRAND. I think that the addition of new judges is critical, and, yes, I think it would definitely help disposition time. And as I said in my testimony, we support providing additional judgeships for the Ninth Circuit.

I do not think that that would solve all the problems, however, because if you added the seven new judges that are provided for by S. 1845, you would then have a court consisting of 35 district judges, which is even larger than it is now, and it would exacerbate the problems that I just described. So, yes, adding judges would help, but it would not completely solve the problem.

Senator FEINSTEIN. You see, I guess I have a problem really understanding the problems that you are describing. Let me ask this: In 1998, the Justice Department opposed splitting the Ninth. Today, you are coming before us and you are supporting splitting the Ninth.

What has changed? The Ninth has always been big. It has always had a high case load. But there was always an admission by Justice that there were certain economies of scale, certain advances the Ninth had put in place that really offset any deficiency caused by its size.

Now, you are not taking that position today, so what has changed?

Ms. BRAND. Well, I have read the Department of Justice's 1998 testimony. It provided comment to the White Commission in connection with its study, and it then provided testimony to Congress when Congress was looking at a bill that would have implemented the White Commission's recommendations.

What the Justice Department said then was that we need to wait and see. Basically the Ninth Circuit should take additional administrative measures to address what the Department did see as issues in the Ninth Circuit, and see how it went.

Well, now 6 or 7 years have passed, and the Ninth Circuit has no doubt been very innovative and very creative in using administrative measures to improve its efficiency. But, nevertheless, the case load has continued to rapidly increase, the length of time for disposition has remained long, and the administrative measures that they have taken have not entirely solved the problem. The measures that have been taken consist largely of delegating certain functions of the Court to non-judicial officers, and inevitably there is some limit to how much of the judicial function can be delegated to non-judges. So at some point there are maximum efficiencies. And, regardless of the measures that have been taken, we have continued to see longer times and increased case load.

So I think we have taken a new look at the issue now. It is 2006, and there are good arguments on both sides, but we think the weight of the evidence is in favor of a split.

Senator FEINSTEIN. Okay. It is just that I have never seen any advocacy by your Department for additional judges. As I have tried to get additional judges, I have never received any help from your Department. And I would like the record to reflect that.

Ms. BRAND. Well, may I make a comment about that?

Senator FEINSTEIN. Sure.

Ms. BRAND. The Attorney General has said on a number of occasions that he supports adequate staffing of the judiciary and that he supports new judges. He has told the Judicial Conference that a few times now.

In October of 2005, the Department of Justice provided a views letter on a Ninth Circuit split bill, and in that letter we supported additional judgeships, and I just want to make sure that you know today that we are supporting additional judgeships for the Ninth Circuit.

Senator FEINSTEIN. Yes. I guess what I am talking about, Ms. Brand, is when it is really not writing a letter or speaking to an outside group. It is lobbying in the House and it is lobbying in the Senate. And I know of no such lobbying to produce additional judgeships for the Ninth Circuit.

Let me ask you this question: If further study determined that splitting the Ninth would result in inefficiency and increased delays, would the Department still support splitting the Ninth?

Ms. BRAND. Well, Senator, I think that when you split a circuit, in the beginning there will be certain administrative challenges that will occur. That is inevitable. I think that so much study has been done at this point that there is not a lot of point in doing additional study. And I would also point out that it is not just delay, it is not just cost that can be measured in monetary terms that it is at stake here. There is a very strong justice interest in consistency in the law. People have to know what the law is, and the greater the body of case law, we think, the greater the inevitability of intra-circuit conflicts. You cannot quantify that in terms of efficiency, administrative function, or money, but you can quantify it

in terms of the impact on justice. And so we want to make sure that that interest is also taken into account.

Senator FEINSTEIN. You know, it is just kind of interesting to me. I have sat on this Committee for 14 years now. No one from Justice has ever picked up the phone and called me and said, "You should know we have a problem with the Ninth Circuit, and these are what the problems are." So I can only conclude—and I must just say this—that this is political, that it has nothing to do with the performance of the circuit.

I sat down with the Attorney General over a very pleasant lunch. We discussed many issues. The Ninth Circuit was never raised. And so if this is, you know, a substantial enough effort, when you have the bar associations of every State, when you have the majority of judges, when you have the majority of lawyers that practice before the Ninth opposing a split, that Justice suddenly comes up and does something they have never done before, which is support a split, I really think the reasons you present today are not, frankly, compelling.

Ms. BRAND. May I respond to that very briefly?

Senator FEINSTEIN. Sure.

Ms. BRAND. The reasons why we have supported the split are the ones that are stated in my testimony, and political motivations would not have much bearing here because Ninth Circuit case law that is in existence now is going to, I predict, stay in effect. As I said, the bill does not address what would happen with precedent, but if the Ninth Circuit and Twelfth Circuit did what the Fifth and Eleventh did, then existing Ninth Circuit case law would remain in effect in both the Ninth and the Twelfth Circuits. So even if we wanted to do away with Ninth Circuit case law, this split would not do it.

Moreover, the judges that are on the court now are going to stay on the court, so our opposition has nothing to do with the outcome of any particular case. It has nothing to do with our opinions about any particular judge. It has to do with our observations as litigants, our observations as lawyers, and our general public policy interests in the administration of justice. That is all I can say.

Senator FEINSTEIN. So you are saying today that you do not believe that the administration of justice is well served by the Ninth Circuit?

Ms. BRAND. I think it could be improved by a Ninth Circuit split.

Senator FEINSTEIN. Well, I would appreciate getting in writing some specifics with the documentation.

Ms. BRAND. I would be happy to do that.

Senator FEINSTEIN. Thank you very much.

Thanks, Mr. Chairman.

Senator KYL. I appreciate it, and if other members of the panel wish to submit questions for the record, or perhaps if we have additional questions, we will get those to you, and I presume that we will leave the record open for the usual period of time.

I appreciate your testimony, and I would just add one thing to what Senator Feinstein said. I have mixed emotions about dividing the court, but I have never determined that it would make much difference politically. If you look at some of the decisions, some of the judges live in places other than California that some people

love to rail against. But, in any event, the one litigant that is in every circuit is the U.S. Department of Justice, so you are not going to be able to escape the clutches of whatever is being complained of, if it is a political complaint, it seems to me.

Senator FEINSTEIN. Let me just say this, if I might, Mr. Chairman. The Justice Department has now joined the fray, and I want them to put up, and if there is a problem with the circuit and what was said here today is that there is not the proper administration of justice, I want to know chapter and verse and subchapter where the problems are.

Senator KYL. Sure. Fair enough. I noted the two specific cases you cited in your testimony, and you said you would try to find some additional ones, and we will leave the record open for you to do that.

Ms. BRAND. Thank you.

Senator KYL. Thank you very much for your testimony.

[The prepared statement of Ms. Brand appears as a submission for the record.]

Senator KYL. The next panel consists of Hon. Mary Schroeder, who is Chief Circuit Judge of the Ninth Circuit; Hon. Richard Tallman, Circuit Judge of the Ninth Circuit; Hon. Sidney Thomas, Circuit Judge of the Ninth Circuit; Hon. Diarmuid O'Scannlain, Circuit Judge of the Ninth Circuit; and Hon. John Roll, Chief District Judge for the District of Arizona.

I would like to briefly introduce each of these witnesses because they are all extraordinarily distinguished, starting with Judge Schroeder, current Chief Judge on the circuit, the first woman to hold that position. She was appointed to the Arizona Court of Appeals and served until 1979, when she was nominated by President Jimmy Carter and appointed to the Ninth Circuit. Before that, she was with the Phoenix firm of Lewis and Roca. She served as a law clerk to Justice Jesse Udall of the Arizona Supreme Court in 1970, practiced as a trial attorney with the Civil Division of the Department of Justice, authored numerous publications, received her B.A. from Swarthmore, and her J.D. from the University of Chicago. Interestingly, one of six women in her class at the University of Chicago.

The Honorable Richard Tallman currently serves on the Ninth Circuit. Prior to his judicial service, he was a partner with the Seattle firm of Tallman & Severin and was previous to that a member of the firm of Bogle & Gates. He had previous service as a Federal prosecutor, first with the Criminal Division of the U.S. Department of Justice and then with the U.S. Attorney in Seattle; received his bachelor's degree from the University of Santa Clara, summa cum laude, and his juris doctorate from Northwestern University School of Law, where he was Executive Editor of the Northwestern University Law Review.

The Honorable Sidney Thomas serves currently as the en banc coordinator and death penalty coordinator for the Ninth Circuit as a member of the court's Executive Committee. He previously served as administrative head of the Northern Unit of the Ninth Circuit, a member of the Judicial Council for the circuit. He was in private practice and received his undergraduate degree from Montana

State University and graduated with honors from the University of Montana Law School.

Judge O'Scannlain was confirmed to the Ninth Circuit in 1986. Between 1969 and 1974, he served as Deputy Attorney General of Oregon, Public Utility Commissioner, Director of the Department of Environmental Quality in Oregon. And then in 2003, the late Chief Justice Rehnquist appointed him to the Federal Judicial Center's Advisory Committee on Appellate Judge Education, and Chief Justice Roberts has recently elevated him to chair that committee. He received his B.A. from St. John's University, his J.D. from Harvard Law School, and his L.L.M. from the University of Virginia Law School.

The Honorable John Roll was just recently elevated to the position of Chief District Judge of the Arizona District Court. Prior to that appointment, he served in a variety of positions, including Judge for the Court of Appeals for the State of Arizona, Judge on the Pima County Superior Court, and as an Assistant U.S. Attorney for the District of Arizona. He received his B.A. from the University of Arizona, his J.D. from the University of Arizona College of Law, and L.L.M. from the University of Virginia School of Law.

As you can see, a very distinguished panel, and I think the best thing to do is simply start from my left with Chief Judge Schroeder. Each of you are aware that we have a 5-minute clock, if you can adhere to that to the best of your ability. Of course, all of your written statements will be put into the record, and so, Judge Schroeder, the floor is yours.

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

Judge SCHROEDER. Thank you, Senator Kyl, and Senator Feinstein—

Senator FEINSTEIN. Could you move the mike directly—thank you.

Judge SCHROEDER. It is a pleasure for me to—

Senator FEINSTEIN. And turn it on. I do not believe it is on.

Judge SCHROEDER. It is not? There, now it is on.

It is a pleasure for me to appear here this afternoon. I understand the Committee has a specific proposal before it for division of the circuit, and I think it illustrates the dramatic inequities that flow from a split proposal that separates California and Hawaii from the rest of the States in the circuit.

I am pleased to have with me here to testify in opposition to this proposal my colleague Sidney Thomas of Montana. He is in line to become chief judge one of these days, and he has a great expertise in dealing with case volume. You have already introduced our newer colleagues who were confirmed by the Committee within the last few years: Judge Callahan, Judge Clifton, Judge Rawlinson, and Judge Bea. They also oppose split of the circuit. Judge Kozinski is also here. He will succeed me as chief judge, and he is opposition to splitting the circuit. My concern in opposing is underlined by my view of the administration of justice. My opposition is shared by all of my predecessors within living memory as chief of the circuit, beginning with Richard Chambers of Arizona, appointed

by President Eisenhower, and extending through chiefs appointed by Presidents Kennedy, Nixon, and Carter, and the future chiefs appointed by Presidents Reagan and Clinton. The overwhelming majority of our court of appeals judges oppose a division. This has never been a partisan issue for us.

You will have before you letters from lawyers, from district judges, from law professors. They do not want a split either. Neither do the bar associations that have been mentioned already this afternoon.

The fact is that while the debate has been focused on a handful of decisions from our court of appeals, the proposal would dismantle the entire circuit. The circuit law for California would be different from that of its neighbors. Lawyers would have to track new and different circuit law in bankruptcy, in commercial litigation, for example, that spans Arizona and California. There is a lot of that, and that makes the practice of law more expensive.

Of course, circuits on the East Coast have been fragmented from the 18th century, but why in the 21st century should we set out to create a similar system in the West. We in the West didn't grow from 13 colonies.

This bill would leave California alone with Hawaii in a circuit containing more than 70 percent of the cases in our circuit, too few judges, much of the Pacific Ocean, and only four Senators, leaving it difficult to get resources in the future. And it could not use the judges we already are able to use in the remaining States because they would be operating under a different circuit law. They would no longer be interchangeable.

So the new circuit would be overwhelmed with new cases that included California, and as for the new Twelfth Circuit, it would have a very busy Arizona border, a long border with Canada, and large security issues to cope with, and it would take years for a new circuit to assemble a staff with the experience of the existing Ninth Circuit staff. And I might mention our Clerk of Court Cathy Catterson is here as well as our Circuit Executive Greg Walters.

And all of this is costly, as you have heard. We are now experiencing growth in the number of immigration-related filings. This is largely due to decisions in the executive branch to decrease administrative review of immigration cases and increase enforcement on the border. And we need to have and the Governors of our border States have called for comprehensive legislative policy.

We want to work with you in any details of whatever legislation you enact so that immigration law can be administered well. We need to work together.

Now, there are myths driving the proponents of dividing circuit. One is that all circuits should look alike. But I live in Maricopa County, Arizona. That county is bigger that Connecticut. And another myth is that our en banc process—we would not have to use a limited en banc. Congress authorized it. We like it. We could sit with all of our judges. But we have decided that limited en banc is a better use of resources.

There is a myth that smaller courts are more collegial, but I think the testimony of our judges who oppose splitting show that that is not true, either, and also that splitting is in the natural order of things. I refer to the split of the Eleventh and Fifth. It is

documented in this book, "A Court Divided," published by Yale University Press. It really had nothing to do with court administration. It grew out of the bitter fight over civil rights divisions and civil rights cases and the demands of some in Congress that the circuit be divided to separate judges in that circuit. And eventually, when they withheld judgeships long enough, the judges asked to be divided. We have not asked to be divided.

I thank you for your time. I have gone a little over, and I appreciate your indulgence.

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

Senator KYL. That is quite all right. Thank you, Judge Schroeder.

Judge Tallman?

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

Judge TALLMAN. Good afternoon, Mr. Chairman and Senator Feinstein. My name is Richard C. Tallman. I was appointed by President Clinton to the Ninth Circuit in May of 2000, with chambers now in Seattle, Washington.

I am here today because I believe Congress must redress the current burden on the Ninth Circuit's decisionmaking process. I do not urge reorganization because I take issue with my court's decisions, because I am tired of writing dissents, or because I am looking for a comfortable sinecure here. My court is just too big, with too many judges and too many cases to consistently render quality decisions with adequate time to reflect upon each case and apply the relevant case law, to adequately confer with my colleagues in crafting a careful and thoughtful disposition, or adequate time to call en banc all of those cases requiring rehearing.

Instead, I see the case load growing at more than 10 percent per year, collegiality declining, and a lower percentage of cases reviewed en banc. We are coping with the remorseless crush of cases by employing the judicial equivalent of triage. It works most of the time, but all objective data suggest it is not working as well as it should, and I agree with Assistant Attorney General Brand on that point.

Ultimately, it is our ability to maintain the people's respect for the quality and reasoning of our decisions that ensures the effectiveness of our system of justice and public confidence in our courts. The case load is now too great to permit even the most conscientious judge on our court to read all the dispositions we issue, all decisions of the United States Supreme Court, and the briefs and records of the nearly 600 cases annually assigned to each judge on our court. When that process is rushed, mistakes are made. Cases fall through the cracks.

Collegial decisionmaking is the hallmark of an effective appellate court. In the past year, there were 26 active and 23 senior circuit judges on my court. I was able to sit on three-judge panels with only nine of the active and seven of the senior judges during the past 12 months. Because of our case load, we are required to borrow increasing numbers of visiting district and circuit judges from

all over the United States, more than 150 this year alone. The use of visiting judges, though we appreciate their time and effort greatly, when combined with the staggering size of my circuit, has made it increasingly difficult for me to work with all of the judges of my own court. This is unlike the experience on the other Federal circuit courts of appeal where the average number of active judges per court is less than 13. Working together on a regular basis promotes a cohesive court, with shared information, circulated expertise, and maximized efficiency.

Our current problems will only worsen over time. No matter how efficient the circuit becomes in its current form, it simply cannot keep pace with its ever increasing case load. The Ninth Circuit terminated just under 2,500 fewer cases than it received last year. My own recent experience hearing cases just last week confirms that private civil appeals are hardest hit by delays in case processing. As a result of our inability to keep up, there are now over 17,000 cases pending on our docket as of June 30, 2006, comprising 30.3 percent of the Nation's entire Federal appellate case load.

I support some form of reorganization, either through Senate bill 1845 or under a different configuration. I urge consideration of a three-way split composed of a Pacific Northwest circuit with five States, a Southwest circuit with Nevada, Arizona, Hawaii, and the Pacific Territories, and a stand-alone California circuit. But whatever choice you make, please act soon. Any action now will greatly increase our efficiency, our collegiality and manageability, and reduce the delay in processing and deciding cases while saving money and reducing productivity losses from extended travel time.

Conspicuous by its absence is any effective rebuttal to the voluminous data showing that my court is disproportionately large when measured by any metric. If we do not act now, we will continue to do the best we can. But it will not be the best we are capable of doing given the constraints within which we must currently operate.

Thank you.

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

Senator KYL. Thank you, Judge Tallman.

Judge Thomas?

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

Judge THOMAS. Yes, Senator Kyl, Senator Feinstein, I appreciate the opportunity to testify on the legislation today.

Division of the Ninth Circuit would have a devastating effect on the administration of justice in the Western United States. It would increase case delay and reduce our ability to provide service. It would cause unnecessary and wasteful duplication. No one disputes that the Ninth Circuit has created an extraordinarily efficient and effective administrative structure that is unique among the circuits. We have been able to accomplish this through economies of scale, technology, and the aggregation of resources.

To give some examples that I believe you gave earlier, Senator Feinstein, our mediation unit, with a 90-percent success rate, set-

tled almost 1,000 cases last year. That is nearly the entire case output of the D.C. Circuit. The Bankruptcy Appellate Panel decided nearly 700 appeals. The Appellate Commissioner, a position unique in the Ninth Circuit, resolved 4,000 motions and over 1,000 fee requests. Through presentations of our Staff Attorneys Office, we resolved over 2,000 appeals and 11,000 motions. Our Habeas Unit assisted in resolving over 1,000 appeals. The Ninth Circuit Pro Se Unit handled over 6,000 appeals.

Now, what has been the result of this? Well, even though the Ninth Circuit, as you have heard, has experienced an astounding increase in immigration case load, over 587 percent over the past 5 years, which has caused our total case load to increase 50 percent over the same period, our case processing time has only increased 1.2 percent over that same period. But for the unexpected and temporary increase in immigration cases, the Ninth Circuit would be current.

During the same period of time, other circuits did not fare so well. Delay in the Second Circuit, which is the other circuit hardest hit by the surge in immigration cases, increased 23 percent. And even though the case load in the Fourth, the Fifth, and the D.C. Circuits grew only 5 percent over the past 5 years, as compared with the 50-percent increase in the Ninth Circuit, their delay increased by more than 50 percent.

Despite unprecedented case load increases, we have held our own because of our administrative efficiencies. However, due to unnecessary duplication and increased costs, these efficiencies would be destroyed by circuit division, leaving the same case load to be managed with sharply reduced resources. One cannot expect improved performance or reduced delay by forcing the Ninth Circuit to lay off a substantial percentage of its employees, and starting up a new circuit from scratch on a shoestring budget. Circuit division will increase delay and not reduce it.

None of the arguments raised in support of a circuit split are persuasive. Proponents argue the circuit is too geographically large, although it has been the same size since the Truman administration. The present legislation will not even address size, leaving 90 percent of the present land mass in the new Twelfth Circuit, which would still stretch from the Sonoran Desert to the Arctic Circle.

Proponents contend the Ninth Circuit issues too many opinions for lawyers and judges to absorb, yet the Seventh and Eighth Circuits produce more, with the Eighth Circuits issuing 30 percent more opinions than the Ninth. If circuit division is justified by the sheer number of opinions, those circuits should be split first.

All academic studies conducted to date indicate the Ninth Circuit does not experience case conflict any more than any other circuit. In fact, we have instituted a number of procedures to prevent case conflict, including electronic case and issue tracking that other circuits have not been able to employ due to lack of resources.

Split proponents argue that population growth justifies a split. However, there is no longer any correlation between population growth and case load growth in the Federal judiciary. Over the past 5 years, although the population in the Ninth Circuit has increased substantially, the case load from the district courts has ac-

tually decreased 1.2 percent. Present case load growth is due to factors other than population.

The separatists argue that the limited en banc process justifies a split. However, the present legislation would still retain a limited en banc court in the Ninth Circuit. All studies of our en banc process indicate it is working well. Few en banc decisions over the past 20 years have even involved close votes, and, in addition, the Ninth Circuit already has a mechanism to rehear a case before the full court if a majority of the cases thought it necessary. In any event, a rehearing en banc is a rare event in any circuit. Last year, only the Eighth and Ninth Circuit reheard more than four cases en banc. It makes no sense to dismantle one circuit and start up a new one from scratch to allow more judges to hear four cases.

In the end, the question is how best to administer justice in the West. The solution is not to duplicate management and create more bureaucracy nor to build expensive new buildings in one circuit while the space goes empty in another. The best path is to become more efficient and effective by pooling our resources and using economies of scale. Can we do better? Sure we can. But the present structure of the Ninth Circuit provides the best platform for administering justice in the Western United States.

Thank you.

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

Senator FEINSTEIN. Wow, he did it within 5.

Senator KYL. All of you guys are really good.

[Laughter.]

Senator KYL. Of course, I guess you are used to holding litigants to that standard. It is only fair.

Judge O'Scannlain?

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

Judge O'SCANNLAIN. Senator Kyl, Senator Feinstein, my name is Diarmuid O'Scannlain, United States Circuit Judge for the Ninth Circuit, with chambers in Portland, Oregon. I appear today in support of S. 1845, which has been set for markup by your Committee in the next few days. My written testimony with graphics attached is before you, substantially unchanged from the very extensive hearings which you held last fall. Today, I would like to emphasize three points.

First of all, the Ninth Circuit just does not look like America anymore. Our court has grown to a size utterly disproportionate from all other circuits in the Federal judicial system, and as you can see from the charts and the graphics beginning at page 17, the question of circuit realignment is no longer whether, but when and how. All of this disproportionality is exactly what the Congressionally mandated Hruska Commission foresaw in 1973. Over 30 years ago, the Commission recommended that both the then-Fifth Circuit and the current Ninth Circuit be split. The Fifth Circuit promptly was split, but the Ninth Circuit resisted. Regrettably, the chief judges of the circuit have continually opposed a necessary and inevitable restructuring.

After the Senate passed a Ninth Circuit bill in 1997, our then-chief judge called for another study. Congress graciously accommodated that request by creating the so-called White Commission, which essentially reiterated the observations of the Hruska Commission. Furthermore, the White Commission recommended splitting the circuit into three semi-autonomous divisional courts, leaving the circuit as but a shell. Yet, once again, our circuit's leadership rejected that Congressionally authorized Commission's well-considered report.

I listened to my colleagues in opposition, and they talk like the Ninth Circuit is the center of the judicial universe. I suggest their perspective is misplaced. The Ninth is only one of 12 circuits in the Federal judicial system. The Supreme Court, of course, is central. Chief Judge Schroeder cannot point to a single Supreme Court Justice who agrees with her. We have pointed to at least four who favor restructuring of the Ninth Circuit.

Mr. Chairman, except for decisions in cases, the Ninth Circuit is not immune from your oversight. It is no longer defensible to allocate 20 percent of the Nation's population, over 23 percent of the Federal case load, and over 30 percent of the backlog of all Federal appeals into but one of 12 regional circuits. Why should the Ninth Circuit be treated differently from its sister circuits? The burden is now on the diehard split opponents to show why the overwhelming burdens and vastly disproportionate size of the Ninth Circuit should be retained in a system which presumes co-equal appellate courts.

My second point is to debunk the extravagant claims made regarding the cost of a split. Most administrative costs would be amply set off by reducing the size of the old circuit. With respect, my chief judge assumes the new Ninth keeps the budget of the old Ninth. If the new Ninth Circuit is about two-thirds of the old circuit, that obviously means that one-third of the combined budget, including a third of the staff and supplies, would get reallocated to the new Twelfth. If there are any significant additional costs beyond reallocation of the present budget and some minor transitional expenses, I would be very much surprised.

Certainly, there is absolutely no need whatsoever for new courthouses to be built. Unused courthouse space now available in Phoenix and Portland and Seattle will accommodate any administrative needs. The $100 million number is a red herring, and most of us in this room can see that for what it is.

Third, while I support S. 1845, which is similar to the bill that actually passed in 1997, I do think that there are other options as well. I have long felt that the Hruska Commission offered a preferable solution, but out of respect for the concerns of Senator Feinstein and, I believe, Chairman Specter, about placing California into two different circuits, I have demurred.

Let me conclude by noting that opponents of restructuring myopically argue that everything is just fine. When they urge that smaller circuits merge into bigger ones, they are simply unrealistic. With respect, the data show that it is the Ninth Circuit that is out of sync, and it is getting worse by the day. I urge the Committee to act now.

Thank you, Mr. Chairman.

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

Senator KYL. Thank you, Judge O'Scannlain. And, finally, Judge Roll.

**STATEMENT OF HON. JOHN M. ROLL, CHIEF DISTRICT JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA, TUCSON, ARIZONA**

Judge ROLL. Thank you, Senator Kyl, Senator Feinstein. It is an honor to be invited to testify before you. I enthusiastically support S. 1845. I am the chief judge in the District of Arizona. I speak only for myself, although five of my colleagues from the District of Arizona have written to you in support of this legislation as well.

When is a circuit court, which is only one of 12 regional circuit courts, too big? In 1998, the White Commission concluded that it was too big. Justice White, who chaired that Commission, described it as "adjudicatively malfunctioning," and Judge Pam Rymer of the Ninth Circuit said, "The Ninth Circuit is broke. It needs fixing and structural changes are required." As has already been mentioned, four Supreme Court Justices wrote in support of a split of the Ninth Circuit to the White Commission. Since the White Commission issued its report, the population of the Ninth Circuit has grown by 8 million people, and the case load is now 30 percent of all pending Federal appeals. Now, you have heard a lot of numbers discussed here. If you will look at my attachments, Attachment B shows where that 30 percent comes from.

Justice Kennedy said, when he wrote to the White Commission in support of a split, the burden should be on the split opponents who want to have three-judge panels decide the law for one-fifth of the United States. I submit to you the Ninth Circuit has not made that showing.

It is the slowest circuit in the country in decisional time, which is the time from the filing of notice of appeal to the time of disposition. That is the time that matters to litigants. It is 4 months slower than the average circuit and 2 months slower than the next slowest circuit. It has too many judges, which requires the use of a limited en banc procedure, which has been criticized by Judge Pam Rymer, who was a member of the White Commission, and by Justice O'Connor, who said that it just can't serve the same purpose as a full en banc. In fact, Judge Rymer said a limited en banc is an oxymoron, because 'en banc' means 'full bench.'

Only a fraction of the Ninth Circuit sits en banc. Panel members who decide three-judge panel decisions frequently are not selected to sit on the en banc. And I do dispute Judge Thomas' indication that only a few of the limited en banc votes are close. My Attachment J shows that since the White Report was issued, one-third of the cases decided en banc by the Ninth Circuit were by close votes, 6–5 or 7–4. It is the most unanimously reversed circuit in the country. Since the White Report was issued, it has been reversed unanimously by the Supreme Court 62 times. Sixty of those cases were not even heard en banc.

S. 1845 benefits all nine States of the Ninth Circuit. The new Twelfth Circuit would look like most other circuits. Its population of 21 million would be average. Its case load of 4,500 cases would

be larger than five other circuits. Its case-to-judge ratio would be right in the middle. It would be 7th of the 13 circuits, with 351 cases per judge, and this is illustrated on page 17 of my prepared statement, in a graph that shows where those numbers come from. That is actually larger than the case loads of the Third and the Sixth Circuits in addition to some of the smaller circuits.

It would be tied with the Eighth Circuit for the most number of States—seven States. The cost, as Judge O'Scannlain has described, is not prohibitive, and that is described at length in my attachments at Attachment M.

The Judicial Conference representation would be equalized for a circuit of that size, and a BAP would be available, in the opinion of Judge Lloyd George, who supports a split. And I would point out that the Tenth Circuit has a BAP, so certainly the Twelfth Circuit could have a BAP as well.

The new Ninth Circuit's case load would drop, with the addition of seven new judges, to a ratio of from 570 to 518 cases per judge. That would take the Ninth Circuit down from the third highest to the fourth highest.

The mantra that we have heard from the beginning is "no split is possible because the only way to evenly divide the Ninth Circuit is to split California. California does not want a split; therefore, you cannot split the Ninth Circuit." That logic cannot possibly continue to prevail.

Thank you for the opportunity to appear before you.

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

Senator KYL. Well, thank you very much.

We have heard a lot about the collegiality of the court, and it strikes me that if Senators could disagree as strenuously and yet agreeably, as you all have, we would be a better place.

[Laughter.]

Senator FEINSTEIN. You do not know what happens after they leave this room.

Senator KYL. Well, for some reason I sense that somehow or other they are able to function, but you are right.

Just a couple of things. First of all, do any of you who support a division of the court disagree with my view— and I suspect this is Senator Feinstein's view—that neither of the two, or if it were to be three, new circuits should—if the object of the split is to try to relieve the case load burden—that we should add a number of judges sufficient that the case load is at least no greater than and hopefully less than the current case load for each of the different remnants that would be divided out? Is there any disagreement with that proposition?

Judge TALLMAN. No disagreement.

Judge O'SCANNLAIN. I don't think so, Senator. I think that is the objective, and that can be attained through various devices.

Senator KYL. One device is we would have to authorize many more judges, which I am in favor of doing, by the way.

Judge Schroeder, just for the record, because I think you would want to probably do this delicately and in great consideration, but given the fact that the immigration cases are such a huge proportion of the new case load of the circuit, and undoubtedly a drain

on resources, if you all had ideas that might be useful to us as we are trying to put together immigration reform legislation that might in some way impact that, it would be very useful for us. And so if you would like to comment, fine.

Judge SCHROEDER. Yes, if I may comment to that. What has created the tremendous increase in immigration appeals—and I might add that this is felt by all of the circuits in the country. Proportionately, it is just that we get about 50 percent of the immigration appeals. The Second Circuit gets about 30 percent. So the two circuits with the great ports are most affected in terms of the numbers, but everyone feels it.

What has created it has been the decisions in the executive branch to increase enforcement and to reduce the intermediate administrative review of cases.

Senator KYL. Right.

Judge SCHROEDER. So that cases are coming from us—from the immigration judge directly to the courts of appeals.

Senator KYL. Which might suggest some other kind of additional administrative remedies?

Judge SCHROEDER. This is correct. It—

Senator KYL. If—I am sorry. Go ahead.

Judge SCHROEDER. Yes, administrative review would be one option. Another that has been suggested is the creation of something akin to the Tax Court that would take the cases from the immigration judges to an Article I court and then to an Article III court.

Senator KYL. Would you treat this as an invitation to submit for the record from the court any ideas that you have that you think are appropriate coming from the judicial branch for policy making? Because it has a direct impact on the functioning of your branch, and, therefore, it seems to me a legitimate thing for you to be commenting on.

Judge SCHROEDER. Well, within the bounds of respecting the independence of our two branches, I would be happy to do that. And as I indicated, if you settle—once Congress decides what kind of policy it wishes to enact, we can work with you on the administrative details so that it can be enforced effectively. And we would like to do that.

Senator KYL. Maybe what we could do is propose some options and ask you to comment on them.

Judge SCHROEDER. That would be helpful.

Senator KYL. Okay. One thing that struck me, much of the statistical analysis and testimony are variations on themes that have been testified to before, and I remember this being said before, but it did strike me—and I think, Judge Tallman, this came from you regarding collegiality—that there are 150 visiting judges, which does detract from the collegiality. And I do remember testimony before that it is really critical for the proper functioning of the court to have this concept of collegiality, be able to know each other, to work with each other on a continual basis. And it does seem to me that that many visiting judges would impede that to some extent. If you would like to follow up on that, I would appreciate it.

Judge TALLMAN. It impedes it in this way: We obviously need to have their help given the case load, but if we are bringing in judges from outside, then by definition, the panel is not composed of all

Ninth Circuit judges. So we cannot be spending the same amount of time we would be with one another if we didn't have to rely so heavily on visiting judges.

Senator KYL. I appreciate that.

Senator Feinstein?

Senator FEINSTEIN. Thank you, Mr. Chairman.

No current circuit consists of fewer than three States, and you have all read the Commission reports, and you know there is a reason for that. Obviously, if this split before us were to take place, it would just be California and Hawaii in a circuit, essentially, and very different in that respect.

Judge O'Scannlain is correct about my strong resistance to a split of California. Clearly, if it were to happen here, it would set a precedent for it to happen in other ways.

Judge O'SCANNLAIN. Right, and I respect that, Senator.

Senator FEINSTEIN. We all know California is a huge State and it is growing, and it is going to be bigger, but to date, nobody has suggested dividing California.

I am very curious why you do not consider the White Commission's comments with respect to maintaining the three—State circuit as, to an extent, dispositive.

Judge O'SCANNLAIN. Well, Senator, if I may, two points.

First, I am not sure I agree with you on your statement that no circuit has less than three States. The District of Columbia Circuit, which is an independent, separate circuit, just like all the rest, only has one jurisdiction, and that is the District of Columbia. So there is a precedent for a one-jurisdiction circuit. Some people have suggested that the State of California is so large that it should be its own circuit. Indeed, if it were its own circuit, it would be, as of day one, the largest circuit in the country in terms of case load and judges, and it would be unique in that way.

Now, with respect to the White Commission, don't forget the White Commission created three separate divisions, divisional courts, two of which straddled California. There was one for the southwest, one for sort of the middle, that would include the northern and eastern districts and put them in two separate divisions within our court. So we would be splitting California to that extent. Again, the court rejected the White Commission's recommendation.

Senator FEINSTEIN. If I can, let me go back to the immigration situation, because a 497-percent increase in cases is considerable. The question is what to do about it.

Now, Judge Schroeder referred to setting up some other entity. Senator Specter, Mr. Chairman, as you know, had a provision in the immigration bill that would automatically take those cases and place them elsewhere.

Are there any other suggestions with respect to this high load of immigration cases? And let me ask another question. Where do they come from—well, I guess where do they come from is not a good question to ask. But are there any other suggestions as to any solution with respect to the high immigration case load? Judge Thomas?

Judge THOMAS. Yes. First, our immigration case load came from a decision by the Attorney General to process—

Senator FEINSTEIN. I cannot hear you. I am sorry.

Judge THOMAS. I am sorry. Our current immigration case load came from a decision by the Attorney General to process over 50,000 cases in 4 months from the Board of Immigration Appeals. All indications are that this is a spike, although starting to decline, we do not know how long. So we think and hope that it is a bulge in cases rather than a permanent situation.

Interestingly, of our case load, 80 percent of those cases wash out before they get to oral argument panels. Either they are procedurally barred or they are jurisdictionally barred. And that is where the importance of our staff and triage comes into play, because if the staff can triage 80 percent of the cases before it gets to an oral argument panel, that is very significant.

So in any solution I think we have to maximize our staff resources, but there are two approaches. One, of course, if you create a different court, that takes 40 percent of our case load away right away. If we just concentrate our resources and try to even improve our ability to tackle these cases, then I think in a few years, we will be current with the immigration case load by just leaving it as it is.

Senator FEINSTEIN. All right. Now, whatever is done, California accounts for 69 percent of the circuit's appeals, and if size is the primary concern with respect to the current Ninth, the current legislation would still leave the Ninth with the largest case load circuit.

Given the size, wouldn't a new Ninth have the same alleged problems with numbers of judges and case load as the current Ninth?

Judge O'SCANNLAIN. Well, Senator, if I may suggest, if any of these options is pursued, either transfer to a central court, such as the Federal Circuit, or the creation of perhaps an Article I court or another court of immigration appeals, the problem is not going to go away. There certainly has been a little bit of a bump because of the streamlining, but, on the other hand, given the enforcement by the executive in the immigration area, those prosecutions and those issues are going to continue to be with us for an indefinite period of time.

Another option would be to sprinkle these immigration cases throughout the country so that circuits other than the Ninth and the Second would be assigned cases. This can be done—you have got the MDL model, the multidistrict litigation model, which could be used in that situation. But I would hope that you can look at the immigration issue as a separate issue, if that can be done. I have no idea where that stands in terms of your agenda this year.

Senator FEINSTEIN. Thank you.

Thank you, Mr. Chairman.

Senator KYL. Thank you.

We are joined by the Chairman of the Subcommittee on Courts, Senator Sessions of Alabama, and if he is not ready, I can go ahead with just one question. But if you are, Senator Sessions, the floor is yours.

Senator SESSIONS. Why don't you go ahead.

Senator KYL. Well, I have one question. It just takes a little long to ask it. This is something that comes out of something that was near and dear to the heart of Senator Feinstein and myself, our

crime victims rights law, and a case in which the Ninth Circuit was so slow in performing its function that we finally filed an amicus brief in the case. And on the theory that a picture is worth a thousand words and that sometimes something that sort of directly impacts you is more meaningful than a lot of statistics, for example, this may suggest one area in which I have noted the difficulty of the court in dealing with a case within the time frame it was supposed to.

Under the victims rights law, when there is a writ of mandamus, under this particular section, the court is to decide the application within 72 hours after the petition is filed. But in the *Kenna* case, instead of that happening, nothing was done with the case for 2 months. Finally, the Ninth Circuit directed the district court to file a response to the petition. Unfortunately, Mr. Kenna was not served with that. He finally got a copy from the Ninth Circuit clerk's office. On September 22nd, now 3½ months after his original petition, he filed a request for ruling with the Ninth Circuit, reminding the court that almost 4 months had elapsed after the court was supposed to have decided the case within a matter of 72 hours.

Three weeks later, October 13th, the case was finally referred to the Merits Panel, but then instead of expediting the case, the clerk ordered it calendared during the week of January 9, 2006—7 months after the petition for writ of mandamus was filed.

On December 30th, we finally filed an amicus brief, as I said, on behalf of Mr. Kenna. And finally, on January 11, 2006, the case was argued. Then on January 20th, 7½ months after the petition had been filed, the case was decided.

I do note and appreciate the fact that in the opinion the court noted its error here and said, "Finally, we recognize under the statute we were required to take up and decide this application forthwith, within 72 hours after the petition had been filed. We acknowledge our regrettable failure to consider the petition within the time limits of the statute and apologize to the petitioner for this inexcusable delay."

Obviously, litigants have to abide by the time frames that are set forth by the court and by the rules, and I would note that at just about exactly the same time that this case was proceeding, a petition was filed in the Second Circuit and was resolved within the 72-hour period that the statute required.

Now, obviously, a case like—you know, it is always possible for there to be a slip-up, but in the administration of justice, we all work really hard to avoid slip-ups because we are dealing with real people's lives, and in this case involving victims of crime who have already been victimized once. So the question is not how could this happen. I suppose anything—it is possible for a mistake like this to be made. But it has certainly made an impression on me as to the ability of the court to deal with cases in a speedy way.

If any of you would like to comment on that, I invite it, but it is more in the nature of "this is one of the things that has kind of been sticking in my craw." Yes, Judge Schroeder?

Judge SCHROEDER. Yes, I would like to comment on that briefly, Senator Kyl. That was an unfortunate glitch that happened be-

cause it was new legislation and our clerk's office did not understand, did not realize the time limitations on the legislation.

We have now corrected our procedures so that we are alerted when these cases are filed, and that should not happen again.

Judge THOMAS. In fact, I would add, Senator, that we had three of those cases last July. All of them were processed within the 72 hours. And to get a written published opinion, which is a requirement of the legislation, is quite a feat. But we have now remedied that situation, and those cases are getting flagged. My understanding is that the parties in that case did not necessarily flag, and the parties may not have been interested in the time limits, or at least flag the time limits for us. But it was an error in that case, and I think the answer is when we make an error, we try to address it. And we have addressed it.

Senator KYL. Well, I know from the counsel to the parties that the parties were very concerned about the lack of timeliness. As I said, everybody can make a mistake. The court certainly recognized it and made the point. But it does demonstrate that from an administrative standpoint, it slipped through. And at the same time, another circuit was handling the case that it had in accordance with the legal requirement.

I actually took a Republican question. Would you like to question next, or shall I turn to Senator Sessions?

Senator FEINSTEIN. Turn to Senator Sessions.

Senator KYL. Okay. Senator Sessions?

Senator SESSIONS. Thank you, Senator Kyl and Senator Feinstein. I know you both care about the Ninth Circuit. You have been engaged in these issues for many years. I have come to it as Chairman of the Courts Committee with the belief that we ought to have a good panel and a good hearing and good testimony and see what the facts shake out. And I look up, and this is the same group we had before.

[Laughter.]

Senator SESSIONS. And I guess that means you are the best of the best, with the best perspectives and best insight.

I just remember very, very vividly testimony from judges in other circuits when Senator Grassley chaired the Subcommittee, and they were concerned about the growth of the circuit. Judge Tjoflat on the Eleventh said that they would be willing to work harder and have a higher case load because if you get the number too big, it does not work. Some have compared the Ninth Circuit to the House of Lords instead of a court. I mean, there are 28 active judges authorized, and we really need more. And you just get so big, that finally you are not a court anymore, in my view. And since the old Fifth split to the Eleventh and the Fifth, they have been happy with that. They would not go back. They are so enthusiastic about the collegiality they have been able to maintain, and that allows for consistency and uniformity when you are a tighter circuit. And when you get bigger, you get panels that, statistically speaking, may not represent the full—the heart of where the circuit is, and that may well be one reason the circuit has had more difficulties in getting its cases affirmed by the Supreme Court, because you can get an aberrational panel when you have 30 judges to pick from. You may get three that have the most extreme view on one

particular subject, and that is the one they decide. So it ends up with a number of problems.

So I have concluded, after our hearing, that we should proceed forward. I have thought, I say to my colleagues, that perhaps a three-way split would be the best because it would have two ideal-size circuits, both of which are in growing areas, and it would probably take care of us for 20 or 30 years, maybe, or more hopefully. It would still be a large California circuit, and whatever is with it, but I do think we need to take that first step in going forward.

Looking at the case load, for example, I believe, Judge Tallman, you submitted this chart. First, I would say that even as currently configured and with the number of judges that you have—and I know you believe you should have more circuit judges. The case load per judge is 595 or 600; whereas, in the Eleventh Circuit it is higher, it is 642. So you don't have the highest case load per judge in the country. And I do think we have got—as we work through the immigration matter, we have got to figure out a way to make the law clearer, and if we do that, I think we will have less appeals in the long run, and maybe a spate of them as the law is initially contested, but they could decline.

I am sure you have discussed all the fundamental questions of the circuit. I would ask this question, I guess for Judge Schroeder. How many new judges—if we did not divide the Ninth Circuit and we just left it, how many new judges do you need now? And I am sure you probably have a number a little higher than I would think, but I know you need some additional judges. What is your judgment and what does the AO recommend?

Judge SCHROEDER. Yes, I am glad you asked that question, Senator Sessions. We have not had a new judgeship on the Ninth Circuit since 1984, and we have requested—and we have never had our full 28 authorized judgeships full except for about 5 minutes once. And we now have two vacancies. As long as 5 years ago, about 5 years ago, before I became chief, we had as many as ten vacancies.

Now, we have asked for a number of years for seven judges. I believe that if the seven judges were added to the circuit, that would help—that would enable us to do our job well if the immigration cases, as you say, as you indicate, there were a different channel for those or they were to diminish, as we think they will.

So if you were to split the circuit, in order to make the Ninth Circuit load equivalent to what the new Twelfth Circuit would be, you would have to add somewhere between 13 to 20 judges all to the California circuit.

So that we want to share the load. Administratively, that is our goal. And we can share the load, we think, pretty effectively with the seven additional judgeships if they get filled. Of course, I am not holding my breath for that.

Senator SESSIONS. Well, I think at some point we have got to confront that problem. I think you are at the upper end. You have the second heaviest case load per judge in the country, and so we need to think about your request.

Now, I would ask you to comment, and if any of the others would, but you have opposed the idea that we would have immigrant appeals go to the Federal Circuit or another type arrange-

ment. Wouldn't that be a real relief to the circuit? And why would you oppose that?

Judge SCHROEDER. I opposed their going to the Federal Circuit because the Federal Circuit is already a specialized court with other fields. Those judges are not familiar with immigration issues, and it is a court that is located in Washington, D.C. It is as far away as possible from where the immigration cases emanate.

But my mind is open as to—I have no fixed solution for this. I did not think that the Federal Circuit was a good solution.

Senator SESSIONS. Any other members of the panel want to comment on that subject?

Senator KYL. Senator Sessions, I might note that at the very beginning we invited the members of the court to give us their suggestions as to how to deal with these large number of immigration appeals, and perhaps the best way to deal with that is to send them some options that might come out of our debate about the immigration reform and elicit their reaction to those options. And they have agreed to do that for us.

Senator SESSIONS. You know, the split did not occur after the Fifth, the old Fifth split, and the White Commission, I think probably, assuming some political problems out there, proposed this divisional concept, which I am not particularly comfortable with.

Judge O'Scannlain, would you like to opine on the difference between a two-way or three-way split? I do not know what perspective—I do not remember your perspective on it, but—

Judge O'SCANNLAIN. Well, in my detailed written testimony, I have indicated a fairly thorough analysis of different options. My preferred option, as I indicated here, was the Hruska Commission report, which was, in effect, followed in the White Commission when it decided to split the single circuit into three separate divisions, divisional courts, including two courts that would share California, the third division would be mostly the Northwest.

I think there are considerations both ways. If you cannot split California, maybe the time has come to look at California being its own circuit, just like the District of Columbia. That should be examined.

After that, if we want to get into closer parity with the rest of the country, why, it might make sense to have a mountain circuit starting from Arizona up to Montana and Idaho, with Nevada. That was the bill, actually, that came out of the House in 2004, with a Northwest circuit. There is another option which would be a Northwest-Southwest. Now, that has been a fairly popular proposal starting with Senator Jackson and Senator Magnuson as far back as 1955 when this entire debate kind of got started in a real way. So we are at this 50 years now.

But there are a variety of different ways to go, and I can see pluses and minuses on all of them. But I think they all come back to your State, Senator Feinstein. California has to be the center of the analysis. The rest of us are very logical regions. The Northwest is probably the most logical region—Oregon, Washington, Alaska, Idaho, and Montana. I think there is almost very broad unanimity on that. In fact, we have a division inside our court that represents that. But then from there on, I think it is a matter of negotiation, as well as analysis in terms of what works.

Senator SESSIONS. Well, thank you, and I have taken too much time. I appreciate your leadership.

I think we should move forward. That is all I would say. I think we need to move this thing to a solution, and I hope that we can reach a comfort level in the Senate that will allow that to happen.

Senator KYL. Senator Sessions, thank you.

I am going to have to apologize to the panel. Senator Feinstein has one final comment or question she would like to pose, but I am going to have to leave here. I will turn the meeting over to Senator Sessions. We do have one more panel.

But I appreciate all of you being here to testify. It may have been dejavu all over again, but I learn something new each time.

[Laughter.]

Senator KYL. So at least I appreciate it very, very much.

Senator Feinstein, I will turn the microphone over to you now.

Senator FEINSTEIN. You know, Judge Schroeder very politely said that the court has been asking for seven judges and has not gotten them. I want to put this on the table. We try, and the reaction that comes back from the House is no new judges until the circuit is split. Ergo, starve the Ninth Circuit, force it into disrepair, until they finally have to admit that it needs a split.

I want everybody to know I will never, ever go to that. I will never, ever let that happen, one way or another. The fair thing, if the proponents of a split want a split, is to give the Ninth the judges it needs now, and then see if there is still a problem. If there is still a problem, then we know something. But, you know, 15 judges sit en banc. Well, that is not enough. It should be all 28 or 30 or 35.

I do not agree with that at all, and I think that there has been a basic unfairness in this whole argument, and it is sub rosa, but it continues year after year and it is not fair. It is not fair to do this to this circuit. And the most cost-efficient way is simply to provide the necessary judges, then make the judgments. Then see what the time lags are. Then see how the cases proceed.

But absent that, I can only believe this is being done with a political motive. If you don't give the circuit what it needs to be equal with other circuits, you do not start out on a level playing field. And that is where this discussion is today. It is not a level playing field. No circuit is as distressed as the Ninth in terms of vacancies and the need to fill them. The longer you keep the vacancies vacant, the more you do not accede to the requests based on case load for additional judges, the more you starve the circuit and you increase the problems. And I believe that is the strategy around here, and it is a wrong strategy. And some of us cannot accede to that strategy. So I think that card has to be put on the table.

Senator SESSIONS [Presiding.] All right. Thank you. Of course, there are other circuits that need judges also, and I would just say that is not the Senate's strategy.

Senator FEINSTEIN. It is the House strategy, though.

Senator SESSIONS. It may—I have heard things of that nature said.

[Laughter.]

Senator SESSIONS. But I do not know that that is the definitive issue, and I do not know that—you know, at some point we have

got to move beyond those intense feelings. I understand your approach to it, Senator Feinstein. I know you care about it, and you are not going to be ordered around. And we have got some on the other side that will not be ordered around, either.

Senator FEINSTEIN. Sure.

Senator SESSIONS. They have hard heads, too.

So this is an excellent panel. I wish I could have heard all of your testimony. Thank you for that. Unless any of you have something you feel like you have to add, we will go to the next panel. Thank you for your service to your country and your commitment to justice.

Senator SESSIONS. Our next panel includes Dr. John Eastman, the Henry Salvatori Professor of Law and community Service at Chapman University School of Law. Prior to joining the Chapman faculty in August 1999, he served as a law clerk for Justice Clarence Thomas at the Supreme Court and at the United States Court of Appeals. After his clerkships, he practiced with the national law firm of Kirkland & Ellis, specializing in civil and constitutional litigation. Prior to law school, he served as Director of Congressional and Public Affairs at the U.S. Commission on Civil Rights and was a 1990 Congressional candidate. He earned his undergraduate degree at the University of Dallas and J.D. from the University of Chicago School of Law, where he graduated with high honors. He has a Ph.D. and an M.A. in government from the Claremont Graduate School, with fields of concentration in political philosophy, American government, constitutional law, and international relations. That is a lot.

Mr. EASTMAN. Do I get more than 5 minutes?

[Laughter.]

Senator SESSIONS. Mr. Neukom is the Chair of Preston Gates & Ellis, LLP. In January of 2004, he was elected to that position. He rejoined Preston Gates in the fall of 2002 from his position as Executive Vice President of Law and Corporate Affairs at Microsoft, where he spent 17 years managing the company's legal and government affairs and philanthropic activities. As Microsoft's lead counsel, he was instrumental in securing the landmark victory in *Apple* v. *Microsoft*. That was a historic event. And he has led Microsoft's defense in antitrust claims and other actions. He is President-elect of the American Bar Association. He earned his A.B. from Dartmouth and his L.L.B. from Stanford.

Dr. Eastman, we are prepared to hear from you.

## STATEMENT OF JOHN C. EASTMAN, CHAPMAN UNIVERSITY SCHOOL OF LAW, ANAHEIM, CALIFORNIA

Mr. EASTMAN. Thank you, Senator Sessions, Senator Feinstein. It is a real honor and pleasure to be here.

I teach constitutional law at Chapman University in Southern California, so I am a constituent of yours, Senator Feinstein. But I also run the Center for Constitutional Jurisprudence, which litigates all over the country, but in particular in the Ninth Circuit. And so I deal with these questions, and I want to address the notion that this effort to split the Ninth Circuit is political. If it were, and if I were politically motivated, most of the judges that tend to vote my direction on my cases would be lost from the Ninth Circuit

that would remain in California, and so I would be on the other side of this. So I guess I am speaking against interest here in arguing it is not political.

I want to focus on the notion of judicial collegiality because I think that is a real stake, a real issue here, and I do not think it has been addressed in the right terms. By "collegiality," I do not mean the mere exchange of pleasantries. The judges on the Ninth Circuit are famous for their collegiality in that sense. What I mean is the notion of shared authority that comes from a court. It is the idea that judges embody the knowledge that they have a common interest in getting the law right, as Judge Harry Edwards noted in a 2003 Law Reserve article.

Collegiality within an appellate panel permits an open, honest, and frank discussion of otherwise divisive legal issues without fracturing the unity of the group but, more importantly, I think helps get the law right. That familiarity between the judges means that there will not be any particular judge who decides to go off solo and apply his own personal agendas rather than really making an effort to get the law, as received, correct in their opinions.

As First Circuit Judge Frank Coffin noted nearly two decades ago, while serving as the Chairman of the Committee on the Judicial Branch of the United States Judicial Conference, "The increased size of courts and heavy workloads mitigate against the old-fashioned collegiality that existed when judges sat often with each other." And I think this is a huge problem. In my written testimony, I go through several other examples of this.

In other words, if we are serious about having decisions from courts rather than individual decisions from individual judges, the size of the court does matter. And the larger you make the court, the more number of judges you add, the fewer opportunities they have to sit with each other and develop the kind of collegiality that I think is necessary to the rule of law.

Now, the most comprehensive assessment of this was done by Judge Richard Posner, a sitting judge on the Seventh Circuit, and he has gone through trying to control for every splits on ideology and these other things by looking at one of the critical statistics: the number of unanimous or summary reversals by courts in the country, by the Supreme Court, by a Supreme Court that does not often do things unanimously over the last number of decades. And the Ninth Circuit is by far the largest reversed court on that, six times larger than the next circuit. And I think that, quite frankly, is a function of this lack of collegiality in the sense of court building, getting the law right. They do not sit often enough. You heard testimony today that they have 150 judges a year from other circuits, district judges sitting by designation. All of that undermines the ability of the Ninth Circuit judges to function as a collaborative court rather than individuals. And it enhances the prospect that those individual decisions will simply get the law so wrong that they unanimously get reversed.

The second thing—and I think the Department of Justice testimony on this was accurate, and I can give you anecdotal stories. When I get clients and they say, "What is the likelihood of success on this appeal?" I often tell them, "I can't tell you that until I know what the panel looks like." That is a terrible statement about the

notion of law in any circuit in the country. And I think practitioners told the White Commission that exists—they have the sense that it exists. It is hard to quantify, but they have the sense that that exists more often in the Ninth Circuit than anywhere else. And I think the Department of Justice testimony—and I look forward to the additional information that they provide in response to Senator Feinstein's request—about the number of intra-circuit conflicts that are created is important. And it is not just on the published decisions. The Ninth Circuit is frequently using unpublished decisions or summary decisions by staff in order to keep up with the workload. That is not the way we ought to be looking at the implications of justice in this country, and I think the evidence is very strong that it is time to split that Ninth Circuit at least into two and, I would argue, probably three circuits.

Thank you.

[The prepared statement of Mr. Eastman appears as a submission for the record.]

Senator SESSIONS. Mr. Neukom?

**STATEMENT OF WILLIAM H. NEUKOM, ESQ., PRESTON GATES & ELLIS, LLP, SEATTLE, WASHINGTON**

Mr. NEUKOM. Thank you, Senator Sessions, Senator Feinstein. It is good to see each of you again. I am appearing as a lawyer who has the privilege of representing clients, largely business clients, in the Ninth Circuit.

Senator FEINSTEIN. Could you pull over the mike, please?

Mr. NEUKOM. Yes, of course.

Let me suggest, in addition to my written testimony, that there are four significant advantages for enterprises of keeping intact the Ninth Circuit Court of Appeals.

First, in a geopolitical era characterized by a global economy, it seems to me it is clear that a uniform, stable, and predictable body of law in a large and coherent—and I am going to come back to that—geographic area is of enormous value. As enterprises plan their work and work their plans, they desire as consistent a set of rules by which to run their businesses as is possible. It is apparent and it is common-sensical that it is more difficult and much more expensive to try to manage a business to pockets of law in a geographical region of any size.

Second, the coastal States of the Ninth Circuit are incubators for a huge share of the intellectual property brought to regional and national and, indeed, to the world market. Those intellectual property enterprises perform best, they are most efficient, they are most productive in an environment of well-developed intellectual property rights law. Intellectual property rights law is the means by which technological companies can derive value from their inventions. That is how inventors and innovators protect their intellectual property from piracy and counterfeiting. It is how they earn a royalty, by permitting others to use their intellectual property, how they get a return on their investment. Intellectual property rights law is the foundation in a very fundamental sense of a powerful incentive cycle that leads to the creation and the bringing to market of useful technology and drives the economy, and will increasingly in the 21st century. And it is this Ninth Circuit, as pres-

ently constituted, this bench, with its experience and its expertise in intellectual property rights law that has created an invaluable body of law that guides the activities and helps resolves the disputes in the critical sector of intellectual property businesses.

Third, a unified West Coast jurisprudence of intellectual property rights law, of maritime law, of commercial law, encourages commerce and trade between our country and the other countries around the Pacific Rim, an area which, by most measures, may be the fastest-growing economy in the world.

And, finally, at a somewhat more conceptual level, if you will, I think the history of the judiciary and I think any basic understanding of human nature shows that the convergence on panels and in chambers of judges of different backgrounds from a broad region and the resulting diverse and broad perspective that they bring to their deliberations and to their analyses promotes sound reasoning and just results.

Let me comment on one other notion. It seems to me that the theater of this hearing, chock-full of information as it was, is just a bit misleading, and I invite the Committee to pay particular attention to the record in its entirety. And I believe that any objective review of the record in its entirety will reflect that the evidence overpoweringly is in support of retaining the Ninth Circuit intact for good reasons: because of the quality of its work and because of the efficiency of its administration of its important responsibilities.

The people who know the most about the Ninth Circuit and bringing justice to the parties who appear before the Ninth Circuit, the judges on the circuit, the judges in the districts within the circuit, the lawyers and their professional associations who appear as advocates before that bench, the law professors who constantly analyze and organize the decisions by that bench—all of them, the people who know most and best about this vital organ of Government, overwhelmingly endorse the Ninth Circuit in its current configuration.

Thank you for your attention.

[The prepared statement of Mr. Neukom appears as a submission for the record.]

Senator SESSIONS. Just briefly, while you mentioned the fact, Mr. Neukom, that we are in a global economy and the Ninth Circuit involves a lot of international trade and that it is important to have uniform, stable, predictable, and coherent opinions, my observation is that is exactly what we are not getting out of the circuit.

You, Mr. Eastman, raised a point that has been obvious for some time that this is the most reversed circuit by the Supreme Court, whose duty it is in one sense to maintain uniformity and consistency throughout the land, and it is 6 times as likely to be reversed by unanimous decisions.

So I would ask both of you to make a brief comment on maybe Mr. Neukom's and my disagreement. Mr. Eastman, you start since you raised the reversal rate.

Mr. EASTMAN. Yes, I think that is right. There are two ways to look at uniformity. You can have uniformity by having a single circuit, and if it could consistently apply the law within the circuit, you would get a greater degree of uniformity. But I think Judge

Posner's statistical analysis has demonstrated that is not what we are getting out of the Ninth Circuit. And nobody has laid a finger on his analysis in criticizing that. We are getting disuniformity within the circuit because it is too large.

But let me add a point to that. If the point we want to have intellectual property—a single body of law because of the importance of the technology, we should perhaps add Boston and Northern Virginia to the Ninth Circuit because of their thriving economies in that field as well. We do not do that anywhere else in the country, and we do not do it for good reason.

There is an importance to the size of the court that allows you to get within a court a judgment that was uniform within the court, and then the Supreme Court can deal with inter-circuit conflicts to make sure you get unanimity at that level.

Senator SESSIONS. Mr. Neukom?

Mr. NEUKOM. Senator, in terms of consistency, I would invite the Committee's attention to the written testimony of Judge Thomas, who I think sets out the evidence quite clearly. I think each of us has our opinions. I simply cannot resist the observation that I do not hear the uproar from the advocates who appear in front of this circuit day in and day out.

There is a single law professor in front of you today. There is a letter from several hundred law professors. You have heard from three judges in favor of this legislation from the circuit, two opposed; there are others in the audience who are in favor of keeping it intact; and there is the overwhelming majority of the 23 or the 26 who say keep it as it is.

I do not see the problem, and we each have our own anecdotal evidence, and perhaps better than that. But I think the point is for the Committee, with the help of its staff, to consider this record in its entirety. And I think what comes out of that kind of an overarching review is that this circuit is exemplary all in, in terms of the quality of its decisional process, in terms of the guidance it provides to its constituents within that district, and particularly with regard to its efficient and innovative administration.

Big is not bad. The question is how you manage your size and the resources that you—

Senator SESSIONS. Wouldn't you agree that an en banc panel of nine is more feasible than one of 28?

Mr. NEUKOM. I think it is, and I think an en banc panel of nine judges of the quality that we have in our circuits may be perfectly adequate to afford the parties a broader review, a broader perspective review of the merits of an appeal. It is not clear to me where the quality leaves off between nine or 15 and 25.

Senator SESSIONS. Well, you have made a number of points, and I would just say that there are two sides to both of those points. The intellectual property rights, well, the upper West Coast has a strong basis of intellectual property cases, and many of them are right there in the Washington-Oregon area. I do not know why they would not maintain an expertise.

Second, as to maritime trade laws, I think there are other circuits that have trade and maritime laws to deal with. They have panels more consistent than the Ninth Circuit. And I do not know that—it seems to me the fundamental thing that the Ninth Circuit

seems to lack is the focus on—well, that is probably an unfair statement. Let me just say it this way: I believe the circuit ought to be committed to getting the case right, what the law says, not what their personal view of international trade is or trademark cases. And it seems that based on the historical appellate record, panels from other circuits get it wrong less often than panels of the Ninth Circuit. So I think that is a reason to consider smaller circuits. And, second, it just would strike me, once this decision would be made and a division were to occur, if ever it does, that people would be really happy with it. They may be objecting right now, but I think the judges are all going to be happy, just like the Fifth Circuit was when it split. I remember being there when the Eleventh Circuit was started up, and they would never want to go back.

Senator Feinstein?

Senator FEINSTEIN. I think this is a very interesting discussion, Mr. Chairman, because it is true there is a small coterie of people who have been pushing for this split of the Ninth Circuit. You know, I have great respect for Judge O'Scannlain. He hangs in there like a tiger. His reports are like—you could get a Ph.D. This could be a dissertation. And he hangs in, and I respect that and appreciate it. I am not being critical.

On the other hand, there is no pressure that I get anywhere I am home for a split in the Ninth Circuit. All the bars are opposed to a split. The dominant number of judges are opposed to the split. Most of the Governors are opposed to the split.

This comes, obviously, from somewhere, but in terms of size, it is not at all reflective of the circuit. In terms as Mr. Neukom has said, it is not reflective of participants in the circuit, professional participants. It comes from outside. So when I say it is political, because there is no popular support for this, I come to the conclusion it is political within certain circles.

Now, Mr. Neukom, I think you have raised a very interesting point, and I want to explore it a little bit more. Obviously, you have represented a very large intellectual property industry in your time, and that is Microsoft. Could you be more specific in how the Seattle-based companies and the Silicon Valley based companies rely on the unity of law and what might happen, if it would happen, if there were not that unity of law?

Mr. NEUKOM. I would be pleased to, Senator, and I should say, as I have in my written testimony, that these are my views and do not represent the views of my former employer or my current employer. But an example would be, I think, the very contentious litigation that has gone on between the Microsoft Corporation and some prominent companies in Silicon Valley. If you are trying to design a litigation strategy for such a company in that situation, and if the case is before a district court in the Northern District of California, you are gratified to know that that court will be likely applying the law of the Ninth Circuit, which is law well known and understood to you because your company is based in a State which is also within the Ninth Circuit. And you are also gratified to know that that is a circuit, as I alluded to earlier, which, because of its breadth, certainly all the way up and down the coast—and I do not mean to suggest there is not increasing amounts of intellectual property being created inland from that coast. But cer-

tainly it is a powerful incubator of intellectual property, and as a result of that, a lot of those cases have come before this circuit, and this circuit has become expert in it.

So you can expect that you will get a fair shake wherever you might be, in whatever district court you might be, because you know that it will be reviewed and those judges know it will be reviewed by a circuit, and it will be reviewed by a circuit which is expert.

That helps you in terms of predictability and confidence in designing a strategy and advising a client. And what that leads to, I think, is less prospect of that sort of litigation and the chance to resolve matters earlier.

The same thing is true in licensing of intellectual property. You are going by a set of rules, whether in litigation or in licensing, that are relatively uniform, and that is helpful to businesses. That increases their efficiency and reduces their cost and lets them pay attention to job one, which is creating useful technology that drives this economy of ours.

Senator FEINSTEIN. What would you have done, representing Microsoft, if the circuit was split?

Mr. NEUKOM. I would have cared a lot more which district the case was being tried in, and I would have allocated resources to trying to determine that forum at the outset. And it would have changed the strategy from the beginning. Do you bring a lawsuit or respond to a lawsuit? If you respond to a lawsuit, you try in some way to have it moved to a different venue. That complicates things enormously and increases the expense.

Senator FEINSTEIN. Of course, forum shopping has been one of my objections to the split of California that you would have real conflicts between the north and the south as to—and you could have conceivably one decision in the southern part of the State and another decision in the northern part of the State, which would not make much sense.

Do you have any specific anecdotal evidence with respect to maritime law and, again, the concept of unit?

Mr. NEUKOM. I do not have any before me. I would be pleased to look into that subject and to bring some to the Committee's attention, if you think that would be helpful.

To the point that was made earlier, I think that if we could do it over again, and if we were trying to get the most out of our opportunities in the Atlantic Rim—forgive me for coining a phrase, ineptly—I think it is just obviously more—it is easier to do business when you have a uniform set of rules in a coast which is doing trade with countries off of that coast. And so, yes, we have a number of circuits on the East Coast, going from Maine to Texas, if you will. That does complicate, I think, trade on the East Coast in a way that having the uniformity of the West Coast maritime law makes it simpler and more efficient to do trade and to provoke trade and commerce with Pacific Rim countries.

Senator FEINSTEIN. Thank you. My time is up.

Thanks, Mr. Chairman.

Senator SESSIONS. One thing I would add that I think is important is that I assume when the circuit splits, if it were to, we would by law or the circuit would itself adopt, as the Eleventh Circuit did,

the authoritative law of the old Fifth, and you would adopt as authoritative the Ninth Circuit law. And I think that would give confidence that there is not going to be any real change.

And, second, I really want to object to the concept that every circuit is independent and has all kinds of different bodies of law. You know, we have just one Constitution. We have one body of Federal statutory law. And in theory and our ideal is that there is a fair interpretation of that and everybody ought to reach the same interpretation and we ought not to have a whole bunch of different theories.

The problem, as I understand it, with the Ninth is that they have had this extraordinary number of reversals by a unanimous U.S. Supreme Court because of the large number of judges on the court, they have been consistently or too frequently unable to render opinions that are deemed by the U.S. Supreme Court to be faithful followers of the law. And I think the numbers and statistics indicate that.

Yes, there has been some concern about the Ninth Circuit, and I guess the circuit and others may have a defensive feeling about it. I have become more convinced that the size maybe is a problem more than ideology. But, regardless, I think we ought to move forward with this. I think we ought to listen to Senator Feinstein, because we always do, because she is thoughtful on it. And we appreciate both of you for your insights into subject.

If there is nothing else, we will stand adjourned. Thank you.

[Whereupon, at 4:34 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

# QUESTIONS AND ANSWERS

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

February 23, 2007

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

Dear Mr. Chairman:

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

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

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

Enclosure

cc: The Honorable Arlen Specter
Ranking Minority Member

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

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

**Responses to Questions from Senator Kyl:**

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

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

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

**Answer:** The lack of clarity in the law that results from intra-circuit splits makes it difficult for all individuals in the Ninth Circuit, including law enforcement and federal agencies, to structure their primary conduct. In addition to the cases cited in response to



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question three and in response to Senator Feinstein, one case in particular highlights the difficulties that intra-circuit splits may create.

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

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

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

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

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



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

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

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

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

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



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federal environmental programs to states will inevitably create recurring problems in the "cooperative federalism" framework of multiple environmental laws, and will implicate the role of multiple federal agencies charged with the authority to delegate federal environmental regulatory programs to states.

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

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

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

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

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



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**Responses to Questions from Senator Feinstein:**

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

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

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

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

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

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

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

**Answer:** The Department of Justice does not keep formal records on "all cases in the Courts of Appeals during the past five years" in which rehearing or rehearing *en banc* was sought and the need to resolve an intra-circuit split was given as a reason. However, because Fed. R. App. P. 35(a)(1) lists as one of two grounds for *en banc* review the need "to secure or maintain uniformity of the court's decisions" (the other ground is that the proceeding involves a question of "exceptional importance"), and because Rule 35(b)(1)(B) requires that every rehearing petition allege an intra-circuit split, or a conflict



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with a Supreme Court case, or a question of exceptional importance, intra-circuit splits are a frequent basis – if not the most frequent basis – for seeking rehearing or rehearing *en banc*. As indicated in the list of rehearing requests under questions one and two, which is not necessarily exhaustive, the Department has petitioned for rehearing *en banc* at least 73 times in the past five years.

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

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

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

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

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

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



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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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



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

**District of Columbia Circuit**

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

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

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

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

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

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

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

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

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

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

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

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



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

**Federal Circuit**

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

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

**First Circuit**

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

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

**Second Circuit**

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

**Third Circuit**

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

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

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

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



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**Fourth Circuit**

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

**Fifth Circuit**

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

**Sixth Circuit**

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

**Seventh Circuit**

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

**Eighth Circuit**

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

**Tenth Circuit**

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

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



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

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

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

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

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

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

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



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

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

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

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

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

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

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



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

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

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

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

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

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



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

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

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

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

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

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



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

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

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

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

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

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



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

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

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

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

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

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



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

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

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

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

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

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



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

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

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

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

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

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



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

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



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**Senator Kyl**
**Examining Proposals to Split the Ninth Circuit**
**September 20, 2006**
**Follow-Up Questions for Professor Eastman**

1) In your testimony you asserted that a judicial body should function as a cohesive unit.

I noted in my testimony that a court should be a collegial body for it to function properly. Cohesiveness would be one aspect of that, but because the concept of collegiality is broader than mere cohesiveness, I'll think it important to respond to this question by reference to collegiality.

a. What are the characteristics of a cohesive judicial body?

As I described in my testimony, it is critical to the functioning of a court *of law* (rather than a mere collection of judges exercising something akin to legislative will) that it be a collegial body, not in the sense that the judges simply exchange pleasantries in the hallway, but that all the judges on the court share the common enterprise of getting the law right, faithfully applying it to the cases before them. In a law review article cited in my prepared testimony, Judge Harry Edwards gave a wonderful description of how to recognize the dynamic of a collegial court: "The mental states of judges who are engaged in collegial deliberations are entirely different from those of judges on a court that is not operating collegially . . . . When a judge disagrees with the proposed rationale of a draft opinion, the give-and-take between the commenting judge and the writing judge often is quite extraordinary – smart, thoughtful, illuminating, probing, and incisive. Because of collegiality, judges can admit and recognize their own and other judges' fallibility and intellectual vulnerabilities . . . . The result is a better work product." I think also helpful is Judge Frank Coffin's discussion of the subject, in which he described "the old-fashioned collegiality that existed when judges sat often with each other, had leisurely discussions together, wrote thoughtful memos back and forth, and, over a year's time, had many opportunities off the bench to dine and socialize with their colleagues. Friendship bred respect which led to consensus or, at least, civility." From these very insightful descriptions we can draw some key characteristics: 1) Frequent discussions both on and off the bench about the law; 2) thoughtful and civil memos back and forth about opinions before they are released, producing a give and take between the judges that makes for a better opinion and a more consistent application of the law; and 3) a small enough group that the judges actually have the opportunity to develop close enough relationships that the first two characteristics are genuinely possible.

b. What impact does such cohesion have on the law?

The benefits of collegiality are, quite simply, better opinions and more consistent legal holdings, stronger devotion to the rule of law instead of idiosyncratic personal views, and a more nuanced and more thoughtful application of the law to new circumstances that come before the court. Conversely, the negative impact of a lack of collegiality on a



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court are, quite frequently, intra-circuit conflicts in the law, opinions that are less thorough in their discussion of existing law or less nuanced in their application of existing law to new circumstances, and perhaps most troubling, the weakening of informal social sanctions that serve to check the tendencies of anyone in positions of power to push their own agendas.

c. How is size detrimental to these attributes?

The larger the court, the less frequently judges are able to sit together, dine together, or just take walks together to reflect on the law and the particular cases before them. The marks of a truly collegial court do not appear overnight, but by frequent exposure to, and appreciation of, the work and thought processes of one's colleagues. It is hard for that process to work if judges only rarely sit together, or even see each other, as is necessarily the case on a large court. On a 13-judge court (the current average size of the federal courts of appeals), there are 286 possible combinations of 3-judge courts. On a court with 28 judges, there are 3,276 possible combinations of 3-judge courts. In other words, a court of slightly more than double the size has more than 11 times greater the number of possible 3-judge panels, with a consequent loss of the collegiality that flows from familiarity. If one factors in all the senior judges on the 9th Circuit, resulting in a total of 49 different judges on the Court, there are 18,424 possible combinations of 3-judge courts. It is hard to imagine a number much less conducive to fostering collegiality than that.

Size is also detrimental in another respect as well. In most courts, the *en banc* process serves as a corrective device for the statistical groupings that are out of sync with the rest of the court, yet in the Ninth Circuit, it is virtually impossible for the Court to sit *en banc*. The truncated *en banc* procedure most often utilized by the court is not a true *en banc* court, but rather a limited subset of the court, where statistical groupings out of sync with the views of the court as a whole are still possible.

d. Please provide specific examples of how the law of Ninth Circuit has been impacted negatively by its size, particularly in relation to other circuits?

The Ninth Circuit's reversal rate is among the worst in the country, but its rate of reversal by summary or unanimous non-summary decisions is six times worse than the next closest circuit. I attribute this reversal rate to the Court's size, to the weakening of collegiality that flows from its size, and to the weakening of the collegiality check on judges in the crafting of opinions with a lesser degree of regard for clearly established binding precedent than is appropriate for an intermediate court of appeals. As for specific case examples, I'll add to the list provided by Judge Roll several cases from the year I clerked at the Supreme Court. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court unanimously reversed Judge Reinhardt's holding for the truncated *en banc* court finding a constitutionally-protected fundamental right to assisted suicide. In *Mazurek v. Armstrong*, 520 U.S. 968 (1997), the Supreme Court reversed in a *per curiam* decision the Ninth Circuit's decision vacating a lower court decision that permitted a Montana statute requiring that only licensed physicians perform abortions to go into



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effect. The Supreme Court found the Ninth Circuit's decision to be "clearly erroneous" under Supreme Court precedent. In *Lambert v. Wicklund*, 520 U.S. 292 (1997), again in a *per curiam* opinion, the Supreme Court reversed Judge Reinhardt's decision for the Ninth Circuit invalidating Montana's Parental Notice of Abortion Act "because the Ninth Circuit's holding is in direct conflict with" Supreme Court precedents. In *Bennett v. Spear*, 520 U.S. 154 (1997), in an opinion by Justice Scalia, the Supreme Court unanimously reversed the Ninth Circuit's holding dismissing a suit by ranchers and irrigation districts under the Endangered Species Act. The Supreme Court held that property owners have as much right to sue for violations of the Endangered Species Act as others, noting: "It is difficult to understand how the Ninth Circuit could have failed to see this from our case law." In *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), in an opinion by Justice Ginsburg, the Supreme Court unanimously reversed the Ninth Circuit's holding (again, in an opinion by Judge Reinhardt) that it had jurisdiction to consider (and then held unconstitutional) Arizona's English as the Official Language initiative, holding that the "Ninth Circuit had no warrant to proceed as it did." In *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997), the Supreme Court summarily reversed the Ninth Circuit's decision ordering the Bureau of Land Management to disclose the list of names and addresses of those private individuals who subscribed to the BLM's newsletter. The Court's *per curiam* opinion derided Judge Schroeder's opinion for the Ninth Circuit, describing the couple of conclusory statements on which the opinion rested as "the sum total of the Court of Appeals' analysis" and "inconsistent" with a recent Supreme Court decision. Most of these cases are not merely reversals where the Supreme Court disagreed with the Ninth Circuit on a close question of law, but unanimous or summary reversals, where the Ninth Circuit's decision was notably inconsistent with clearly-established precedent. It is unlikely that a court of more modest size would not have utilized the informal checks that flow from effective collegiality, or the more formal checks that flow from a properly functioning *en banc* review, to correct these flagrant errors before they went to the Supreme Court.

2) Please include any other facts or comments that you consider to be important to this discussion, particularly from your perspective as a law professor.

As a law professor and also as the director of a constitutional litigation center, I am frequently asked my opinion about the merits of a particular case pending on appeal to the Ninth Circuit. My typical response is to ask whether the panel has been announced in the case, because without that information, I cannot give even an educated guess about the likely outcome. While panel composition is an important variable in every court, the problem seems to be particularly acute in the Ninth Circuit, a phenomenon which I attribute to the Court's size and resulting decrease in the ability of each judge to be familiar with all the work of his or her colleagues. This loss of collegiality, in the way I have defined the term, produces a bit of a "crap shoot" mentality among litigants in the Ninth Circuit, and it is no way to engender respect for the rule of law.



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**Preston|Gates|Ellis LLP**

November 20, 2006

The Honorable Arlen Specter, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Chairman Specter:

This letter responds to your letter of October 10, 2006, posing a follow-up question to me regarding testimony I provided to the Committee on the Judiciary at a hearing on September 20, 2006, regarding "Examining Proposals to Restructure the Ninth Circuit."

Before responding to the question, I would like to thank you and the other members of the Committee for allowing me to testify on this important subject and for the opportunity to respond to your further question.

The question you posed to me is as follows:

**Background**: In your testimony, you discussed the consistency of law in the West that is provided having one circuit cover much of the West. In particular, you noted the importance of consistency in intellectual property law and maritime law.

- *Please provide additional examples in which consistency of law provided by the 9th Circuit has been important in intellectual property law.*
- *Please provide additional examples in which consistency of law provided by the 9th Circuit has been important in maritime law.*

I address each part of this question below, the first part regarding intellectual property with several relatively brief illustrative bullet points and the second regarding maritime law with a more expansive discussion of primarily one aspect of maritime regulation.

**Consistency of Intellectual Property Law**

The current Ninth Circuit has provided important consistency in federal law governing many aspects of intellectual property from copyright to trademark and trade secret issues to issues affecting the internet and many other aspects of technology. It may be worth noting that is consistency of law generally excludes patent cases because Congress has sought to provide uniformity in this area by directing such cases to the Federal Circuit. Some noteworthy

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examples of uniformity in intellectual property law that the current Ninth Circuit provides -- and that provide stability for business development in the West -- include:

- Decisions that provide consistency in the law governing trademark infringement and dilution in internet searches. *See, e.g., Playboy Enterprises, Inc. v. Netscape Communications Corp.*, 354 F.3d 1020 (9th Cir. 2004) (setting forth standards regarding trademark violations in the "keying" of advertisements to terms entered in internet searches); *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199 (9th Cir. 2000) (affirming finding of consumer confusion in similar marks displayed commercially on the internet); *Brookfield Communications, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036 (9th Cir. 1999) (addressing likelihood of confusion between two internet-based movie industry databases). As a result of this consistency in the law, a business in Idaho, Nevada, or any of the other states within the Ninth Circuit need not contend with potentially conflicting standards governing internet searches conducted by users or affected by companies in other Western states.

- Decisions that provide consistency in the law governing the sharing of computer files containing copyrighted sound recordings. *See A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002) (affirming preliminary injunction in multi-district litigation regarding violation of record companies' copyrights through peer-to-peer music file sharing). The court's rulings in the *Napster* case gave consistent direction to all of the record companies and the many thousands of music file users in the Western states. For example, a California-based record company can be sure that not only users in California, but also users in Oregon, Arizona, and all of the other states in the Ninth Circuit are governed by the same rules regarding copyright violation.

- Decisions that provide consistency in the law governing various aspects of video game development such as reverse engineering. *See, e.g., Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000) (intermediate copying of certain elements of Playstation software for purposes of designing emulator software was permissible reverse engineering and fair use); *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (download of content from Internet to RAM is copying under Copyright Act; purpose of download and use of content subject to fair use analysis), *cert. dismissed* 510 U.S. 1033 (1994); *Sega Enterprises v. Accolade*, 977 F.2d 1510 (9th Cir. 1992) (permitting as fair use the disassembly of copyrighted computer program in order to gain understanding of unprotected functional elements of the program when person seeking understanding has legitimate reason for doing so and no other means of access to unprotected elements exists). Because of these cases, video game developers, whether located in Los Angeles, Silicon Valley, or the Pacific Northwest, have operated under a coherent body of law that provides a level and consistent competitive playing field.



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- Decisions that have provided consistency in the law on internet jurisdiction over the years and across the circuit. *See Pebble Beach Company v. Caddy,* 453 F.3d 1151 (9th Cir 2006)(operation of passive website and selection of golf course trademark as domain name does not support specific jurisdiction over foreign operator of website); *see also Schwarzenegger v. Fred Martin Motor Co.,* 374 F.3d 797 (9th Cir. 2004) (defendant must engage in some activity that amounts to "express aiming" at forum in order to support specific jurisdiction); *Rio Properties v. Rio International Interlink,* 284 F.3d 1020 (9th Cir 2000) (registration of domain and creation of a passive web site insufficient basis for jurisdiction); *Bancroft & Masters v. Augusta National,* 223 F.3d 1082 (9th Cir 2000) (sending letter to plaintiff that triggered dispute sufficient to establish jurisdiction in plaintiff's forum); *Panavision International v. Toeppen,*141 F.3d 1316 (9th Cir. 1998) (attempt to sell domain name to plaintiff is conduct aimed at plaintiff's forum sufficient to establish jurisdiction) (all cited and followed in *Pebble Beach*). This consistency over time in a rapidly growing and changing area of technology provides important stability for businesses.

- Decisions that provide consistency in the law regarding when one party may use the trademark of another party, by establishing and following the "nominative fair use" defense to trademark infringement. *See New Kids on the Block v. News America Publishing, Inc.,* 971 F.2d 3012 (9th Cir. 1992) (establishing 3-factor test for when use of trademark is necessary because it is only word reasonably available to describe a particular thing). The *New Kids* analysis has been applied in many cases, including *Playboy Industries v. Welles,* 279 F.3d 796 (9th Cir. 2002) (use of Playboy and Playmate trademarks in conjunction with web site promoting Welles's services was fair use), *Cairns v. Franklin Mint Co.,* 292 F.3d 1139 (9th Cir. 2002) (use of Princess Diana's name and likeness in connection with collectible products was fair use), *Mattel, Inc. v. Walking Mountain Productions,* 353 F.3d 792 (9th Circ. 20003) (use of Barbie doll in photographic parodies was fair use), and *Brother Records, Inc. v. Jardine,* 318 F.3d 900 (9th Cir. 2003) (use of Beach Boys name not fair use because name was used more prominently than necessary, suggesting sponsorship by trademark holder). As in other areas of intellectual property law, this consistency in an important area of law across the broad geographic reach of the current Ninth Circuit enhances business development and innovation whether it occurs in Boise, Idaho or Hollywood, California.

**Consistency of Maritime Law**

Like intellectual property law, maritime law is a broad subject containing many subcategories, including, to name a few, fisheries management, marine mammal protection, navigable waterways, admiralty law, Jones Act cases, marine insurance, oil spills, vessel flag and safety requirements, security interests in vessels, and Coast Guard jurisdiction. Any one of these areas could provide examples where consistent interpretation of federal law within the Ninth Circuit is important to West coast businesses. Rather than survey all of these different areas of maritime law, by way of illustration, I describe below the importance of consistency in fishery



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management and also include some additional brief examples from other laws affecting fishermen.

*Fishery Management*

The Magnuson-Stevens Fishery Conservation and Management Act ("the Magnuson Act" or "the Act") is the "principal law governing marine fisheries in the United States." Pacific Fishery Management Council Information Sheet: The Magnuson-Stevens Act ("the Information Sheet"), at 1, *available at* http://www.pcouncil.org/facts/msact.pdf (last visited Nov. 13, 2006). The Magnuson Act created eight Regional Fishery Management Councils ("Councils"), with each Council representing a group of neighboring states with ocean borders. *See* 16 U.S.C. § 1852. The Act granted each of the eight Councils authority over a geographic portion of the ocean, which, as a general matter, entailed the area "seaward of [the] States" represented on the Council out to the edge of the "exclusive economic zone," roughly two hundred nautical miles from shore. *Id.* at § 1852 (A)-(H); *see id.* at § 1811; Information Sheet at 1. The Act tasked the Councils with creating Fishery Management Plans ("Plans") for each "fishery" — defined broadly as "one or more stocks of fish which can be treated as a unit," 16 U.S.C. § 1802(13)(A) — located within the Council's geographical area of authority. *See id.* at § 1853(a). The Plans must comply with eight National Standards set forth in the Magnuson Act, the principle aim being to "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery." *Id.* at § 1851(a)(1). The Councils submit to the Secretary of Commerce their Plans, which the Secretary may then incorporate as law through regulation. See *id.* at 1854.

Under this legal regime, "unity of management, or at least close cooperation, is vital to prevent jurisdictional differences from adversely affecting conservation practices." *Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1120-21 (9th Cir. 2006) (citing a Senate Committee Report on the Magnuson Act, S. Commerce Comm. Rep. No. 94-416 (1975), reprinted in *A Legislative History of the Fishery Conservation and Management Act of 1976*, at 685 (1976); alterations omitted). The logic is simple. Conservation efforts of one community concerning a mobile or migratory species of fish can be nullified by another. Moreover, economic hardship arising from restricted fishing in one community may translate directly into a boon for the second — given the consequently undiminished resource — a result that discourages and undermines efforts to impose restraint.

For this reason, along with the Magnuson Act's nationalization of fishery law, Congress drafted certain provisions to prevent the Act's eight management Councils from inconsistently managing fisheries that overlap more than one Council's geographic area of authority. National Standard # 3 of the Magnuson Act thus directs the Secretary to manage stocks of fish "as a unit throughout [the stock's] range." 16 U.S.C. § 1851(a)(3). Moreover, where a fishery "extends beyond the geographical area of authority of any one Council," the Secretary is permitted either to designate which of the relevant Councils will prepare the management plan for that fishery or to require the Councils jointly to prepare the plan. *Id.* at § 1854(f); *see, e.g.*, Fishery Management Plan for Coastal Migratory Pelagics in the Atlantic and Gulf of Mexico, Amendment 5, *available at* http://www.safmc.net/Portals/0/HistManag/CMP_History.pdf (last



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visited Nov. 13, 2006) (management plan outline for mackerel and cobia fishery jointly prepared by Gulf Council and South Atlantic Council). Similarly, for certain East Coast species of fish that customarily traverse the geographical authority of multiple Councils, authority is centrally retained by the Secretary. 16 U.S.C. § 1852(a)(3).

The principle of consistency in the Magnuson Act, of course, could be undercut by *in*consistent court interpretation of the Act and its implementing regulations throughout the geography of a regulated fishery. On the West Coast, many fish stocks are migratory and are encountered along the entire contiguous United States. *See, e.g.*, Pacific Coast Groundfish Fishery Management Plan For The California, Oregon, And Washington Groundfish Fishery, Appendix B, Part 2, at 173-74 (Nov. 2005), *available at* http://www.pcouncil.org/groundfish/gffmp/gfa19/GF_FMP_App_B2.pdf (last visited Nov. 9, 2006) (Pacific Hake "is highly migratory, moving into many areas of the West Coast . . . . [M]ature adults [move] northward and inshore, following food supply and Davidson currents." (citations omitted)); *id.* at 185-86 (Leopard Sharks "found from southern Oregon to Baja California, Mexico" and "form large nomadic schools"); *id.* at 188 (Soupfin Sharks "found from Northern British Columbia to Abreojos Point, Baja California" and "have a coast-wide movement," migrating "north in the summer and southward in the winter"); *id.* at 190 (Spiny Dogfish "migrate in large schools" with "[s]easonal migrations . . . taken so as to stay in the preferred temperature range" (citations omitted)). Unlike migratory fish stocks on the East Coast, which are subject to the potentially differing interpretations of the First, Second, Third, Fourth, Fifth, and Eleventh Circuits, such stocks on the West Coast currently enjoy the consistent and coherent interpretations offered by a single Circuit for the entire region.

Migratory fish stocks aside, the potential for variance in federal court interpretations of the Magnuson Act and its regulations is significant. The National Marine Fisheries Service, through which the Secretary of Commerce promulgates the regulations interpreting the Magnuson Act, issues "more than 400 rules a year . . . governing where, when and how fishermen can fish." Michael C. Laurence, Note, *A Call To Action: Saving America's Commercial Fishermen*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 825, 829 (2002) (quotations and footnote omitted; alterations in original). That number is the "fourth-highest among federal agencies in the issuing of rules and regulations." *Id.* at n.30 (citations omitted). While not all of these rules pertain specifically to West Coast fisheries, any interpretation or determination of their validity or invalidity is a potential basis for inter-Circuit disagreement.

Even minor variations in the interpretation of the Magnuson Act could generate incentive for forum-shopping among smaller Circuits. A disagreement between federal judges regarding the inception of the Act's limitations provision, for example, can leave aggrieved parties empowered to bring suit in one jurisdiction but not another. *Compare Kramer v. Mosbacher*, 878 F.2d 134, 137 (4th Cir. 1989) (holding that limitations period for challenging regulation under Magnuson Act began to run at the time the regulation was promulgated, not when the regulation was implemented to close the fishery), *superseded by Fishery Conservation Amendments of 1990, as stated in Or. Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1113 (9th Cir. 2006), *with Islamorada Charter Boat Ass'n v. Verity*, 676 F. Supp. 244, 246 (S.D. Fla. 1988)



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(holding that limitations period for challenging regulation under Magnuson Act did not begin to run until the regulation was implemented to close the fishery). Analogous disagreement might signify the availability of preliminary relief in one jurisdiction but not another. *Compare Kramer*, 878 F.2d at 137 (holding that due to section 1855(d) of the Act, preliminary relief from fishery regulations was unavailable), *with Verity*, 676 F. Supp. at 245-46 (holding that section 1855(d) of the Act did not preclude preliminary relief from fishery regulations). Such forum shopping and conflicts between smaller Circuits is avoided in the Ninth Circuit.

*Examples from Other Laws Affecting Fishermen*

The problem of potential forum-shopping extends beyond the Magnuson Act to other laws affecting fishermen. For example, the willingness of creditors to make loans to fishermen for basic supplies and services needed for voyages — and the consequent ability of fishermen to engage in their occupation — may currently depend to some extent on the Circuit in which the creditor and fishermen operate. The value of fishing permits linked to a fisherman's vessel are often "integral to the value of the vessel itself," *PNC Bank Del. v. F/V Miss Laura*, 381 F.3d 183, 185 (3rd Cir. 2004), yet a creditor's ability to extend its lien against such permits along with the vessel remains unclear in some Circuits. *Compare Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 68-69 (1st Cir. 2001) (holding that creditor's lien against a fisherman's vessel also could apply against valuable permits associated with the vessel), *with PNC Bank Del.*, 381 F.3d at 186-87 (leaving open the question of whether a lien could attach to such permits).

Although not exclusively within the province of fishermen, maritime tort law is a particularly troublesome area for forum-shopping. When deciding where to bring such an action, the likely defenses to the action are a crucial factor. In this regard, the Fifth and Ninth Circuits endured a period during which comparative negligence provided a defense to strict liability in the latter Circuit but not the former. *See Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1137 (9th Cir. 1977) (holding that comparative negligence can apply as a partial defense to a strict liability claim under admiralty law); *Lewis v. Timco, Inc.*, 697 F.2d 1252, 1255 (5th Cir.) (rejecting *Pan-Alaska Fisheries* and holding that comparative negligence is no defense to strict liability claims under admiralty law), *vacated*, 716 F.2d 1425 (1983). Although that inconsistency was resolved, the two Circuits have yet to agree about whether a plaintiff's negligence in "failing to uncover" the product's defect is a cognizable form of negligence under the defense. *Compare Pan-Alaska Fisheries*, 565 F.2d at 1139-40 (rejecting Restatement view and holding that even "negligence consist[ing] merely in a failure to discover the defect in the product" can reduce an award), *with Lewis v. Timco, Inc.*, 716 F.2d 1425, 1430 n.2 (noting *Pan-Alaska Fisheries*' conclusion on the issue but leaving the question open). Such conflicts and attendant forum-shopping would be aggravated by splitting the Ninth Circuit into smaller circuits.

In sum, the ready availability of the above examples, just within the subcategory of maritime law related to fishery management and fishing, should give pause when assessing the extent to which dividing the Ninth Circuit could lead to inconsistent maritime law application, conflicting rulings affecting West coast businesses, and the potential for forum-shopping.



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I hope the above responses are helpful to you and the Committee in your consideration of the important issues raised by proposals to divide the Ninth Circuit. As I explained in my testimony to the Committee, I believe enacting any of these proposals would be a disservice to the administration of justice through the federal courts in the West and I continue to oppose such proposals.

If I can be of further assistance to you or any other member of the Committee, please do not hesitate to contact me.

Sincerely,

William H. Neukom



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Senator Kyl
Examining Proposals to Split the Ninth Circuit
September 20, 2006 hearing
Follow-Up Questions for Judge Roll and
November 3, 2006 responses of Judge Roll

**1) Please explain what impact the limited en banc process has on you and your colleagues' ability to do your job.**

Because of the large number of votes required for a case to receive limited en banc review (15 active circuit judges), many Ninth Circuit cases deserving of en banc review are never heard en banc and are left to three-judge panel decisions.

Close votes in 1/3 (42 of 127) of limited en banc decisions have resulted in a lack of certainty as to applicable law.

Further, Ninth Circuit Judge Pamela Ann Rymer, one of the five members of the White Commission, has pointed out that three-judge panel members are oftentimes not selected to serve on the limited en banc panel (as was true in 22 of 95 limited en banc cases heard between 1999-2005). Accordingly, the limited en banc court is frequently deprived of those circuit judges most knowledgeable of the record on appeal.

The seven states of the new Twelfth Circuit would have full en banc review of all three-judge panel decisions. This would result in a much clearer development of case law because every active circuit judge in the new Twelfth Circuit will have participated.

The new Ninth Circuit created by S. 1845, with 22 active circuit judges (seven new judgeships added to the exisitng 15 active circuit judges) may choose to continue to utilize a limited en banc procedure. If it did so, more than 2/3 of the active circuit judges (15 of 22) would participate in limited en banc hearings. This would be a vast improvement over the current procedure, in which barely 50% of the active circuit judges (15 of 28) participate. Without a circuit split but with the addition of seven new judgeships, the situation would be even worse–only 15 of 35 active circuit judges would participate in limited en banc hearings.

**2) What problems are caused on the District level by the slow resolution time at the appellate level? Could these problems be solved by simply approving more judges?**

The only meaningful standard for measuring delay on appeal is decisional time–the time from filing of notice of appeal to disposition. In this category, the Ninth Circuit is a distant last.

Cases not decided promptly by the Ninth Circuit languish before being returned to the district judges for further proceedings. Long delays require district judges to expend



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substantial time in re-familiarizing himself or herself with the record of the case. Of course, delay harms litigants more than anyone else. For example, when cases are overturned on appeal after long delays in processing, witnesses and/or attorneys who litigated the matter the first time are sometimes no longer available.

Simply approving more judges is clearly not the solution. In 1998, a majority of the Supreme Court wrote to the White Commission expressing the opinion that the Ninth Circuit Court of Appeals is too big. Ninth Circuit Judge Pamela Ann Rymer, who served on the White Commission, said that 30, 40, or 50 judges is too many judges for a court to function as a single court.

**3) As a District judge who daily reads, interprets, and applies decisions rendered by the Ninth Circuit, does the Court speak with one voice? Are decisions consistent and uniform?**

Candidly, no. Both the Hruska Commission in 1973 and the White Commission in 1998 commented that a frequent complaint about the Ninth Circuit is that cases are too often based on the composition of the three-judge panel.

Below is an incomplete list of cases illustrative of the lack of consistency and uniformity from a court of approximately 50 circuit judges.

Habeas Cases

*Death Penalty*

a) *Comer v. Schriro*, 463 F.3d 934 (9th Cir. 2006). In a 2-1 panel decision, the Ninth Circuit vacated a death sentence, despite recognizing that the defendant had entered a valid waiver of his habeas rights. In dissent, Judge Rymer wrote:

> We need to–and may only–decide one question: whether death row inmate Robert Comer is competent to withdraw his appeal from denial of his petition for writ of habeas corpus and has done so knowingly and voluntarily. All of us agree that the answer to that question is yes, based on what the district court found following a *Rees* hearing that we ordered. This means that this case is over, because Comer's waiver of further review of his habeas claims leaves no live controversy remaining between Comer and the State of Arizona.
>
> Nevertheless, the majority reverses *on the merits* and orders the writ to issue. In the doing, it thumbs this court's nose at the United States Supreme Court, which made clear in *Gilmore v. Utah*, 429 U.S. 1012 (1976), that courts lack jurisdiction to consider unresolved constitutional issues underlying a death sentence when the defendant competently and voluntarily waives his right to pursue an appeal; at the district court, which went all out to conduct a comprehensive evidentiary hearing and issued an extraordinarily detailed and comprehensive, 90-page opinion setting forth its



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> findings and conclusions on the competence and voluntariness of Comer's decision; and at Comer himself, who has repeatedly, competently and intelligently tried for five years to choose what he wants to do. I dissent from this raw imposition of judicial power.

*Id.* at 965 (emphasis supplied).

b) *Correll v. Ryan*, --- F.3d ----, 2006 WL 2796489 (9th Cir. Oct. 2, 2006). In a 2-1 panel decision, the Ninth Circuit reversed the district court's denial of death row inmate Emerson's petition for writ of habeas corpus.

The district court had conducted a nine day evidentiary hearing and concluded that trial counsel's performance was deficient. However, the district court found no prejudice, and accordingly denied Emerson's ineffective assistance of counsel claim. A majority of the three-judge panel reversed. Judge O'Scannlain, in his dissent, stated: "By holding that the mitigating evidence in this case is clearly sufficient to establish prejudice under *Wiggens,* the majority essentially writes the prejudice requirement out of our circuit jurisprudence." *Id.* at *22.

*Other Habeas Issues*

a) *James v. Pliler*, 269 F.3d 1124 (9th Cir. 2001). In this panel decision, the Ninth Circuit indicated that the district courts must give significant advice to petitioners in the habeas context. ("*Ferdik* and *Noll* place the burden of advising the pro se litigant of the right to amend squarely on the court. *See James I*, 221 F.3d at 1078."). *Id.* at 1126-27.

Although it appears this requirement to give warnings and advice to the petitioner has been overruled by the Supreme Court, *Pliler v. Ford,* 542 U.S. 225, 231 (2004) ("District judges have no obligation to act as counsel or paralegal to pro se litigants"), there is a long line of Ninth Circuit Court of Appeals cases that would have to be impliedly overruled by *Pliler* for this to be correct.

b) *Goldyn v. Hayes*, 444 F.3d 1062 (9th Cir. 2006). The Ninth Circuit reversed the district court's denial of a petition for writ of habeas corpus. The Nevada Supreme Court had affirmed the petitioner's state conviction for drawing and passing bad checks without sufficient funds. *Id.* at 1063-64. Although the petitioner had cashed several checks without having money in her account, she used a check guarantee card by which the bank promised to cover the petitioner's checks. *Id.* The Ninth Circuit concluded that the Nevada Supreme Court's analysis of the Nevada statute involved was incomplete and that the district court had erred in denying relief. *Id.* at 1069-70.

<u>Criminal Cases</u>

*Fourth Amendment–Search and Seizure*

a) *Founded suspicion–Profiles*



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*U.S. v. Rodriguez*, 976 F.2d 592 (9th Cir. 1992), *amended*, 997 F.2d 1306 (9th Cir. 1993). A panel of the Ninth Circuit held that Border Patrol lacked founded suspicion to stop a vehicle on Interstate 8 in Southern California, which was ultimately determined to be carrying 168 lbs. of marijuana. The Ninth Circuit found "troubling" that the agents' "founded suspicion" matched similar profiles in other cases. 976 F.2d at 595. The factors described in the case included driving in a smuggling corridor, driver's failure to acknowledge presence of law enforcement, operation of a vehicle that could be used for alien smuggling, driver keeping watch over agents by monitoring rearview mirror, and vehicle's appearance of being heavily loaded. *Id.* The agents' reasons, the Court said, "appear to be a prefabricated or recycled profile of suspicious behavior..." *Id.*

In *U.S. v. Garcia-Camacho*, 53 F.3d 244 (9th Cir. 1995), a panel of the Ninth Circuit ruled that an inadequate basis existed for stopping a vehicle with methamphetamine materials, stating in a footnote:

> We note, initially, that this is not the first time Border Patrol agents have tendered a similar profile to this court as evidence of the existence of reasonable suspicion. In fact, this profile is so familiar, down to the very verbiage chosen to describe the suspect, that an inquiring mind may wonder about the recurrence of such fortunate parallelism in the experiences of arresting agents.

53 F.3d at 246 n.2.

Although the Supreme Court overturned a Ninth Circuit's panel's suppression of evidence based upon an allegedly faulty stop in *United States v. Arvizu*, 534 U.S. 266, 274-76 (2002) (stating that the Ninth Circuit did not properly take into account the "totality of the circumstances" in determining the existence of reasonable suspicion), it has not ended the confusion in this area of Ninth Circuit case law.

b) *Warrantless arrest–Privacy. U.S. v. Quaempts*, 411 F.3d 1046 (9th Cir. 2005). A panel of the Ninth Circuit held that when law enforcement officers, positioned outside a small trailer, told a rape suspect to exit the trailer, the resulting arrest was unlawful because the suspect was in bed at the time he opened the door to the officers. The panel found that the defendant's right to privacy under *Lawrence v. Texas*, 539 U.S. 558 (2003), was violated. 411 F.3d at 1048-49.

c) *Overnight guests. U.S. v. Gamez-Orduno*, 235 F.3d 453 (9th Cir. 2000). In this case, by a 2-1 vote, a panel of the Ninth Circuit ruled that under *Minnesota v. Olson*, 495 U.S. 91 (1990), 10 marijuana backpackers who were tracked from an area near the border to a trailer and were found in possession of 880 pounds of marijuana and two firearms, were overnight guests entitled to standing to challenge the agents' entry into the trailer. Judge Berzon, joined by Judge Thomas, stated that "[t]he record shows that appellants were overnight guests in the trailer, and that they were there for rest and food, not 'simply . . . to do business.'" 235 F.3d at 459.

The dissent, authored by Judge Noonan, argued that marijuana backpackers who



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had arrived at the trailer in the back of a pickup truck and who had been instructed to not leave the trailer did not qualify as "overnight guests" under Supreme Court precedent. *Id.* at 465- 66.

*Evidentiary Issues*

a) *Federal subpoena. U.S. v. James*, 980 F.2d 1314 (9th Cir. 1992), *cert. denied,* 510 U.S. 838 (1993). This case misapplied the doctrine of tribal sovereign immunity from civil actions to federal criminal prosecutions and held that immunity barred the enforceability of a federal subpoena on the custodian of a tribal agency's records.

A district court judge has written an opinion which criticizes the *James* case and begs for further review. *See U.S. v. Juvenile Male 1*, 431 F. Supp. 2d. 1012 (D. Ariz. 2006). Congress would not have vested jurisdiction over major crimes committed on Indian reservations in the federal courts without acknowledging the need for compulsory process because the judicial system cannot work without the constitutional right to process. *See id.* at 1017. This issue of optional compliance with federal process is of particular significance to the District of Arizona which has more Indian homicides than any district in the country. There is a circuit conflict, as yet unresolved.

b) *Modus operandi evidence. U.S. v. McGowan*, 274 F.3d 1251, 1254 (9th Cir. 2001), *cert. denied*, 537 U.S. 1050, 1066 (2002). Drug trafficking organizations' modus operandi may not be admitted and "expert testimony concerning the structure of drug trafficking organizations [is] inadmissible under Fed. R. Evid. 401 and 403 "where the defendant is not charged with conspiracy to import drugs or where such evidence is not otherwise probative of a matter properly before the court" (internal citation omitted). *Id.* at 1254. *See also U.S. v. Pineda-Torres*, 287 F.3d 860 (2002) (finding that the probative value of expert testimony concerning structure of drug-trafficking organizations was substantially outweighed by danger of unfair prejudice where defendant was not charged with conspiracy). *But see U.S. v. Valencia Amezcua*, 278 F.3d 901, 908-10 (9th Cir. 2002) (modus operandi testimony may be admitted even when conspiracy not charged); *U.S. v. Murillo*, 255 F.3d 1169, 1176-78 (evidence regarding modus operandi of drug couriers admissible despite absence of conspiracy charge), *cert. denied*, 535 U.S. 948 (2002).

*Illegal Reentry After Deportation Prosecutions*

*a) Official restraint. U.S. v. Pacheco-Medina,* 212 F.3d 1162 (9th Cir. 2000). This decision has spawned over 70 Ninth Circuit opinions or unpublished memorandum decisions. *Pacheco-Medina* held that a defendant who is observed by law enforcement entering the United States has not actually entered the country, because the alien was under "official restraint." *Id.* at 1166. "An alien does not have to be in the physical custody of the authorities to be officially restrained; rather, the concept of official restraint is interpreted broadly, and the restraint may take the form of surveillance, unbeknownst to the alien" (internal citations omitted). *U.S. v. Gonzalez-Torres*, 309 F.3d 594, 598 (9th Cir. 2002), *cert. denied,* 538 U.S. 969 (2003).

b) *Intent to be arrested. U.S. v. Lombera-Valdovinos*, 429 F.3d 927 (9th Cir. 2005)(2-1 decision, Judge Rymer, dissenting). A Ninth Circuit panel applied the principle of official



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restraint to an individual who entered the United States illegally and then, upon seeing a law enforcement officer, approached the officer and asked to be arrested. The panel stated that the defendant entered the United States with intent to be imprisoned, not to be free from restraint. *Id.* at 930. Accordingly, the defendant lacked the specific intent required for his attempted illegal reentry conviction. *Id.*

c) *Requirement of prosecution for attempted illegal reentry. U.S. v. Garcia-Cano*, 168 Fed. Appx. 833, 835 (9th Cir. 2006). A defendant, in custody of county law enforcement officials when "found in" the United States, was charged with illegal reentry into the United States. A Ninth Circuit panel found that because the defendant was in the custody of county law enforcement when taken into federal custody, the defendant was entitled to an official restraint jury instruction. (Individuals under "official restraint" must be prosecuted for attempted illegal re-entry rather than illegal re-entry.)

d) *Double jeopardy. U.S. v. Ruiz-Lopez*, 234 F.3d 445 (9th Cir. 2000). A Ninth Circuit panel found that a defendant was under "official restraint" due to surveillance by an immigration official. Accordingly, the defendant did not "enter" the United States but merely attempted to enter, and was entitled to acquittal rather than retrial on illegal reentry.

*Good Faith (But Mistaken) Belief in Citizenship as Defense to Illegal Reentry Prosecution*

*U.S. v. Smith-Baltiher*, 424 F.3d 913 (9th Cir. 2005). A panel of the Ninth Circuit ruled that despite the defendant's "sordid criminal history" and prior convictions for entering or being in the United States illegally, the defendant was entitled to present evidence to the jury that he mistakenly believed he was a U.S. citizen. Judge Reinhardt, writing for the Court, said that the defendant's mistaken belief could legally prevent him from having a "conscious desire" to be in the U.S. illegally under. *See id.* at 922. At trial, the district judge had expressed confusion over Ninth Circuit case law regarding when a defendant can contest citizenship despite prior deportations. *Id.* at 917.

*Jury Instructions–Deliberate Ignorance*

*U.S. v. Heredia*, 429 F.3d 820 (9th Cir. 2005), *reh. en banc granted*, 460 F.3d 820 (2006). A divided three-judge panel overturned a conviction for drug smuggling, based on the district court giving a deliberate ignorance instruction. The dissent said: "[I]f there was ever a case where a [deliberate ignorance] instruction was proper, this is surely it." 429 F.3d at 830.

After originally approving a deliberate ignorance instruction in *U.S. v. Jewell*, 532 F.2d 697 (9th Cir.)(en banc), *cert. denied*, 426 U.S. 951 (1976), the Ninth Circuit has at times indicated that such an instruction is "rarely appropriate." *See, e.g., U.S. v. Baron*, 94 F.3d 1312, 1318 n.3 (9th Cir.), *cert. denied*, 519 U.S. 1047 (1996).

*Sentencing Guidelines–Booker Issues*

a) *U.S. v. Zavala*, 443 F.3d 1165, 1171 (9th Cir. 2006). A 2-1 decision overturned the sentence imposed, holding that the district court judge's treatment of sentencing guideline



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calculations as a "presumptive sentence" came perilously close to making the guidelines mandatory again. The dissent pointed out that the district court had merely used the guidelines as a starting point–something that the Ninth Circuit had upheld twice before. 443 F.3d at 1172.

b) *U.S. v. Menyweather,* 431 F.3d 692 (9th Cir. 2005), *opinion amended and superseded on denial of reh. by* 447 F.3d 625 (9th Cir. 2006). A 2-1 decision held that in the post-*Booker* world, the defendant's family responsibilities warranted departure, in context of a $435,000 embezzlement case. The dissent pointed out: "After *Booker*, [the Guidelines] are not dead, just 'advisory' instead of mandatory." 447 F.3d at 640.

*Sentencing Issues*

a) *Rejection of guilty plea. Ellis v. U.S. District Court*, 356 F.3d 1198 (9th Cir. 2004)(en banc). A divided limited en banc panel, by 8-3 vote, ruled that the district judge erred, in rejecting the defendant's plea of guilty to a lesser-included offense of the charged first degree murder, after the judge read the pre-sentence report. The district court concluded that the proposed agreement, which would have resulted in the defendant being sentenced for second degree murder, was inappropriate. The majority stated that the sentencing judge could not review the presentence report until the defendant's guilty plea had been accepted. 356 F.3d at 1204.

The dissent pointed out that a judge has the power to reject a plea agreement after reading the presentence report and stated: "Today's decision marks a substantial shift from judicial to executive control over much of the criminal law process," because "[t]raditionally, plea bargains have been subject to judicial approval." 356 F.3d at 1228.

b) *Right to discovery of uncompleted presentence report. U.S. v. Alvarez*, 358 F.3d 1194 (9th Cir. 2004), *cert. denied, Valenzuela v. U.S.*, 543 U.S. 887 (2004). A three-judge panel, in an opinion authored by Judge Jane Restani of the U.S. Court of International Trade, ruled that under *Brady*, the defendant was entitled to information from the Probation Department about a co-defendant awaiting sentencing even though that co-defendant's report had not been written yet. In so ruling, the Ninth Circuit relied on a case holding that a defendant may be entitled to information from an adverse witness' completed probation report. 358 F.3d 1207-08.

c) *Rehabilitation as sole sentencing purpose. U.S. v. Juvenile*, 347 F.3d 778, 785 (9th Cir. 2003). In overturning a juvenile's sentence for two counts of aggravated sexual abuse, a panel of the Ninth Circuit ruled that rehabilitation was the singular goal of sentences under the Federal Juvenile Delinquency Act (the purpose of the FJDA is to remove juvenile delinquents from the ordinary criminal justice system and provide a separate system of treatment for them).

In a concurring opinion, Judge Lay, a visiting judge from the Eighth Circuit, stated: "In my judgment, this opinion serves as one of the strongest statements that a federal judge has made as it relates to the overall sentencing of human beings. 347 F.3d at 790.



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Judge Gould, in a partial concurrence and partial dissent, stated: "I also regret that I cannot join the majority's discussion of sentencing principles, because the majority has understated the risk to the public posed by [the Juvenile]..." *Id.*

d) *Indecent liberties with child not a crime of violence. U.S. v. Baza-Martinez,* 464 F.3d 1010, 1017-18 (9th Cir. 2006). Contrary to decisions of the Fifth and Eleventh Circuits, the Ninth Circuit ruled that the crime of taking indecent liberties with a child, in violation of N.C. Gen. Stat. § 14-202.1, is not a crime of violence warranting a 16-level enhancement to the guidelines for illegal reentry after deportation.

*Civil cases*

a) *Rule 56 Motion–Requirement of ruling on merits even if unopposed.* On a Rule 56 Motion for Summary Judgment, the district court must resolve the Motion on the merits, even if the party opposing the Motion does not bother to respond to the Motion. *See Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003). This creates a tremendous amount of work for the district court to both scour the record to look for issues of fact and to identify legal or factual arguments for the party who failed to respond. This may also call into question the duty of neutrality–when the Court has basically undertaken to argue one party's case for them.

b) *Rule 56–Consideration of inadmissible evidence.* The district court is required to consider inadmissible evidence at the summary judgment stage. *See Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003) ("the nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment." (internal citations and quotations omitted) (specifically addressing hearsay objections))(dissent by Judge Tallman, but not on this point), *cert. denied, Fraser v. Goodale,* 54 U.S. 937 (2004); *see also Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1003 (9th Cir. 2002) ("In order to preserve a hearsay objection, a party must either move to strike the affidavit or otherwise lodge an objection with the district court.").

Considering evidence that is inadmissible at the summary judgment phase can cause the district court to deny summary judgment and proceed to trial when there will potentially be no admissible evidence to create a question of fact at trial.

For example, Plaintiff could file an affidavit that says Person X told Plaintiff that Person X witnessed Defendant hitting Plaintiff while Plaintiff was unconscious. Plaintiff's recount of Person X's testimony is subject to a hearsay objection. Person X's testimony also creates a question of fact for the jury as to whether Defendant hit Plaintiff. Thus, allowing Person X's testimony to be considered on summary judgment (either due to Defendant's failure to object, or because, even if Defendant objects, the district court is to consider evidence properly subject to a hearsay objection if it could be presented though direct testimony at trial) allows the case to proceed to trial. However, if Person X testifies in a materially different way at trial, the Court has allowed a case to proceed to trial when there was no actual evidence supporting Plaintiff's case. Unwarranted trials create extra work for the court (and unnecessary expense for the taxpayers in empaneling unnecessary juries).



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c) *Dispositive motions–Oral argument requirement.* District courts are required to hold oral argument on dispositive motions. *Dredge Corp. v. Penny*, 338 F.2d 456, 462 (9th Cir. 1964) ("[a] district court may not, by rule or otherwise, preclude a party from requesting oral argument, nor deny such a request when made by a party opposing the motion unless the motion for summary judgment is denied."); *Jasinski v. Showboat Operating Co.*, 644 F.2d 1277, 1280 (9th Cir.1981). Accordingly, even if a case can be decided without oral argument, the district court is forced to hold an unnecessary hearing. *But see* (cases from the 9th Circuit finding that denial of oral argument was not reversible error) *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998); *Lake at Las Vegas Investors Group, Inc. v. Pacific. Dev. Malibu Corp.*, 933 F.2d 724, 728-29 (9th Cir. 1991), *cert. denied, Lake at Las Vegas Investors Group, Inc., v. Transcontinental Corp.*, 503 U.S. 920 (1992).

d) *Excessive force lawsuits–Conviction not a bar. Smith v. City of Hemet*, 394 F.3d 689, 696-97 (9th Cir. 2004)(en banc). A divided Ninth Circuit limited en banc panel, by an 8-3 vote, in an opinion by Judge Reinhardt, ruled that a defendant's conviction for resisting arrest did not preclude the defendant from suing the arresting officer for use of excessive force. The dissent said that the excessive force lawsuit was barred by *Heck v. Humphrey*, 412 U.S. 477 (1994), which held that an excessive force lawsuit under §1983 was barred where the plaintiff had been convicted of multiple acts of resistance during the arrest. 394 F.3d at 710.

**4) How much legislative impact does California have on Arizona? Would Arizona lawyers and judges experience a negative impact if a split were to divide Arizona from California?**

I am not aware of any "legislative impact" California may have on Arizona. In diversity cases, the federal judges of the District of Arizona primarily use Arizona law. In those situations in which the law of another state is applied (e.g., contract cases), circuit boundaries are irrelevant. Nor am I aware of any negative impact that might flow from Arizona and California being in different circuits.

**5) Please include any other facts or comments that you consider to be important to this discussion, particularly in light of your position as a Chief District Judge.**

Many of the problems that I identified in my written and oral testimony may not directly affect me as a district judge. These problems are, however, largely known only to those judges who serve in the Ninth Circuit. As such, I believe that federal judges who are familiar with the workings of a circuit court and recognize the opportunity for significant improvement in the administration of justice have a duty to speak out on existing problems and potential solutions. It is in this spirit that I continue to strongly urge Congress to divide the Ninth Circuit as proposed in S. 1845.

Former Chief Judge William D. Browning (D. Ariz.) told a subcommittee of this Committee in 1999, that to some opponents of a split, the Ninth Circuit can never be too big. Justice Kennedy, in a letter to the White Commission, pointed out that the tradition of



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the federal circuit courts is to have regional courts, and that by no stretch of the imagination are the nine states, territory and commonwealth that now are contained in the Ninth Circuit a "region" of the country.

Since the White Report was issued, the caseload of the Ninth Circuit has doubled and now represents over 30% of all pending appeals. However, even if the caseload was still at the 1998 level, a split would be necessary and appropriate, for all of the reasons contained in the White Report.

As the White Commission pointed out, the problem is not with the administrative functioning of the Ninth Circuit; the problem is with the all-important adjudicative functioning of the court. Litigants appeal to the Ninth Circuit to have their cases decided correctly, not merely efficiently.



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**Senator Kyl**
**"Examining Proposals to Split the Ninth Circuit"**
**September 20, 2006**
**Follow-Up Questions for Judge O'Scannlain:**

1) **In his testimony Governor Wilson suggested that splitting the circuit would create uncertainty in the law. (Pages 4-7). Wouldn't the new circuit simply adopt the existing precedent of the Ninth Circuit so that *stare decisis* would be respected and parties in the new Twelfth Circuit would enjoy stability and certainty in the application of settled law to their lives and transactions?**

The new circuits would simply adopt the existing precedents of the Ninth Circuit, if the experience of splitting the Fifth Circuit in 1980 is any guide. As I understand it, the new Eleventh Circuit simply published a General Order on its first day of existence which provided that all of the previous precedents of the Fifth Circuit would automatically become precedents of the new Eleventh Circuit. I see no reason why *stare decisis* would not be respected in the new Twelfth Circuit, which would, of course, provide stability and certainty in the application of settled law to the lives and transactions of those within the new Twelfth circuit.

2) **Why are you so confident that the average resolution time of cases would decrease in both circuits if there were to be a split? Especially in light of the factor that the Ninth Circuit processes the highest percentage of cases administratively.**

The conclusions of the White Commission are quite powerful in demonstrating that smaller circuits, because judges sit more frequently among themselves, resolve cases more promptly. While the Ninth Circuit commendably applies "triage" procedures very efficiently, most of the cases on the oral argument calendar have been on the clerk's office shelves for well over a year and, with respect to civil cases, frequently two years.



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3) **Since the Ninth Circuit is one of the faster courts once the case has reached the judges, can you explain what happens up until that point that is causing such severe delays and how that would be remedied by a split?**

The shear volume of filings in the Ninth Circuit becomes an avalanche which meets the barrier of limited judicial resources.

4) **A. Please explain what damage the limited *en banc* process is having on the uniformity of the law of the circuit?**

**B. Since a new Ninth Circuit would still not seat the complete bench for an *en banc* hearing, please explain the benefit to the uniformity of the law from having 68% of judges – which is how many would sit in the new Ninth Circuit – sitting on the panel instead of the 43% that would be on the panel if seven more judges are approved without a split.**

I associate my views on the limited en banc process with those expressed by my colleague, Judge Tallman, in his response, dated September 20, 2006, to Senator Kyl's question 4.

5) **Both the Hruska Commission of 1973 and the White Commission of 1998 recommended that the Ninth Circuit should be split, and five Supreme Court Justices have suggested or approved a split, yet most judges within the Ninth Circuit oppose the idea. Why should the Circuit be split over the objection of its judges?**

In many respects, the judges least competent to consider proposals to split the Ninth Circuit are members of the court themselves. Instinctively, we all try to "make the current system work." On the other hand, the test of size should be comparison within the overall federal judicial structure. When one circuit is four times the average size of all remaining circuits, a disinterested observer, such as a member of the Hruska Commission or the White Commission or the Supreme Court, is more to be trusted. Members of the Ninth Circuit have a variety of reasons, some political, some administrative, some otherwise, for refusing to bend to the counsel of members of the court which is superior to us and to national commissions which are broadly representative of the entire country.



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6) **Please include any other facts or comments that you consider to be important to this discussion.**

I have no further comments beyond those made above and in my submitted testimony.



43383.046

MARY M. SCHROEDER
CHIEF JUDGE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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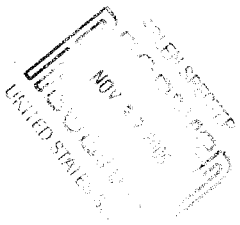
November 21, 2006



The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington D.C. 20510-6275
*via facsimile 202/224-9102*

Dear Chairman Specter:

This letter responds to your letter of October 10, 2006, in which you posed additional questions for me to answer following the Senate Judiciary Committee's September 20 hearing on "Examining Proposals to Restructure the Ninth Circuit."

The questions you posed are as follows:

**Background:** Under S. 1845, the "Circuit Court of Appeals Restructuring and Modernization Act of 2005, the new headquarters for the 12th Circuit Court of Appeals would be in Phoenix. The Administrative Office has estimated that splitting the 9th Circuit would have $96 million in startup costs, predominantly for courthouse costs. During the hearing, it was suggested that an existing courthouse in Phoenix would be sufficient to serve as the headquarters for the 12th Circuit.

• *Is there adequate space in federal buildings in Phoenix to accommodate a circuit headquarters?*

**Answer:** No. Of the two existing federal buildings in Phoenix, the Sandra Day O'Connor United States Courthouse and the Federal Building/Courthouse at 230 North First Avenue are fully occupied. All federal agencies housed in those buildings have occupancy/lease agreements with GSA. If they were to be forced to



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move by the judiciary to accommodate a circuit headquarters, the judiciary would be responsible for all associated costs, including (but not limited to) moving costs, unamortized tenant improvements, new build out of their space, and associated telecommunication/data needs. Additionally neither of the existing buildings has the type of courtrooms or space suitable for a circuit headquarters. The judiciary would also have to bear the cost of extensive renovations.

The following information was received from GSA, Region 9 on October 19, 2006:

O'Connor Courthouse - 401 W. Washington (District Court, Court of Appeals, Pretrial Services, Probation)

| | |
|---|---|
| Rentable: | 486,344 s.f. |
| Usable: | 341,238 s.f. |
| Courts occupy: | 241,572 s.f. |
| Other federal agencies: | 99,075 s.f. |
| Vacant: | 591 s.f. |

Federal Building and Courthouse - 230 North First (Bankruptcy Court, Probation)

| | |
|---|---|
| Rentable: | 288,783 s.f. |
| Usable: | 215,306 s.f.[1] |
| Courts occupy: | 112,003 s.f. |
| Other federal agencies: | 102,983 s.f. |
| Vacant: | 320 s.f. |

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**Background:** During the hearing, it was stated that more than 150 visiting judges participated in 9th Circuit appellate panels last year.

• *How does this usage of visiting judges in the Ninth Circuit compare to other Circuit Courts of Appeals?*

**Answer:** According to the Administrative Office of the U.S. Courts' most

[1] GSA has recently remeasured the building, which account for previous variations of this number.



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recent statistical report (year ending June 30, 2006) on the use of visiting judges in the U.S. Courts of Appeals, visiting judges participated in 4% of cases terminated on the merits in the Ninth Circuit. The national average was 2.5%; the Sixth Circuit, who has had a very high rate of judicial vacancies had the highest usage, 7.9%.

The 150 figure referred to during the hearing comes from internal court statistics which reflect the number of visiting judge participations on three-judge oral argument panels scheduled during a calendar year. For example, in 2006 the Court has scheduled approximately 420 days of three-judge oral argument panels. That equates to 1260 judge participations for the year (3 x 420 = 1260). That means on roughly 12% of the oral argument panels, a visiting judge was a member of the panel. In practical terms, most visiting judges serve multiple days with the court of appeals, so the actually number of different visiting judges is closer to 50 than 150. This practice is common in many other federal circuit courts of appeals, particularly those circuits experiencing a high rate of vacancies, such as the Sixth and Second Circuits. The Eleventh Circuit also uses a very high number of visiting judges as that court has made a policy decision not to seek additional judgeships. As a result, in recent years, the Eleventh Circuit has had visiting judges on anywhere from 40% to 50% of its precedential opinions.

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**Background:** Professor Eastman testified regarding the number of times the Supreme Court has reversed decisions of the Ninth Circuit Court of Appeals.

- *Please provide information on the rate of reversal of the Ninth Circuit.*
- *Please provide information of the rate of reversal of the Ninth Circuit relative to the other Circuit Courts of Appeals.*

Proponents of a circuit split often cite the Ninth Circuit reversal rate as a rationale for a circuit split. There is no evidence that the structure of the Ninth Circuit has any effect on reversal rate, nor any evidence that circuit size has an impact.

In recent years, the reversal rate of the Ninth Circuit has not deviated materially from other circuits. In the 2005-2006 term, the national reversal rate was



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73%; the reversal rate for the Ninth Circuit was 83%. The statistics are as follows:

| Circuit | Reversal Rate (2005-06) |
|---|---|
| D.C. Circuit | 100% |
| First Circuit | 100% |
| Third Circuit | 100% |
| Seventh Circuit | 100% |
| Second Circuit | 86% |
| Ninth Circuit | 83% |
| Eleventh Circuit | 80% |
| Sixth Circuit | 71% |
| Fifth Circuit | 67% |
| Fourth Circuit | 60% |
| Eighth Circuit | 33% |
| Tenth Circuit | 25% |

The statistics for the last few Terms demonstrate that the Ninth Circuit's reversal rate does not differ significantly from other circuits:

| Term | Total Average Reversal Rate | Ninth Circuit Reversal Rate |
|---|---|---|
| 2003-04 | 77% | 76% |
| 2002-03 | 73% | 75% |
| 2001-02 | 75% | 76% |
| 2000-01 | 63% | 71% |

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**Background:** At the hearing there was discussion regarding the heavy burden that immigration appeals place on the Ninth Circuit, constituting 40% of its caseload. Starting in 2001, the Department of Justice instituted several changes in the way that immigration appeals are handled.

- *Please provide information on the impact of these changes on the Ninth Circuit.*



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The primary cause of the Court's current backlog is the extraordinary increase in immigration appeals. The immigration caseload increased by approximately 590% from 2001 to 2005 while the non-immigration caseload decreased by .2%. The increase stems in large part from more aggressive prosecution of aliens following 9/11, and a decision of Attorney General Ashcroft back in 2000 to eliminate the Board of Immigration Appeals backlog of 56,000 cases. Over half the petitions for judicial review from those cases were venued in the Ninth Circuit. The following numbers illustrate the point:

| Fiscal Year | Immigration Appeals | Non-Immigration Appeals |
|---|---|---|
| 2001 | 955 | 9,713 |
| 2002 | 2,662 | 8,975 |
| 2003 | 4,191 | 8,919 |
| 2004 | 5,361 | 9,692 |
| 2005 | 6,520 | 9,692 |

But for the unprecedented increase in immigration cases due to executive branch action, the Ninth Circuit would not have any backlog. Because of the court's innovative case management techniques, the Ninth Circuit has been able to absorb the enormous spike in immigration cases without losing too much ground.

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**Background:** During the course of the hearing, some parallels were drawn between the split of the 5th Circuit and proposals to split the Ninth Circuit.

• *Please comment on the similarities and differences in the split of the Fifth Circuit and efforts to split the Ninth Circuit.*

Many of those advocating division disagreed with decisions of both courts. Many disagreed with the integration decision of the Fifth Circuit in the 1950's and 1960's following the Supreme Court's decision in *Brown v. Board of Education.* In the Ninth Circuit, there was much criticism of the court's decisions beginning with the Indian fishing rights cases in 1960s, extending through environmental decisions (e.g. logging and the spotted owl), and more recently the 2002 decision involving the Pledge of Allegiance. For a complete history of the division of the Fifth



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Circuit, please see: Barrow & Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform*, Yale University Press (1988).

With respect to both the Fifth and the Ninth Circuits, there were also threats of refusing to provide additional judgeships until there was circuit division.

As to differences with the split of the Fifth Circuit, first, the Fifth Circuit divided after its Judicial Council and a majority of its judges voted in favor of a split. An overwhelming majority of Ninth Circuit Judges - circuit, district and bankruptcy - have consistently opposed a split. Almost every state bar within the Ninth Circuit, the American Bar Association, the Federal Bar Association and many local bar associations throughout the jurisdiction of the Ninth Circuit oppose division.

A second difference is the Fifth Circuit could achieve an equitable division of caseload and states for each new circuit because the old Fifth was anchored at each end by a large state - Texas in the West (that remained in the Fifth) and Florida in the East, that along with Georgia, anchored the new Eleventh Circuit. No such equitable division of caseload would be possible in the Ninth Circuit without dividing California.

Third, the technological advances that have been implemented since the division of the Fifth Circuit in 1980, and continue to be implemented in the courts, make it much more efficient and economic to administer a large appellate court. 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 and the routine electronic filing in all cases will soon be available to all litigants. Technology allows both the judges of the Ninth Circuit to stay in close contact with one another as well as with the community they serve. 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,



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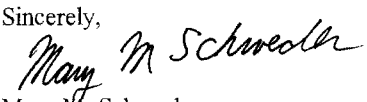
the resources for doing so would be seriously diminished in a small circuit.

To conclude, I hope these responses are helpful to the Committee in your consideration of legislative proposals concerning the Ninth Circuit. If I can provide any additional information, please let me know.

Sincerely,



Mary M. Schroeder



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**Senator Kyl**
**"Examining Proposals to Split the Ninth Circuit"**
**September 20, 2006**
**Follow-Up Questions for Judge Tallman:**

1) **In your testimony you stated that you recently were confronted with the severe delay civil appeals are experiencing. Can you expound upon this by giving a practical example?**

On September 15, 2006, I sat in Seattle on a three-judge panel hearing a regularly scheduled oral argument calendar. We heard a typical mix of cases including a civil rights action, an insurance coverage dispute under our diversity jurisdiction, and Title VII employment actions. Of the six cases submitted for decision after argument that day, four had been filed more than two years ago. The reality is that even though 80% of the immigration appeals are quickly procedurally terminated through the motions and screening process (40% of our pending docket), that statistic makes the average case processing time look better than it really is. It masks the real delay being suffered by private and civil litigants whose more complex cases languish under the current Ninth Circuit's staggering caseload.

2) **Your colleagues who disagree with you cite the unique and efficient administrative systems within the Ninth Circuit as justification for not splitting the Circuit. (Schroeder at 9; Thomas at 1). Yet, you remain convinced that splitting would increase the efficiency and productivity of both circuits. Can you explain what would occur systematically that would increase productivity and consequently the speed with which decisions are rendered?**

The White Commission concluded that smaller circuits equate to reduced caseloads, a smaller body of judges, and a more manageable workload. This, in turn, leads to a more collegial and informed court. As Judge O'Scannlain mentioned in his written testimony, "[u]nlike a legislature, an appellate court is expected to speak with one consistent, authoritative voice in declaring the law." (O'Scannlain at 7.) With a smaller body of circuit law, and more time to devote to each case, the court's precedent will become more cohesive and consistent. For instance, panels in the smaller circuits will have the opportunity to circulate for-publication opinions to the entire court before the opinions are released to the public. This, in itself, will result in a more productive court as the number of intra-circuit conflicts decrease. Conflicts generate more litigation and adversely impact efficiency by requiring more judge-time be expended to address the conflicts.

Moreover, opponents of a split have argued, for example, that a split would eliminate the efficiencies we currently enjoy from innovative mechanisms like the Bankruptcy Appellate Panel. But that does not account for the fact that bankruptcy judges from all over the western



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United States have sat on our BAP. Our current BAP is comprised of three judges from California, and one each from Idaho, Washington, and Arizona. The expertise of all western bankruptcy judges will continue to be utilized as new bankruptcy appellate panels will be created in the new circuits, just as other circuits throughout the nation have done when they set up their own bankruptcy appellate panels. Because their caseloads will be smaller, these new BAP panels could still be utilized in both the Twelve Circuit and the reduced Ninth Circuit to process more cases faster than can one panel now serving the entire circuit.

3) **If we add seven more judges to the court that would reduce your workload. How much more benefit is there to splitting the circuit than just adding more judges?**

Efficiency is not a function of size. The White Commission made that point clear when it concluded that "the maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between eleven and seventeen." (White Commission Report at 29.) As recognized by the White Commission, smaller decisional units—or circuit courts—would have a number of advantages: (1) "[j]udges can monitor the law more easily because they are responsible for monitoring fewer decisions"; (2) "[s]maller units may circulate for-publication opinions among all judges for whom the opinion speaks, thereby reducing inadvertent inconsistency and providing a way to address substantive conflicts or disagreements before they cause confusion or generate more litigation"; (3) "[smaller] units may also more readily take cases en banc that do create inconsistency, or that seem wrong to a majority of the judges"; (4) judges that sit on smaller decisional units "can sit together more frequently than is possible on larger courts"; (5) the bar "can better keep abreast of current law declared by a smaller number of judges serving in fewer panel combinations"; and (6) all of this combined "should contribute to the more efficient and less expensive resolution of disputes." (White Commission Report at 29-30.)

Therefore, simply adding seven new judges to the 28 active positions on the Ninth Circuit will do nothing but exacerbate the problems which flow from an appellate court that is already too large to effectively serve the entire Western United States.

4) **What are the negative effects of the limited en banc process? Particularly in light of the severe imbalance in the number of judges who serve on the court in comparison to the number who sit en banc? How much impact would adding seven more judges have on the effects of this process?**

As I previously testified in April 2004,[1] our limited en banc proceedings create more

[1] *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).



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problems than they solve. Because the Chief Judge presides over every en banc panel, only fourteen seats are actually chosen at random. The randomness of this selection process frequently results in an en banc panel that does not contain any of the judges who originally sat on the three-judge panel. This occurred in the California recall election case, *Southwest Voters Registration Education Project v. Shelley*,[2] and two recent death penalty cases, *Payton v. Woodford*[3] and *Cooper v. Woodford*.[4]

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[2] 344 F.3d 914 (9th Cir. 2003) (en banc).

[3] 346 F.3d 1204 (9th Cir. 2003) (en banc).

[4] 358 F.3d 1117 (9th Cir. 2004) (en banc). The original three-judge panel consisted of Judges Browning, Rymer, and Gould, none of whom participated on the en banc panel. *See Cooper v. Woodford*, 357 F.3d 1019 (9th Cir. 2004) (withdrawn).



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Most strikingly, a mere eight judges on a limited en banc panel can set the law of the circuit for the other twenty judges, whether or not the resulting decision reflects the full majority's views. It is indisputable that when we operated under an 11-judge en banc system some close cases (with 6-5 or 7-4 split votes) would have been decided differently had different eligible circuit judges been drawn for the en banc panels. In *Payton v. Woodford*, a slight majority of six judges on a limited en banc panel granted habeas corpus relief to a death row inmate.[5] There is no reason to believe the recent experiment that took effect January 1, 2006,

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[5] At least seven active judges on the Ninth Circuit would have denied relief. *See Payton v. Woodford*, 258 F.3d 905, 910 (9th Cir. 2001) (Rymer, J., joined by Gould, J., in the original three-judge panel decision); *Payton v. Woodford*, 346 F.3d 1204, 1219 (9th Cir. 2003) (en banc) (Tallman, J., dissenting in part, joined by Kozinski, Trott, Fernandez, and T. Nelson, J.J.).

This disparity between the result announced in limited en banc proceedings and the views of the active judges on the court who participated on either the original panel and/or the limited en banc panel is illustrated in other cases as well. *See, e.g.*, *Costa v. Desert Palace*, 299 F.3d 838 (2002) (en banc) (of the 12 different judges towho reviewed the case, 7 would have affirmed and 5 would have reversed; however, the limited en banc panel reversed 7-4); *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (en banc) (of the 14 different judgesto who reviewed the case, 7 would have affirmed and 7 would have reversed; however, the limited en banc panel reversed 7-4); *Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir.) (en banc), *subsequently dismissed as moot*, 266 F.3d 979 (2001) (of the 13 different judges who to reviewed the case, 7 would have affirmed and 6 would have reversed; however, the limited en banc panel reversed 6-5). In each



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increasing the limited en banc panel to 15 judges, has cured this problem.

A further disadvantage of this system is that it discourages judges from making en banc calls—which, again, play a key role in developing and maintaining our jurisprudence—because there is no guarantee that the judge who makes the call and persuades his or her colleagues to accept the case for en banc review will actually be drawn to sit on the resulting 15-judge panel. This serves as a disincentive for judges to invest time in pursuing en banc calls, as they will not know whether they have been randomly assigned to the panel until after a majority of active judges has voted in favor of en banc review. As the court grows bigger, a judge's chances of being drawn for an en banc panel decrease.

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of the latter three cases listed above, one of the judges on the initial three-judge panel was a visitor from a district court or other circuit court.



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Due to the extremely large caseload in the circuit, too many cases are decided annually to permit effective review of each by an en banc panel. En banc proceedings occur in only a small percentage of our cases. For example, in 2002, out of 1,039 petitions for rehearing en banc, judges called for en banc votes in only 35 cases. Of those 35 only 17 were eventually reheard en banc. Further, en banc review is rarely invoked for the thousands of unpublished dispositions that our court issues each year, although the Supreme Court occasionally grants a petition for certiorari and reverses one or two of these decisions.[6]

If the Ninth Circuit receives the seven new judgeships we have requested to augment our currently authorized 28 positions, our court will grow to 35 active judges. With such a large number of judges, we could empanel two separate en banc panels without any overlap in judges. Such limited en banc panels will not truly reflect the shared wisdom of the court as a whole. It is unacceptable that a mere eight judges on a limited en banc panel could direct the development of our circuit's law without the input of the 27 who did not happen to be chosen randomly.

Nor is authorizing larger en banc panels the right solution. Our public criticism as to the undemocratic nature of this system has had one effect on the way the Ninth Circuit does business. Effective January 1, 2006, our court changed from 11 to 15 the number of judges drawn for limited en banc panels. But as the White Commission report observed, at a certain point a panel simply becomes too large for its members to work effectively together.7 The recent change to 15 judges has borne that out. Because litigants are given only 30 minutes per side to present their oral argument to an en banc panel, it is impossible for each judge to effectively pose the questions, particularly follow-up questions, which he or she may have about the case. Oral argument in the California recall election case—when we had only an 11-judge en banc panel—proved that point beyond cavil. I have not spoken with any of my colleagues who have expressed the view that increasing the size of the en banc panel to 15 has improved efficiency and collegiality in deciding the issues. I predict there will be more, not less, concurring and dissenting opinions written in hard cases heard en banc. Our decisions will then resemble the plurality opinions of the Supreme Court in those cases where consensus is impossible to achieve. Justice is not well served by such a system.

5) **Chief Schroeder commented in her written testimony that a new Twelfth Circuit would require a "hefty travel budget." (Page 9). Can you explain in more detail**

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[6] *See, e.g.*, *Twentieth Century Fox Film Corp. v. Enter. Distrib.*, 34 Fed. Appx. 312 (9th Cir. 2002), *rev'd sub nom Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *Clark County Sch. Dist. v. Breeden*, 2000 WL 991821 (9th Cir. 2000), *rev'd* 532 U.S. 268 (2001); *Great-West Life & Annuity Ins. Co. v. Knudson*, 2000 WL 145374 (9th Cir. 2000), *rev'd* 534 U.S. 204 (2002).

[7] *See* White Commission Report at 40.



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**how travel time would be reduced for judges in both the new Ninth and Twelfth Circuits, especially since the new Twelfth Circuit would remain quite large geographically? Please also comment on how this would improve the administration of justice.**

Overall, a split would result in some economy by reducing travel costs. Judges in the new Ninth Circuit would no longer have to fly from California to hear cases in Seattle, Portland, or Anchorage and vice versa. Moreover, although the Twelfth Circuit would remain quite large geographically, most judges would benefit from a reduction in necessary travel time. I would no longer need to make multiple trips to San Francisco—both for court meetings and case calendars—throughout the year. Instead, I would spend more time hearing cases in Seattle.

6) **Judge Thomas commented in his written testimony that the average disposition time for the Circuit is skewed by the fact that in many of the immigration cases the government asks for an extension of a year or more. (Page 16). Is this true? If so, why should the Ninth Circuit be held accountable for this delay?**

It is true that the flood of immigration appeals following the decision to "streamline" the processing of immigration cases by the Board of Immigration Appeals has put enormous strain on the Justice Department's ability to compile the administrative record in each alien's case. Requests for continuances of six months or more are routine now. But the fact remains that the volume of new immigration cases, now approximately 40% of all new filings, are increasing faster than we can process them. For instance, in fiscal year 2006, we received 5790 new immigration filings. However, over that same time period, the court terminated only 4914 immigration appeals. Clearly, the court cannot keep up at its current pace, resulting in increasing delays in resolving deportation matters that is fairly chargeable to the Ninth Circuit, not the government. As mentioned earlier, these cases are also delaying other types of appeals for far too long.

7) **Please include any other facts or comments that you consider to be important to this discussion.**

Change is inevitable.[8] It is not without cost. And for many it is difficult to face. But face it we must. It is no answer to simply decry efforts to improve upon the status quo, labeling them assaults on judicial independence while attempting to trivialize those who urge improvement as a vocal minority who do not truly represent the views of the majority. I believe a more responsible approach is to accept the inevitability of growth and the need for change, while planning and

[8]Kenneth Ofgang, *Ninth Circuit Split Inevitable, Tashima Tells Gathering*, METRO. NEWS-ENTER., Oct. 30, 2006.



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managing the necessary restructuring to maintain and improve the quality of our judicial system.

While it is true that the Ninth Circuit has a tremendously experienced staff, it is also true that some of the current staff can and will be reallocated to the new circuits to set up and run the courts' systems. Naturally, the new Ninth Circuit will not be able to keep its current budget as it reduces its caseload under a split—some of those dollars will have to be reallocated to the new circuits. In fact, some staff are already located in other states within our current circuit.

The opponents' fear of inconsistent immigration decisions affecting border security lacks rational foundation. No problems have surfaced due to the number of circuits currently touching the Mexican or the Canadian borders, as Judge O'Scannlain persuasively argues in his written testimony. He rightly concludes any demand for a cohesive law of the West, whether affecting shipwrecks or smuggling, is merely a red herring.

I thank Senator Kyl for giving me this opportunity to expand upon my written and oral testimony of September 20, 2006.



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SUBMISSIONS FOR THE RECORD

# ALASKA BAR ASSOCIATION

July 28, 2006

The Honorable Arlen Specter
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Democratic Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter and Senator Leahy:

As Executive Director of the Alaska Bar Association, I write to convey the Bar's opposition to S. 1845, a bill to divide the current Ninth Circuit Court of Appeals, and to convey the Bar's support for retaining the Ninth Circuit intact as currently configured.

In recent years the issue of dividing the Ninth Circuit has been debated within the Alaska Bar Association. In April 2006 the issue was finally presented to the Bar membership and a Resolution considered at the annual convention. At that time, Resolution No. 2-2006 was adopted (copy enclosed).

As the enclosed Resolution reflects, the Alaska Bar Association believes that the Ninth Circuit has creatively and effectively met the challenges faced by its size. The Circuit efficiently handles its caseload notwithstanding substantial increases in recent years due to increased numbers of immigration cases. Indeed, published data shows that at least one Circuit is slower than the Ninth Circuit, and that the Ninth Circuit is the second fastest in handling appeals from federal agencies.

P.O. Box 100279 • Anchorage, Alaska 99510-0279
907-272-7469 • Fax 907-272-2932 • http://www.alaskabar.org



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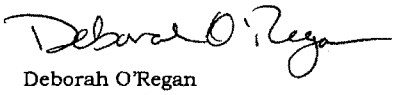
In adopting Resolution No. 2-2006, the Alaska Bar also noted that there is rough political parity across the Circuit, as well as within each of the two proposed new Circuits, so that political considerations of neither party favors splitting the Circuit in two. Finally, the Alaska Bar noted that the Ninth Circuit's reversal rate in the United States Supreme Court is roughly on a par with the general Supreme Court reversal rate in all cases, a fact which compares favorably to the 100% unanimous reversal rates of certain other Circuits.

The membership of the Alaska Bar Association has spoken clearly in support of retaining the Ninth Circuit intact under its current configuration. The Alaska Bar Association therefore respectfully urges Congress not to pass S. 1845, and instead to fill all the remaining vacancies on the Ninth Circuit, preferably with an additional judge from Alaska (which currently has only one active judgeship on the entire Ninth Circuit bench).

Sincerely,



Deborah O'Regan
Executive Director

Enclosure: Resolution 2-2006

cc: The Honorable Ted Stevens, United States Senate
The Honorable Lisa Murkowski, United States Senate

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# ALASKA BAR ASSOCIATION

## Resolution No. 2-2006
(concerning the United States Court of Appeals for the Ninth Circuit)

WHEREAS, proposals are currently pending in Congress that would split the United States Court of Appeals for the Ninth Circuit into two parts, with the new Ninth Circuit limited to California and Hawaii, and a new Twelfth Circuit created for Alaska, Washington, Oregon, Idaho, Montana, Nevada and Arizona; and

WHEREAS, in the year ending March 31, 2005 the 28-member Ninth Circuit resolved 12,253 cases and is by any measure the most productive federal appellate court in the Nation; and

WHEREAS, the Federal Bar Association, the American Bar Association, the Ninth Circuit Lawyers' Representatives Coordinating Committee (appointed by the 9 State Bar Associations), and several individual State Bar Associations all oppose splitting the Circuit; and

WHEREAS, only a very small minority of Ninth Circuit judges supports the split; and

WHEREAS, despite the Ninth Circuit's caseload having increased over the past two years by 12.5% and 20.8%, respectively (due largely to a massive increase in immigration cases), the median life of a case from initial local filing at the trial level to final disposition by the Ninth Circuit in 2004 was 30.5 months, less than 5 months off the national median of 25.9 months; and

WHEREAS, the Sixth Circuit is slower than the Ninth Circuit in handling appeals, while the Ninth Circuit is the second fastest in the Nation in handling appeals from federal agencies; and

WHEREAS, there is no meaningful geo-political split on the Court defined by California judges, considering that a slight majority of the 13 Ninth Circuit California judges are Republican appointees, and a slight majority of the Ninth Circuit judges who would be in the new 12th Circuit are Democratic appointees; and

WHEREAS, so long as Alaska remains within a larger Ninth Circuit, with 3 existing vacancies and another 7 positions slated to be added, there exists a fair chance that a second active Alaska judge could be appointed to the Ninth Circuit (while such an outcome is a virtual impossibility within a much reduced Twelfth Circuit);and

WHEREAS, the estimated start-up costs for a new Twelfth Circuit (depending on whether it is headquartered in Seattle or Phoenix) could be as high as $95 million, with an additional annual administrative cost for two Circuit systems up to $10 million; and

WHEREAS, in comparison to the Supreme Court's general reversal rate of 74%, the Ninth Circuit's reversal rate in recent years has been 75%; and



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WHEREAS, during the portion of the Supreme Court's 2005 Term from October 2005 through February 2006, six other Circuits had 100% unanimous reversal rates while the Ninth Circuit's 75% reversal rate included 8 of 9 unanimous reversals (constituting a 66% overall unanimous reversal rate); and

WHEREAS, the current session of Congress is expected to revisit the issue of splitting the Ninth Circuit,

NOW THEREFORE BE IT RESOLVED, that the Alaska Bar Association in Convention assembled hereby supports retaining intact the United States Court of Appeals for the Ninth Circuit, and opposes any initiative to split the Circuit.

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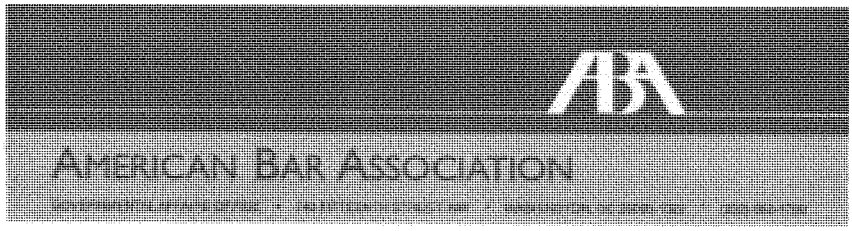


**STATEMENT**

**OF THE**

**AMERICAN BAR ASSOCIATION**

**submitted to the**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

**on the subject of**

**Proposals to Split the Ninth Judicial Circuit**

**September 20, 2006**

The American Bar Association appreciates the opportunity to present this written statement for the hearing record of the Senate Judiciary Committee regarding proposals to restructure the Ninth Judicial Circuit. After carefully reviewing the current functioning of the Ninth Circuit, we reaffirm our opposition to current legislative efforts to restructure the Ninth Judicial Circuit.[1]

The structure and function of the federal courts of appeal have been the subject of intermittent congressional concern and debate during the past thirty-five years. Congressional interest initially was sparked by growing concerns over the persistent growth in population and dramatic increase in federal appellate caseload, which became evident in the early 1970's and continues today.[2] It is worth briefly summarizing congressional activity during this period to provide context for evaluating current restructuring efforts.

**Early Efforts to Restructure the Regional Federal Courts of Appeal**

In 1972, Congress created the Hruska Commission, formally called the Commission on Revision of the Federal Court Appellate System, to study the federal appellate system. The Commission issued its final report a year later, which recommended several procedural and structural changes, including division of both the Fifth and Ninth Circuits, then composed of 15 and 13 judges respectively, because they were considered too large. Congress declined to divide the circuits and instead substantially increased the number of authorized judgeships in both circuits, providing the Fifth Circuit with 26 judgeships and the Ninth Circuit with 23. Congress also authorized any circuit with 15 or more judges to

[1] The Association has expressed opposition to circuit splitting proposals in separate statements submitted earlier this Congress and in 2003. *See* Statement of the ABA submitted to the Senate Judiciary Subcommittee on Administrative Oversight and the Courts October 26, 2005); and Statement of the ABA submitted to the Senate Judiciary Subcommittee on Courts, the Internet and Intellectual Property (October 21, 2003).

[2] To understand the dynamic growth of the appellate courts, consider these facts: In 1950, 2,830 appeals were filed in the regional courts of appeal, consisting of 68 judges. In 1960, appeals rose to 3, 899 and judgeships remained the same. In 1970, 11,662 cases were filed and judgeships increased to 97. By 1980, 23,200 appeals were filed and the regional appellate courts consisted of 132 authorized judgeships. In 1990, there were 40,898 appeals filed and 156 judgeships. That year, an omnibus judgeship bill was enacted, which increased judgeships for the regional appellate courts to 167. Judicial Conference of the United States, LONG RANGE PLAN FOR THE FEDERAL COURTS 15-16 (1995).

No additional appellate judgeship have been authorized by Congress, a fact that is astounding, given that the Administrative Office of the U.S. Courts has reported that 68,473 appeals were filed in the preceding 12-month period ending June, 2005.



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use limited *en banc panels* or to divide into administrative units to deal with rising caseloads.[3] The Ninth Circuit chose to adopt these new procedures; the judges of the Fifth Circuit preferred division. In 1980, at the behest of the judiciary, Congress enacted legislation to divide the Fifth Circuit by placing Florida, Georgia and Alabama into a new Eleventh Circuit.[4] This was the second -- and last -- time that Congress has divided an existing circuit since creation in 1891 of the regional circuit courts of appeal as we know them today.[5]

Although the ABA originally supported the Hruska Commission's recommendation to split both the Fifth and Ninth Circuits, it rescinded that position in 1990 with respect to the Ninth Circuit, stating that procedural changes implemented during the preceding decade, in conjunction with other court management innovations, gave the Circuit the tools it needed to handle rising caseloads without sacrificing quality or timeliness.

In 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by the late Justice Byron R. White, to study the structure and alignment of the federal appellate system, with particular reference to the Ninth Circuit, and to submit its final recommendations regarding changes in circuit boundaries or structure to the President and to Congress by December 1998.[6]

The "White Commission," as it was popularly known, concluded that the Ninth Circuit should not be split. In its final report, released at the end of the 105th Congress, the Commission stated:

> There is no persuasive evidence that the Ninth Circuit (or any other circuit for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the Circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the Circuit.[7]

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[3] Omnibus Judgeship Act of 1978, Pub.L. No. 95-486, 92 Stat.1633 1978).
[4] Pub. L. No. 96-452, 94 Stat. 1994.
[5] The first split occurred in 1929, only after almost unanimous consensus was reached among Members and judges on how to divide the circuit: a new Tenth Circuit was carved out of five contiguous western-most states of the existing circuit. Pub .L. 71-840, 45 Stat. 11407. Interestingly, the ABA urged Congress to split the 8th Circuit, citing the vast size of the circuit and unequal work load of the judges as main cause of concern.
[6] Pub.L.No. 105-1 19.
[7] COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 29 (1998).



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Further, the White Commission also acknowledged that certain benefits derived from the current alignment of the Ninth Circuit, including the development of a consistent body of law that applies to the entire far western region of the United States and governs relations with the other nations of the Pacific Rim, in addition to the practical advantages of the Circuit's administrative structure.

Despite these findings and conclusions, the White Commission recommended that Congress restructure the Ninth Circuit into three regionally based adjudicative divisions. The ABA opposed this recommendation, asserting that the only rationale the Commission offered for the recommendation -- its stated subjective preference for smaller decisional units --was an insufficient basis for restructuring a judicial circuit.[8] Congressional reaction to the final report of the White Commission was tepid, and implementing legislation introduced during the 106th Congress by Senator Frank Murkowski (R-AK) received minimal attention.

During the 107th Congress, identical bills were introduced in the House and Senate by Representative Simpson (R-ID) and Senator Murkowski to split the Ninth Circuit into two circuits, with Arizona, California and Nevada remaining in the Ninth Circuit, and Alaska, Hawaii, Oregon, Washington, Idaho and Montana forming a new Twelfth Circuit. Hearings were held, but no further action was taken.

During the 108th Congress, bills proposing three different strategies for dividing the Circuit were introduced. Representative Simpson reintroduced the previous congress's bill proposing a two-way split. He and Senator Lisa Murkowski (who took her father's seat when he became governor) introduced identical bills in their respective chambers calling for a different reconfiguration of the Circuit, whereby only California and Nevada would remain in the Ninth Circuit and a new Twelfth Circuit would be fashioned out of the remaining states and territories.

Later, during the 2nd Session, yet another formula for splitting the Ninth Circuit was presented to Congress by Senator Murkowski and Representative Renzi (R-AZ). Their identical bills proposed a novel three-way split, with California, Hawaii, Guam and the North Marianas Islands to compose the Ninth Circuit; Arizona Nevada, Idaho and Montana, the Twelfth Circuit; and Alaska, Oregon and Washington the Thirteenth Circuit. The Senate Judiciary Committee held a hearing on the bill just days after the bill was introduced. Even though the House Judiciary Committee had not held a hearing to examine this novel circuit restructuring proposal, House members attempted to secure the bill's passage by attaching it to a omnibus judgeship bill that had already passed the Senate. The strategy failed,

[8] The ABA House of Delegates adopted policy in August 1999 opposing the recommendations of the White Commission.



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ultimately dooming restructuring legislation as well as the much needed judgeship bill to which it was attached. A prominent House member stated that the future success of any omnibus judgeship bill was dependent on successful enactment of legislation to divide the Ninth Circuit.

**Current Efforts to Restructure the Ninth Circuit**

Seven circuit restructuring bills have been introduced this Congress.[9] None of them would evenly distribute the caseload or the authorized judgeships among the newly created circuits, even after factoring in the additional judgeships that some of the bills authorize for the new circuits. One bill proposes a two-way split with Arizona, California and Nevada composing the new Ninth Circuit; two other bills propose the same three-way split that was introduced last year; and four bills propose a two-way split, with the new Ninth Circuit comprising the same two states and territories that the three–way split bills propose and assigning all the remaining states to the new Twelfth Circuit. One of these four bills -- H.R. 4093 -- combines circuit division provisions with a new omnibus judgeship bill, and was reported out of the House Judiciary Committee. As with last year's combination bill, it is unlikely to see further action this Congress. If duplication is any measure of support, the heretofore unseen reconfiguration proposed in these four bills appears to be the preferred method of division this Congress.

We have provided some historical context and described with particularity the various circuit reconfigurations proposed during the last three Congresses to make four important points.

- First, even the most ardent proponents of Ninth Circuit restructuring do not concur over the best method to accomplish restructuring; in fact, individual sponsors do not appear to be committed to any one methodology.[10] This stands in stark contrast to the kind of congressional bipartisanship and solidarity that existed over legislation that resulted in the division of the Eighth and Fifth circuits, a point to which we will return later.

- Second, even though the operational definition of what constitutes a "large" circuit is relative and has changed over the decades, there has been a consistent historical presumption favoring small circuits that dates back to the first circuit division in 1929. At the time, it was a logical, even

[9] Appendix A contains a chart comparing the reconfigurations of the Ninth Circuit proposed by legislation, introduced this Congress.
[10] Appendix B contains a chart that compares circuit restructuring proposals introduced over the last six years.



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intuitive presumption, given the state of private and public transportation, and the absence of electronic forms of communication outside of telephone or wire services. The presumption appears to have become so accepted over the decades that it has taken on the aura of a "truism," even though no empirical evidence exists to support the conclusion in today's world, where individuals in any area of the country can communicate with others instantly through a variety of electronic means and people can now travel from place to place in this country quickly and comfortably and relatively inexpensively.

- Third, only a handful of Members have demonstrated enough interest in circuit restructuring to become co-sponsors. In fact, from 1983 to the present, no legislative proposal has enjoyed the co-sponsorship of more than eight Congressional members, the majority of whom represent (or represented) those jurisdictions that would be severed from California in creating a new circuit or circuits.[11]

- Fourth, despite the absence of a reasoned, well-supported reconfiguration plan and the concomitant conviction that the chosen plan will accomplish the purported goals, a few Members of Congress have been willing to try to circumvent the deliberative process or hold other legislation hostage in order to achieve their focused objective of dividing the Ninth Circuit into whatever reconfiguration seems feasible at the time.

**Circuit Restructuring Should Occur Only if There is Compelling Evidence of Dysfunction**

The standard by which the ABA assesses the need for circuit restructuring states: "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload." This standard, first suggested by the Judicial Conference of the United States in its *Proposed Long Range Plan for the Federal Courts,*[12] clearly embodies the principle that circuit restructuring is a "remedy of last resort" and should only be used if there is compelling evidence that justice is being denied to individual litigants and the integrity of the law

[11] Appendix C contains a chart listing the original sponsors and cosponsors of all the circuit splitting bills introduced since the 98th Congress.
[12] Judicial Conference of the United States, LONG RANGE PLAN FOR THE FEDERAL COURTS 44 (1995).



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of the circuit is threatened. Furthermore, as with any remedial legislation, circuit restructuring legislation should not be supported unless there is broad bipartisan consensus that it is the best solution and that the benefits of the proposed reconfiguration, if enacted, will outweigh any negative consequences.

Congress should adhere to this very stringent standard because any circuit restructuring profoundly affects every component of the justice system and creates its own set of serious problems that may be temporary or may linger for years, including: substantial start-up expenses for new construction or renovation of existing facilities and for relocation of personnel and tangible property; administrative disruption; and, of course, fostering an unpredictability of case law in the circuits whose boundaries are moved.

**No Compelling Evidence Exists to Support Claims that the Ninth Circuit Needs Restructuring or that Restructuring would Improve the Federal Judicial System**

We have examined the most recent judicial statistics and evaluated the claims of those who support and oppose division, and we remain steadfast in our assessment that no compelling evidence exists to support claims that the Ninth Circuit is failing to deliver quality justice in a timely fashion or that any of the perceived problems identified by supporters of the legislation would be remedied by the various proposed circuit divisions.

Statistics compiled by the Administrative Office of the U.S. Courts (AO) and submitted to Congress annually establish that the Ninth Circuit is functioning very well and utilizing its resources effectively.[13] In fact, even though there were 12.4 per cent more filings in 2005 than in 2004 (primarily due to an increase in immigration appeals), the Ninth Circuit terminated 10.3 per cent more cases in 2005 *(13,399 compared to 12,151)*, rendering decisions on the merits in *6,197* cases.

Disposition times for the Ninth Circuit also have steadily improved over the last several years and are more favorable than those of a majority of the other circuits in many respects. For example, the Ninth Circuit was the second fastest circuit in terms of median time from the date of the first hearing to final disposition -- 1.4 months. The Tenth Circuit was the slowest- 4.3 months. The Ninth Circuit shared with the Second Circuit the fastest median time from submission on the briefs to disposition -- a record-

[13] Administrative Office of the U.S. Courts, JUDICIAL BUSINESS OF THE FEDERAL JUDICIARY (2005). Same-titled reports are produced annually by the AO. Unless otherwise noted, statistics relied on in this statement were extracted from this report, which covers the twelve-month period ending 9/30/05.



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breaking .2 months. While the Circuit may lag behind others in the median time from the date of filing the appeal to final disposition, once the judges of the Ninth Circuit receive case files, they move them expeditiously through the system and close the cases in record time.

One of the reasons that the Ninth Circuit has been able to function so well even though its caseload keeps growing is because it has been on the forefront of utilizing technology to enhance administrative efficiency. For example, the Ninth Circuit was the first to institute automated docketing and is on the brink of instituting electronic web-based filing. It is the only circuit to use an automated issue identification system that inventories cases in a way that flags potential conflicts for early resolution and facilitates efficient resolution of cases that share the same central issue. The system also enables the Court to issue pre-publication reports to Court members to advise them in advance of the filing of every published opinion and to identify pending cases that might be affected by the lead opinion.

We believe that it is very significant that that the vast majority of the Ninth Circuit's bench and bar believe that the Circuit is functioning well and should not be divided. The views of Circuit judges and the lawyers who practice daily before them should be accorded great deference because they are in the best position to know how the Circuit operates on a day-to-day basis and to evaluate its strengths and weaknesses. In the past, Congress has agreed that the views of the affected legal community carry great weight and has refrained from using its power to restructure a circuit unless there was consensus within Congress and the affected legal community that it was absolutely necessary and there was agreement over how best to reconfigure the circuit.

Division of the Ninth Circuit does not have the affirmative support of a majority of the judges of the Ninth Circuit. According to Chief Judge Mary Schroeder, only three of the 24 active judges and only nine of the Court's total complement of 47 active and senior judges favor a split. Neither the Judicial Council of the Ninth Circuit nor the Judicial Conference of the Unites States supports realignment.

The opposition of the organized bar in the Ninth Circuit is just as strong.[14] All but one of the state bar associations that have adopted a policy position on the issue over the last several years oppose division of the Ninth Circuit: Idaho supports division, while the state bars in Alaska, Arizona, Hawaii, Montana, Nevada, Oregon and Washington oppose division. Guam, the North Marianas Islands and the State Bar of California have not taken official positions. However, the Litigation Section of the State Bar of California and the following local bars oppose division: the Bar Association of San Francisco, the

[14] Appendix A lists the bars who have indicated their position on divisions of the Ninth Circuit. While we have done our best to research this point, there may be other bar associations in the Circuit that have adopted a position that are not included on this list.



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Beverly Hills Bar Association, the LA County Bar Association, the Orange County Bar Association, the Santa Clara County Bar Association and the San Diego County Bar Association. In addition, the California Public Defenders Association and the California Academy of Appellate Lawyers also oppose division. Specialty bars that oppose division include the Hispanic National Bar Association, Los Abogados Hispanic Bar Association and the Federal Bar Association.

Finally, thousands of ABA members who belong to the Association's Section of Litigation and practice daily before the courts of the Circuit also oppose restructuring. The Section prepared a supplemental statement, which is attached as Appendix D, to emphasize the conviction of its members that the Ninth Circuit is functioning well and should not be divided.

Based on the overwhelming consensus among the Circuit's judges, lawyers and litigants that the Circuit is functioning well and should not be divided, the Circuit's effective use of innovative case management practices and statistical proof of its sound and efficient judicial operations, we firmly believe that the Ninth Circuit continues to cope admirably with its rising caseload without jeopardizing the quality of justice, and that its overall performance measures favorably against that of the other judicial circuits.

**Circuit Restructuring is a Costly Proposition**

The Administrative Office of the U.S. Courts estimated last year that start-up costs for a two-way split could run as much as $ 96 million, with recurring annual costs ranging from $13 - $16 million, and that a three-way split could cost as much as $134 million initially and an additional $22 million annually thereafter. It would be particularly troubling to incur this kind of national expense at a time when budget cuts have detrimentally affected the daily operations of the federal judiciary and the national deficit continues to climb as the nation tries to cope with the enormous costs of war overseas and natural disasters at home. The potential cost of circuit restructuring, alone, counsels against division, absent verifiable compelling evidence of dysfunction.



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**Conclusion**

The federal judiciary is presently facing record-breaking caseloads and operating under serious budgetary constraints. Existing judicial vacancies need to be filled; additional judgeships need to be authorized; courthouses need renovation; security systems need updating; adequate staffing levels need to be maintained; innovative technology and case management programs need to be funded; and concomitant resources need to be channeled to the federal courts when federal jurisdiction is expanded or implementation of national policies results in significant increases in case filings. Resources also need to be directed toward improving the quality of administrative immigration determinations to avoid further unprecedented increases in the number of immigration appeals handled at the circuit level.

These problems need to be addressed because insufficient resources (including too few authorized judgeships and inadequate staffing) and persistent vacancies undermine the ability of our federal courts to operate with maximum efficiency and timeliness. We therefore urge Members of Congress not to pursue legislation to divide the Ninth Circuit and instead to commit their time, energy and influence to enacting legislation that will provide the federal judiciary with the resources it needs to perform its adjudicatory functions efficiently and impartially and ensure that every litigant has an opportunity to have his or her case heard in a timely manner.

Thank you for this opportunity to present our views. We stand ready to assist you in whatever way we can.

For more information regarding the position of the ABA, please contact:
Denise Cardman, Deputy Director
Governmental Affairs Office
cardmand@staff.abanet.org
202/662-1761



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## APPENDIX A

109th Congress

CONFIGURATION OF PROPOSALS TO SPLIT THE NINTH JUDICIAL CIRCUIT
& BAR ASSOCIATION POSITIONS RE: ANY FORM OF DIVISION

| | S 1296 | S 1301 | S 1845 | HR 211 | HR 212 | HR 3125 | HR 4093 | BAR/GOV POSITION |
|---|---|---|---|---|---|---|---|---|
| CA | | | | | | | | * Bar, lawyer groups & Gov OPPOSE |
| HI | | | | | | | | HI St. Bar Ass'n OPPOSE |
| NMI | | | | | | | | No Position |
| GUAM | | | | | | | | No Position |
| AK | | | | | | | | AK Bar Ass'n OPPOSE |
| AZ | | | | | | | | St. Bar of AZ & Gov OPPOSE |
| NV | | | | | | | | St. Bar of NV OPPOSE |
| OR | | | | | | | | OR St. Bar &Gov. OPPOSE |
| WA | | | | | | | | WA St. Bar Ass'n OPPOSE |
| MT | | | | | | | | St. Bar of MT OPPOSE |
| ID | | | | | | | | ID St. Bar SUPPORT |

KEY:

| | |
|---|---|
| | New 9th Circuit |
| | New 12th Circuit |
| | New 13th Circuit |

- The State Bar of CA has taken no position; however, the Litigation Section of the St. Bar of CA opposes splitting the 9th Circuit, as do the following local bars: The Bar Ass'n of San Francisco, Beverly Hills Bar Ass'n, LA County Bar Ass'n, Orange County Bar Ass'n, Santa Clara County Bar Ass'n and the San Diego County Bar Ass'n. In addition, the CA Public Defenders Ass'n and the CA Academy of Appellate Lawyers oppose division. Specialty bars that oppose division include the Hispanic National Bar Ass'n, Los Abogados Hispanic Bar Ass'n and the Federal Bar Ass'n.

Prepared by:
Governmental Affairs Office, American Bar Association
September 20, 2006



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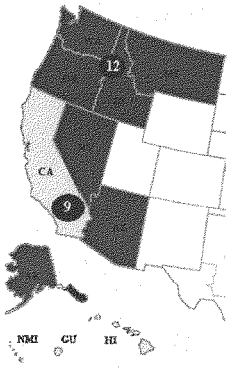
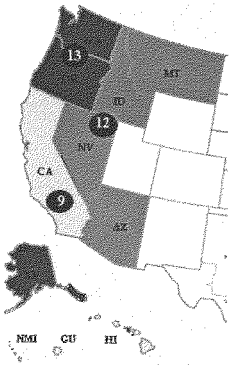
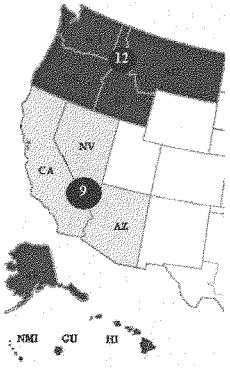
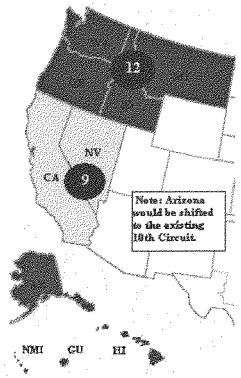
# APPENDIX B

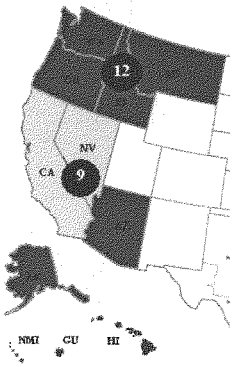
**COMPARISON OF PROPOSALS TO SPLIT THE NINTH CIRCUIT INTRODUCED DURING THE 107TH, 108TH & 109TH Congress**




**109th Congress**
*H.R. 4093
H.R. 3125
S. 1845
S. 1296

*This bill contains both circuit–splitting and omnibus judgeship provisions.

**108th Congress**
H.R. 4247
S. 2278

**109th Congress**
H.R. 211
S. 1301

**107th Congress**
H.R. 1203
S. 346

**108th Congress**
H.R. 2723
H.R. 212

**108th Congress**
H.R. 1033

**108th Congress**
S. 562



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# APPENDIX C

## LEGISLATIVE PROPOSALS TO DIVIDE THE NINTH CIRCUIT:

### ORIGINAL SPONSORS (IN BOLD) AND COSPONSORS*

### 1998-2006

| Congress Bill # | CA | NV | AZ | OR | WA | ID | MT | AK | HI | Other Members |
|---|---|---|---|---|---|---|---|---|---|---|
| **98th** | | | | | | | | | | |
| S. 1156 | | | | | **Gorton** | | | | | |
| **101st** | | | | | | | | | | |
| HR 4900 | | | | Smith | **Morrison** Chandler | Stallings Craig | Marlenee | Young | | |
| S 948 | | | | Hatfield Packwood | **Gorton** | McClure, Symms | Baucus Burns | Stevens Murkowski | | |
| **102nd** | | | | | | | | | | |
| S. 1686 | | | | Hatfield Packwood | **Gorton** | Symms Craig | Burns | Stevens Murkowski | | |
| **103rd** | | | | | | | | | | |
| HR 3654 | Farr | | | **Kopetski** Smith | Unsoeld | | | Young | | |



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| Congress Bill # | CA | NV | AZ | OR | WA | ID | MT | AK | HI | Other Members |
|---|---|---|---|---|---|---|---|---|---|---|
| **104th** | | | | | | | | | | |
| S. 956 | | | | Hatfield<br>Packwood | **Gorton** | Craig<br>Kempthorne | Baucus<br>Burns | Stevens<br>Murkowski | | |
| HR 2935 | | | | **Bunn**<br>Cooley | Dunn<br>Hastings<br>Tate<br>White | | | Young | | |
| S. 853 | | | | Hatfield<br>Packwood | **Gorton** | Craig<br>Kempthorne | Burns | Stevens<br>Murkowski | | |
| **105th** | | | | | | | | | | |
| HR 639 | | | | | | Chenoweth | **Hill** | | | |
| S. 431 | | | | Smith | Gorton | Craig<br>Kempthorne | Burns | Stevens<br>**Murkowski** | | |
| **106th** | | | | | | | | | | |
| S. 253 | | | | | | | | Stevens<br>**Murkowski** | | |
| **107th** | | | | | | | | | | |
| S. 346 | | | | | | | | Stevens<br>**Murkowski** | | |
| HR 1203 | | | | | | **Simpson** | | | | |
| **108th** | | | | | | | | | | |



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| Congress Bill # | CA | NV | AZ | OR | WA | ID | MT | AK | HI | Other Members |
|---|---|---|---|---|---|---|---|---|---|---|
| S. 562 | | | | Smith | | Craig, Crapo | Burns | **Murkowski** Stevens | | Inhofe-OK |
| S. 2278 | | **Ensign** | | | | Craig Crapo | Burns | Stevens **Murkowski** | | Inhofe-OK Cornyn-TX Hatch-UT |
| HR 1033 | | | | | Walden | Hastings Nethercutt | **Simpson** Otter | Young | | |
| HR 2723 | | | | Walden | Hastings | **Simpson** Otter | | Young | | |
| HR 4247 | | Porter | **Renzi** | | | | | | | |
| **109th** | | | | | | | | | | |
| S. 1296 | | | Kyl | Smith | | Craig Crapo | Burns | Stevens **Murkowski** | | |
| S. 1301 | | **Ensign** | | | | Craig Crapo | | | | Coburn- OK Inhofe-OK Cornyn- TX |
| S. 1845 | | **Ensign** | Kyl | Smith | | Craig Crapo | Burns | Stevens Murkowski | | Inhofe-OK |
| HR 211 | | | | Walden | Hastings | **Simpson** Otter | | Young | | Delay-TX |



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| Congress Bill # | CA | NV | AZ | OR | WA | ID | MT | AK | HI | Other Members |
|---|---|---|---|---|---|---|---|---|---|---|
| HR 212 | | | | | | **Simpson** | | | | |
| HR 3125 | | | | | | **Simpson** | | | | |

*This chart does not list bills that combine omnibus judgeship provisions with court restructuring because it would be impossible to determine the reason for cosponsorship.





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## APPPENDIX D

Supplemental Written Statement of Kim J. Askew
Chair, ABA Section of Litigation
Regarding
Proposed Legislation to Split the United States Court of Appeals
for the Ninth Judicial Circuit

Submitted to the
Senate Judiciary Committee

September 2006

I am Chair of the American Bar Association Section of Litigation, and I write to reiterate the American Bar Association's opposition to the proposed legislation to divide the United States Court of Appeals for the Ninth Judicial Circuit.

The Section of Litigation is the largest section in the ABA, with more than 77,000 members in the United States. The Section is not "pro-plaintiff, "pro-defendant" or "pro-anyone." Our charter is to improve the quality of justice among practicing lawyers and their clients. We have no axe to grind other than making sure that our nation's justice system and judicial administration are the best they can be.

As Brad Brian, my predecessor as Chair of the Section, previously noted in his November 2005 statement to the Senate Judiciary Committee, he and thousands of Section members practice in the states and territories that comprise the Ninth Circuit. They regularly appear in all of the federal District Courts within the Ninth Circuit and before the Ninth Circuit itself. Their clients will be directly affected by any action taken to modify the current structure of the Ninth Circuit. Our members do not report that the proposed Circuit split is necessary.

As also demonstrated by Ninth Circuit Judge Sidney R. Thomas' previous testimony before the Senate Judiciary Committee, splitting the Circuit "would be costly, disruptive and would create enormous inefficiencies." Judge Thomas' testimony confirms the conclusion by the White Commission in 1998 that there is "no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall."

The ABA itself, Ninth Circuit Chief Judge Mary Schroeder and other affected bar groups have repeatedly pointed out the significant costs and dislocations that a split circuit would produce. Contrary to the views expressed by some advocates of a circuit split, there has been no showing that splitting the Ninth Circuit would produce any meaningful benefits to anyone, including litigants or the public at large, much less that they clearly outweigh the downsides of doing so. We join in their statements and fully support them.



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Although some have criticized the geographic size of the Circuit, we believe it is extremely useful to have both the collective and individual views and experience of appellate judges from Arizona to Alaska and from Idaho to Hawaii in framing the Ninth Circuit's jurisprudence. The Court's diversity also helps to bring balance to the other states within its boundaries. The Ninth Circuit may be large, both in geography and the number of its judges, but it serves the important purpose of collecting all of the western-most states together in one appellate judicial unit to arrive at an overall, balanced perspective on the important legal issues that come before it.

Perhaps most telling is the fact that the vast majority of Judges on the Ninth Circuit – including those whose appointments came from "both sides of the aisle" – are opposed to a split and see no benefits from one. This is itself compelling. Congress should give great weight to these Judges, who know firsthand whether the Ninth Circuit is working effectively.

The truth is that the Ninth Circuit is working, and working well with support from not only its own judges, but the bar associations and lawyers within its jurisdiction.

We urge you to oppose any efforts to split the Ninth Judicial Circuit and would be pleased to provide any additional information to assist the Committee in its important work.



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LEGISLATIVE OFFICE

Honorable Arlen Specter
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

June 28, 2006

AMERICAN CIVIL LIBERTIES UNION
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WASHINGTON, DC 20005
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F/202.546.0738
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CAROLINE FREDRICKSON
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CHAIR, NATIONAL
*ADVISORY COUNCIL*

RICHARD ZACKS
*TREASURER*

Re: Oppose S. 1845, Which Splits the U.S. Court of Appeals for the Ninth Circuit

Dear Chairman Specter and Senator Leahy:

The American Civil Liberties Union urges you to oppose S. 1845, which would split the United States Court of Appeals for the Ninth Circuit into two new circuits. The new Ninth Circuit would consist of California, Hawaii, Guam, and the Northern Mariana Islands. The new Twelfth Circuit would have the remaining states from the present Ninth Circuit, namely, Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington.

The ACLU opposes any legislative proposal that disciplines federal judges other than removal by impeachment. Protecting the judiciary from legislative pressure is fundamental to maintaining an independent judiciary. In fact, the Constitution even prohibits Congress from reducing salaries for judges during their service. Redistricting the courts of appeals in response to disfavored judicial decisions is at least as threatening to separation of powers as a salary reduction.

Congress may revise the judicial map to account for population shifts or to balance judicial caseloads, but the proposed split of the more than century-old Ninth Circuit appears to be driven primarily by an interest in affecting the decisions of the new proposed appellate court by cordoning off those judges whose decisions some senators do not like. In fact, the legislation is so results oriented that it even ignores the historical practice of creating diversity within circuits by including at least three states. Enactment of any of these bills would send a message to judges that Congress seeks oversight over judicial decisions.

When Congress last seriously considered splitting the Ninth Circuit, in 1997, it instead set up a commission to consult with judges and practitioners in the affected states to develop a plan for promoting judicial economy and improving access to justice. The resulting commission recommended against splitting the Ninth Circuit. However, the commission also recommended numerous administrative reforms, which the Ninth Circuit is now implementing. The ACLU urges you to allow the Ninth Circuit to complete its changes and have them be tested by experience before reopening the possibility of splitting the circuit.



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Thank you for your attention to this matter. Please do not hesitate to call us at 202-675-2308 if you need any additional information.

Sincerely,

Caroline Fredrickson
Director

Christopher E. Anders
Legislative Counsel



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Helen Perry Grimwood, President
The Grimwood Law Firm, plc
3101 North Central Avenue, Suite 940, Phoenix, AZ 85012
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College of Law
Dean Patricia White
Arizona State University
College of Law

June 8, 2006

The Honorable Jon Kyl
730 Hart Senate Office Building
United States Senate
Washington, D.C. 20510-0304

Dear Senator Kyl:

On May 3, when our State Bar delegation met with Steve Higgins of your office, we promised to provide you with a summary of the main reasons for the State Bar Board of Governor's continued and long-standing opposition to the various Congressional bills to split the Ninth Circuit Court of Appeals. The following summarizes the Board's principal concerns.

- The State Bar disagrees with the premise that there is a problem with the Ninth Circuit. The Circuit is functioning well and serves Arizona litigants well.

- The Ninth Circuit is doing a good job in administering its caseload. It has been innovative with the creation of more efficient processes such as new mediation systems and a new system for screening and evaluating cases.

- Uniformity of law serves Arizonans well. Arizona businesses and litigants often have close ties to other states in the Circuit. Moreover, the federal courts handle immigration and border issues. It makes sense to have California and Arizona border issues handled by the same Court of Appeals.

- Some of the split proposals have called for the new circuit court to be headquartered in remote locations. That would make it difficult and costly for Arizona lawyers and litigants to appear in court.

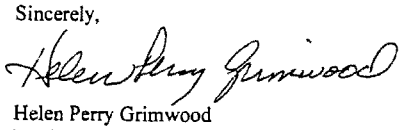
4201 N. 24th Street • Suite 200 • Phoenix, AZ 85016-6288

- None of the proposals to split the Ninth Circuit effectively have addressed how a split would be funded. The federal system is already under-funded and strong financial support is critical to maintaining a federal court system with adequate resources.

- It is not appropriate for any Court to be dismantled by the political branches of government based, in whole or even in part, on disagreement with the Court's decisions in particular cases. The Courts must be respected as a separate branch of our Government. The Courts of Appeals must be allowed to make decisions in every case, independent of political interference, and subject only to a proper review by the United States Supreme Court. The State Bar opposes all politically motivated efforts to affect the outcome of court cases or change the administration of justice. Decisions about the court system should be motivated only by the need to maintain fair and impartial courts where justice can be efficiently administered.

Please consider these points seriously as you continue in your work to determine what is in the best interest of Arizonans. The Board of Governors would be happy to continue as a resource to you on this matter, and appreciates your interest in our view. The Ninth Circuit split remains an important issue to the State Bar of Arizona.

Sincerely,



Helen Perry Grimwood
President

HPG:tr

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

95 SEVENTH STREET, SUITE 205
SAN FRANCISCO, CALIFORNIA 94103-1526

CHAMBERS OF
CARLOS TIBURCIO BEA
U.S. CIRCUIT JUDGE

TEL: 415.556.3000
FAX: 415.556.3001
Judge_Bea@ca9.uscourts.gov

September 14, 2006

The Honorable Arlen Specter
Chairman
Judiciary Committee
United States Senate
711 Hart Office Building
Washington D.C. 20510
*via facsimile 202/224-3799 and 202/224-9102*

Re: Proposed Ninth Circuit Split Bill

Dear Mr. Chairman:

I am writing on behalf of recent (2000 and later) appointees to the U.S Court of Appeals for the Ninth Circuit, in opposition to the proposed Bills to split our Circuit. I have been authorized by Judges Rawlinson, Clifton and Callahan to write you on their behalf.

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 of 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



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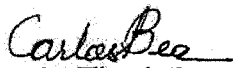
several locations in which we sit enhances rather than diminishes the enthusiasm and collegiality we have encountered.

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.

Thank you for your consideration of our views. If you have any further questions, don't hesitate to ask them of us.

Very truly yours,



Carlos Tiburcio Bea
U.S. Circuit Judge

cc: Honorable Patrick Leahy, Ranking Member
*via facsimile 202/224-9516*

**STATEMENT OF**
**SEN. BARBARA BOXER**
**ON PROPOSED LEGISLATION**
**TO SPLIT THE 9TH CIRCUIT, S.1845**
September 20, 2006

Mr. Chairman, Senator Leahy, and members of the Senate Committee on the Judiciary, thank you for inviting me to speak about this very important topic – the proposed split of the 9th Circuit Court of Appeals.

This issue is important for many reasons, not the least of which is the effect this proposed bill will have on the federal appellate judges in my home state of California. This bill, which I oppose, has managed to bring together people from a wide range of the political spectrum in opposition.

I would like to welcome former Governor and Senator Pete Wilson. Thank you for taking the time to come and speak before the Committee today.

The 9th Circuit consists of federal courts in the following states – Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington. The bill before the Committee today would create a "new" 9th Circuit, with only California and Hawaii, and a new 12th Circuit, consisting of the other states.

I oppose this legislation for three reasons. First, splitting the 9th Circuit is unnecessary. Second, splitting the 9th Circuit would create additional costs without benefits, and create administrative problems that do not currently exist. Third, this bill opposed by the majority of people who would be most affected – the judges and attorneys of the 9th Circuit.



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While it is true that the 9th Circuit has the largest caseload of any federal appellate court, the court has performed well, according to most measures of judicial performance. Indeed, the 9th Circuit is one of the fastest courts in the country in terms of issuing decisions following oral argument. To the extent there is delay in the movement of cases in the circuit, it is due to the high caseload per judge in the circuit, which can lead to delays in assigning judges to each case.

However, this issue could be resolved by adding more judges to the circuit, which would decrease the caseload per judge. Adding judges to the circuit would be more effective and less costly than creating a new circuit court.

Splitting the 9th Circuit would lead to an interesting result – the new "9th Circuit" with California and Hawaii would be left with 71% of the former circuit's caseload – just over 11,000 cases – spread among 58% of the former circuit's judges. Thus, splitting the circuit would actually increase the caseload per judge in California and Hawaii, not decrease the caseload.

What is the benefit of adding cases to our judges? Does it make sense to claim that the judges in the circuit are overburdened, then propose a fix that increases their caseload? That does not make sense to me.

Also, this bill would require the creation of a new administrative bureaucracy for the new 12th Circuit, including construction costs, along with personnel and administrative costs. And what is the benefit we get for these additional costs? We get less judicial efficiency in the federal courts in my home state. Does that make sense?

Only twice in our nation's history have we divided a federal judicial circuit. And both times, the split was supported by the majority of judges and attorneys in the circuit who were to be affected by the split.



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In this case, the split of the 9th Circuit is not supported by the majority of judges and attorneys in the circuit. On the contrary, most oppose splitting the circuit.

Here are some quick statistics – 18 of the 26 active federal appellate judges in the 9th Circuit oppose the split proposed in this bill. Many of the trial court judges in the circuit, whose decisions are reviewed by the appellate judges, also oppose this bill.

The American Bar Association and almost every state bar association for the states covered by the 9th Circuit oppose breaking up the circuit.

Yet, in the face of this overwhelming opposition, there is still a push within the Senate to split the 9th Circuit Court of Appeals.

I urge my colleagues to vote against this bill, which would not only increase the burdens on federal appellate judges in my home state, but also send a bad message that we do not respect the independence of our judiciary.



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# Department of Justice

STATEMENT

OF

RACHEL L. BRAND
ASSISTANT ATTORNEY GENERAL FOR LEGAL POLICY
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

LEGISLATIVE PROPOSALS TO SPLIT THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PRESENTED ON

SEPTEMBER 20, 2006



43383.093

**Statement of**
**Rachel L. Brand**
**Assistant Attorney General for Legal Policy**
**Department of Justice**

**Before the**
**Committee on the Judiciary**
**United States Senate**

**Concerning**
**Legislative Proposals to Split the United States Court of Appeals for the Ninth Circuit**

**September 20, 2006**

Chairman Specter, Senator Leahy, and members of the Committee, thank you for the opportunity to testify on this important issue. From time to time, Congress has acted to improve the administration of justice by adding or splitting United States Courts of Appeals. For example, more than 25 years ago, Congress split the Fifth Circuit into the new Fifth Circuit and what is now the Eleventh Circuit. Today, the Ninth Circuit bears a strong resemblance to the pre-split Fifth Circuit. As a frequent litigant in the federal system and in the Ninth Circuit, the Department of Justice is directly affected by the Ninth Circuit's ability to function efficiently. Furthermore, the Department has a strong interest in the efficient administration of justice generally. The Department therefore supports legislation providing for additional federal judgeships and for a split of the United States Court of Appeals for the Ninth Circuit.



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The Department of Justice believes that dividing the Ninth Circuit would benefit the administration of justice at the federal level in the states located within the circuit. One factor favoring dividing the circuit is its sheer size. By any measure, whether geography, caseload, or number of authorized judgeships, the Ninth Circuit is the largest federal appellate court. The 11 states and territories within the circuit extend over more than 1.3 million square miles, which is nearly 40 percent of the entire United States. The circuit encompasses more states than any other circuit, and with over 58 million people in its jurisdiction, its population is almost double that of the Sixth Circuit, which, with a population of 31 million, is the second most populous circuit. The Ninth Circuit binds nearly twenty percent of the nation's population; thus, decisions by a three-judge panel in the circuit bind almost one in every five Americans. The population of the states within the Ninth Circuit grew far faster than the population of any other circuit over the past two decades. The United States Census Bureau projects that it will grow even more, both in absolute terms and relative to the other circuits, between 2000 and 2030. Notably, the Ninth Circuit includes the first-, second-, and sixth-fastest growing states: Nevada, Arizona, and Idaho.

The Ninth Circuit is also the largest circuit when measured by caseload. For the year ending in September 2005, 16,037 appeals were filed in the Ninth Circuit, a 12.4 percent increase from the year before. This was significantly more than the



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number of appeals filed in any other circuit and accounted for over 23 percent of the total number of appeals filed in the country. Between 2000 and 2005, the Ninth Circuit's caseload increased by over 70 percent, almost five times the average increase of the other circuits. The Ninth Circuit is disproportionately large in terms of judgeships, as well. The circuit has 28 authorized judgeships, which is 11 more than the next-largest circuit. Moreover, the circuit has 23 senior-status judges, some of whom handle the same large caseload as the active judges. Even with the large number of judges, it is often necessary to ask judges from other courts to hear cases in the Ninth Circuit by designation.

The Ninth Circuit's size has led to administrative difficulties that have adversely affected its ability to operate effectively. As of September 2005, the Ninth Circuit was the slowest circuit in resolving cases. During the 12-month time period ending September 30, 2005, the median time from filing of notice of appeal to final disposition of a case was over 16 months, which is over four months longer than the national average of 11.8 months. The delay in resolving cases has increased since the 12-month time period ending September 30, 2004, when it took a median time of 14 months from filing of notice of appeal to final disposition of a case. Additionally, the Ninth Circuit had the most cases pending for more than three months and for more than six months in September 2005. This inefficiency impacts negatively on both the Department of Justice, as a frequent litigant in the



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Ninth Circuit, and other parties waiting for their cases to be resolved. For example, aliens who are detained during the appellate review of their petitions but are ultimately granted legal status in the United States face an extended loss of freedom in the Ninth Circuit. The Government, on the other hand, faces increased detention costs. Similarly, in situations where an alien is challenging a removal order, the delay in resolving the case allows aliens who are subject to removal to remain in the United States for a longer period of time, while non-detained aliens who are ultimately found to be not subject to removal can face challenges in finding employment or traveling during the pendency of their appeal.

As Judges Tallman and O'Scannlain have noted, the number of appeals the court hears makes it virtually impossible for the judges of the Ninth Circuit to read all of the opinions issued by their own court. Judge Tallman has testified that there are "simply not enough hours in the day for even the most conscientious and hardworking judge to remain current" by reading other Ninth Circuit opinions. Judge O'Scannlain has echoed that concern, noting that Ninth Circuit judges are "losing the ability to keep track of the legal field in general and [their] own precedents in particular." Even the most diligent Ninth Circuit judge will be unable to monitor every opinion issued by the court, especially considering the large number of unpublished opinions, which account for over 80 percent of the circuit's terminated cases. This can lead to intra-circuit inconsistencies, which



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make it difficult for citizens, organizations, and government agencies within the Ninth Circuit to conform their actions to the law. For example, in *United States v. Juvenile*,[1] one panel of the Ninth Circuit limited district courts' authority to consider issues beyond rehabilitation when sentencing under the Federal Juvenile Delinquency Act. In cases decided after *United States v. Juvenile*, however, different panels reached precisely the opposite conclusion, holding that district courts are allowed to consider other issues besides rehabilitation under the Federal Juvenile Delinquency Act.[2] This type of inconsistency also presents unique challenges to lawyers, including those employed by the Department of Justice, litigating before that court. As Justice Kennedy has pointed out, the size of the circuit creates an "unacceptably large risk of intra-circuit conflicts or, at the least, unnecessary ambiguities."

When a circuit is faced with an intra-circuit conflict or a panel decision that conflicts with Supreme Court precedent or raises a serious legal question, a majority of the active judges on the court can vote to hear the case *en banc*. In every circuit but the Ninth, all active, non-recused judges sit for an *en banc* proceeding. The number of active judges on the Ninth Circuit makes a traditional *en banc* proceeding impracticable. The Ninth Circuit has adopted a unique and

[1] 347 F.3d 778, 787 (9th Cir. 2003).
[2] *See United States v. D.R.L.*, 2003 WL 22735846, at *1 (9th Cir. 2003) (unpublished); *United States v. Juvenile #1 (LWQ)*, 38 F.3d 470, 472 (9th Cir. 1994); *United States v. J.L.B.*, 141 F.3d 1181, 1998 WL 101716 at *3 (9th Cir. 1998) (unpublished).



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frequently criticized *en banc* procedure. Rather than having all active judges hear a case *en banc* as all other federal courts of appeals do, only 15 out of 28 active judges participate when the Ninth Circuit hears a case *en banc*. This number used to be even lower, but the circuit increased the number of participating judges from 11 to 15 in 2006 in response to criticism of the procedure. This means that a majority of the *en banc* panel is eight judges, less than a third of the active court. In a close eight-to-seven vote, eight judges will speak for the entire court, deciding cases for almost 20 percent of the American population. Judges who hold a minority view on the court might easily be the majority in the *en banc* proceeding, subverting the purpose of the *en banc* rehearing. The court cannot effectively reconsider its decisions with these *en banc* procedures, and, because of its size, a full *en banc* hearing with all 28 judges is not feasible on a regular basis. Although the Ninth Circuit may consider a case with a full *en banc* hearing, the judges have never voted in favor of such a review. With the limited *en banc* review, judges who participated in the panel decision might not be selected for the *en banc* review at all. For example, in the California recall election case, the original panel unanimously made one decision and then the *en banc* panel unanimously came to the opposite conclusion. The *en banc* panel did not include any members of the original panel.



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Even the truncated *en banc* procedure is invoked rarely. Accordingly, intra-circuit inconsistencies that could be solved through *en banc* procedures are not. On a number of occasions, the Department of Justice has sought *en banc* review without success on issues the Solicitor General has deemed to be of great legal significance pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure (where *en banc* review is necessary to "secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance"). For example, in *United States v. Olabanji*,[3] the Government's request for rehearing *en banc* was denied, despite the existence of an intra-circuit conflict. In *Olabanji*, the Ninth Circuit held that district judges must consider policy statements and the sentencing guidelines for the underlying offense when calculating a sentence after revoking probation. As Judge Graber pointed out in her dissent from denial of rehearing *en banc*, this decision conflicted with the Ninth Circuit panel decision in *United States v. George*,[4] which held that when sentencing for probation violations, district court judges should consider policy statements and sentencing guidelines for probation violations, not the guidelines applicable to the original offense.[5] As another example, a Ninth Circuit panel held in *United States v. Patterson*[6] that Double Jeopardy attached when the district court accepted the defendant's guilty

[3] 268 F.3d 636, 639 (9th Cir. 2001).
[4] 184 F.3d 1119 (9th Cir. 1999).
[5] *United States v. Olabanji*, 286 F.3d 1114, 1117-18 (9th Cir. 2002) (Graber, J., dissenting from denial of rehearing en banc).
[6] 381 F.3d 859, 864-65 (9th Cir. 2004).



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plea, thus precluding the Government from prosecuting Patterson for a greater offense, even though Patterson only pled guilty to the lesser included offense. The Government petitioned for rehearing *en banc*, citing a Supreme Court case[7] that held that prosecution on remaining charges that are greater or lesser included offenses does not violate the Double Jeopardy Clause. Despite this inconsistency, the Government's petition was denied. The lack of clarity in the law that results from intra-circuit splits and Ninth Circuit decisions that are inconsistent with the opinions of the Supreme Court makes it difficult for all individuals in the Ninth Circuit, including law enforcement, to structure their primary conduct.

Caseloads indicate that the conditions described above will only intensify with time. For example, there has been a marked growth in immigration appeals over the past three years. This problem is particularly prevalent in the Ninth Circuit, which includes much of the southwest border of the United States. In fact, appeals from the Board of Immigration Appeals to the Ninth Circuit increased by an astounding 575 percent from 2002 to 2006.

Previous judicial reorganizations, and particularly the split of the former Fifth Circuit into the current Fifth Circuit and Eleventh Circuits, were undertaken in circumstances similar to those in the Ninth Circuit today. In 1973, the Commission on Revision of the Federal Court Appellate System, the Hruska

[7] *Ohio v. Johnson*, 467 U.S. 493 (1984).



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Commission, recommended that the Fifth and Ninth Circuits be split. The Fifth Circuit was split in 1980 primarily because of its size and yet, today, the Ninth Circuit is nearly the same size in terms of geography and judgeships as the current Fifth and Eleventh Circuits combined. The relative size of the Ninth Circuit and the former Fifth Circuit is also seen by comparing the caseloads of those courts. During the 12-month time period ending on June 30, 1980, the number of appeals commenced in the former Fifth Circuit accounted for over 18 percent of the total filings in the country. Currently, however, the number of appeals filed in the Ninth Circuit in the 12-month period ending on September 30, 2005, represents over 23 percent of the total number of appeals filed nationwide, which is up from 16 percent in 1980 and nearly 18 percent in 2001. These percentages show that the Ninth Circuit is dealing with a higher share of the courts' appellate caseload than the former Fifth Circuit dealt with when Congress split that circuit, and that the volume of cases in the Ninth Circuit, as compared to the other circuits, continues to increase. Judge Tjoflat, an active judge on the former Fifth Circuit at the time of its split and now a senior judge on the Eleventh Circuit, has stated that the split was an unequivocal success in terms of improving efficiency, consistency, and collegiality.

The Department also supports legislation providing for additional judgeships in the Ninth Circuit; specifically, we expressed our support in November 2005 for



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legislation that would create five new judgeships and two temporary judgeships for the new Ninth Circuit. These additional judgeships would bring the new Ninth Circuit's caseload per judge down to approximately 518 and from second-highest to fourth-highest nationally. Although the new Twelfth Circuit would initially have a caseload below that of the new Ninth Circuit, the new Twelfth Circuit would include Nevada, Arizona, and Idaho, which are projected to be the first-, second-, and sixth-fastest between 2000 and 2030. With that population growth inevitably will come a growth in caseload per judge for that new circuit.

Thank you for the opportunity to present our views. The Department looks forward to working with Congress and the Judiciary on the important issues of splitting the Ninth Circuit and providing additional federal judgeships.



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Testimony of the Honorable Richard Bryan

United States Senator from Nevada (1989-2001)

before the

United States Senate Committee on the Judiciary

"Examining the Proposal to Restructure the Ninth Circuit"

September 20, 2006

Mr. Chairman, Senator Leahy, and members of the Committee, I appreciate the opportunity to submit testimony on the important issue of restructuring the Ninth Circuit Court of Appeals. I had the pleasure of serving in the Senate with many members of this Committee, and, as you know, examining the organization of the Ninth Circuit is not a new issue for me. I hope that I can bring a unique perspective to this debate both as a practicing attorney in Nevada and by having the honor of being the only Nevadan to have served as a State Legislator, Attorney General, Governor, and United States Senator.

I am pleased that the full Judiciary Committee is having a hearing on this issue, as I know there have been numerous efforts over the years to divide this Circuit on budget reconciliation and various appropriations bills. An issue of this magnitude has far-reaching implications and deserves the careful deliberation of this Committee and the full Senate. There have been numerous legislative proposals to split the Ninth Circuit over the years, many of which pre-date my tenure in Congress, and each bill has presented a different paradigm. After reviewing the legislation before the Committee today, the old adage that I have quoted many times before when considering splitting this Circuit still applies, "If it ain't broke, don't fix it." In my opinion, the Ninth Circuit is not broken.

One of the most frequent criticisms of this Circuit by those who support its division is that cases take too long to reach final disposition. While the Ninth Circuit may lag in overall time from the filing of an appeal to disposition, it is among the fastest in the nation in resolving cases once the case is heard by the Court. The national average time from hearing to decision is 2.1 months, yet the average in the Ninth Circuit is 1.3 months, making it the second fastest in the nation. Any perceived delay in the Circuit should be attributed to the heavy caseloads of the Ninth Circuit judges.

Senators Kyl and Ensign's bill, the "Circuit Court of Appeals Restructuring and Modernization Act," would split the Ninth Circuit into a "new" Ninth Circuit consisting of California, Hawaii, Guam, and the Northern Mariana Islands and a new Twelfth Circuit that includes Arizona, Nevada, Montana, Idaho, Washington, Oregon, and Alaska.

The bill would increase the number of permanent judgeships in the Ninth Circuit by five and add two "temporary" judgeships that would expire after ten years. At first blush, one might think this division into two circuits and a few new judges just might do the trick to speed up the Court; however, a close look at the numbers tells the whole story. Currently, the average caseload in the Ninth Circuit is 570 cases per judgeship, as opposed to 381 cases per judgeship in the other Circuits.

The Kyl/Ensign bill (even after adding a few new judgeships) would not remedy this problem – it would exacerbate it for the Ninth Circuit. Under this proposal, the "new" reorganized



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Ninth Circuit would have an average of 600 cases per judgeship and the new Twelfth Circuit would average 326 cases per judgeship. Under the bill, the "new" Ninth Circuit would still have the one of the highest caseloads of any Circuit Court in the country.

Clearly, the motivation behind this bill is not to speed up the deliberations of the Ninth Circuit. Any serious effort to reduce the caseload of the judges on the Ninth Circuit must include the creation of new judgeships.

Moreover, the primary source of the high number of cases in the Ninth Circuit is immigration appeals. While the number of non-immigration appeals in the Ninth Circuit has remained constant since 2002, immigration appeals have increased by 479% in the Ninth Circuit since 2002, constituting 40% of the Ninth Circuit caseload today. Passage of immigration reform legislation would likely have a significant impact on the Ninth Circuit's immigration caseload. Dividing the Circuit prior to the passage of this legislation would be premature.

Another criticism of the Ninth Circuit has been a perceived lack of uniformity in the case law. There has never been sufficient evidence to substantiate this claim, and in fact, the opposite is true. Splitting the Ninth Circuit would eliminate uniformity of law in the West, since States sharing common concerns could end up with different law. This could have significant impact on immigration, water, technology and other areas of law.

Currently, no Circuit Court of general jurisdiction includes fewer than 3 states. I was involved with the establishment of the White Commission, and I have great respect for its members. The White Commission recognized that a Circuit with fewer than 3 states would not have the legislative representation to ensure that the Circuit would receive sufficient resources. The Circuits could lose their federal nature and become overly state focused.

Most importantly, there is no consensus that the Ninth Circuit should be split. In fact, an overwhelming majority of judges and lawyers practicing in the Ninth Circuit are opposed to reorganizing the circuit at all. Eighteen of the twenty-six active judges oppose the split. The seven state bar associations that have weighed in on the split (Alaska, Arizona, Oregon, Hawaii, Montana, Nevada and Washington), all oppose breaking up the Ninth Circuit. It is my understanding that the State Bar of Nevada sent a letter to the Committee last week reaffirming its longstanding opposition to the split.

As if these were not reason enough, finally there are serious financial burdens associated with splitting the Ninth Circuit. Splitting the Ninth Circuit would require the creation of a new and costly bureaucracy to administer the new circuit in a time when our federal judiciary is already facing severe cuts.

In conclusion, I believe the Ninth Circuit is functioning well and is not in need of major, structural reforms. I thank the Committee for letting me share my thoughts on this important matter.



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March 29, 2005

VIA FACSIMILE AND U.S. MAIL

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
2449 Rayburn HOB
Washington, DC 20515-4905
Facsimile: (202) 225-3190

The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
United States House of Representatives
2426 Rayburn HOB
Washington, DC 20515-2214
Facsimile: (202) 225-0072

The Honorable Lamar S. Smith
Chairman, Subcommittee on Courts,
the Internet, and Intellectual Property
Committee on the Judiciary
United States House of Representatives
2231 Rayburn HOB
Washington, DC 20515-4321
Facsimile: (202) 225-8628

The Honorable Howard L. Berman
Ranking Member, Subcommittee on Courts,
the Internet, and Intellectual Property
Committee on the Judiciary
United States House of Representatives
2221 Rayburn HOB
Washington, DC 20515
Facsimile: (202) 225-3196

Re Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2005 (H.R. 211 and 212) - OPPOSE

Dear Gentlemen:

Please accept this letter on behalf of the Executive Committee of the Litigation Section of the State Bar of California.

The Executive Committee of the Litigation Section of the State Bar of California on behalf of the Litigation Section opposes H.R. 211 and 212, the latest in a series of proposals to split the Ninth Circuit. There is no sound reason to split the Ninth Circuit, and certainly no reason to incur the very substantial costs that such a split would generate.

This position is only that of the Executive Committee of the Litigation Section of the State Bar of California. This position has not been adopted by the State Bar's Board of Governors, its overall membership, or the overall membership of the Litigation Section, and is not to be construed as representing the position of the State Bar of California. Membership in

the Litigation Section and its Executive Committee is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

Founded in 1983, the Litigation Section of the State Bar of California has over 9,000 members and is one of the largest of the State Bar of California Sections. Litigation Section members practice before the courts of the Ninth Circuit, and are an important constituency of the Circuit. The mission of the Litigation Section is to promote excellence and civility in litigation and alternative dispute resolution. The Litigation Section gives effect to its mission by (a) furthering the knowledge of Section members in all aspects of litigation, whether before judicial, quasi-judicial, or administrative tribunals, and in aspects of alternative dispute resolution, (b) assisting in the formulation, administration and implementation of programs, forums and other activities for the education of members of the State Bar in the area of litigation, and (c) assisting with the formulation, administration and implementation of regulations and legislation which impact the quality of justice.

The proposed split of the Ninth Circuit has a direct, substantial and negative effect on the quality and cost of justice. Thus, we write this letter in opposition to the proposal.

As both Chief Judge Mary M. Schroeder and Senior Judge Clifford Wallace testified on April 7, 2004, splitting the Ninth Circuit lacks the support of a consensus of the judges and lawyers in the Ninth Circuit. Moreover, the proposed division serves no legitimate interest and will, in fact, hamper the effective and consistent administration of justice in the western United States.

Dividing the Ninth Circuit would do away with the important advantages that flow from a large circuit. The Ninth Circuit currently enjoys significant economies of scale in its administrative and managerial functions. A divided circuit would have to duplicate many of those functions: splitting the Ninth Circuit, as proposed by H.R. 211 and 212, would cost an estimated $100 million, plus $10 million per year in added administrative costs. At a time when our federal government is facing significant deficits, and our federal courts are struggling to secure adequate funding, our efforts should be directed at lowering costs, not increasing them—particularly where, as here, the increased costs will do nothing to improve the administration of justice in the circuit.

As the nation's largest federal circuit, the Ninth Circuit has consistently been at the forefront of technological and administrative innovation. As caseloads grow in all of the nation's Courts of Appeals, efficient administration will become ever more essential. As Senior Judge Wallace pointed out in his testimony last year, simply splitting a large circuit confers no such benefit; that path will lead only to fragmented federal law and increased inter-circuit conflicts. Even in the face of an increasing workload, the Ninth Circuit has been delivering coherent, consistent circuit law. An undivided Ninth Circuit will continue to serve as a model of effective administration of a large appellate court for the rest of the country.

MAZZARELLA DUNWOODY CALDARELLI LLP

Sensenbrenner, Smith, Conyers, Berman
March 29, 2005
Page 3

The Ninth Circuit has been consistently and effectively serving the western United States for over 110 years. Dividing this venerable institution will yield no benefits, and will squander the significant economies of scale that the circuit currently enjoys. We urge you and your colleagues to reject H.R. 211 and 212, as well as any other proposals to split the Ninth Circuit.

Very truly yours,

William J. Caldarelli
Chairman, Litigation Section of the State Bar

WJC:etc

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

The Honorable Arlen Specter
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

**Re: Senate Committee on the Judiciary Hearing: "Examining the Proposal to Restructure the Ninth Circuit"**

September 18, 2006

Dear Chairman Specter and Ranking Member Leahy:

On behalf of the 109 undersigned national, regional, state and local civil rights, women's rights, disability rights, senior, Native American, labor, health, religious, conservation and other groups we submit for your review the attached letter opposing S. 1845 and any other bill that would split up the U.S. Court of Appeals for the Ninth Circuit. Please include this letter in the official record of the Senate Committee on the Judiciary's September 20th hearing: "Examining the Proposal to Restructure the Ninth Circuit."

We respectfully urge your careful review of this letter and other non-partisan (and bi-partisan) opposition to splitting up the Ninth Circuit Court of Appeals. For comprehensive links to this wide-ranging opposition see our website at:
http://www.judgingtheenvironment.org/issues/page.jsp?itemID=27579314

Thank you for considering our views on this important subject. If you have any questions, please contact me at 202 667 4500.

Sincerely,

/s/

Glenn Sugameli
Senior Judicial Counsel
Earthjustice

CC: Members, Committee on the Judiciary

1625 MASSACHUSETTS AVENUE, SUITE 702 WASHINGTON, DC 20036-2212
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ALLIANCE FOR JUSTICE ♦ AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME) ♦ AMERICANS FOR DEMOCRATIC ACTION
♦ AMERICAN LANDS ALLIANCE
♦ CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)
♦ CLEAN WATER ACTION ♦ DEFENDERS OF WILDLIFE
♦ DISABILITY RIGHTS EDUCATION & DEFENSE FUND (DREDF)
♦ EARTHJUSTICE ♦ EARTHRIGHTS INTERNATIONAL ♦ EQUAL JUSTICE SOCIETY
♦ FEMINIST MAJORITY ♦ FRIENDS OF ANIMALS ♦ FRIENDS OF THE EARTH
♦ JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW
♦ LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW ♦ LEGAL MOMENTUM
♦ LIVING EARTH ♦ LOVE MAKES A FAMILY, INC.
♦ MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF)
♦ NATIONAL ABORTION FEDERATION ♦ NATIONAL AUDUBON SOCIETY
♦ NATIONAL CENTER FOR LESBIAN RIGHTS ♦ NATIONAL COUNCIL OF JEWISH WOMEN ♦ NATIONAL GAY AND LESBIAN TASK FORCE ♦ NATIONAL HEALTH LAW PROGRAM ♦ NATIONAL ORGANIZATION FOR WOMEN (NOW)
♦ NATIONAL SENIOR CITIZENS LAW CENTER
♦ NATIONAL TRIBAL ENVIRONMENTAL COUNCIL
♦ NATURAL RESOURCES DEFENSE COUNCIL (NRDC) ♦ THE OCEAN CONSERVANCY
♦ PEOPLE FOR THE AMERICAN WAY ♦ PROGRESSIVE JEWISH ALLIANCE
♦ SAFE FOOD AND FERTILIZER ♦ SIERRA CLUB ♦ WESTERN LANDS PROJECT
♦ THE WILDERNESS SOCIETY ♦ WILDLANDS CPR
♦ WOODHULL FREEDOM FOUNDATION ♦ WORKMEN'S CIRCLE/ARBETER RING
♦ WORLD STEWARDSHIP INSTITUTE
♦ XERCES SOCIETY FOR INVERTEBRATE CONSERVATION

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ALASKA COALITION ♦ ALASKA CONSERVATION SOLUTIONS
♦ ALASKA RAINFOREST CAMPAIGN ♦ AMERICAN WILDLANDS
♦ AUDUBON SOCIETY OF PORTLAND
♦ THE BANDON, OREGON BILL OF RIGHTS DEFENSE COMMITTEE
♦ BARK ♦ BIODIVERSITY CONSERVATION ALLIANCE
♦ CALIFORNIANS FOR ALTERNATIVES TO TOXICS
♦ CALIFORNIA NATIONAL ORGANIZATION FOR WOMEN
♦ CALIFORNIA NATIVE PLANT SOCIETY ♦ CALIFORNIA WILDERNESS COALITION
♦ CALIFORNIA WOMENS LAYWERS ♦ CENTER FOR BIOLOGICAL DIVERSITY
♦ CENTER FOR COMMUNITY ACTION AND ENVIRONMENTAL JUSTICE
♦ CENTER FOR ENVIRONMENTAL LAW AND POLICY
♦ CENTER FOR NATIVE ECOSYSTEMS ♦ CENTER ON RACE, POLICY, & THE ENVIRONMENT ♦ CITIZENS FOR THE CHUCKWALLA VALLEY
♦ COLUMBIA RIVERKEEPER ♦ COMMITTEE FOR JUDICIAL INDEPENDENCE
♦ CONSERVATION NORTHWEST ♦ EARTH DAY NETWORK
♦ ENDANGERED HABITATS LEAGUE ♦ ENVIRONMENTAL LAW FOUNDATION
♦ THE ENVIRONMENTAL PROTECTION INFORMATION CENTER (EPIC)



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♦ FOREST GUARDIANS ♦ FORESTS FORVEVER
♦ FRIENDS OF THE COLUMBIA GORGE ♦ FRIENDS OF THE PANAMINTS
♦ IDAHO CONSERVATION LEAGUE ♦ GIFFORD PINCHOT TASK FORCE
♦ GREAT OLD BROADS FOR WILDERNESS ♦ KENTUCKY RESOURCES COUNCIL, INC
♦ KLAMATH FOREST ALLIANCE ♦ KLAMATH-SISKIYOU WILDLANDS CENTER
♦ KOOTENAI ENVIRONMENTAL ALLIANCE ♦ THE LANDS COUNCIL
♦ NARAL PRO-CHOICE ARIZONA ♦ NARAL PRO-CHOICE CALIFORNIA
♦ NATIONAL COUNCIL OF JEWISH WOMEN CALIFORNIA
♦ NORTHWEST ENVIRONMENTAL ADVOCATES ♦ NORTHWEST ENVIRONMENTAL DEFENSE CENTER ♦ OKANOGAN HIGHLANDS ALLIANCE
♦ OLYMPIC FOREST COALITION ♦ OREGON CENTER FOR ENVIRONMENTAL HEALTH ♦ OREGON COUNCIL TROUT UNLIMITED
♦ OREGON NATURAL DESERT ASSOCIATION
♦ OREGON NATURAL RESOURCES COUNCIL ♦ OREGON TOXICS ALLIANCE
♦ PACIFIC ENVIRONMENTAL ADVOCACY CENTER
♦ PLANNING AND CONSERVATION LEAGUE ♦ PUBLIC ADVOCATES, INC.
♦ RELIGIOUS CAMPAIGN FOR FOREST CONSERVATION ♦ SAVE THE VALLEY
♦ SISKIYOU PROJECT ♦ SITKA CONSERVATION SOCIETY ♦ SODA MOUNTAIN WILDERNESS COUNCIL ♦ SOUTHEAST ALASKA CONSERVATION COUNCIL
♦ TRUSTEES FOR ALASKA ♦ UMPQUA WATERSHEDS, INC. ♦ VALLEY WATCH, INC.
♦ WATERWATCH OF OREGON ♦ WESTERN ENVIRONMENTAL LAW CENTER
♦ WILDERNESS STUDY GROUP AT THE UNIVERSITY OF COLORADO
♦ WORKMEN'S CIRCLE/ARBETER RING SOUTHERN CALIFORNIA DISTRICT

September 18, 2006

**Re: Oppose Proposals to Split the Ninth Circuit**

Dear Senator:

We urge you to oppose S. 1845, the "The Circuit Court of Appeals Restructuring and Modernization Act of 2005," and other proposals to split the U. S. Ninth Circuit Court of Appeals into separate appellate courts.

Anti-environmental and other special interests have long desired to increase their ability to "judge-shop" by dividing the Ninth Circuit Court of Appeals into a number of smaller courts of appeals. By "dividing and conquering" the Ninth Circuit, polluters and other special interests hope to change the pool of judges who will decide their cases. The result would be less consistency in the law affecting Western and Pacific issues. For example, it would fracture the management of natural resources in the Pacific Ocean and numerous special places in the western states, and leave them vulnerable to greater exploitation and mismanagement.

Pete Wilson, as a Republican U.S. Senator from California (who later served two-terms as Governor), condemned previous efforts to split the Ninth Circuit, calling them attempts at

"environmental gerrymandering" by those who had been angered by rulings upholding and enforcing environmental laws. Opposition to the current efforts to split the Ninth Circuit includes: Mary Schroeder, the current Chief Judge; Senior Judge Clifford Wallace, a former Chief Judge who was nominated by a Republican President; the next Chief Judge, Alex Kozinski, a conservative judge who was appointed to the Ninth Circuit in 1985 by President Ronald Reagan, and who maintains his chambers in California; and the vast majority of other Ninth Circuit judges, including at least three appeals court judges nominated by President Bush.

Other opponents of splitting the Ninth Circuit include California Governor Arnold Schwarzenegger, Arizona Governor Janet Napolitano, former-Washington Governor Gary Locke, the American Bar Association, the Federal Bar Association, the Hispanic National Bar Association, the Alaska Bar Association, State Bar of Arizona, Hawaii State Bar Association, State Bar of Montana, State Bar Association of Nevada, and Washington State Bar, as well as numerous local bar associations, prominent jurists, law professors, and legal advocates, and civil rights, women's rights, disability rights, senior, Native American, labor, health, religious, conservation and other national, state and local groups.

Splitting the Ninth Circuit would not only be bad for environmental protection and a range of other rights and safeguards, it would be fiscally irresponsible as well. The current proposal would only exacerbate the federal judiciary's virtually unprecedented fiscal crisis, which has led to suspension of new court construction and layoffs of court employees.

Please oppose ill-considered efforts to divide the Ninth Circuit. For comprehensive links to opposition see: http://www.judgingtheenvironment.org/issues/page.jsp?itemID=27579314

Sincerely,

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# How Large is Too Large for the Rule of Law?

Prepared Testimony of

Dr. John C. Eastman
Interim Associate Dean of Administration and
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Chapman University School of Law

Director, The Claremont Institute
Center for Constitutional Jurisprudence

Before

United States Senate
Committee on the Judiciary

Hearing on:

S. 1845
Circuit Court of Appeals
Restructuring and Modernization Act

September 20, 2006, at 2:00 p.m.
Senator Dirksen Office Building, Room 226



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**How Large is Too Large for the Rule of Law?**

**John C. Eastman***

Chairman Specter, members of the Judiciary Committee. I am truly delighted to be here with you today to discuss what I believe a critical issue in the administration of justice in the western third of the United States. As many of you know well, proposals to split the Ninth Circuit Court of Appeals have been offered on numerous occasions over the past half century. As early as 1954, the Ninth Circuit judicial council had endorsed a circuit-splitting proposal, although it withdrew its approval of the plan later that year.[1] Then again, in 1973, the Commission on Revision of the Federal Court Appellate System—the Hruska Commission—recommended splits for both the Fifth and Ninth Circuits.[2] Nearly a decade later, the Fifth Circuit was finally split, but the Ninth Circuit was left under the weight of rapid population growth and the resultant increased caseload. Throughout the past three decades, judgeships have been added and en banc proceedings modified to help the Ninth Circuit cope with its massive caseload without splitting the circuit. Now with 28 active judgeships, there are simply too many cases and too many judges in the Ninth Circuit to effectively administer justice in an efficient and cohesive manner. The ponderous structure that is the Ninth Circuit can continue in its present fashion indefinitely, but the rule of law within the circuit will certainly not last much

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[1] Commission on the Structural Alternatives for the Federal Courts of Appeals, Final Report, Pub. L. No. 105-119 at 43, December 18 1998.

[2] *Id.*



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longer, for reasons I will explain in a moment. Thus, it is imperative that the circuit be split, in order to create a structure under which the judiciary can perform its vital functions.

The Ninth Circuit is by far the largest in the nation, both in terms of geography, population and the corresponding workload. The circuit covers an area with nearly twice the population as the next most-populous circuit,[3] and accounts for nearly a third of all pending appeals in the country.[4] The rapid growth experienced by the states within the Ninth Circuit shows no sign of dissipating either; the Census Bureau estimates that by 2010, the states of the circuit will be home to 63 million people, a number that represents a 43% increase over 15 years.[5] Although the Ninth Circuit has more than double the average number of active judgeships as any other circuit,[6] those 28 judges are inundated with cases and unable to efficiently handle the constant caseload, resulting in a longer time from appeal to decision than exists in most other circuits. Unfortunately, simply adding more judges to the Ninth Circuit is not a plausible remedy.[7] Indeed, there are already too many judges in the Ninth Circuit – a situation that has exacerbated caseload problems and contributed to the inefficiency of the Circuit.

But more fundamentally than either caseload or judicial efficiency is the loss of collegiality on the court, and by that I do not mean merely the exchange of pleasantries by the judges. Collegiality, in the most general terms, denotes a feeling of shared authority among

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[3] Based on U.S. Census population projections, July 2006.

[4] Based on U.S. Courts Statistical Tables for the period ending March 31 2006.

[5] 1st Session, 104th Congress, Ninth Circuit Court of Appeals Reorganization Act 1995 at 9.

[6] Statistics from the Ninth Circuit AIMS Database.

[7] *See generally* Gerald Bard Tjoflat, *MORE JUDGES, LESS JUSTICE: The Case Against Expansion of the Federal Judiciary*, 79 A.B.A.J. 70, July 1993. *Cf.* Stephen Reinhardt, *TOO FEW JUDGES, TOO MANY CASES: A Plea to Save the Federal Courts*, 79 A.B.A.J. 52, January 1993.



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members of a group.[8] For our purposes, it is the idea that judges embody the knowledge that they have a "common interest . . . in getting the law right," as Judge Harry Edwards noted in a 2003 law review article.[9] Collegiality within an appellate panel permits an open, honest, and frank discussion of otherwise divisive issues without fracturing the unity of the group. Moreover, familiarity between judges allows each to learn of the other's "ways of thinking and reasoning, temperaments, and personalities,"[10] which in turn fosters a cohesive group in which ideas can be exchanged freely, an exercise which necessarily precedes a sound decision.[11] As First Circuit Judge Frank Coffin noted nearly two decades ago while serving as Chairman of the Committee on the Judicial Branch of the United States Judicial Conference:

> The increased size of courts and heavy workloads militate against the old-fashioned collegiality that existed when judges sat often with each other, had leisurely discussions together, wrote thoughtful memos back and forth, and, over a year's time, had many opportunities off the bench to dine and socialize with their colleagues. Friendship bred respect which led to consensus or, at least, civility. Now, with both trial and appellate courts composed of even larger numbers of judges, collegiality is at risk of being an endangered condition.

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[8] The American Heritage Dictionary 291 (2d college ed. 1982).

[9] Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003).

[10] *Id.* at 1647.

[11] *Id.* at 1650 ("The mental states of judges who are engaged in collegial deliberations are entirely different from those of judges on a court that is not operating collegially . . . . When a judge disagrees with the proposed rationale of a draft opinion, the give-and-take between the commenting judge and the writing judge often is quite extraordinary – smart, thoughtful, illuminating, probing, and incisive. Because of collegiality, judges can admit and recognize their own and other judges' fallibility and intellectual vulnerabilities . . . . The result is a better work product.")



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The consequences of a loss of collegiality should not be underestimated. An important by-product of collegiality within an appellate panel is the strengthening of the rule of law.[12] Instead of serving to fracture and divide the group, diverse viewpoints are able to engage in healthy scholarly debate, which results in "better and more nuanced opinions - opinions which, while remaining true to the rule of law, over time allow for a fuller and richer evolution of the law."[13] Collegiality thus serves to check the tendencies of some judges to "fly solo," ruling according to their personal views rather than the clear commands of the law. Additionally, the concept of judicial collegiality conveys a reverence for "circuit precedent and the principle of stare decisis,"[14] as well as a healthy reluctance to decide certain issues "in the absence of collegial deliberation."[15] Thus, collegiality is absolutely vital to the proper execution of the judicial function—that is, if we are to adhere to the founders understanding of the proper role of the judiciary as the branch which exercises judgment and not will.

The late Judge Edward Becker of the Third Circuit recognized the importance of collegiality among an appellate court's judges. Commenting on whether the structure of the federal appellate judiciary is suited to its ever-growing workload, Judge Becker wrote:

> "[W]e must not let the size of the courts of appeal themselves grow too large. In principle, each court of appeals should consist of a number of judges sufficient to maintain the traditional access to and excellence of federal appellate justice; to

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[12] Harry T. Edwards, *Race and the Judiciary*, 20 Yale L. & Pol'y Rev. 325, 329.

[13] *Id.*

[14] *Id.* at 1680.

[15] *Id.* at 1681 (citing Glass v. Blackburn, 767 F.2d 123, 124 (5th Cir. 1985) (per curiam) (noting that "the remaining issues require additional evaluation and collegial consideration before a ruling can be made"); *see also* Wells ex rel. Kehne v. Arave, 18 F.3d 658, 661 (9th Cir. 1994) (Reinhardt, J., dissenting) ("The Ninth Circuit en banc court less than four hours later denied a stay without any oral argument and without even assembling or otherwise discussing the case in a collegial manner. Surely this is no way for judges to perform the single most important duty assigned to them by the Constitution and federal law." (emphasis omitted))



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> preserve judicial collegiality; and to maintain the consistency, coherency, and quality of circuit precedent. An appellate court, in this special sense, is not merely an administrative entity. An appellate court is a cohesive group of individuals who are familiar with one another's ways of thinking, reacting, persuading, and being persuaded."[16]

In a circuit the size of the Ninth Circuit, judges are denied the opportunity to develop fully the collegiality required for proper execution of their duties. The concept is simple: the more judges, the more combinations of judges; the less likely that the same judges will work together frequently enough to become familiar with each other. As a result, the judges never develop the kind of collegiality that is critical to keep maverick tendencies and personal agendas in check by the rule of law.

Other problems arise in circuits as large as the Ninth due to a lack of predictability in regard to the law of the circuit. As explained by Chief Judge Gerald Bard Tjoflat, who served on the old Fifth Circuit before it was split:

> "[W]hen you get as large as the old Fifth Circuit was, with twenty-six judges, the law becomes extremely unstable. One of several thousand different panel combinations will decide the case, will interpret the law. Even if the court has a rule . . . that one panel cannot overrule another, a court of twenty-six will produce irreconcilable statements of the law."[17]

As Chief Judge Tjoflat recognized, adding judgeships yields a more manageable caseload per judge, but the rule of law suffers immensely. Any other result can hardly be expected: In a

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[16] William H. Rehnquist *et al*, *Symposium: The Future of the Federal Courts*, 46 Am. U. L. Rev. 263, 284 (April 1996).

[17] Thomas E. Baker, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 66-67 (1994) (quoting from an interview with Gerald Bard Tjoflat).



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circuit with 28 active judgeships, for example, there are 3,278 possible three-judge panel combinations![18] In such a situation, a decision could go either direction depending upon which three judge combination was selected to hear the case, and the truncated *en banc* mechanism utilized by the Ninth Circuit does little to alleviate the problem. The White Commission itself recognized the problem, noting that "there is consensus among appellate judges throughout the country (including about one-third of the appellate judges in the Ninth Circuit) that a court of appeals, being a court whose members must work collegially over time to develop a consistent and coherent body of law, functions more effectively with fewer judges than are currently authorized for the Ninth Circuit Court of Appeals."[19] The White Commission concluded that "the maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between eleven and seventeen."[20]

Judge Becker was also cognizant of the manner in which an overgrown judiciary weakens the rule of law within a circuit. Judge Becker demonstrated his point by comparing the Ninth Circuit to his own circuit. In 1995, the Judge Becker's Third Circuit published 353 opinions, which equated to approximately 8500 pages of typed material. Judge Becker explained that when this amount of reading is added to the "manifold other duties of reading, writing, thinking, conferring, and administering" inherent in a federal appellate judgeship, "it takes me seven days a week to do my job."[21] During the same period, however, the Ninth Circuit

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[18] Gerald Bard Tjoflat, *MORE JUDGES, LESS JUSTICE: The Case Against Expansion of the Federal Judiciary*, 79 A.B.A.J. 70, July 1993.

[19] Commission on Structural Alternatives for the Federal Courts of Appeals Final Report, December 18, 1998, Pub. L. No. 105-119.

[20] *Id.*

[21] Rehnquist *et al.*, *Symposium*, 46 Am. U. L. Rev., at 285.



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published 927 opinions.[22] According to Judge Becker, "there is no conceivable way that any judge of that court can read, or even meaningfully scan and digest, anywhere near that number of opinions so as to be abreast of circuit law. In other words, the Ninth circuit is already far too large."[23] In any circuit in which the judges are physically incapable of keeping up with the decisions of their colleagues, the law of the circuit becomes fragmented and contradictory, resulting in the loss of predictability. Thus, the vicious cycle is completed, as the lack of predictability within the circuit and the "instability in circuit law creates unnecessary litigation," which must be dealt with by an already overburdened judiciary.[24]

Both collegiality and the rule of law suffered as the old Fifth Circuit expanded, and both were reinvigorated after the circuit was split. As has been described by Judges Becker and Tjoflat, both are currently at risk in the Ninth Circuit.

These claims are not mere speculation. As Seventh Circuit Chief Judge (and University of Chicago Law Professor) Richard Posner has demonstrated, the quality of judicial output declines as the number of judge on an appellate court expands. Controlling for ideological disagreements by looking at summary reversals and unanimous non-summary reversals by the Supreme Court, Judge Posner statistically demonstrated that the Ninth Circuit had the highest rate of reversal of any regional court of appeals in the country during the period studied, 1985 to 1997.[25] The summary reversal rate for the Ninth Circuit during that time was 0.030820; the next

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[22] *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES, STATISTICS DIVISION, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: REPORT OF THE DIRECTOR, LEONIDAS RALPH MECHAM 50 tbl. S-3 (presenting statistics to the effect that, in the twelve months prior to Sept. 30 1995, the Ninth Circuit published a total of 927 opinions).

[23] Rehnquist, supra note 16, at 285.

[24] *Id.* at 286.

[25] *See* Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. Legal Stud. 711 (2000) (comparing summary reversal rate for the Ninth Circuit to other circuits).



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largest circuit – the Fifth – had a summary reversal rate of 0.005092.[26] Thus, although the Fifth Circuit had nearly the same caseload as the Ninth Circuit (548 cases per judge in the Fifth, 570 per judge in the Ninth), the Ninth Circuit experienced a rate of summary reversal *more than six times higher* than the next busiest circuit.

Moreover, the combined reversal rate of the Fifth and Eleventh Circuits is much lower than it was before the two circuits were split from the old Fifth. As Judge Posner demonstrated, the combined rate of summary reversal of the split courts, since the split, has been (through 1997) .000146; the Fifth Circuit's rate for the 5 years before the split was .000597, more than four times larger and statistically significant at the 95 percent confidence level.[27] In other words, size matters, and the overly-large size of the Ninth Circuit is producing a demonstrably higher reversal rate than exists in her sister circuits.

The Commission for Revision of the Federal Court Appellate System—more commonly known as the Hruska Commission—was created by the Judicial Council in 1971 in order to study how best to decrease caseload and increase judicial efficiency in the federal circuit courts of appeal. To achieve this end, the Hruska commission recommended in 1973 that the Fifth and Ninth Circuits be split. Although Congress initially declined to implement either reform, the Fifth Circuit was eventually split in 1981, forming the new Fifth Circuit and the Eleventh Circuit.[28] The Ninth Circuit merely adopted procedural changes, including a limited en banc policy.[29] The Eleventh and new Fifth Circuits have since enjoyed renewed collegiality between

[26] *Id.*, at 714 (the figures are statistically significant at a 95% confidence level).

[27] *Id.*, at 717.

[28] FIFTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1980, October 14, 1980, Public Law 96-452, 94 Stat. 1994.

[29] *Id.*



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its judges, allowing for a higher quality of judicial output, but the Ninth Circuit's reversal rate has remained the highest in the country, despite its innovative procedural changes.

More recently, the Commission on Structural Alternatives for the Federal Courts of Appeal, chaired by former Supreme Court Justice Bryan White (the "White Commission") recommended yet another procedural innovation for the Ninth Circuit rather than the tried and true model of splitting the circuit into manageable size. The White Commission recommended retaining the Ninth as a single circuit with three, semi-autonomous administrative divisions.[30] Yet while this would improve collegiality within the divisions, the inter-division conflicts would still create a problem for the Circuit, and there would still need to be a limited *en banc* procedure, with all the same "roll of the dice" problems for judicial consistency that exist presently.

The simple fact is that for over a hundred years, the area of the Ninth Circuit has remained static, but the population and docket of the Ninth Circuit has swelled to proportions that render the administration of justice an extremely difficult task. The circuit's phenomenal growth has undermined the crucial concept of collegiality upon which the efficient functioning of an appellate *court* (rather than a loose collection of independent jurists) relies. The remarkable judges of the Ninth Circuit—and there are many—are hamstrung by the sheer volume of output from colleagues that they rarely see, making it all but impossible for them to even read, much less deliberate about, all the decisions of the court.

In order to remedy this situation, the Ninth Circuit must be split. Such a split will decrease caseload and administrative burdens and promote collegiality within the newly-created

[30] COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT (Dec. 18, 1998), *available at* http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf.



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circuits,[31] thereby permitting the judiciary to function at the level of efficiency justice requires. Moreover, splitting the Ninth Circuit will strengthen the rule of law by promoting decision-making grounded in collective understanding of the law's commands rather than idiosyncratic interpretations or personal agendas, resulting in a more cohesive, consistent body of law that helps insure its faithful and equal application.

These are more than lofty ideals or laudable goals; this is a vision of what the federal judiciary could, and indeed should, be. Splitting the Ninth Circuit is merely the first step toward restoring the reverence deserved by one of our nation's second-highest courts.

[31] Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 955 (1998).



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**TESTIMONY OF SENATOR JOHN ENSIGN**
**BEFORE THE SENATE COMMITTEE ON THE JUDICIARY**
**ON SPLITTING THE NINTH CIRCUIT COURT OF APPEALS**
**SEPTEMBER 20, 2006**

Chairman Specter, Ranking Member Leahy:

I want to thank you for holding this hearing on the proposal to split the Ninth Circuit Court of Appeals. Because my home state of Nevada is under the jurisdiction of the Ninth Circuit, I have taken particular interest in how the Ninth Circuit functions. As a Senator from Nevada, I represent people who are on both sides of this issue. I have heard arguments for, and against, splitting the Ninth Circuit but, having listened to the debate, have concluded that it is time for Congress to split the Ninth Circuit.

I have introduced two different bills in the 109th Congress to split the Ninth Circuit. I am very pleased to have been able to work with a number of my colleagues on this issue, particularly Senator Murkowski who has worked with me to develop the language of Senate bill 1845. I am also grateful to my colleagues on this committee, Senator Kyl, Senator Cornyn, and Senator Coburn, who have cosponsored legislation to split the Ninth Circuit.

The Ninth Circuit really has become too large to function as efficiently as it should. The population of the states in the Ninth Circuit is growing too fast for the circuit to manage its caseload. Cases working their way through the Ninth Circuit take far too long to come to resolution. The circuit is becoming increasingly dependent on visiting judges, who are not as familiar with circuit precedent, to manage its caseload. The reversal rate of cases heard by the Supreme Court which on appeal from the Ninth Circuit



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is much higher than the average of all federal circuits. These problems require some form of action by Congress and, having studied the issue, simply adding more judges is not the solution.

As I believe that other witnesses will testify, a sense of collegiality is critical to the judicial branch. Adding more judges, in a circuit so geographically large, is not going to adequately address the need for collegiality among judges and the need for the familiarity with the body of the circuit's case law. This committee has assembled a very impressive list of witnesses to testify on whether the Ninth Circuit is functioning as it should and, having heard the previous testimony of these same witnesses on this issue, I am confident that the case will be made that it is time for Congress to split the Ninth Circuit.

I would like to make just a few brief points about this issue. First, I would hope that members of the Senate could agree that, regardless of where each of us may be on this issue, we could engage in an honest discussion and avoid attacking each other's motives. I have read with great interest the statements of people on the other side of this issue suggesting that split supporters, like myself, are only "politically motivated" or that supporters of a split are "trying to punish" the Ninth Circuit because of the perception of the circuit's ideology. Nothing could be further from the truth. I am sure the people who do not favor a split have likewise had similar attacks directed at them. I do not condone those attacks either. I do not believe that it is in the Senate's, or the nation's, best interest to attack someone else's motives. I have met with people on both sides of this issue and respect their views.



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Second, my primary motivation is to ensure that my constituents, the people of Nevada, have equal access to justice. Equal access to justice requires not only fair, but also prompt, resolution of a case. From my perspective, the current backlog in cases and the fact that the resolution of appeals takes far longer in the Ninth Circuit than any other circuit demonstrates that Nevadans are not guaranteed the promise that their claims will be heard with the same timeliness as persons living in other circuits. The adage of "justice delayed is justice denied" is appropriate with respect to the Ninth Circuit delays.

I believe we should consider the cost that unreasonable delay causes to the parties in a case. The lawyers and the judges live in this system. To these people, delays are not only reasonable but they are expected. A delay to someone who is part of the legal community is just the way things are done. But that is not the case for litigants. Ask any litigant whose case is waiting for a hearing on appeal. They take being sued personally and would tell you that their lives are on hold. They may fear they will lose their business, or their job, or their livelihood. It really does not matter whether the case involves business litigation, an immigration appeal, or a criminal matter. If you talk to the parties to a case, they will tell you stories of the economic, social, and psychological toll extended litigation has on them and their families. That is why I am concerned about delays in the process.

That is also why I believe that some groups have endorsed my bill. For example, the Western States Sheriff's Association, which includes Nevada, has endorsed S. 1845. I believe that the Association understands that America's law enforcement agencies have been devoting scarce budget resources to monitoring and dealing with criminal appeals



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that would otherwise be better devoted to protecting America's families if only appeals cases were resolved sooner rather than later.

Third, I believe that it is not only the duty of Congress but also our obligation to ensure that the Judicial branch is operating efficiently. I do not believe that splitting the Ninth Circuit would infringe on the "independence of the judiciary" as some might suggest. The Constitution provides Congress with the power to "constitute" or establish "tribunals inferior to the supreme Court," and also gives Congress the power to "ordain and establish" the lower federal courts. Acting in accordance with the Constitution, Congress has used its authority to establish the federal appeals courts and the federal district courts, as well as other federal courts. Congress has the ability to create courts of special jurisdiction, such as military courts, bankruptcy courts, and tax courts, and to limit the appeals jurisdiction of all federal courts, including the Supreme Court of the United States. The Constitution clearly provides that the people, acting through their respective Congressional representatives, can enact legislation to split the Ninth Circuit. The prerogative of Congress to enact legislation to split the Ninth Circuit is consistent with the role of Congress established by the Constitution. The idea of splitting the Ninth Circuit is a proper action for Congress to take.

So I thank the committee for the opportunity to testify before you and look forward to working with each of my colleagues on this issue.



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News from . . .

# Senator Dianne Feinstein

of California

**FOR IMMEDIATE RELEASE:**
Wednesday, September 20, 2006

Contact: Howard Gantman
or Scott Gerber 202/224-9629
http://feinstein.senate.gov/

## Senator Dianne Feinstein Cautions Against Splitting Ninth Circuit Court of Appeals for Ideological Motivations

***Washington, DC*** *– Citing concerns that proposals to split the Ninth Circuit Court of Appeals are ideologically motivated, U.S. Senator Dianne Feinstein (D-Calif.) announced her continued opposition to splitting the Circuit Court at a hearing of the Senate Judiciary Committee, where she served as the Ranking Member.*

***"I am concerned that recent attempts to split the Ninth Circuit are part of an assault on the independence of the Judiciary by those who disagree with some courts' rulings,"*** *Senator Feinstein cautioned.* ***"When ideological concerns are set aside, it becomes evident that the proposal before this Committee to split the Ninth Circuit is a lose/lose proposition. The costs of court administration would rise, while the administration of justice would suffer."***

*The following is the text of Senator Feinstein's prepared remarks:*

"Thank you, Mr. Chairman, for holding this hearing.

Let me welcome and thank each of the witnesses for taking time out their busy schedules to share their insights on the Ninth Circuit Court of Appeals. Many of you have traveled across the country to be with us today.

I would like to extend a special welcome to Governor Pete Wilson. Thank you for returning to the Senate to appear before the Judiciary Committee.

In addition, I offer my thanks to Judge Callahan, Judge Rawlinson, Judge Bea, Judge Clifton, and Judge Kozinski for traveling from the Ninth Circuit to attend this hearing.

The subject of this hearing is the Circuit Court of Appeals Restructuring and Modernization Act of 2005, which proposes splitting the existing Ninth Circuit into a "new" Ninth Circuit consisting of California, Hawaii, Guam and the Marianas and a Twelfth Circuit including Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington.

I oppose this split.

This is an important matter for the West and has implications for the nation as a whole.



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The Supreme Court reviews less than 1% of all the cases appealed to it, so for most of the Ninth Circuit's residents, the Ninth Circuit is their court of last resort.

Last year, the Ninth Circuit reviewed almost 16,000 cases, making decisions on every legal issue under the sun.

I agreed with many of the Ninth Circuit's decisions. I disagreed with some of them. However, the Framers of the Constitution intended the Judiciary to be independent and free from Congressional or Presidential pressure or reprisal.

I am concerned that recent attempts to split the Ninth Circuit are part of an assault on the independence of the Judiciary by those who disagree with some courts' rulings.

As Governor Wilson has stated, these attempts are judicial "gerrymandering" designed to isolate and punish judges whose decisions some disagree with. They are antithetical to the Constitution.

Attempting to coerce or punish judges or rig the system is not an appropriate response to disagreements with a court's decisions. It is essential that we preserve our system of checks and balances and make it clear that politicians will not meddle in the work of judges.

The configuration of the Ninth Circuit is not set in stone. However, any change to the Ninth Circuit should be guided by concerns of efficiency and administration, not ideology.

The Ninth Circuit is the largest Circuit Court of Appeals in the nation as measured by both population and caseload. However, its size alone tells us little. The question is whether the size of the Circuit helps or hinders it in providing justice to the people within its boundaries.

After a substantial review of statistics, decisions, and reports from those who know the Circuit best, it is clear that splitting the Ninth Circuit would hinder its mission of providing justice to the people of the West.

When ideological concerns are set aside, it becomes evident that the proposal before this Committee to split the Ninth Circuit is a lose/lose proposition. The costs of court administration would rise, while the administration of justice would suffer.

The uniformity of law in the West is a key advantage of the Ninth Circuit, offering consistency to states that share many common concerns.

The size of the Ninth Circuit is an asset offering a unified legal approach to issues from immigration to the environment. Dividing the Circuit would make solving these problems even more difficult.

For example, splitting the Circuit could result in different interpretations in California and Arizona of laws governing immigration, different applications of environmental regulations on the California and Nevada sides of Lake Tahoe, and different intellectual property law in Silicon Valley and the Seattle technology corridor. These differences would have real economic costs.

The economy of scale offered by the Ninth Circuit has resulted in numerous innovations to increase efficiency that would be lost in a split. Some of these innovations include:



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- **A Circuit Mediator**, whose office settled 90% of the 977 cases that came before it, saving both time and money.
- **A Bankruptcy Appellate Panel** that resolved almost 700 appeals last year.
- **A System for Case Tracking** that inventories and tracks appeals, grouping similar questions of law together to promote consistent treatment.

In a time of tight judicial budgets, splitting the Circuit would add significant and unnecessary expense.

The split would require additional federal funds to duplicate the current staff of the Ninth Circuit, and new or expanded courthouses and administrative buildings, since existing judicial facilities for a Twelfth Circuit are inadequate.

The Administrative Office of the U.S. Courts estimates that creating a Twelfth Circuit would have a start-up cost of $96 million with another $16 million in annual recurring costs.

With budget pressures already forcing our federal courts to cut staff and curtail services, this is no time to impose new, unnecessary costs on the Judiciary.

Those who know the Ninth Circuit best overwhelmingly oppose a split. Of the Ninth Circuit's active Court of Appeals judges, 18 oppose the split and only 3 support it. The District Court and Bankruptcy judges of the Ninth Circuit also oppose the split.

Every state bar association that has weighed in on the split – Alaska, Arizona, Hawaii, Montana, Nevada, Oregon, and Washington – opposes breaking up the Ninth Circuit, and more than 100 different national, regional, and local organizations have written to urge that the Ninth Circuit be kept intact.

Yesterday, I received a letter from 368 law professors, representing 49 different states and countless legal philosophies, counseling against a split.

I move to place into the record these letters from judges, organizations, and individuals opposing the split, as well as the written testimony offered by Senator Richard Bryan of Nevada in opposition to the split.

The split proposal before us would unfairly distribute judicial resources in the West. The Ninth Circuit would keep 71% of the caseload of the current Circuit, but only 58% of its permanent judges.

Currently, the Ninth Circuit has a caseload of 570 cases per judge – as opposed to the national average of 381 cases per judge.

Under the proposed split, the average caseload in the new Ninth Circuit would actually increase to 600 cases per judge, while the new Twelfth Circuit would have only 326 cases per judge.

This inequitable division of resources would leave residents of California and Hawaii facing greater delays, and with court services inferior to their Twelfth Circuit neighbors.



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Some advocates of splitting the Ninth Circuit assert that doing so would reduce delays in the Court of Appeals. However, this bill would actually increase the caseload per judge in the Ninth Circuit – and with it, increase delays.

If our goal is to reduce delays in the Ninth Circuit, a better answer is giving its judges caseloads comparable to the other Courts of Appeals, not splitting the Circuit.

New judgeships for the Ninth Circuit are long overdue. Adding judges to bring the Ninth Circuit's caseload per judge down to the national average would cost far less than splitting the Circuit, and would have a much greater impact in combating delay.

In addition, 40% of the Ninth Circuit current caseload consists of immigration appeals – an increase of 497% in less than 5 years.

I hope that Congress will pass immigration legislation, which over time would alleviate this new burden on the Court.

Splitting the Ninth Circuit would create more problems than it would solve. Following this hearing, I urge this Committee to set aside the discussions of splitting the Ninth Circuit and instead focus our attention on more pressing matters facing the nation.

I look forward to hearing from our distinguished panel."

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September 14, 2006

The Honorable Arlen Specter
Chairman
Judiciary Committee
United States Senate
Washington, DC 20510

*Re:* *Proposals to Split the Ninth Circuit Court of Appeals*

I write on behalf of The Northern District of California Chapter of the Federal Bar Association to reiterate our Chapter's opposition to the pending proposals to split the Ninth Circuit Court of Appeals, including S. 1845. Members of the Federal Bar Association practice before the federal courts, including the Northern District of California and Ninth Circuit Court of Appeals.[1]

The proposals to split the Ninth Circuit are wrong, whether judged on the basis of practical judicial administration or as a legislative reaction to unpopular court decisions. The arguments now being advanced to split the Circuit are old arguments that were not persuasive when they were first made. Nothing has changed. They are still unpersuasive.

The cost of splitting the Court will be expensive, at a time when crippling cutbacks are impairing the work of the federal courts, and the federal government is struggling to find funds for disaster relief and to finance U.S. government military and diplomatic activities in Iraq, Afghanistan, and throughout the Middle East. Courthouse construction or renovation will be necessary under any of the proposals. Staff, programs and facilities would have to be duplicated.

Most importantly, those advocating that the Circuit be split do not seem to have considered other costs in splitting one Circuit and creating more Circuits. Indeed, the impact on operation of many federal agencies of the Executive Branch, which have a region or division located within the present Ninth Circuit geographic boundaries that would be divided by each of the current proposals, has not been considered. The loss of continuity and historical experience would seem inevitable with the split of the Ninth Circuit, and again with enormous additional cost not considered. This at a time of economic crisis seems terribly wrong, even were the reasons right.

[1] This letter expresses the position only of the Chapter, and not that of the Federal Bar Association itself.

The assertion that the Circuit is too big to work effectively is based only on the size of the Circuit, not its effectiveness. Chief Judge Schroeder and her administrative staff have succeeded in effectively managing the Circuit. The Ninth Circuit has requested additional judges so that it can deal with the increased workload, largely attributable to a spike in the number of immigration cases on the Court's docket, a spike that is by no means limited to the Ninth Circuit. These additional judgeships can and should be added without splitting the Circuit.

While any large circuit faces the challenge of avoiding inconsistent decisions, the Ninth Circuit has effectively dealt with that challenge. It has established procedures to minimize inconsistent decisions, and where inconsistency appears, the Court's limited *en banc* procedure is designed to restore consistency. To answer the criticism of some that a majority of the Court's 28 authorized judges should sit on each en banc panel, the Court enacted a rule change increasing the size of *en banc* courts from 11 to 15 judges.

The most recent study of the federal courts, by the Commission on Structural Alternatives for the Federal Courts of Appeal, known as the White Commission, examined the structure of the Ninth Circuit and, in December 1998, recommended against splitting the Circuit. The White Commission concluded:

> There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall.

The Long Range Planning Commission in 1995 reached the same conclusion. "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent consistent circuit law in the face of increasing workload." *Long Range Plan of the Federal Courts (1995) of the Judicial Conference of the United States* 44. No such evidence of either adjudicative or administrative dysfunction has been shown.

The proposed legislation is not only unnecessary, it is not reasonably calculated to solve any problems relating to size or judicial efficiency that might exist, because there is no equitable way to split the Ninth Circuit without splitting California. Under any of the pending proposals, the resulting Circuits would be significantly unequal, and the workload for the new Ninth Circuit disproportionately heavy.

There are significant advantages to the Ninth Circuit in its current configuration. The Ninth Circuit provides a single body of law

for the Pacific Rim economic area, which would be lost if the Circuit is split. Businesses that conduct business or are regularly involved in litigation throughout the Pacific Rim economic area will see increased legal expenses as their legal teams will have to deal with inter-circuit conflicts in the interpretation of federal laws. Separation of California from neighboring states with which it has strong business ties may also create incentives to forum shop. If the Circuit is divided, the current administrative advantage of being able to move judges from one district of the Circuit to another in response to changing case loads, without requiring the judges to become familiar with the laws of a different circuit, will be lost. And important, pioneering programs of the Ninth Circuit, such as the Bankruptcy Appellate Panel, The Public Information and Community Outreach Program, the Circuit's mediation program, and circuit-wide educational programs may be lost.

Finally, it appears that at least some proponents of the legislation are doing so in reaction to Ninth Circuit decisions with which they disagree. If there is one thing upon which legal scholars and thoughtful citizens should agree, it is that a decision by Congress to split the Ninth Circuit, or indeed take any punitive action against a part of the Judicial Branch, because of unpopular Court decisions, would be antithetical to the principles of our Constitution and its careful construct of separation of powers. As the White Commission found:

> There is one principle that we regard as undebatable: It is wrong to realign circuits (or not realign them) and to restructure courts (or leave them alone) because of particular judicial decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.

In the past, Congress has split circuits only when there was a consensus in the affected legal community that a division was warranted. Both of the earlier circuit splits – the creation of the Tenth Circuit from the old Eighth Circuit and the creation of the Eleventh Circuit from the old Fifth Circuit, occurred only after the a consensus had been reached in legal community in the affected region that division was warranted. When the old Eighth Circuit was split in 1929, and again when the old Fifth Circuit was split in 1980, all of the affected judges had expressed their approval, and division was supported by the bar associations in the affected states. The notion that a consensus should first exist ensures that the decision is not a political one. No consensus for splitting the Ninth Circuit exists.

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January 10, 2005

Board of Bar Governors
Oregon State Bar
5200 SW Meadows Road
Lake Oswego, Oregon 97035

Re: Federal Practice and Procedure Committee (2004)
Ninth Circuit Split
Committee Vote

Dear Board of Bar Governors:

As the Chair of the 2004 Federal Practice and Procedure Committee, I was directed to report the Committee's work to you with respect to the issue of the potential split of the Ninth Circuit Court of Appeals. The Committee spent considerable time studying this issue during 2004.

There were three separate bills pending in Congress during 2004 (S. 2278, S. 562 and H.R. 2723) each proposing to split the Ninth Circuit differently. Some of these proposals were said to be politically motivated as the Ninth Circuit was deemed by some in Congress to be too liberal. Others sincerely believe the present court is in dire need of change. The Committee reviewed these proposals together with the written testimony of members of the Ninth Circuit and others both in favor of and opposed to a split of the circuit.

Locally, Judge O'Scannlain was a vocal proponent in favor of the split. Judge O'Scannlain and Judge Redden appeared before the Committee on June 9, 2004 supporting the split. We were informed that the local district court was polled by Chief Judge Haggerty and the majority of the district's judges (10-4) favored the split. The major reasons given to support the split were the massive size of the circuit, intra-circuit conflicts in case law, administrative issues, delay, the sheer volume of decisions, lower opinion publication rates, and a lack of collegiality between the judges.



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In addition to Chief Judge Schroeder, one of the primary opponents of a circuit split was Ninth Circuit Judge Alex Kozinski. Judge Kozinski appeared by video teleconference before the Committee on November 9, 2004. Judge Kozinski emphasized that, while the Ninth Circuit is much larger than other circuits, it is well run administratively and at present has no material operational problems. He observed that size alone should not control as law firms and other institutions today are extremely large when compared to the past. There also would be significant (estimated at $130 million) administrative costs accompanying any split in the Circuit. Judicial independence would be preserved by rejecting politically motivated legislation. Additionally, Judge Kozinski denied that collegiality among the circuit's judges had suffered. Finally, the circuit judges themselves had voted approximately 3 to 1 against splitting the circuit.

The Committee considered all of the information available to it and determined that it should advocate that the Oregon State Bar take a position **against** the split of the Ninth Circuit Court of Appeals. The formal vote of the members of the Committee present at its December meeting was 5-3 (1 abstention) in favor of retaining the Ninth Circuit in its present form.

Thank you for your consideration in this matter.

Very truly yours,

Michael G. Hanlon

MGH:jeb



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September 14, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
711 Hart Building
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Democratic Member
Committee on the Judiciary
United States Senate
433 Russell Building
Washington, DC 20510

Dear Senators Specter and Leahy:

I write to urge that the Judiciary Committee reject legislation that would divide the Ninth Circuit. My reasons may differ somewhat from those of others.

I have followed the debate of the circuit's size since clerking for a district judge in the circuit nearly forty years ago. While I initially opposed splitting the circuit, more recently I became less sure. In connection with the current debate, I have read excellent arguments in *Engage* written by Judge O'Scannlain and Judge Kozinski, both of whom I've known for decades and greatly respect. Judge O'Scannlain, as I would expect, makes the strongest argument for splitting the circuit that I have seen laid out in one place. It certainly gave me pause. But after further reflection, and after reading Judge Kozinski's article and looking at statistics on Ninth Circuit cases from the clerk of the court, I believe it would be a mistake to divide the circuit. (I realize Judge O'Scannlain plans to respond to the Kozinski article. I have not seen his response.)

I am told that 18 active judges on the circuit oppose a split, three favor it, and three abstain. Among senior judges, 16 oppose a split, six favor it, and one abstains. So out of a total of 47 senior and active judges, 34 oppose a split, nine favor it, and four abstain. If we don't count abstentions, nearly 80 percent of active and senior judges and 85.7 percent of active judges oppose a split. (Two new judges have not taken any position as yet and I do not count them in my tally.)



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These numbers are important, for the reason explained below, but not determinative. For Congress, the question must be whether splitting the circuit will improve the administration of justice whether or not judges favor it. But because division would be serious surgery, Congress should have a firm and abiding conviction based on available evidence that it is necessary to overrule nearly 80 percent of the judges casting a vote.

In evaluating the administration of justice, the valid questions are the quality of the Ninth Circuit's work, including its productivity, and whether division is the correct solution even if quality is found wanting. The fact that the circuit has a disproportionate number of judges and cases compared with other circuits, and the fact that it is geographically larger than them, are not reasons to divide the circuit. Neither is the fact (if so) that if the nation were writing on a clean slate, the circuit's lines would differ. If the slate were clean, the shape of every circuit would likely differ. Conversely, the fact that division will cost money is not a reason to forbear if the administration of justice requires division.

How do we measure quality? There is no formula but one would expect certain things to be true if quality were a problem. We would have complaints from bar groups. But I am aware of none. Academic research would reveal that the quality of the circuit's decisions is below par or that its rulings have consistently and significantly deviated from the rulings in other circuits or the Supreme Court. But I have seen none. (I would in any event put little stock in a study that used deviation as a test. Differences among circuits and between any circuit and the Supreme Court are inevitable and will vary as different presidents and departures remake the membership of each of these courts.)

We might look at the relative number of cases from the circuit that are reversed by the Supreme Court. The statistics I have been shown reveal that the circuit's reversal rate is well within the range for the average of all circuits.

Inconsistency in holdings would, of course, be a major quality concern. But I understand that the circuit has taken steps to avoid inconsistency and I have seen no case law evidence that these efforts have been unsuccessful. We would expect that the bar, particularly the specialized bar, would identify this problem if it existed.

Last, and of great importance, is the view of the people who are closest to the circuit's work – its judges. We must assume that judges would be the first to know, and the first to seek a remedy, if the quality of their court's work suffered because of its caseload or size. Yet, as stated, 85 percent of active judges and nearly 80 percent of all judges taking a position do not want to split the court.



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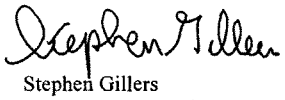
September 14, 2006

Productivity is also a legitimate basis for concern. Regardless of quality, are appeals heard and decided within a reasonable time? Judge O'Scannlain does identify "several recent cases" where the delay between briefing and oral argument was a year or more. Judge Kozinski replies that the circuit is the second fastest to dispose of cases after they are submitted following argument. He also points out that the circuit has been short four of its authorized 28 judgeships (or 14 percent). Two more judges have since been appointed. So it would seem that delay in the period between briefing and argument could be addressed through the much more modest act of filling the remaining vacancies. Indeed, the various proposals to split the current circuit anticipate appointment of new judges in order adequately to staff the two new circuits. Doesn't it make more sense to address any productivity problem in the first instance by giving the circuit its full complement of judges?

A further reason to reject calls to divide the circuit is that the remedy for the alleged problems will have little or no bearing on any problems that size may create. California now accounts for seventy percent of the circuit's business. All proposals to divide the circuit would leave an undivided California in the reconfigured Ninth Circuit. The new court would have 21-26 judges (depending on the proposal and the circuit to which some current judges are assigned). The circuit currently has 28 authorized judges. So the new Ninth Circuit will have between 75 percent and 92 percent of the judges now authorized for the circuit and more than 70 percent of the cases. In other words, the size and caseload of the new Ninth Circuit will create the same challenges that confront the current Ninth Circuit.

As the population grows, and the jurisdiction of the federal courts expands, caseloads will inevitably increase. Among the circuit courts, the Ninth may simply be in the forefront of this development but other circuit courts will face like challenges and some already do. One possibility is to create an additional appellate level below the circuits, or some of them, or to do so for certain categories of cases identified by basis for jurisdiction, the nature of the judgment, or other criteria. In any event, as we know from experience, addressing increased caseloads will at times require more judges, either on the same courts or as part of new tribunals. Increased efficiency can boost productivity somewhat, but sometimes increased work requires more workers. Whatever the solutions, however, dividing the circuit is not one of them.

Sincerely yours,



Stephen Gillers
Emily Kempin Professor of Law

SG:sg



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April 28, 2005

Honorable Daniel Inouye
United States Senate
722 Hart Senate Office Bldg.
Washington, D.C. 20510

Honorable Arlen Spector
United States Senate
711 Hart Senate Office Bldg.
Washington, D.C. 20510

Honorable Daniel Akaka
United States Senate
141 Hart Senate Office Bldg.
Washington, D.C. 20510

Honorable Jon Kyl
United States Senate
730 Hart Senate Office Bldg.
Washington, D.C. 20510

Honorable Patty Murray
United States Senate
173 Russell Senate Office Bldg.
Washington, D.C. 20510

Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Bldg.
Washington, D.C. 20510

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**YLD PRESIDENT**
Roxann C. Bulman

**HSBA/ABA DELEGATE**
James A. Kawachika

**EXECUTIVE DIRECTOR**
Lyn Flanigan

Dear Senators:

As the issue of a possible split of the Ninth Circuit Court of Appeals may once again be considered by the United States Senate, the Board of Directors of the Hawaii State Bar Association has directed me to inform you that the HSBA remains opposed to a split of the Ninth Circuit. We believe the current composition of the Ninth Circuit serves the public well, representing as it does diverse demographic areas as well as a broad range of political and economic constituencies. We also believe that splitting the Ninth Circuit would lead to increased polarization of divergent interests and the attrition of consistency in the federal court system.

Very truly yours,

Richard Turbin
President

cc: Honorable Neil Abercrombie, United States House of Representatives
Honorable Edward E. Case, United States House of Representatives
Honorable Richard R. Clifton, Ninth Circuit Court of Appeals
Honorable David A. Ezra, United States District Court
Honorable Helen Gillmor, United States District Court
Ninth Circuit Judicial Conference, c/o Carol Eblen, Esq.

1132 Bishop Street, Suite 906 • Honolulu, HI 96813 • Phone: (808) 537-1868 • Fax: (808) 521-7936 • http://HSBA.org

*The National Voice of the Hispanic Legal Community.*

May 9, 2006

The Honorable Jeff Sessions
Chairman
Subcommittee on Administrative Oversight and the Courts
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Opposition To Senate Bill 1845 (Ensign)

Dear Chairman Sessions:

The Hispanic National Bar Association ("HNBA") strongly opposes Senate Bill 1845, which proposes to divide the Ninth Circuit Court of Appeals into two separate circuit courts. The proposed division would have a harmful impact on the Hispanic community by creating additional barriers to justice, needlessly wasting a tremendous amount of resources, and severely disrupting judicial efficiency.

Founded in 1972, the HNBA represents the interests of over 27,000 Hispanic American attorneys, judges, law professors, and law students in the United States and Puerto Rico. The HNBA, a member of the National Hispanic Leadership Agenda, plays a prominent, national role in advocating on behalf of the Hispanic community, which comprises the largest and fastest growing minority group in our nation. Thus, the HNBA strives to protect the legal rights and access to justice of Hispanics and reviews any issues that concern those rights or cause potential barriers to access justice.

While the HNBA recognizes the value of judicial efficiency and applauds efforts to improve the administration of justice, we strongly believe that dividing the Ninth Circuit Court of Appeals would have a negative impact on the people its serves, many of which are Hispanic. SB 1845 would create a new Ninth Circuit comprised of California, Hawaii, and the Pacific Islands (Guam and the Northern Mariana Islands) with an estimated population of 37,405,565 and a new Twelfth Circuit comprised of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington with an estimated population of 20,852,541.

The argument that dividing the Ninth Circuit would speed up case disposition is illusory. Rather, the proposed Ninth Circuit would keep 82% of the cases, but only 60% of

815 Connecticut Avenue, NW, Suite 500 • Washington, DC 20006 • 202-223-4777 phone • 202-233-2324 fax hnba.com



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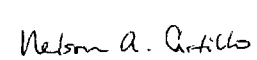
the Judges. This would create a disparity in caseloads between the new Ninth Circuit, which would have an average of 536 cases per Judge, and the new Twelfth Circuit, which would have 317 cases per Judge. Creating disparate caseloads for Judges CANNOT improve the quality of justice or judicial efficiency. Furthermore, the fact that California – the State with the highest number of Hispanics – would be isolated in the proposed circuit with the worst judicial caseload means that our community would suffer the most from SB 1845.

Aside from the judicial efficiency problems, the estimated $96 million in start-up costs and $16 million in operating costs associated with SB 1845 are staggering. It is, therefore, not surprising that only three of the 24 active Judges on the Ninth Circuit Court of Appeals support this division.

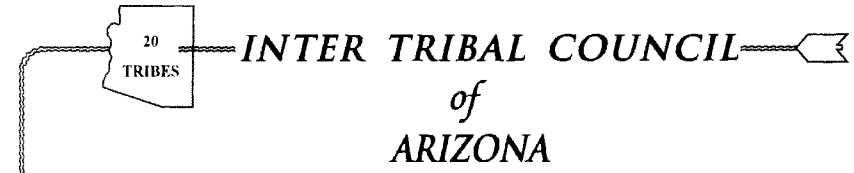
Based on the above, we strongly oppose SB 1845 and the proposed division of the Ninth Circuit Court of Appeals into two separate circuit courts. We thank you for your attention and consideration of the points that we raise in this letter. I may be reached through our national office, or directly at (516) 621-8646, nelson.castillo@caslawfirm.com.

Sincerely yours,



Nelson A. Castillo, Esq.
HNBA National President

cc: Members of U.S. Senate Subcommittee on Administrative Oversight and the Courts
Rep. F. James Sensenbrenner, Jr.
Rep. John Conyers, Jr.
Rep. Lamar S. Smith
Rep. Howard L. Berman
Congressional Hispanic Caucus
Congressional Hispanic Conference
Mrs. Jennifer Sevilla Korn
HNBA Board of Governors




**RESOLUTION NO. 0602**

MEMBER TRIBES
AK-CHIN INDIAN COMMUNITY
COCOPAH TRIBE
COLORADO RIVER INDIAN TRIBES
FORT McDOWELL YAVAPAI NATION
FORT MOJAVE TRIBE
GILA RIVER INDIAN COMMUNITY
HAVASUPAI TRIBE
HOPI TRIBE
HUALAPAI TRIBE
KAIBAB-PAIUTE TRIBE
PASCUA YAQUI TRIBE
PUEBLO OF ZUNI
QUECHAN TRIBE
SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY
SAN CARLOS APACHE TRIBE
TOHONO O'ODHAM NATION
TONTO APACHE TRIBE
WHITE MOUNTAIN APACHE TRIBE
YAVAPAI APACHE NATION
YAVAPAI PRESCOTT INDIAN TRIBE

OPPOSITION TO THE NINTH CIRCUIT COURT SPLIT

**WHEREAS,** the Inter Tribal Council of Arizona (ITCA), is an organization of 20 tribal governments in Arizona, provides a forum for Tribal governments to advocate for national, regional and specific Tribal concerns and to join in united action to address these issues; and,

**WHEREAS,** the member Tribes of the Inter Tribal Council of Arizona have the authority to act to further their collective interests as sovereign Tribal governments; and,

**WHEREAS,** sovereignty of Indian Tribes, the right of self governance, the rights and titles to land and resources among others are often confirmed through court decisions; and,

**WHEREAS,** Tribes in Arizona are within the jurisdiction of the Ninth Circuit Court of Appeals; and,

**WHEREAS,** the Ninth Circuit Court decisions have time and again verified the sovereign rights and title of Indian Tribes to their lands, resources, environments, sacred sites and cultural resources among others; and,

**WHEREAS,** the Ninth Circuit Court of Appeals is the largest federal judicial circuit in the country, encompassing the States of Arizona, California, Nevada, Idaho, Montana, Oregon, Washington, Alaska and Hawaii; and,

**WHEREAS,** proposals to divide the Circuit have been put forth for many years, with the primary push beginning in the 1980s due, in large part, to decisions favorable to Tribes such as the off-reservation treaty fishing rights of Washington tribes and recognizing that land held by Alaska Corporations could qualify as "Indian Country: among others; and,

**WHEREAS,** calls for a division of the Ninth Circuit have intensified lately, with success in the House of Representatives due in part, to the Ninth Circuit Court decision that held that the addition of the phrase "under God" to the pledge of allegiance violated the First Amendment when it was included in a pledge recited by young schoolchildren; and,

**WHEREAS,** the U.S. House of Representatives has passed a bill which divides the circuit in two; the Ninth Circuit consisting of California, Hawaii and certain Pacific Islands, the new Twelfth Circuit would include Alaska, Washington, Oregon, Montana, Idaho, Nevada and Arizona; and,


2214 North Central Ave. • Suite 100 • Phoenix, Arizona 85004 • (602) 258-4822 • Fax (602) 258-4825

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**WHEREAS,** the supporters of the split argue that the Ninth Circuit needs to be split because of its size and administrative difficulties; and,

**WHEREAS,** every empirical study of the Ninth Circuit has concluded that it operates efficiently and effectively; and,

**WHEREAS,** the motivation arose, and significantly continues, from opposition to the Ninth Circuit decision on Indian fishing, logging and the spotted owl, Indian land title and the Pledge of Allegiance; and,

**WHEREAS,** the Ninth Circuit opinions have supported Tribes, have supported the common good of the West and the constitutional mandate that separates the powers of the three branches of government.

**NOW THEREFORE BE IT RESOLVED,** the member Tribes of the Inter Tribal Council of Arizona strongly oppose the proposed split of the Ninth Circuit Court of Appeals and directs its Executive Director to forward this message to the U.S. Senate and the Arizona Congressional Delegation requesting them to oppose the split.

**CERTIFICATION**

The foregoing resolution was presented and dully adopted at a meeting of the Inter Tribal Council of Arizona, where a quorum was present, on **Friday, March 24, 2006.**

Jamie Fullmer
President, Inter Tribal Council of Arizona
Chairman, Yavapai Apache Nation



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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTHONY M. KENNEDY

August 17, 1998

The Honorable Byron R. White
Chairman, Commission on
Structural Alternatives for the
Federal Courts of Appeals
Washington, D. C.

Dear Byron:

In response to your invitation, I am pleased to comment on the question of the geographic boundaries of the United States Court of Appeals for the Ninth Circuit. Based on my observations and perspective as a former judge of that court and as a member of this Court, I submit the reasons for dividing the Ninth Judicial Circuit outweigh the reasons for retaining it as now constituted.

Background

In 1975, the Court of Appeals for the Ninth Circuit, anticipating an increase in its thirteen authorized judgeships, began informal discussions to decide whether to recommend division of the Circuit. There was a difference of opinion; but a majority of the judges, myself among them, concluded the Circuit should maintain its geographic boundaries at least until it could operate for a time with a full complement of judges. We wanted to experiment, to determine the advantages and disadvantages of a large Court of Appeals. So the court did not recommend changes in its geographic jurisdiction. A 1978 statute, Pub.L. 95-486 (92 Stat. 1633), authorized ten new judges for the court. In response, and as permitted by the new statute, the court implemented a limited en banc panel composed of fewer than all the court's judges. Some of us wanted nine judges on the panel, others thirteen. The resulting compromise was eleven.

In part, I think, because some of us did recognize that the large circuit was an experiment, we devoted tremendous time and energy to make it a success. We hoped the opportunity to decide a large number of cases might yield principles of decision which would bring more clarity and cohesion to the law than if the Circuit were smaller. We thought the bar would benefit if nine states were to have a single resolution of any common issue. More ambitious suggestions, such as assigning judges to discrete subject areas for a period of time, were thought problematic and were not pursued.



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As the Federal Courts Study Committee observed, the Courts of Appeals have been faced for more than a decade with a "crisis of volume." *Report of the Federal Courts Study Committee* 109 (April 2, 1990). Like all of its sister circuits, the Ninth Circuit confronted the problem by innovations and changes, not the least important of which was the successful use of Bankruptcy Appellate Panels. The Committee was also correct to note, however, that increases in productivity "seem to be approaching their limit." *Ibid.*

Few members of the public, indeed all too few members of the Bar, appreciate the scholarship and dedication of the individual judges on our courts of appeals. I retain the greatest admiration and respect for all of my former colleagues. Since I have left the Court of Appeals, their workload has again increased in dramatic proportions. It is remarkable that they have been able to manage the case load, though it seems to me unfair to ask them to continue to process such a high number of cases per judge. This heavy case load makes it all the more urgent to ensure that the size of the circuit is not an additional and systemic problem.

Reasons for Concern About Present Size

I have not had the opportunity to study all the submissions made to your Commission, but my present view is that the large Circuit has yielded no discernable advantages over smaller ones. From my discussions with the judges of the court and my review of some of the material submitted in support of retaining the Circuit with its present boundaries, what is striking is the relative absence of persuasive, specific justifications for retaining its vast size. A court which seeks to retain its authority to bind nearly one fifth of the people of the United States by decisions of its three-judge panels, many of which include visiting Circuit or District Judges, must meet a heavy burden of persuasion. In my view this burden has not been met. The size of the Ninth Circuit has a number of disadvantages, a few of which I shall mention.

First, a laudable desire to respect the views and prerogatives of other judges on the court tends, I think, to encourage judges to avoid general principles so that other members of the court can write on the same subject. The result is a certain lack of clarity and cohesion in the case law of the Circuit.

Second, there is an unacceptable risk of intra-circuit conflicts, or, at the least, unnecessary ambiguities. A large number of dispositions tends to make it difficult for judges to keep abreast of the jurisprudence of the court. Soon after the 10 judges were added in 1978, not to mention the five additional judges in 1984, see Pub.L. 98-353 (98 Stat. 346), I found I could not read all of the published dispositions of my own court. This in turn causes inadvertent intra-circuit conflicts. Further, even when judges in good faith attempt to follow stare decisis, a certain potential for

error exists. The risk and uncertainty increase exponentially with the number of cases decided and the number of judges deciding those cases. Thus, if Circuit A is three times the size of Circuit B, one would expect the probability of an intra-circuit conflict in the former to be far more than three times as great as in the latter. The number of en banc decisions should be correspondingly higher, yet the Ninth Circuit, which is the largest circuit by far, does not use its en banc process more often than other circuits. In some years the Ninth Circuit has had fewer en banc hearings than other circuits even in terms of absolute numbers. True, en banc hearings are such a small percentage of the total number of dispositions system-wide that no clear comparative pattern of utilization emerges, even on a ten-year study. It is quite apparent, however, that the Ninth Circuit does not come close to the number of en banc hearings necessary to resolve intra-circuit conflicts, much less to address questions "of exceptional importance." Fed. R. App. Proc. 35(a). Uncertainty and lack of cohesion in the law are antithetical to the ends of our judicial system.

A decision in an en banc case, as a general rule, requires more time, more deliberation, and more writing than go into the ordinary three-judge panel opinion. The result, however, is beneficial. Products of en banc consideration, majority opinions and separate writings, reflect extra efforts invested in the process and represent appellate judging in one of its most instructive forms. En banc opinions assist other courts, including the Supreme Court, in resolving difficult legal issues. And where circuit precedent has been "overtaken by the tide" of authority from other Courts of Appeals, *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F. 2d 871, 876 (CADC 1992) (en banc), rehearing en banc allows a circuit the opportunity to assess the soundness of its earlier views and, if need be, to put its house in order before the Supreme Court must do so. If the Ninth Circuit were divided, then the necessity for more en banc hearings, and the harm from the failure to use the device often enough, would be reduced.

Third, even if the Court of Appeals does have a consistent internal law in a number of subject areas, its size prevents the multiple panel opinions that sometimes produce inter-circuit conflicts. In other words, if the Ninth Circuit were to be divided into two or more circuits, then we would be more likely to have the benefit of more than one panel opinion on a given issue and would have the advantage of the views of more judges. While intra-circuit conflicts or ambiguities and the instability they create are harmful to the system, inter-circuit conflicts, where there is reasoned and deliberate disagreement, are instructive to the system as a whole and in particular to the Supreme Court.

Fourth, although I deplore the tendency to increase the number of Article III judges and to expand the jurisdiction of the federal courts, past experience would seem to show that, even if federal jurisdiction is not increased, a certain number of additional judges will be needed in the future. The Commission's report will be

influential in considering the size of the Circuit not just at present but for perhaps two decades. The Commission, therefore, may wish to consider what recommendation it would make if the Ninth Circuit were to have 40 or more judges. The likelihood of the addition of some judges is a further reason to divide the Circuit now, so that the problems I note are not exacerbated.

Fifth, the recruitment of judges is a relevant consideration. A talented lawyer or jurist who contemplates the prospect of service on a court which should be designed to offer the benefits and rewards of a collegial relationship might well hesitate before agreeing to serve on a court where some 3000 different combinations of judges will make up the panels, and where he or she will be the junior judge on a court of 28 active judges, in addition to valued senior members.

This brings me to a sixth observation about the Ninth Circuit even in its present size. Our constitutional tradition has been one of broad community participation in the judicial selection process. When a court is seen as an integral part of a community, then persons and groups from the community as a whole, and not just the bar, can insist that the political branches consider nominees who are distinguished by their fairness, detachment, and impartiality. The sense of shared identity and responsibility dissipates, however, when a circuit is so large that the makeup of a panel is a luck-of-the-draw proposition, with a strong likelihood of drawing judges having no previous attachment to the affected community. In these circumstances there is less incentive for groups other than political ones to become involved in the judicial appointment process. If the selection and nomination process is accessible and meaningful only to those with partisan interests, there will be a tendency to give less consideration to those qualities of judicial temperament and demeanor that are essential to a fine judiciary. I am concerned, then, that in the future the large size of the Circuit will have an adverse effect on the judicial selection process. Justice must detached but should not be remote; judges must be impartial but ought not to be faceless. When an appellate court becomes as large as the Ninth Circuit, there is a greater risk that unfortunate influences will predominate in the appointment process. Special interests work best when simple lines of responsibility are blurred.

This is related to my seventh concern, which is that the present size of the Ninth Circuit is not sensitive to the vital necessity of preserving the values of federalism. As noted by the Judicial Conference's most recent study of the federal courts, those values are reflected in our long tradition of appointing judges to serve a specific region. *See* Judicial Conference of the United States, *Long Range Plan for the Federal Courts* 43 (December 1995). For this reason, and because of the undesirability of any of the contemplated structural alternatives for the federal appellate system, *see Report of the Federal Courts Study Committee* 116-124 (April 2, 1990), our present system should be preserved and strengthened. The legal communities and other constituencies in the separate states ought to have a real

interest in the judges of their respective circuits, and the judges, conversely, ought to have historic and professional ties to the regions they serve. The experiment accepted in 1978 represents a notable departure from the design which has served us so well. What began as an experiment should not become the status quo when it has not yielded real success. In my view the judicial system would be better served if the states of the present Ninth Circuit were to comprise more circuits than one.

Possible Ways to Divide the Circuit

It is one thing to identify a problem, another to solve it. How to split the Ninth Circuit is a difficult, sensitive question. In an attempt to offer some assistance, I make these brief observations.

The States of 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. If the solution for the latter states is not at hand, that could be studied and debated while the Northwest states concentrate their energies on at once forming a cohesive and effective circuit.

The problem with the remaining states, of course, is the vast population of the State of California. California's population today is the rough equivalent of the entire population of the United States at the time of the Civil War. The problem, however, suggests its own solution. Serious consideration should be given to assigning California to two different circuits. The Districts of Northern and Eastern California could be in one circuit, with, say, Hawaii and Nevada. The Districts of Central and Southern California could form another, with Arizona, Guam, and Saipan. These are just illustrative possibilities, for I have not studied projected case loads or population figures.

The described alignment would give Senators from California a special interest in two circuits, not just one. The attendant advantages of manageable size and sensible administration, however, seem to me to overcome that objection, if indeed it be one. If California were not divided, moreover, the number of judges required for California alone would constitute a circuit so large that the deficiencies already present in the Ninth Circuit might persist.

If California were assigned to two circuits, it would, of course, be imperative to ensure prompt resolution of any conflict between these circuits with respect to issues affecting California. I have seen no proposal for an inter-circuit en banc procedure that makes sense or is fair to the bar and litigants of the State. To take just one example, a bill in the House of Representatives in the 103d Congress provided that, in the event of a conflict between the two circuits, the "California"

judges from each Circuit would constitute an inter-circuit en banc. *See* H. R. 3055, 103d Cong. §3 (1993). This is contrary to our tradition and to sound judicial principles. After being appointed some judges find it necessary or convenient either to move to California or to move away from it, depending on their individual situations. Does mere residence while serving on the court determine who is a "California" judge? In addition, an inter-circuit en banc should bind both circuits, but it would be inappropriate and destructive of collegiality to require "non-California" judges to be bound by their "California" colleagues on important questions of law. Yet this would be the necessary result, for even if the cases prompting an inter-circuit en banc arose from California, the en banc decision would bind both circuits in cases arising from all other states.

At one time, I thought the absence of a fair and workable proposal for an inter-circuit en banc mechanism was an all but insurmountable objection to allowing two circuits to operate within a single state. I have begun to think this is not an obstacle. The judicial system could function well without an inter-circuit en banc, leaving to the Supreme Court the responsibility to resolve any inconsistent decisions affecting the single state. After all, the government of the United States functions well despite the possibility of having to litigate a question in multiple circuits and the concomitant possibility of conflicting decisions in those courts. Furthermore, duplicative litigation and potential conflict between two circuits in the same state would hardly be unfamiliar to California, which like every state already faces the possibility of litigating the same question in both state and federal court. Where such litigation results in a conflict between a state's highest court and a federal court in that state on a question of federal law, our Court resolves the conflict. *See, e.g., South Dakota* v. *Yankton Sioux Tribe*, __ U. S. __, 118 S. Ct. 789 (1998) (conflict between the Supreme Court of South Dakota and the Eighth Circuit). No one has suggested that such conflicts are the result of some serious dysfunction of judicial structures. If duplicative litigation, in practice, should result in an excessive burden on the State of California, the statutes and rules governing transfer and consolidation of cases could no doubt be adapted to mitigate the problem. Thus, although not insensitive to the potential burden to California of having to defend its laws in two different circuits, I believe the advantages attendant to California in having concise, orderly, predictable case law in two circuits would outweigh the temporary problems of a few conflicting decisions, decisions which can have prompt resolution in this Court. The advantages to all of the other states of the present Ninth Circuit have been enumerated.

## Conclusion

My present view is that if the Ninth Circuit were divided, the new alignment could better serve the orderly and efficient administration of justice. My further conclusion is that the State of California could be assigned to two different circuits and the Supreme Court could act with the necessary speed and determination to

resolve any conflicts that create difficulty or uncertainty in administering and enforcing the laws and policies of that State.

I extend to you and your Commission my greetings and special thanks for undertaking this study, which will be of vital importance to the federal courts and to our judges, who remain devoted to preserving the integrity of the justice system.

Sincerely,

**Federal Bar Association**

*Office of the President*

**WILLIAM N. LAFORGE**
*Winstead Sechrest & Minick PC*
*1850 M Street, NW, Suite 800*
*Washington, DC 20036*
*(202) 572-8016 • (202) 572-8001 (fax)*
*wlaforge@winstead.com*

September 18, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

**Re: September 20, 2006 Hearing on "Examining the Proposal to Restructure the Ninth Circuit"**

Dear Chairman Specter and Senator Leahy:

I write in connection with your upcoming hearing on September 20 to examine S. 1845, "The Circuit Court of Appeals Restructuring and Modernization Act," which would restructure the Ninth Circuit Court of Appeals. I respectfully request that this letter be included in the hearing record.

Nearly a year ago in October 2005, the Judiciary Committee's Subcommittee on Administrative Oversight and the Courts held a hearing on splitting the Ninth Circuit. At that time the Federal Bar Association communicated its views on S. 1845 and other proposals that would split the Ninth Circuit, questioning their necessity and expressing concern over the impact they would bear upon efficient and effective judicial administration. Since then, no new legislative proposals have surfaced, and our views on S. 1845 remain largely the same.

As we said then, we not favor any restructuring of the Ninth Circuit based upon ideological discontent with the case law developed by the judiciary of the Ninth Circuit. Our views on the merits of dividing the Ninth Circuit remain consistent with the overwhelming majority of lawyers and judges throughout the Ninth, who believe that the Circuit works well as currently configured and should remain intact. We remain unconvinced by the arguments of split proponents that size matters. Although the Ninth Circuit is the largest Circuit Court of Appeals in the nation in both population and caseload, what matters is not the size of the Circuit, but whether justice is being effectively and efficiently administered. The Ninth Circuit Court of Appeals is currently satisfactorily meeting that objective. While the day may come when changed circumstances cause us to revisit that conclusion, we believe the arguments against dividing the Ninth Circuit outweigh those for splitting it.



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History demonstrates that Congress has divided a circuit only when there was conclusive proof that the administration of justice was not effectively occurring and a consensus among the bench, bar and public promoted division of the circuit as an appropriate solution. We do not believe that those conditions exist as to the question of splitting the Ninth Circuit at the current time. Our assessment is drawn from the active dialogue we maintain with the association's sixteen chapters in the Ninth Circuit, with a combined membership of nearly 3,000 lawyers and judges, and located throughout Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.

Our opposition to legislative proposals to split the Ninth Circuit is further founded on concerns over its costs and its negative impact on current efficiencies. The Administrative Office of the United States Courts previously estimated the costs for splitting the Ninth Circuit under S.1845 (a two-way split) to require $95,855,172 in start-up costs and $15,914,180 in annual recurring costs. In times of increased anxiety over government spending and the size of the federal deficit, it would seem that more pressing national priorities should take precedent over these avoidable obligations. Moreover, we remain unconvinced by the suggestions of some that ample space already exists for housing the courtrooms, judicial chambers and administrative apparatus for a new Circuit or Circuits. 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 economy of scale derived from a single administrative structure handling the affairs of the current Ninth Circuit will be diminished by the creation of new and costly duplicative physical arrangements and staffing (requiring a clerk of court, a circuit executive, staff attorneys, and technology) necessitated through any split.

Finally, we are also disturbed by the unfairness residing in the distribution of judicial resources under current split proposals. S. 1845 would cause the states remaining in the Ninth Circuit – California and Hawaii -- to take on significantly greater caseloads per judge than those states realigned into a new 12th Circuit. Far more permanent and temporary judgeships than are authorized by S. 1845 are required for the caseloads of the new Ninth Circuit and the new 12th Circuit to be equal.

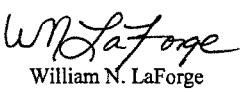
While we strongly support the Judicial Conference's request to authorize the creation of 68 Article III judgeships, including 12 new judgeships in five courts of appeals and 56 new judgeships in 29 district courts, we do not favor any linkage in Congressional action upon the comprehensive request of the Judicial Conference for additional judgeships beyond the Ninth Circuit and legislative proposals to split the Ninth Circuit. We believe that the establishment of those judgeships and the reconfiguration of the Ninth Circuit are entirely different issues, embodying separate and distinct considerations.

The FBA is the only nationwide bar association that has, as its primary focus, the jurisprudence and vitality of the United States federal court system and the practice of federal law. As I noted previously, of our 16,000 members across the United States, nearly 3,000 are lawyers and judges residing and practicing in the Ninth Circuit. Ours is the constituency whose members daily bear the consequences of the structure, caseload, adjudication and operation of the Ninth Circuit. Obviously, our members have a direct and significant interest in the outcome

of any effort to split the Ninth Circuit Court of Appeals. We therefore ask the Committee to refrain from approving legislative proposals to restructure the Ninth Circuit until there is demonstrable proof that the administration of justice is not effectively occurring and a consensus among the bench, bar and public agrees that division of the Circuit represents an appropriate solution.

Thank you very much for the consideration of our views.

Sincerely yours,



William N. LaForge
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## LAW PROFESSORS OPPOSED TO SPLITTING THE NINTH CIRCUIT

September 27, 2006

The Honorable Arlen Specter
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, D.C. 20510

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

Dear Chairman Specter and Ranking Member Leahy:

The undersigned law professors write to urge that Congress reject current proposals that would split the boundaries of the Ninth Circuit Court of Appeals.

While our ranks include professors belonging to both major political parties, we wish to emphasize that the basis for our position is not partisan, but grounded in the belief that a circuit split would be unnecessary, costly and inefficient.

The split proposal that is being considered by the Senate Judiciary Committee this month would leave the current Ninth Circuit with just California, Hawai'i, Guam and the Northern Mariana Islands, and create a new Twelfth Circuit composed of Arizona, Nevada, Idaho, Montana, Oregon, Washington and Alaska.

Dividing the court isn't necessary. To be sure, the Ninth Circuit bears the most cases of any federal appellate court (about 16,000 new cases were filed this year, versus 1,300 in the D.C. Circuit; the next highest is the Fifth Circuit, which includes Texas, with 9,300). But it also has more judges than any other circuit in the country and appears to face no problem of a quality or magnitude any different than those faced by any other court.

For example, although it has a much higher caseload, the real measure of whether too much pressure harms quality is the number of cases decided and opinions written by each judge. On this score, Ninth Circuit judges appear to write opinions and dispose of cases at the average for all federal appeals court judges. Although critics have alleged conflicts of decisional law within the Ninth



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Circuit, there is no serious evidence of such a conflict; indeed, the circuit's active use of its en banc review process (when the Court sits in groups larger than its standard three-judge panels) has effectively resolved precisely such conflicts. And although supporters of a split often cite statistics involving U.S. Supreme Court reversal of the Ninth Circuit, it must be remembered that the Ninth Circuit decisions selected for Supreme Court review reflect a minuscule fraction (approximately 0.3 percent) of those cases decided by the Ninth Circuit in any given year.

Nor does a split make sense from a budgetary perspective. Dividing the Ninth Circuit would require the creation of an additional costly bureaucracy to administer the new circuit, eliminating the economies of scale achieved by a single administration. Furthermore, a split would require expenditures for expanded courthouses and administrative buildings. The Administrative Office of the U.S. Courts estimates start-up costs of almost $100 million and annual recurring additional costs of almost $16 million.

Finally, a split would result in judicial inefficiency. A "new" Ninth Circuit comprised of California and Hawai'i would maintain 72 percent of the caseload, but only 60 percent of the judges. Such a circuit would yield 536 cases per judge, moreover, contrasted with 317 cases per judge in the proposed Twelfth Circuit. These statistical disparities in fact understate the true extent of the inequity resulting from a circuit split, given that the more than 600 death penalty cases originating in California are enormously time-consuming for judges and at present can be divided among all Ninth Circuit judges.

In our country's history, there have been only two instances in which a circuit was divided, and both times -- unlike at present -- the division was supported by a substantial majority of the judges and attorneys who were to be affected by the division. The Ninth Circuit judges themselves believe a circuit split to be a bad idea. Only three of the active judges (out of 26) on the Ninth Circuit support the breakup. The state bar associations that have voted on the idea -- Alaska, Arizona, Hawai'i, Montana, Nevada and Washington -- all oppose it. California's present and former governors Arnold Schwarzenegger, Gray Davis and Pete Wilson; California's senators Dianne Feinstein and Barbara Boxer; Arizona Governor Janet Napolitano and former Washington State Governor Gary Locke; and many other public officials oppose a division of the Ninth Circuit.

We thus believe that splitting the Ninth Circuit is unwise and urge you to vote against any such split.

Sincerely,

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43383.208

**Statement of Senator Patrick Leahy**
**Ranking Member, Judiciary Committee**
**Hearing on "Revisiting Proposals to Split the Ninth Circuit"**
**September 20, 2006**

There are currently three proposals before the Senate to split the Ninth Circuit, one of which goes so far as to divide the circuit into three. We reviewed similar legislation last Congress and I continue to view attempts to alter the structure of our federal judiciary with skepticism.

The Bush Administration is now firmly behind splitting the Ninth Circuit, purportedly because of its large caseload. However, none of the proposals before us will result in a fair distribution of workload among the newly-created circuits or among the existing judges. I remain very concerned 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. Some may wonder why we are having this hearing in the penultimate week before the end of this congressional session. It is an election year, and unfortunately the Ninth Circuit has been a convenient scapegoat for partisan critics of the judiciary.

One significant issue that the Senior Senator from California has repeatedly raised is the substantial costs the judiciary would incur should the circuit be split. 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 Administrative Office determined that the 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.

Additionally, unlike the 1980 division of the Fifth Circuit, this proposed division has very little support from the judges of the Ninth Circuit. In a letter to this Committee a few months ago, 373 judges opposed the split that is being considered here today. Almost all of the circuit court judges oppose the 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 affected would endorse one of these legislative proposals. The judges' overwhelming opposition should be taken seriously as we consider this legislation.

I thank all our witnesses for traveling so far to be with us and look forward to receiving their testimony.



43383.209

**Statement of Senator Patrick Leahy**
**Ranking Member, Judiciary Committee**
**Hearing on "Revisiting Proposals to Split the Ninth Circuit"**
**September 20, 2006**

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August 31, 2006

Senator Jon Kyl
United States Senate
2200 E. Camelback, Ste 120
Phoenix, AZ 85016-3455

**RE: Senate Bill 1845**

Dear Senator Kyl:

On behalf of the Los Abogados Hispanic Bar Association, I express our opposition to Senate Bill 1845.

Founded in 1976, Los Abogados is comprised of approximately 150 attorneys in Arizona, mostly concentrated in Maricopa County, but we do have members from outside of Maricopa County. One of the objectives of our organization is to enhance the quality of legal services provided to the Spanish-speaking community.
We believe that the passage of Senate Bill 1845 will negatively impact the minority community as a whole – not only in Arizona - in several ways.

The general arguments both for and against splitting the 9th Circuit are well-hashed and I'm sure you are aware of them both - the large size 9th Circuit, the reversal rate of 9th Circuit decisions by the Supreme Court and the "liberal" leanings of the Circuit. However, the bottom line is that the 9th Circuit performs its duties well, in terms of efficiency, productivity and rendering decisions after oral argument - despite its size, reversal rate and regardless of the leanings of the Court as a whole (all issues which have *no* bearing on the functionality of the Court). Further, even if one accepts that these are "problems" with the Court that need to be "fixed", there is no evidence that splitting the Circuit would correct any of these so-called problems.

One important issue that has not been frequently addressed is the void of Hispanic representation on the bench that would be left in the 12th Circuit. Of the sitting judges on the 9th Circuit, only 6 are Hispanic. If the 12th Circuit is created, *none* of the 6 Hispanic judges would be assigned to the new circuit, leaving Arizona and the other western states with no Hispanic representation on the Court of Appeals. This is unacceptable in a state where 28% of the population is Hispanic or Latino (according to the U.S. Census Bureau, 2004). Minority communities in Nevada (22.8%

Hispanic/Latino), Oregon (9.5% Hispanic/Latino) and Washington (8.5% Hispanic/Latino) will suffer similarly. Separating California, which has a 34.7% Hispanic/Latino population, from these other states, make no sense in this regard.

For these reasons, we ask you to reconsider your support of Senate Bill 1845.

Sincerely,

Margarita Silva
President

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WRITER'S DIRECT LINE:

August 17, 2006

The Honorable Arlen Specter
Chairman, Committee on the Judiciary
United States Senate
711 Hart Building
Washington, DC 20510
VIA FACSIMILE (202) 228-1229

The Honorable Patrick J. Leahy
Ranking Democratic Member
Committee on the Judiciary
United States Senate
433 Russell Building
Washington, DC 20510
VIA FACSIMILE (202) 224-9516

Re: **The Circuit Court of Appeals Restructuring and Modernization Act of 2005 (S.1845) – OPPOSE**

Dear Chairman Specter and Ranking Member Leahy:

The Los Angeles County Bar Association strongly opposes S.1845, "The Circuit Court of Appeals Restructuring and Modernization Act of 2005," the latest in a series of proposals to split the Ninth Circuit. There remains no compelling reason to split the Ninth Circuit, and certainly no reason to incur the very substantial costs that such a split will generate.

Founded in 1878, the Los Angeles County Bar Association is the largest voluntary local bar association in the nation. The Association is a diverse organization made up of more than 26,000 members, 60 sections and committees, 27 affiliated bar associations, 100 staff members, and thousands of active volunteers. A significant number of our members practice in the Federal Courts and particularly the Ninth Circuit. Our fundamental mission is to meet the professional needs of our members and to improve the administration of justice. It is in this last capacity that we send this letter.

Both Chief Judge Mary M. Schroeder and Senior Judge Clifford Wallace have made clear in their presentations to your committee that splitting the Ninth Circuit lacks the support of a consensus of the judges and lawyers in the Ninth Circuit. Moreover, the proposed division serves no legitimate interest and will, in fact, hamper the effective and consistent administration of justice in the western United States. The American Bar Association has provided additional details as to the disadvantages and potential costs associated with restructuring the Ninth Circuit in a written statement dated October 26, 2005 to your Subcommittee on Administrative Oversight and the Courts. The Ninth Circuit currently enjoys significant economies of scale in its administrative and managerial functions. A divided circuit would have to duplicate many of those functions: Splitting the Ninth Circuit in two would cost an estimated $100 million, plus $10 million per year in added administrative costs. At a time when our federal government is facing significant deficits, our efforts should be directed at lowering costs, not increasing them—particularly where, as here, the increased costs will do nothing to improve the administration of justice in the circuit.

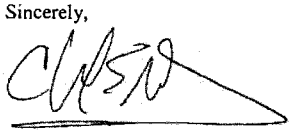
As the nation's largest federal circuit court, the Ninth Circuit has consistently been at the forefront of technological and administrative innovation. As caseloads grow in all of the nation's Courts of Appeals, efficient administration will become ever more essential. As Senior Judge Wallace has pointed out simply splitting a large circuit confers no such benefit; and will lead only to fragmented federal law and increased inter-circuit conflicts. Even in the face of an increasing workload, the Ninth Circuit has been delivering coherent, consistent circuit law. If it remains undivided, it will continue to serve as a model of effective administration of a large appellate court for the rest of the country.

Opponents to splitting the Ninth Circuit constitute a long and bipartisan list. They include Pete Wilson, a former Republican U.S. Senator from California (who later served two terms as the Governor of California) who has condemned previous efforts to split the circuit calling them attempts at "environmental gerrymandering" by those who had been angered by rulings upholding and enforcing environmental laws; California's current Governor Arnold Schwarzenegger; Arizona's Governor Janet Napolitano; a former Governor of Washington Gary Locke; the American Bar Association; the Federal Bar Association; the Alaska Bar Association, the State Bar of Arizona; the State Bar of Montana; the Washington State Bar; the Hawaii State Bar; the State Bar of California and the Association's Federal Courts Committee and Litigation Section. These individuals and entities along with numerous other local voluntary associations, prominent jurists, law professors, legal advocates, and national, state and local groups advocating civil liberty rights, women's rights, disability rights, labor, health, religious, and conservation rights are united in their opposition to the proposal to split the Ninth Circuit.

Moreover, we also wish to express our deep concern regarding the manner in which this issue is constantly being raised. We have observed that proposals to split the circuit have been repeatedly made in a variety of contexts, either as proposed riders to seemingly unrelated bills or otherwise. An issue that is as important as this demands the full attention of Congress and it should be not presented in a manner that would allow it to simply slip into the system without the necessary testimony and analysis.

The current proposed Restructuring Act is a solution in search of a problem. The Ninth Circuit has been consistently and effectively serving the western United States for over 110 years. Dividing this venerable institution will yield no benefits, but will squander the significant economies of scale that the circuit currently enjoys. We urge you and your colleagues to reject S.1845, as well as any other proposals to split the Ninth Circuit.

Sincerely,



Charles E. Michaels
President
(213) 622-1254 charles.michaels@laaco.net

cc: All Members of the Senate Judiciary Committee
The Honorable Barbara Boxer
All California Members of the House of Representatives

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
UNITED STATES COURTHOUSE
700 STEWART STREET
SEATTLE, WASHINGTON 98101

ROBERT S. LASNIK
CHIEF JUDGE

(206) 370-8810

September 19, 2006

The Honorable Arlen Specter
Chairman
Judiciary Committee
United States Senate
Washington D.C. 20510

Dear Mr. Chairman:

We, the undersigned district judges within the Ninth Circuit want to express our opposition to legislation dividing the Ninth Circuit, including S. 1845. We believe that the reasons for such opposition have been well articulated in the recent statement prepared by thirty-three judges of the Ninth Circuit: *A Court United: A Statement of a Number of Circuit Judges*, Engage, Volume 7, Issue 1 (October 2005). As district judges, we believe that a split would seriously impair the excellent administrative services we now receive from our Circuit Executive's Office and would harm the administration of justice in the West.

Very truly yours,

Robert S. Lasnik
Chief Judge Western District of Washington
Seattle, Washington
Chair, Conference Executive Committee

c: Honorable Patrick Leahy
Ranking Member

/s Ann L. Aiken
District Judge
District of Oregon

/s Susan Bolton
District Judge
District of Arizona

/s Anna J. Brown
District Judge
District of Oregon

/s Rudi Brewster
Senior Judge
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District Judge
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District Judge
District of Hawaii

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District Judge
Central District of California

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Chief Judge
District of Hawaii

/s Irma E. Gonzalez
Chief Judge
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District Judge
Central District of California

/s Terry J. Hatter
Senior Judge
Central District of California

/s Thelton E. Henderson
Senior Judge
Northern District of California

/s Russell Holland
Senior Judge
District of Alaska

/s Marilyn L. Huff
District Judge
Southern District of California

/s Susan Illston
District Judge
Northern District of California

/s Martin Jenkins
District Judge
Northern District of California

/s Lawrence Karlton
Senior Judge
Eastern District of California

/s Alan C. Kay
Senior Judge
District of Hawaii

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Senior Judge
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/s William Keller
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Senior Judge
District of Hawaii

/s Stephen G. Larson
District Judge
Central District of California

/s Ronald Lew
District Judge
Central District of California



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/s M. James Lorenz
District Judge
Southern District of California

/s Consuelo B. Marshall
District Judge
Central District of California

/s Ricardo S. Martinez
District Judge
Western District of Washington

/s A. Howard Matz
District Judge
Central District of California

/s Donald W. Molloy
Chief Judge
District of Montana

/s Margaret Morrow
District Judge
Central District of California

/s Susan Oki Mollway
District Judge
District of Hawaii

/s Barry T. Moskowitz
District Judge
Southern District of California

/s Mary H. Murguia
District Judge
District of Arizona

/s Marilyn H. Patel
District Judge
Northern District of California

/s James S. Otero
District Judge
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/s Marsha J. Pechman
District Judge
Western District of Washington

/s Mariana Pfaelzer
District Judge
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/s Virginia Phillips
District Judge
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/s Dean D. Pregerson
District Judge
Central District of California

/s Justin L. Quackenbush
Senior Judge
Eastern District of Washington



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/s Edward Rafeedie
Senior Judge
Central District of California

/s Manuel L. Real
Senior Judge
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District Judge
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/s James Selna
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Chief Judge
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/s Robert M. Takasugi
Senior Judge
Central District of California

/s Robert J. Timlin
Senior Judge
Central District of California

/s James Ware
District Judge
Northern District of California

/s Robert H. Whaley
Chief Judge
Eastern District of Washington

/s Ronald Whyte
District Judge
Northern District of California



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/s Claudia Wilken
District Judge
Northern District of California

/s Frank R. Zapata
District Judge
District of Arizona

/s Thomas S. Zilly
Senior Judge
Western District of Washington



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July 30, 2006

Honorable John Ensign
United States Senate
B34 Dirksen Senate Office Building
Washington, D C 20510-2193

Dear Senator Ensign:

As you know, the Ninth Circuit Court of Appeals has lost its' efficiency and effectiveness with respect to representation of the western states that comprise the circuit. The Department of Justice has endorsed splitting the Ninth for these reasons.

This association has requested support from the Senate Judiciary and the House Committee on the Judiciary to enact legislation to divide the court. Each state sheriff's association has adopted a resolution requesting Congress to act, and enclosed is a copy for your review. Seven of the nine western states who are members of this association have since the early nineteen ninetics supported the division. Alaska and Hawaii do not have elected sheriffs or sheriff's associations.

A number of bills await action from the 109th Congress, and your efforts to make dividing the Ninth Circuit Court of Appeals a reality is truly appreciated.

Your state sheriff's association will also be contacting your office.

Very truly yours,

SHERIFF CLAY PARKER, PRESIDENT

By: Paul B. McGrath
Executive Director

Enclosure(s)

cc: WSSA State Rep(s)
State Sheriffs' Assn

WSSA@WORLDNET.ATT.NET • Ph. (775) 882-4686 • Fax (775) 882-5919
Est. 1993



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# WESTERN STATES SHERIFFS' ASSOCIATION

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IDAHO
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Sheriff Wayne Toombs, Twin Falls County

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Sheriff Gary Edwards, Thurston County

WYOMING
Sheriff Dave Martin, Big Horn County
Sheriff Byron Oppenhuizen, Campbell County

**RESOLUTION 2003-02**

**SUPPORTING THE REORGANIZATION OF THE 9TH CIRCUIT COURT OF APPEALS**

**WE**, the members of the Western States Sheriffs' Association, respectfully represent as follows:

**WHEREAS**, the responsibilities of our circuit courts have evolved greatly the last century while the structure of the Ninth Circuit Court of Appeals remained largely unchanged since 1866; and

**WHEREAS**, the Ninth Circuit Court of Appeals suffers from an overwhelming caseload and unreasonable delays in issuing decisions; and

**WHEREAS**, there are twenty-eight (28) judges on the Ninth Circuit Court of Appeals, which is nearly twice the recommended maximum, and has led to inconsistent decisions which has reduced the reputation and authority of the Circuit, which has caused numerous reversals by the U. S. Supreme Court; and

**WHEREAS**, a number of recent Congressional reorganization of the Court have occurred, once in 1996, and again in 2002 only to lack congressional action after introduction of the legislation; and

**WHEREAS**, the Ninth Circuit Court administratively reorganized recently in order to avoid additional reorganization attempts by the Congress of the United States; and

**WHEREAS**, the division of the Ninth Circuit Court of Appeals is long over-due, having been recommended a number of times during the past twenty years; now

**THEREFORE BE IT RESOLVED** this 20th day of February, 2003, that the Western States Sheriffs' Association at their regularly scheduled meeting in Las Vegas, Nevada support: (1) the reorganization of the 9th Circuit Court of Appeals into two new circuits in order to streamline the appeals process and allow for more consistent decision; (2) urge our U. S. Senators and Representatives within the western states to co-sponsor new legislation in the 108th Congress and pass a reorganization of the Ninth Circuit Court of Appeals that is similar to S.956 and H. R. 2935 of the 104th Congress.

Jim DuPont
President

Attest:

Paul B. McGrath
Secretary-Treasurer

WSSA@WORLDNET.ATT.NET • Ph. (775) 882-4686 • Fax (775) 882-5919

**State Bar of Montana**
**Resolution 1**

WHEREAS Montana is one of nine states and two territories of the United States Court of Appeals for the Ninth Circuit; and

WHEREAS, the United States Court of Appeals for the Ninth Circuit has provided significant guidance to all circuit courts regarding issues of collegiality, maintaining precedent and effectively accomplishing and administrating the business of the circuit courts; and

WHEREAS, the United States Court of appeals for the Ninth Circuit has been a leader in implementing gender equity and recognizing the need to address racial and ethnicity concerns to improve the involvement of all citizens in the administration of justice; and

WHEREAS, the United States Court of Appeals for the Ninth Circuit has provided innovative leadership in the involvement of lawyers in all functions and committees of the circuit; and

WHEREAS, the United States Court of Appeals for the Ninth Circuit has instituted long range planning to project the needs of the circuit; and

WHEREAS, Montana has reaped significant benefit from being a part of the Ninth Circuit; and

WHEREAS, the Congress has once again undertaken consideration of bills to divide the Circuit; and

WHEREAS, a divided circuit would remove the numerous benefits which Montana enjoys as a part of the United States Court of Appeals for the Ninth Circuit with very little, if any, gain; and

WHEREAS, a divided circuit would result in additional one time construction and division costs and increased annual administrative expenses thereby straining the already inadequate budget of the judiciary, resulting in fewer funds for the direct administration of justice and other essential components of the administration of justice; and



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WHEREAS, a division of the Ninth Circuit would not address or resolve the principal problem of circuits that serve rapidly growing regions, that is, the crisis of volumes of filings with inadequate judicial resources to resolve them; and

NOW, THEREFORE, BE IT RESOLVED that the State bar of Montana opposes the passage of any bill directed at splitting the Ninth Circuit.

Dated this 16th day of September 2005.



43383.224

STATE OF ARIZONA

JANET NAPOLITANO
GOVERNOR

OFFICE OF THE GOVERNOR
1700 WEST WASHINGTON STREET, PHOENIX, AZ 85007

MAIN PHONE: 602-542-4331
FACSIMILE: 602-542-7601

September 13, 2006

The Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators Specter and Leahy:

I understand that on September 20, 2006, the Senate Judiciary Committee is scheduled to hold further hearings regarding the proposal to split the Ninth Circuit Court of Appeals into smaller circuits. On October 20, 2004, I wrote to Arizona Senators John McCain and Jon Kyl to voice my concerns regarding this issue. Copies of those letters are attached.

I am writing now both to reiterate the concerns I raised in 2004 and to express an additional concern that splitting the Ninth Circuit could compromise the effectiveness of efforts that law enforcement officials in Arizona and California have undertaken at the Mexican border.

As you are aware, the United States' border with Mexico includes four states currently spread across three federal circuits. The proposed addition of yet another federal circuit touching the Mexican border significantly increases the likelihood of differing interpretations of important federal laws related to the border, including our immigration laws and laws related to drug and human smuggling. This poses a particular dilemma for law enforcement officials along the U.S. -- Mexican border. Especially given the massive number of illegal border crossings, federal laws related to the border should be subject to consistent interpretation whenever possible. Further splintering of the Circuit courts that govern our border states will only further complicate and possibly frustrate border law enforcement efforts.

As I indicated in my October 20, 2004 letter, some have estimated cost to the federal government of splitting the Ninth Circuit at in excess of $100,000,000. This money could be much better spent securing our border with Mexico, prosecuting immigration-related crimes

and implementing a meaningful employer sanctions program on employers who knowingly hire undocumented immigrants. To instead use this money on the infrastructure and administrative costs necessary to create new federal circuit courts that could further fracture the interpretation of federal law would be a significant step in the wrong direction, and would not reflect the priorities or needs of American voters.

Yours very truly,

Janet Napolitano
Governor

JN:TN/jm
Attachments
cc: The Honorable Orrin G. Hatch (w/attachments)
The Honorable Charles E. Grassley (w/attachments)
The Honorable Jon Kyl (w/attachments)
The Honorable Mike DeWine (w/attachments)
The Honorable Jeff Sessions (w/attachments)
The Honorable Lindsey Graham (w/attachments)
The Honorable John Cornyn (w/attachments)
The Honorable Sam Brownback (w/attachments)
The Honorable Tom Coburn (w/attachments)
The Honorable Edward M. Kennedy (w/attachments)
The Honorable Joseph R. Biden, Jr. (w/attachments)
The Honorable Herbert Kohl (w/attachments)
The Honorable Dianne Feinstein (w/attachments)
The Honorable Russell D. Feingold (w/attachments)
The Honorable Charles E. Schumer (w/attachments)
The Honorable Richard J. Durbin (w/attachments)

STATE OF ARIZONA

JANET NAPOLITANO
GOVERNOR

OFFICE OF THE GOVERNOR
1700 WEST WASHINGTON STREET, PHOENIX, AZ 85007

MAIN PHONE: 602-542-4331
FACSIMILE: 602-542-7601

October 20, 2004

**VIA TELECOPIER: (202) 224-2207**

The Honorable Jon Kyl
United States Senate
730 Hart Office Building
Washington, D.C. 20510

Dear Senator Kyl:

I urge you to vote against S. 878, the bill to split the Ninth Circuit Court of Appeals into three new circuits.

Among other concerns, I am told that this proposal carries a price tag of approximately $100,000,000 in new court construction and administrative expenses. At a time when Congress has been unable to fully fund the State's homeland security needs, as well as a host of other federal mandates on the states, it is fiscally irresponsible to spend this kind of money to create unnecessary new appellate courts and the bureaucracy to support them.

I agree with Governor Schwarzenegger that "there is no compelling reason to make any change in the [Ninth] Circuit's composition." Despite the size of the Ninth Circuit, the ratio of opinions published per judge is within the range of other circuits. Even when panels within the Circuit differ on a legal issue, such conflicts are generally effectively resolved through *en banc* review. Creating additional circuits would only increase the likelihood of circuit splits on legal issues, thereby increasing the number of cases presented to the Supreme Court and the cost of litigation to the people and businesses that use our courts.

Splitting up the Ninth Circuit is simply not in the best interest of Arizona or the nation at this time.

Thank you for considering my view on this matter.

Yours very truly,

Janet Napolitano
Governor

STATE OF ARIZONA

JANET NAPOLITANO
GOVERNOR

OFFICE OF THE GOVERNOR
1700 WEST WASHINGTON STREET, PHOENIX, AZ 85007

MAIN PHONE: 602-542-4331
FACSIMILE: 602-542-7601

October 20, 2004

**VIA TELECOPIER: (202) 228-2862**

The Honorable John McCain
United States Senate
241 Russell Senate Office Building
Washington, D.C. 20510-0303

Dear Senator McCain:

I urge you to vote against S. 878, the bill to split the Ninth Circuit Court of Appeals into three new circuits.

Among other concerns, I am told that this proposal carries a price tag of approximately $100,000,000 in new court construction and administrative expenses. At a time when Congress has been unable to fully fund the State's homeland security needs, as well as a host of other federal mandates on the states, it is fiscally irresponsible to spend this kind of money to create unnecessary new appellate courts and the bureaucracy to support them.

I agree with Governor Schwarzenegger that "there is no compelling reason to make any change in the [Ninth] Circuit's composition." Despite the size of the Ninth Circuit, the ratio of opinions published per judge is within the range of other circuits. Even when panels within the Circuit differ on a legal issue, such conflicts are generally effectively resolved through *en banc* review. Creating additional circuits would only increase the likelihood of circuit splits on legal issues, thereby increasing the number of cases presented to the Supreme Court and the cost of litigation to the people and businesses that use our courts.

Splitting up the Ninth Circuit is simply not in the best interest of Arizona or the nation at this time.

Thank you for considering my view on this matter.

Yours very truly,

Janet Napolitano
Governor

Testimony of

**WILLIAM H NEUKOM**

before the

**UNITED STATES SENATE COMMITTEE ON THE JUDICIARY**

September 20, 2006

Mr. Chairman and members of the Committee, my name is William H. Neukom. I am currently a partner and the Chair of Preston Gates & Ellis LLP, a law firm with its headquarters in Seattle, Washington. Prior to rejoining the Preston Gates firm in 2002, I was General Counsel for Microsoft Corporation for seventeen years. I appear as a witness before you today in my individual capacity and speak based on my nearly forty years of experience as an attorney. These are my views and should not be considered the views of my law firm or of Microsoft Corporation. I am also the President-Elect of the American Bar Association and am authorized to remind you of its opposition to restructuring of the Ninth Circuit.[1]

[1] The Association's position is set forth in a resolution of the ABA House of Delegates adopted in August of 1999.



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I have followed the debate about restructuring or dividing the U.S. Court of Appeals for the Ninth Circuit for many years both out of professional interest – because it is a court in which my clients or the company that I worked for have had many important cases – and out of a broader interest in the health, integrity and effective functioning of our federal courts. My experience with the federal courts is not limited to the Ninth Circuit and its district courts. I am also familiar with or have practiced before other federal district and appellate courts and a number of international tribunals.

Based on all of my experience, I come before you today to state my strong opposition to splitting the Ninth Circuit – whether through the current proposal, S. 1845, or through any of the many similar proposals that have been offered over the years. I firmly believe that the proposals that have been made to reconfigure the Ninth Circuit over the years – including S.1845 – are not an inevitable or even a desirable solution to a problem, but are instead a misguided, shortsighted, and costly response in search of a problem.



VerDate Nov 24 2008 13:02 Feb 09, 2009 Jkt 043383 PO 00000 Frm 00283 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43383.TXT SJUD1 PsN: CMORC

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Before I address three of the particular reasons I have for opposing a division of the Ninth Circuit, I would note that others, including the current, past, and future Chief Judges of the Circuit have articulated thoroughly both the strengths of the Ninth Circuit today, especially its innovative efforts to improve the delivery of judicial services, and the shortcomings of the proposals to divide the Court. As these Judges and others have explained, nothing has changed since the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by former Associate Supreme Court Justice Byron White, concluded in 1998, "[t]here is no persuasive evidence that the Ninth Circuit . . . is not working effectively, or that creating new circuits will improve the administration of justice . . . ."[2] These compelling views from an independent Commission and from the Judges of the Court belie the notion that splitting the Court is either inevitable or a solution to a growing problem.

While I agree fully with these Judges and the White Commission, let me address three specific reasons why I believe that dividing the current Ninth Circuit into two or even three smaller circuits is unlikely to serve either the interests of the many businesses and corporations that are so

[2] Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report



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important to the economy of the West or the broader administration of justice.

First, quite simply, there is a significant advantage to the Court's current structure from a business perspective – an economy of scale that would be lost if the current Court were divided. A ruling from the Ninth Circuit, as it is currently constituted, on an issue that affects businesses establishes one standard of federal law for the western states. A single federal appellate court for the West Coast minimizes the risk that the law of intellectual property, maritime trade, labor relations, banking or other business matters will be different in San Diego and Seattle.

This is not an abstract advantage. In my years at Microsoft, we worked extensively with technology companies and intellectual property issues around the globe. A significant part of our work, of course, involved transactions with companies in California's Silicon Valley. The fact that one federal court of appeals announced the rules of federal law for both Seattle and Silicon Valley eliminated an element of uncertainty and potential conflict in our work with companies up and down the West Coast. Certainty

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(1998) at 29 (the "White Commission Report").



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and predictability in the law are critical elements of a business climate that supports innovation and economic strength. The current configuration of the Ninth Circuit provides on important aspect of that certainty and predictability that would be lost if the Court were divided and a different federal law for intellectual property rights or other business regulation governed in Seattle and in Silicon Valley.

A practical illustration of the advantages of a single western circuit would be the intellectual property rights litigation over the past 30 years between Microsoft based in Seattle and companies such as Apple Computer and Sun Microsystems based in Silicon Valley. While this litigation proceeded before trial courts in the Northern District of California, we were reassured by the fact that the district court there would apply the same interpretations of copyright law that a district court in Seattle would apply because they are both part of a single federal circuit. Likewise, any ruling by a trial court in San Francisco or San Jose would be reviewed by the same circuit that would review a ruling from Seattle. There was no need to consider either the potential costs of litigation over the appropriate forum for the trial of the case or any related issues of divergent federal law.



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It also was reassuring that any interpretation of the law by the trial court eventually would be reviewed by Judges of the larger Ninth Circuit who possess considerable sophistication and experience in copyright matters because of the very breadth of the Circuit's case load. In a range of similar situations, differences between companies from California's Silicon Valley and the Northwest's Silicon Forest were simpler and easier to resolve, even when they did not go to court, because the law of intellectual property rights and other disciplines was the same in both places as a consequence of having a single federal circuit for the West. From a business perspective, this strength of the current Court should not be lightly discarded.

The advantages of the current Court are by no means limited to business conducted within the Circuit. Indeed, one of the greatest advantages for west coast businesses of a single west coast federal court of appeals is that a single circuit interprets federal law that affects trade with our international partners around the Pacific Rim. Again, this uniformity and predictability serves business interests better than a multiplicity of west coast federal courts of appeals would. The White Commission in its Final Report recognized this point explicitly -- and



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contrasted the uniformity of federal law in the West with its more fractured status elsewhere:

> Maintaining the court of appeals for the Ninth Circuit as currently aligned respects the character of the West as a distinct region. Having a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with other nations on the Pacific Rim is a strength of the circuit that should be maintained. The Atlantic seaboard and Gulf Coast are governed by law determined by courts of appeals in six separate circuits, which gives rise to complaints about intercircuit conflicts from practitioners in the maritime bar, who regularly bemoan the differences in interpretation of federal law in circuits from Maine to Texas.[3]

While the White Commission focused particularly on maritime law, in my experience their point applies equally to many other areas of federal law that benefit from having a single circuit court of appeals for our region.

In fact, the current Ninth Circuit's very size and diversity ensures a kind of neutrality that protects against even the perception of any "home town" bias, a reassuring feature of the current Court to almost any large corporation. If the Circuit were split, these advantages would disappear and, over time, the law in the new circuits would diverge; they would tend to acquire a more local character; and businesses would incur the added costs of both staying abreast of these developments and adjusting their



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practices in the different cities and states now served by the Ninth Circuit. This too is not an abstract concern. While each federal district court may reflect some aspects of local character and practice, the role of the circuit courts has always been viewed as at least regional if not national. This larger perspective is one of the unique strengths of our federal courts of appeals. Circuit judges in each circuit come from a number of states and from many different backgrounds. Their diverse perspectives are brought to bear and reflected in the jurisprudence of the circuit over time. Dividing the Ninth Circuit as proposed in S.1845 would undercut this important source of strength by isolating California and Hawaii in a single circuit with the attendant loss of richness of judicial perspective that presently exists. This loss cuts both ways: division of the Ninth Circuit would deprive California and Hawaii of the diversity that the current circuit brings to those states as much as it would deprive the other states of the perspectives that California and Hawaii judges afford. The risk to business is that the new circuits would both become more provincial and afford businesses less of the institutional neutrality that the current court offers.

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[3] White Commission Report at 49-50.



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Based on my experience, I believe many attorneys who work for corporations that do business around the world would actually support efforts to *consolidate* the federal judiciary, especially at the appellate level, rather than further balkanize it. As the Europeans are discovering, there are great economies and synergies in consolidating legal and economic regimes. In every area, we see globalization of regulation and government shrinking the world to the point that physical geography has become almost irrelevant. Dividing the Ninth Circuit into several smaller circuits at this point in history runs counter to these strong and accelerating trends. Breaking up the Ninth Circuit is unlikely to serve the long-term best interest of the business community as we move forward in a global economy.

Let me summarize this point: while neither I nor my clients have always agreed with all of the individual decisions of the Ninth Circuit, I support and appreciate the fact that my business and corporate clients can look to a single appellate court to interpret and apply federal law in the western states and up and down the American length of the Pacific Rim. Dividing the Ninth Circuit as proposed in S.1845 and similar bills would undermine this significant business advantage.



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Second, the very size of the current Ninth Circuit has, by necessity, led it to innovate and adapt in ways that are important to businesses around the west, innovations that could well disappear if the Court were divided. As a former general counsel to a large corporation, I can assure you that size is not inherently a disadvantage. While size can lead to complacency, bureaucracy, and rigidity, it can also provide a spur to innovation and opportunities for leadership. Based on my experience, I believe the Ninth Circuit has made size its friend and used it to pioneer new and important techniques for the delivery of judicial services by our federal courts. For example, the Court has grappled with ensuring consistency in its case law by using technology and implementing a case-monitoring and issue-spotting system that alerts the Judges to cases raising similar issues before they are decided so decisions can be harmonized. The Court has also engaged technology to its advantage for teleconferencing among Judges, communications between judicial chambers that are geographically disparate, and hearings in some cases where attorneys and Judges cannot easily appear in the same place. All of these efforts have reduced significantly the burdens of travel on Judges and attorneys that is sometimes offered as a reason to divide the Court. In addition, the Court has taken innovative steps in other areas to enhance its efficiency including



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the creation of an appellate commissioner to resolve certain routine motions and other matters and an active and highly-regarded appellate mediation program that resolves about a thousand cases each year. Of course, these programs – especially the strong appellate mediation program – save businesses time and money. In a divided and smaller circuit, the resources to support these and other innovations would be scarce and many of them might wither to the detriment of judicial effectiveness and efficiency.

Let me mention one specific and innovative program to highlight this point. The Ninth Circuit was the first circuit to create a Bankruptcy Appellate Panel that now resolves some 500 bankruptcy appeals each year and reduces the case load facing the district and circuit courts. I mention this because as the bankruptcy judges who are members of this appellate panel explained in a letter to one of the members of this Committee in 2004, bankruptcy touches more American lives than any other federal law except the Federal Tax Code.[4] It is an important aspect of business and corporate law and it affects hundreds of thousands of individuals. The

[4] Letter of May 10, 2004 from Bankruptcy Judge Perris to The Honorable Jeff Sessions and attachment thereto (Statement Opposing Division of the Ninth Circuit by the Judges of the Bankruptcy Appellate Panel)("BAP Statement Opposing Circuit Division").



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availability of an experienced and highly-regarded Bankruptcy Appellate Panel in the Ninth Circuit contributes significantly to the predictability and certainty of the law in this important area. It also conserves both district court and circuit resources by resolving cases that would otherwise require the attention of these courts. As the Judges on this Panel have explained, historically they have handled approximately 60% of the bankruptcy appeals with the consent of the parties while the district courts have handled 40%. Of these appeals, only some 25% proceed to a second level of review before the Ninth Circuit. Significantly, appeals that go through the Bankruptcy Appellate Panel are much less likely to proceed to this second level of review than appeals that go through the district courts.[5]

As the members of the Bankruptcy Appellate Panel point out, the advantages they provide in the delivery of judicial services in this important area of business law would likely disappear if the Ninth Circuit were divided. The case loads of the smaller circuits, particularly any new circuits that do not include California, would be unlikely to support such an institution and the smaller number of districts in either of the new circuits would make creation of such a panel difficult under the governing legal

[5] BAP Statement Opposing Circuit Division at 3-5.



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standards.[6] Loss of this important and well-established innovation in the bankruptcy area would not serve the interests of individuals or businesses in the Ninth Circuit.

To summarize, the size of the current circuit confers positive advantages for innovation in the delivery of judicial services, advantages the Court has seized effectively in many areas.

Third, as a former corporate general counsel and as an attorney representing corporate clients over the years, I am all too familiar with the tough decisions business managers regularly must make about allocating limited financial resources. The government certainly faces these same constraints, especially today. I cannot help but question the wisdom of spending scarce government funds to create the new bureaucracies and structures that additional circuits would require if the Ninth Circuit were divided. In the business world, companies routinely find themselves seeking to eliminate – rather than increase – this kind of duplication. My concern on this point is particularly acute because a decision to spend significant sums today to divide the circuit would surely soon appear

[6] BAP Statement Opposing Circuit Division at 2-4.



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shortsighted. In fact as soon as a division occurs, any new circuit that includes California will be nearly as large as the current court in its number of Judges and its case load due to the size of the state and the volume of cases that come from it. In a few short years, because of continued growth in California, a new circuit that includes it would reach or exceed the current Court's size. Within a few more years, other circuits may also reach the same size thresholds, for example the Second and Fifth Circuits. We cannot afford, either financially or legally, to continually divide our federal circuits when they reach the size of the current Ninth Circuit. We must find ways to turn size to our advantage in the federal court system and the Ninth Circuit has been a pioneer in this area.

Indeed, it would be a far wiser investment of limited federal resources over the long term to support the efforts of the current Ninth Circuit to confront and solve the challenges of its size rather than split the court in an ultimately fruitless effort to limit the size of our federal courts of appeals. The Ninth Circuit has made great strides in taking advantage of technology to improve its efficiency, consistency, and delivery of judicial services. Congress should support this and similar efforts with available funds rather than use limited federal dollars to divide the Court.



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Finally, let me address very briefly three points that are frequently made in support of splitting the Circuit. First, one often hears that the Ninth Circuit is so large and issues so many opinions it is too difficult for lawyers to stay abreast of developments in the law. This point has some superficial appeal but no real merit. The number of opinions the Court issues is not actually a function of its size. In fact the smaller Eighth Circuit issues even more opinions per year and the Seventh Circuit nearly as many. More importantly, almost no attorney's practice requires him or her to keep up with the law in all areas. Rather, we specialize and try to keep up to speed on the law in the specific areas of our practice. The fact that the Ninth Circuit may issue some 700 published opinions each year across the many areas of practice in which it hears cases means little as a practical matter.

Second, proponents of a split also often cite the current circuit's geography as a reason to divide it arguing that its size imposes unacceptable burdens on Judges and lawyers alike. This point too has some superficial appeal – no one likes to travel and those of us who do would like to do so less. But dividing the Ninth Circuit will not resolve this problem. Whatever circuit they are in, Hawaii, Guam and the other Pacific Islands – and even Alaska – will still be many hours by air from circuit



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headquarters. Likewise, the new circuit proposed in S. 1845 would still span some 4,000 miles from the Arizona border to Alaska and still require considerable travel by Judges and lawyers – and possibly even more complicated travel – than the current court with its headquarters in San Francisco.

Third, the long history of efforts to divide the Ninth Circuit is unfortunately replete with statements from different members of Congress at different times urging division of the Court because of a disagreement with the Court about a particular decision or series of decisions.[7] While I am confident that everyone here today would agree with the White Commission's statement that:

> [t]here is one principle that we regard as undebatable: It is wrong to realign circuits (or not to realign them) or to restructure courts (or to leave them alone) because of particular judicial decisions or particular judges,[8]

the history of this issue makes any legislation focused solely on restructuring the Ninth Circuit politically suspect. Consequently, I believe

[7] Recent examples of such statements include, among others, 149 Cong. Rec. H7087-0, H7087 (July 17, 2003)(statement of Rep. Young), 149 Cong. Rec. S14547-03, S14560 (Nov. 12, 2003)(statement of Sen. Santorum), 149 Cong. Rec. S3254-01, S3319 (Mar. 6, 2003)(statement of Sen. Murkowski), 149 Cong. Rec. S3074-01, S3075 (Mar. 4, 2003)(same).

[8] White Commission Report at 6.



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the only way for Congress to address changes to the structure or alignment of the federal courts of appeals and escape this unfortunate shadow is to address court structure comprehensively, thoroughly, and through an independent process. Looking forward ten, twenty, or even thirty years, it is likely that some changes will be needed to keep our federal appellate courts efficient and effective. Some of these may even involve realignment of current circuit boundaries. As I have said, these changes may ultimately prove to be more about consolidation than division. But carefully exploring what those changes might be in a rapidly changing world may well be worth the Committee's time and attention. Continuing to focus narrowly and repeatedly on proposals to divide the Ninth Circuit, however, is a tainted and unnecessary approach that the Committee should reject once and for all.

In sum, everyone in business is familiar with the maxim "if it ain't broke, don't fix it." For all of the reasons discussed above and those articulated so well by others including the overwhelming majority of the Ninth Circuit's active and senior Judges, I believe this maxim should guide the Committee and the Congress in its deliberations about the future of the Ninth Circuit. The current Court is not broken – far from it. The Court is a



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leader in the innovative and effective delivery of justice. It serves its lawyers, businesses, and other constituents well. I urge you to oppose any legislation that would divide the Court. Thank you for your consideration of my views.



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**Michael Traynor**
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San Francisco, CA 94111-5800

July 19, 2006

***Via Facsimile***

The Honorable Arlen Specter, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

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

Re: S.1845 (to Divide the U.S. Court of Appeals for the Ninth Circuit)

Dear Chairman Specter and Ranking Member Leahy:

We write to express our strong opposition to S.1845 or any similar bill to divide the U.S. Court of Appeals for the Ninth Circuit. We write at this time because we understand your Committee is considering holding hearings on S.1845 and we are deeply concerned about the impact of S.1845 on both the Ninth Circuit and the independence of our federal judiciary.

Both of us have followed this issue for some time, either as General Counsel for Microsoft Corporation and more recently as President-Elect Nominee of the American Bar Association or as counsel since 1963 with a firm that has played a significant role in the creation and growth of enterprises in Silicon Valley and elsewhere, and the advancement of intellectual property and Internet law. While we write to you as individuals, our views are based on this experience.* We firmly believe the series of proposals that have been made to reconfigure the Ninth Circuit over the years – including the current one, S.1845 – are not an inevitable solution to a growing problem, but instead a misguided, shortsighted, and costly response in search of a problem.

Others, including the current, past, and future Chief Judges of the Circuit have articulated thoroughly both the strengths of the Ninth Circuit today, its innovative efforts to improve the delivery of judicial services, and the shortcomings of the proposals to divide the Court. More recently, thirty-three of the Court's forty-seven active and senior Judges have explained at some length (in an article we attach and recommend to you) the many reasons division of the Ninth Circuit would not serve the interests of justice. As these Judges and others have explained, nothing has changed since the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by former Associate Supreme Court Justice Byron White concluded in 1997, "[t]here is no persuasive evidence that the Ninth Circuit . . . is not working effectively, or that creating new circuits will improve the administration of justice." These very compelling views from an independent Commission and from the Judges of the Court belie the notion that splitting the Court is an inevitable solution to a growing problem.

While we agree fully with these Judges and the White Commission, we write separately based on our many years of experience as attorneys practicing in the Ninth Circuit and other federal courts throughout the country to emphasize our view that dividing the Court into two or three smaller circuits is unlikely to serve the interests of the many businesses and corporations that are so important to the economy of the West Coast. Quite simply, there is a significant advantage to the Court's current structure from a business perspective – an economy of scale that would be lost if the current Court were divided into two or three new circuits. A ruling from the current Circuit on an issue that affects businesses establishes one standard of federal law for the entire West Coast. A single federal appellate court for the West Coast minimizes the risk that the law of intellectual property, maritime trade, labor relations, banking or other business matters will be different in San Diego and Seattle. In addition, the Circuit's very size and diversity ensures a kind of neutrality that protects against even the perception of "home town" bias, a reassuring feature of the current Court to almost any large corporation. If the Circuit were split, these advantages would disappear and, over time, the law in the new circuits would diverge; they would tend to acquire a more local character; and businesses would incur the added costs of both staying abreast of these developments and adjusting their practices in the different cities and states now served by the Ninth Circuit. Certainly we have not always agreed with all of the individual decisions of the Ninth Circuit, but we strongly support and appreciate the fact that our business and corporate clients can look to a single appellate court to interpret and apply federal law up and down the American length of the Pacific Rim.

Indeed, we would argue that many of the attorneys who work for corporations that do business around the world would actually support efforts to *consolidate* the federal judiciary, especially at the appellate level, rather than further balkanize it. As the

Europeans are discovering, there are great economies and synergies in consolidating legal and economic regimes. In every area, we see globalization of regulation and government shrinking the world to the point that physical geography has become almost irrelevant. Dividing the Ninth Circuit into several smaller circuits runs counter to these strong and accelerating trends. Breaking up the Ninth Circuit is unlikely to serve the long-term best interest of the business community in the 21st Century.

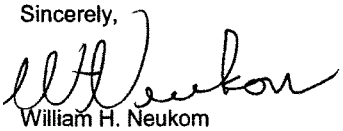
As a former corporate general counsel and as an attorney representing corporate clients over the years, we also are all too familiar with the tough decisions business managers regularly must make about allocating limited financial resources. The government certainly faces these same constraints, especially today. We cannot help but question the wisdom of spending scarce government funds to create the new bureaucracies and structures that additional circuits would require if the Ninth Circuit were divided. In the business world, companies routinely find themselves seeking to eliminate – rather than increase – this kind of duplication. We believe the current Ninth Circuit has made great strides in taking advantage of technology to improve its efficiency, consistency, and delivery of judicial services. We would urge Congress to support this kind of effort with increased funding rather than use limited federal funds to divide the Court.

Finally, we understand your Committee is considering scheduling hearings on S.1845 at some time in the future. While many members of the Committee may already be familiar with the extensive information available on this issue, others may not. Although we do not think it appropriate for the Committee to single out the Ninth Circuit consideration of structural change instead of examining the federal circuits as a whole, if the Committee decides to proceed with hearings, we would urge you to schedule them with enough advance notice and enough hearing time to allow your Committee to take testimony not only from the Judges of the Court but also from practicing attorneys, academics, and some of the many state and federal bar associations in the Ninth Circuit and nationally who have expressed their concern and opposition to proposals to divide the Court. We firmly believe that if you take the time this important issue warrants and hear from this broad range of relevant experience, you and your Committee will conclude – as we have – that dividing the Ninth Circuit will not advance the administration of justice or the independence of our federal judiciary.

In sum, we are all familiar with the maxim "if it ain't broke, don't fix it." For all of the reasons discussed above and those articulated so well by others including the overwhelming majority of the Ninth Circuits active and senior Judges, we believe this maxim should guide the Committee and the Congress in its deliberations about the future of the Ninth Circuit. The current Court is not broken. It serves its lawyers,

businesses, and other constituents well. We urge you to oppose any legislation that would divide the Court. Thank you for your consideration of our views.

Sincerely,



William H. Neukom

Michael Traynor

Enclosure

cc: Members of the Committee on the Judiciary
The Honorable Mary M. Schroeder, Chief Judge
U.S. Court of Appeals for the Ninth Circuit

* Views expressed by Bill Neukom are his own, and he is not speaking on behalf of the ABA or its policies.

STATE BAR OF NEVADA

September 15, 2006

The Honorable Arlen Specter
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The Honorable Patrick J. Leahy
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**Re: Opposition to S.1845**
***Circuit Court of Appeals Restructuring and Modernization Act of 2005***

Dear Chairman Specter and Ranking Member Leahy:

The State Bar of Nevada Board of Governors respectfully reaffirms its opposition to the above-referenced Senate bill seeking to split the Ninth Circuit such that it would retain only California and Hawaii and realign the remaining states into a new Twelfth Circuit.

Given the tremendous financial strain splitting the Ninth Circuit would cause and thereby taking away from the direct administration of justice, and the lack of evidence supporting a quantifiable need for the split under those considerations, the State Bar of Nevada Board of Governors opposes S.1845.

Respectfully,

Rew Goodenow

Rew R. Goodenow, Esq.
President, State Bar of Nevada by Dwayne Bloom

cc: Honorable John Ensign, United States Senate



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**Opposition to Splitting the 9th Circuit**

- AFL-CIO
- Alliance for Justice
- ACLU
- American Federation of State, County and Municipal Employees (AFSCME)
- Americans for Democratic Action
- American Lands Alliance
- Center for International Environmental Law (CIEL)
- Clean Water Action
- Defenders of Wildlife
- Disability Rights Education & Defense Fund (DREDF)
- Earthjustice
- Earthrights International
- Equal Justice Society
- Feminist Majority
- Friends of Animals
- Friends of the Earth
- Judge David L. Bazelon Center for Mental Health Law
- Lawyers Committee for Civil Rights Under Law
- Leadership Conference on Civil Rights
- Legal Momentum
- Living Earth
- Love Makes a Family, Inc.
- Mexican American Legal Defense and Educational Fund (MALDEF)
- National Abortion Federation
- National Audubon Society
- National Center for Lesbian Rights
- National Council of Jewish Women
- National Gay and Lesbian Task Force
- National Health Law Program
- National Organization of Women (NOW)
- National Senior Citizens Law Center
- National Tribal Environmental Council
- Natural Resources Defense Council
- The Ocean Conservancy
- People for the American Way



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- Progressive Jewish Alliance
- Project Freedom of Religion (An Affiliate of the Unitarian Universalist Service Committee)
- Public Employees for Environmental Responsibility
- Rethinking Schools
- Safe Food and Fertilizer
- Sierra Club
- Western Lands Project
- The Wilderness Society
- Wildlands CPR
- Woodhull Freedom Foundation
- Workmen's Circle/Arbeter Ring
- World Stewardship Institute
- Xerces Society for Invertebrate Conservation
- Alaska Coalition
- Alaska Community Action on Toxics
- Alaska Conservation Solutions
- Alaska Rainforest Campaign
- American Wildlands
- Audubon Society of Portland
- The Bandon, Oregon Bill of Rights Defense Committee
- Bark
- Biodiversity Conservation Alliance
- California Communities Against Toxics
- California National Organization for Women
- California Native Plant Society
- California State Public Affairs Network
- California Wilderness Coalition
- California Women Lawyers
- Californians for Alternatives to Toxics
- Center for Biological Diversity
- Center for Community Action and Environmental Justice
- Center for Environmental Law and Policy
- Center for Native Ecosystems
- Center for Race, Policy, & the Environment
- Citizens for the Chuckwalla Valley
- Columbia Riverkeeper



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- Committee for Judicial Independence
- Conservation Northwest
- Earth Day Network
- Endangered Habitats League
- Environmental Law Foundation
- The Environmental Protection Information Center (EPIC)
- Forest Guardians
- Forests Forever
- Friends of The Columbia Gorge
- Friends of the Panamints
- Gifford Pinchot Task Force
- Great Old Broads for Wilderness
- Headwaters
- Idaho Conservation League
- Kentucky Resources Council, Inc.
- Klamath Forest Alliance
- Klamath-Siskiyou Wildlands Center
- Kootenai Environmental Alliance
- The Lands Council
- Los Angeles Chapter of Americans United For Separation of Church and State
- McKenzie Guardians
- NARAL Pro-Choice Arizona
- NARAL Pro-Choice California
- National Council of Jewish Women California
- National Lawyers Guild San Francisco Bay Area
- Northwest Environmental Advocates
- Northwest Environmental Defense Center
- Okanogan Highlands Alliance
- Olympic Forest Coalition
- Oregon Center for Environmental Health
- Oregon Council Trout Unlimited
- Oregon Natural Desert Association
- Oregon Natural Resources Council
- Oregon Toxics Alliance
- Pacific Environmental Advocacy Center
- Planning and Conservation League



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- Public Advocates, Inc.
- Religious Campaign for Forest Conservation
- San Diego County Now
- Save the Valley
- Siskiyou Regional Education Project
- Sitka Conservation Society
- Soda Mountain Wilderness Council
- Southeast Alaska Conservation Council
- Temple Kol Tikvah
- Trustees for Alaska
- Umpqua Watersheds, Inc.
- Valley Watch, Inc.
- Waterwatch of Oregon
- Western Environmental Law Center
- Wilderness Study Group at the University of Colorado
- Workmen's Circle/Arbeter Ring Southern California District
- Arizona Governor Janet Napolitano
- California Governor Arnold Schwarzenegger
- Former California Governor and Senator Pete Wilson
- Former Washington Governor Gary Locke
- Alaska Bar Association
- Arizona Bar Association
- Hawaii Bar Association
- Montana Bar Association
- Nevada Bar Association
- Oregon Bar Association
- Washington State Bar Association
- American Bar Association
- Federal Bar Association
- Los Abogados Hispanic Bar Association
- Hispanic National Bar Association
- Orange County Bar Association
- The Bar Association of San Francisco
- Los Angeles County Bar Association
- San Diego County Bar Association
- Beverly Hills Bar Association
- Santa Clara County Bar Association



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- Federal Bar Association, Northern District of California Chapter
- Federal Bar Association, Orange County Chapter
- Ninth Circuit Lawyer Representative Coordinating Committee
- California Public Defenders Association
- California Academy of Appellate Lawyers
- Litigation Section of the State Bar of California
- Administrative Office of the U.S. Courts
- *The Register-Guard*
- *San Francisco Chronicle*
- *San Jose Mercury News*
- *Modesto Bee*
- *Sacramento Bee*
- *Seattle Post-Intelligencer*
- *Juneau Empire*
- *Honolulu Star-Bulletin*
- *Seattle Post-Intelligencer*
- *Tucson Citizen*
- *Legal Affairs*



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United States Senate
Committee on the Judiciary

Hearing on:
Examining the Proposal To Restructure the Ninth Circuit
Wednesday, September 20, 2006, 2:00 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
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Good afternoon, Chairman Specter and Members of the Committee. 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 Examining the Proposal To Restructure the Ninth Circuit. I am very pleased to see that S. 1845 has been on the Chairman's mark-up agenda for several months, and hopefully may be passed out to the Senate floor shortly.

My testimony today is essentially unchanged from my appearance before the subcommittee in October of last year. I continue to believe that the urgency of restructuring the largest judicial circuit in the country is 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 presumably 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.

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.

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 forty-nine judges, soon to be fifty-one).[1] I have also written and spoken repeatedly on issues of judicial administration.[2] Therefore, I feel qualified to share these perspectives

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[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.

[2] See Statement of Diarmuid F. O'Scannlain, Hearing before Subcommittee on Administrative Oversight and the Courts, United States Senate, Revisiting Proposals To Split the Ninth Circuit: An Inevitable Solution to a Growing Problem (October 26, 2005); 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



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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 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

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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.



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proportions. Nine states, sixteen thousand annual case filings, forty-nine judges, and approximately fifty-nine million people are too much for any non-discretionary appeals court to handle satisfactorily.[4] 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.[5] 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. 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

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[4] For numerical data, please see Supplemental 2006 Appendix, to be filed separately with the Senate Judiciary Committee. In lieu of attaching the Supplemental 2006 Appendix here, I have appended a shortened version called "Ninth Circuit Graphics." All the numerical data used in this testimony and graphics can be found in the Supplemental 2006 Appendix, unless otherwise noted. 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 January 1, 2005 to December 31, 2005, and I use population statistics compiled by the United States Census Bureau for the year 2004.

[5] To trace the numerous splits that have occurred within the circuits over the last centuries, please see Supplemental 2006 Appendix, pages 5-9 (Exhibit 1).



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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 response to 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.[6] Congress transferred part of the Eighth Circuit into a new Tenth Circuit in 1929 and split off portions of the Fifth to form the Eleventh in 1981. The next year Congress created the Federal Circuit.[7] And, in due course, I have absolutely no doubt that Congress will act upon the need to form a Twelfth—and even, perhaps, a Thirteenth—out of the current 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, both the White Commission of 1998[8] and the Hruska Commission of 1973[9] concluded that the Court of Appeals for the Ninth Circuit is too big. Regardless of which party controlled Congress when the commissions were

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[6] The original name of the D.C. Circuit was the Court of Appeals for the District of Columbia. In 1934, it was renamed the United States Court of Appeals for the District of Columbia, before taking its present name in 1948. See generally, Jeffrey Brandon Morris, Calmly To Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit (2001).

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

[8] See White Commission Report.

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



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authorized, each concluded that the Ninth Circuit needed restructuring because of the unsustainable costs of its vast size.

A

From a purely numerical perspective, the sheer enormity 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 twenty-eight active judges—more than the total number of judges, active and senior combined, on any other circuit. Currently, twenty-six of those active judgeships are filled, and we have an additional twenty-three senior judges, who are in no sense "retired," with each generally hearing a substantial number of cases ranging from one-hundred percent to twenty-five percent of a regular active judge's load. There are forty-nine judges on our court today. And when the two existing vacancies are filled, our court will have fifty-one.

I should pause to put that figure in perspective. When vacancies are filled, the number of judges in the Ninth Circuit will have more than twice the number of total judges of the next largest circuit (the Sixth with twenty-five), and will have more than five times that of the smallest (the First with ten). 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 forty-nine judges (soon to be fifty-one), the average size of all other circuits today remains at around twenty 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 twelve months ending December 31, 2005, 16,101 appeals were filed—over triple the average of other circuits, and 6,690 more cases than the next busiest circuit, 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 continues to widen, 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 seventy percent during that period, nearly five times that of the average of all other circuits. You can find the statistical details in the Supplemental 2006 Appendix to my testimony. Part of this increase flows from the 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, our circuit dwarfs 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



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Sonoran Desert to the Bering Strait and the Arctic Ocean. In this vast expanse live approximately fifty-nine million people—almost exactly one fifth of the entire population of the United States. Indeed, there are almost twenty-seven 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 ten fastest-growing cities of over 100,000 residents, seven are located in the Ninth Circuit.[10]

No matter what metric one uses, the Ninth Circuit overwhelms the federal judicial system. 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 a fifth of the judges into just one of twelve regions. From any reasonable perspective, the Ninth Circuit already equals at least two circuits in one.

B

These striking numbers tell only a fraction of the story. I have concluded as a firsthand observer that our court's size negatively affects our ability as 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 fewer than 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

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[10] Cumulative Estimates of Population Change for Incorporated Places over 100,000, Ranked by Percent Change: April 1, 2000 to July 1, 2005, 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) North Las Vegas, NV; (3) Port St. Lucie, FL; (4) Miramar, FL; (5) Elk Grove, CA; (6) Cape Coral, FL; (7) Chandler, AZ; (8) Rancho Cucamonga, CA; (9) Roseville, CA; (10) Henderson, NV.



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frequency with which any pair of judges hears cases together is quite low, it becomes difficult to establish effective working relationships in discerning 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 16,000 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 sua sponte en banc requests for review of their own decisions, because they at a late hour uncover 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



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consistency of a court that issued 606 published dispositions in 2005 alone.[11]

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 sixteen-and-a-half months—almost four months longer than the average for the rest of the Courts of Appeals. 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. While we are the slowest, we are not lazy; my colleagues and I are veritable workaholics. We are entitled to ten more judgeships; the seven new judgeships in S. 1845 will go a long way to solve this problem. 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 forty percent of the total geographic area of this country when the remaining sixty percent is shared by eleven other regional circuits?[12] 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

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[11] This is not to mention the over 5,000 non-precedential, unpublished dispositions we circulate each year.

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



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commented that the risk of intra-circuit conflicts is heightened in a court that publishes as many opinions as the Ninth.[13] 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,[14] 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 twenty-eight 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 forty-nine-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. The most recent restructuring efforts 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.

I should be clear that S. 1845 does not implement the circuit configuration I would prefer. I have long felt that the Hruska Commission approach was the better solution, but due to concerns over placing California into two different

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

[14] 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.



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circuits, I have demurred. The present circuit is so large, I think it could appropriately be divided into three circuits—a new California-based Ninth Circuit, a Twelfth "Mountain" Circuit, and a Thirteenth "Pacific Northwest" Circuit—the configuration which actually passed the House in 2004 as an amendment to S. 878. Alternatively, I would welcome Senator Murkowski's bill, S. 1301, which would be a Northwest/Southwest split.

Nevertheless, I continue to support passage of S. 1845 because it corrects 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, and responsiveness to regional concerns. And, of course, the new circuits created would remain bound by pre-split Ninth Circuit precedent, helping to minimize confusion in interpreting the law.

A

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 thirty-five, with twenty-two allocated to the new Ninth Circuit and fourteen 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."[15] 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.[16] It is truly regrettable that we failed to request new judgeships in 1990 notwithstanding our statistical eligibility for

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[15] 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).

[16] 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.



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perhaps as many as ten 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.

B

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, Tenth, and D.C. Circuits. And at 348 appeals filed per authorized judgeship, the new Twelfth Circuit's caseload would compare favorably to eight of the twelve current regional 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 thirty-seven million and twenty-one 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 thirty million.[17]

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.

A

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.

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



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

B

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. The current Ninth Circuit's budget could be cut by 1/3 following the restructuring, and that savings would serve to defray at least part of the administrative costs of the new Twelfth Circuit. Second, there are far simpler—and far cheaper—solutions. There is plenty of space in existing courthouses in Phoenix to accommodate a circuit headquarters there. 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. Any of these physical plants would be appropriate for administrative operations. Indeed, there is absolutely no need for new building construction, aside from relatively modest design and remodeling expenses—expenses that must be borne regardless of what use the buildings will take. In any event, the costs of circuit reorganization are much more modest than opponents claim—and pale in comparison to the administrative costs imposed by a megacircuit such as ours.

C

I concede that there are judges on the Ninth Circuit Court of Appeals who believe the disadvantages of splitting the circuit outweigh the advantages. There



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are, however, a significant number who favor restructuring. In addition, 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."[18] The Commission itself reported that, "[i]n general, the Justices expressed concern 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."[19] An increasing number of district judges have expressed support for restructuring, and many joined the recent letter—one that received wide recognition around the Ninth Circuit—from twenty-four judges to Chairman Specter in support of S. 1845. A significant number of practitioners also concur. In any event, I truly believe that support for a split is not so thin as many objectors suggest.

D

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. S. 1845, like many of the recent split proposals, incorporates 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 judicial case 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.

Split opponents are loathe to confront the judicial administration arguments and the statistics behind them. They would much rather cast the debate as one of ideology. In a recent article, Judge Kozinski, one of the split's most vocal opponents, insisted that belief in the split "'is, in the realm of religion, like some sort of paganism.'"[20] He said, "I think [split proponents are] unhappy with some of our rulings, and they think that if they split the 9th Circuit, it'll send a message to those activist judges. But if they split it, they'll still have the biggest circuit in the

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

[19] Id.

[19] Justin Scheck, 9th Circuit Split Proponents Attack Case Overload, July 17, 2006, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1152867927545.



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country, and it'll be way more liberal."[21] In his view, then, "the split has become a conservative shibboleth rooted in historic dissatisfaction with liberal opinions."[22] At the risk of repeating myself, I must again emphatically state that my support for the split has nothing whatsoever to do with opposition to certain of my court's decisions.

Split opponents are content to ignore the fact that 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.

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. Twenty-eight judges is too many already, and more judges –

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[20] *Id.*

[21] *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).



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however necessary – 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.

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. 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.

V

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.



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# Ninth Circuit Graphics

Graphics to Testimony of Judge Diarmuid F. O'Scannlain to Senate Judiciary Committee (extracts from Supplemental 2006 Appendix, to be filed separately with Senate Judiciary Committee).



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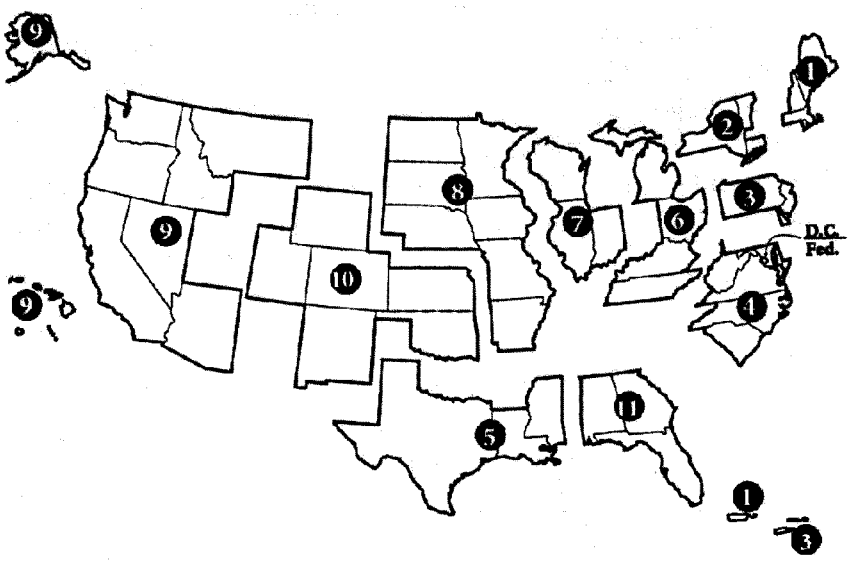
Exhibit 2

# 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 formally recognized
1981 - Eleventh Circuit carved out of Fifth Circuit
1982 - Federal Circuit created



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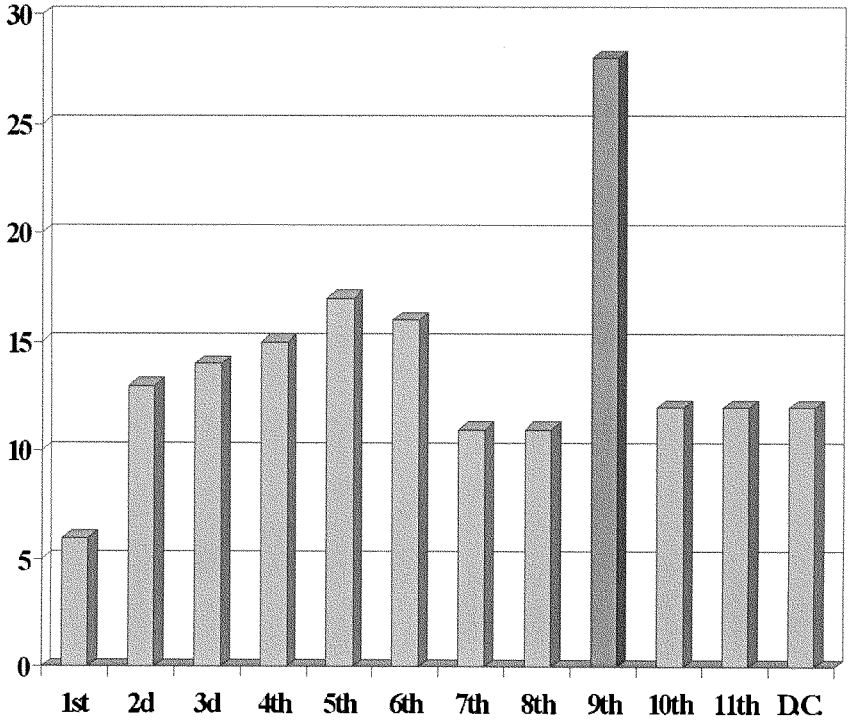
Exhibit 4

## The Ninth Circuit has eleven more authorized judgeships than the next-largest circuit.




SOURCE: 28 U.S.C. § 44 (2004).



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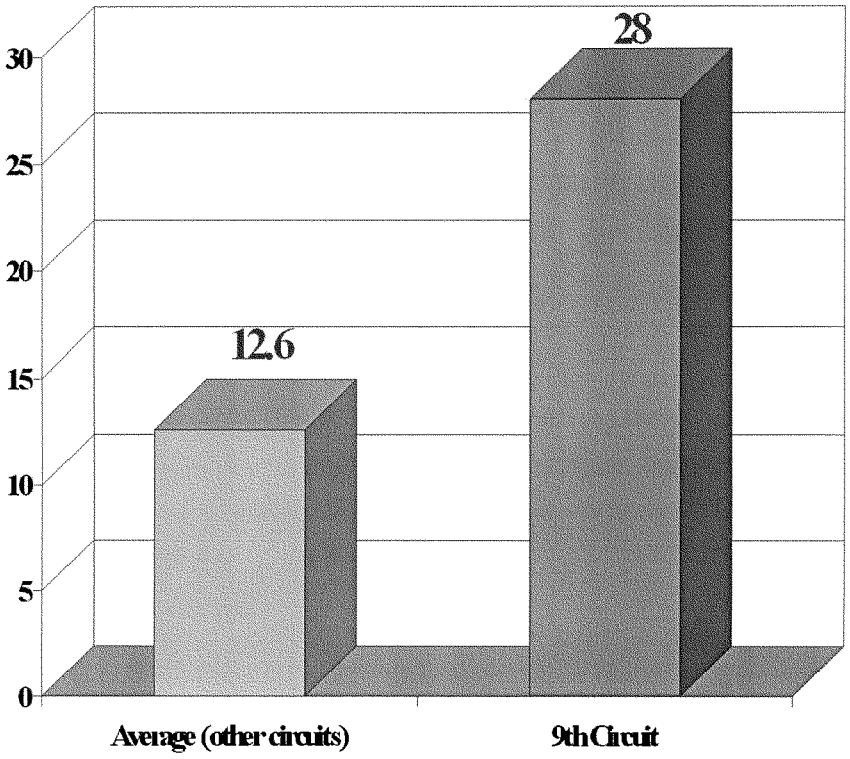
Exhibit 5

## The Ninth Circuit has more than double the average number of authorized judgeships of all other circuits.




SOURCE: 28 U.S.C. § 44 (2004).



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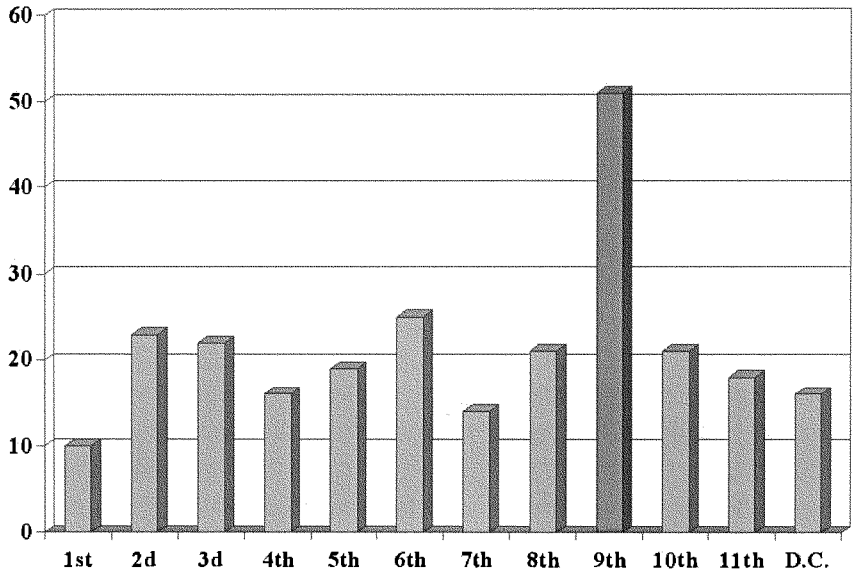
Exhibit 6

## The Ninth Circuit has twenty-six 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).



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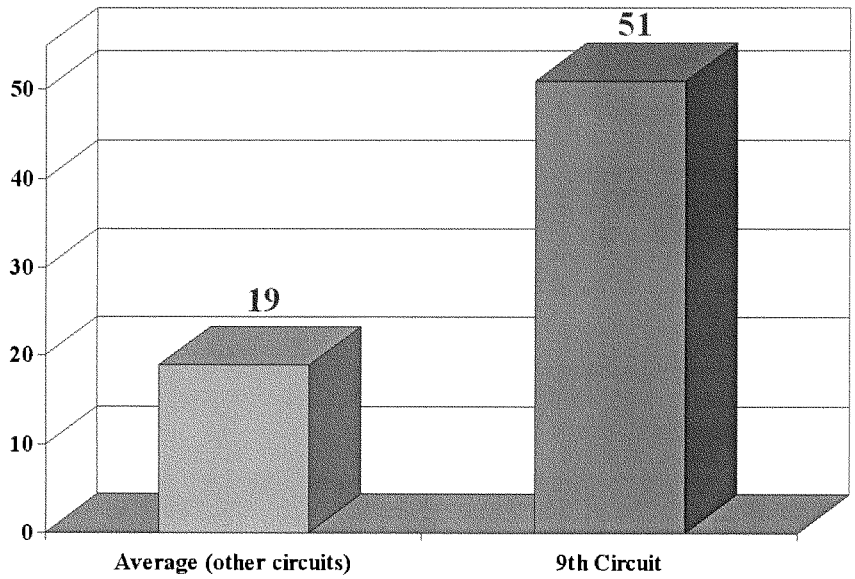
Exhibit 7

## The Ninth Circuit has more than double the average number of total judges (authorized + senior) of all other circuits.




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).



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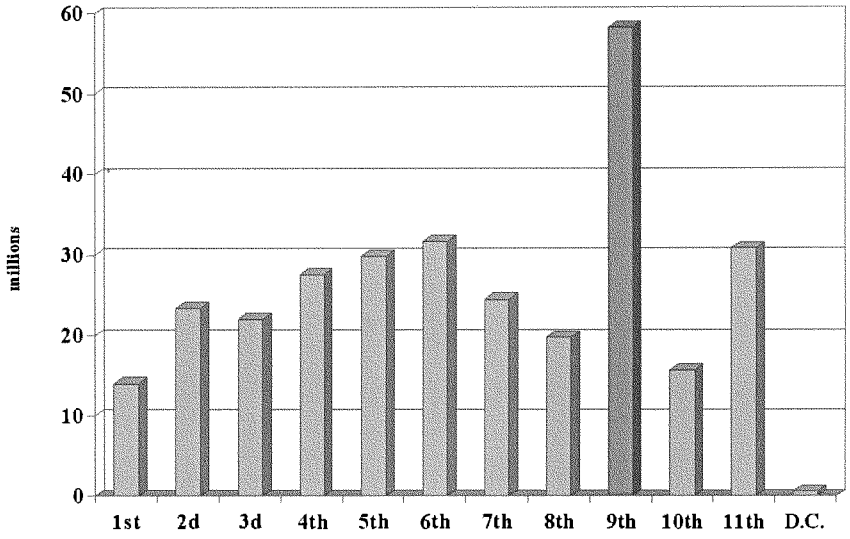
Exhibit 9

## The Ninth Circuit's population is 27 million more than the next-largest circuit.




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/.



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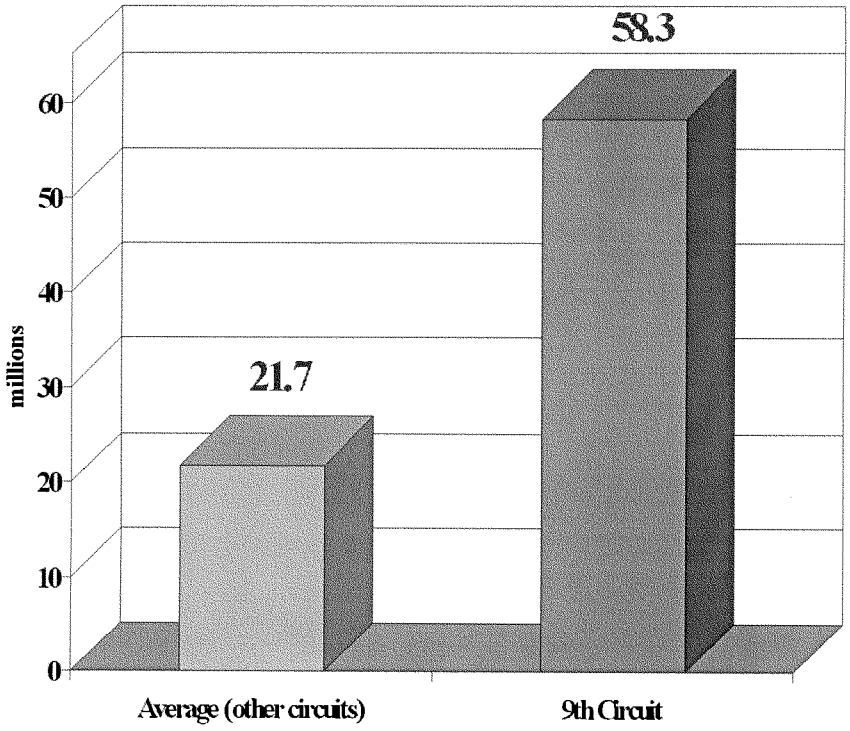
Exhibit 10

## 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/.



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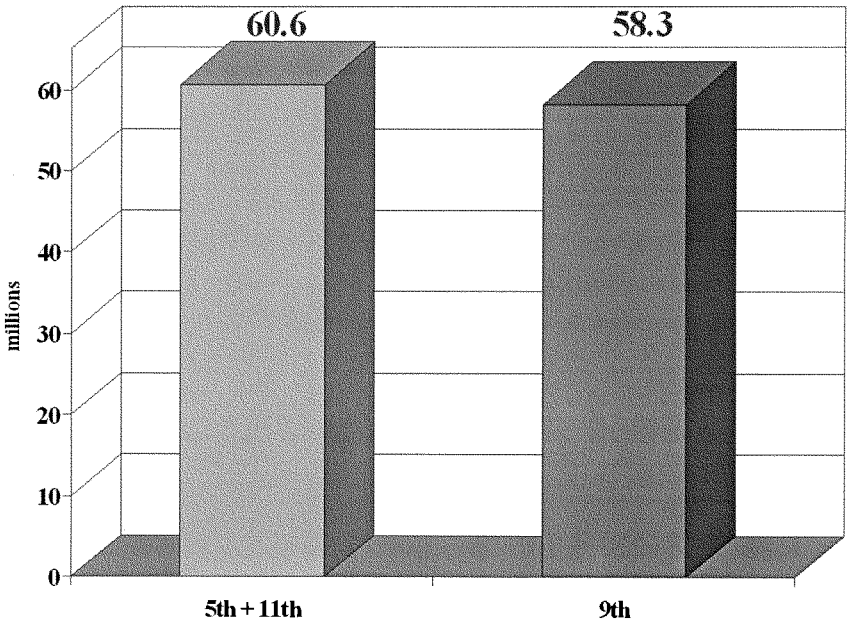
Exhibit 11

**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/.



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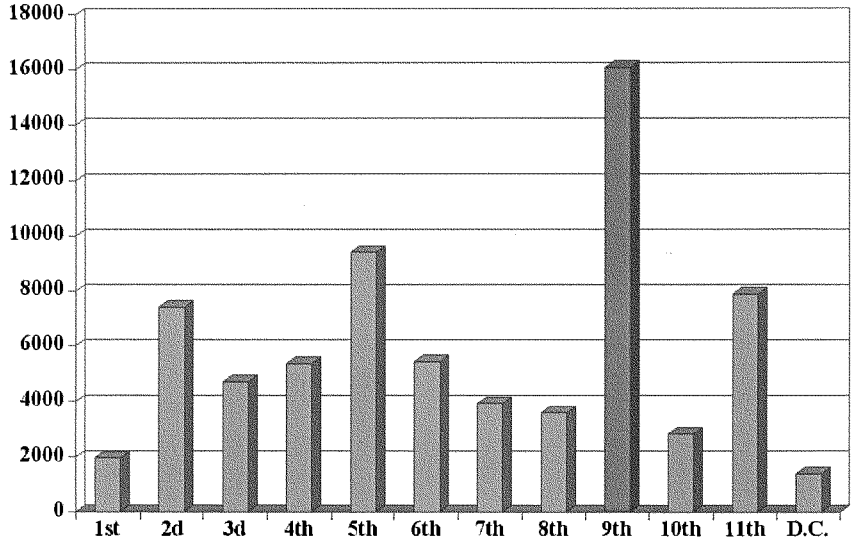
Exhibit 12

# The Ninth Circuit had almost 7,000 more filings in 2005 than the next-busiest circuit.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html.



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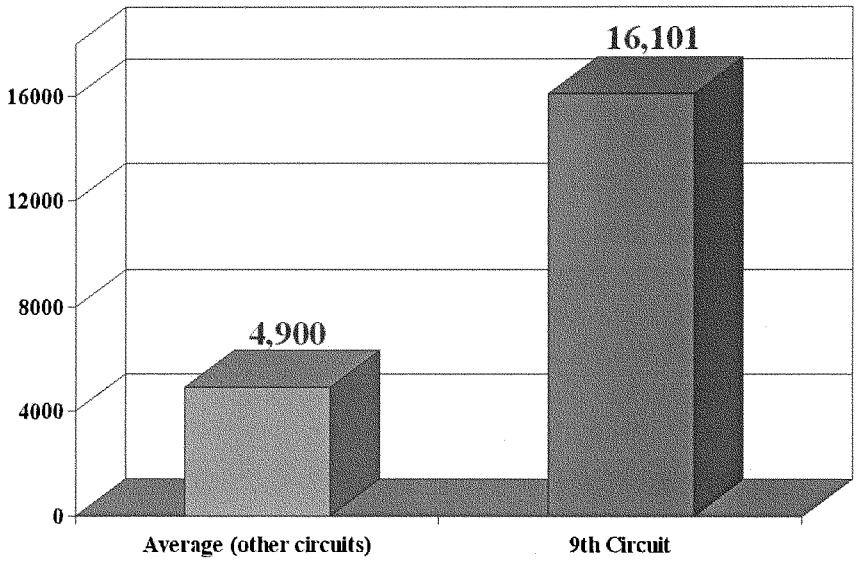
Exhibit 13

# The Ninth Circuit had more than triple the average number of appeals filed of all other circuits in 2005.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html.



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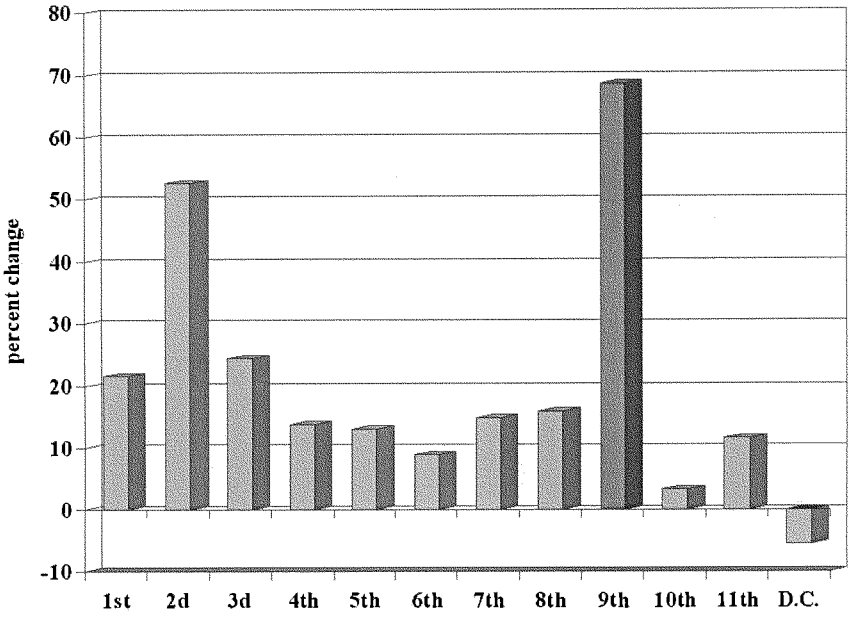
Exhibit 14

## The Ninth Circuit's caseload increased more rapidly between 2000 and 2005 than did any other circuit's.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html.



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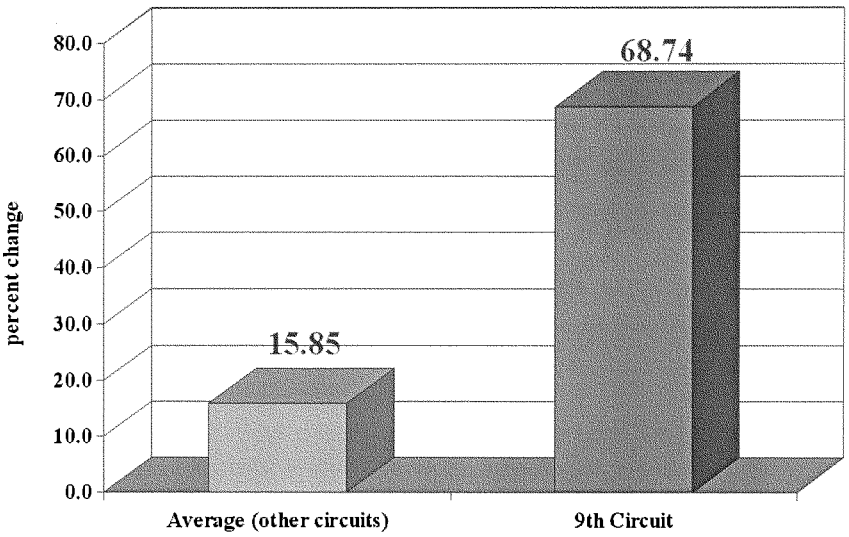
Exhibit 15

## The Ninth Circuit's caseload increased nearly five times faster between 2000 and 2005 than did 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.



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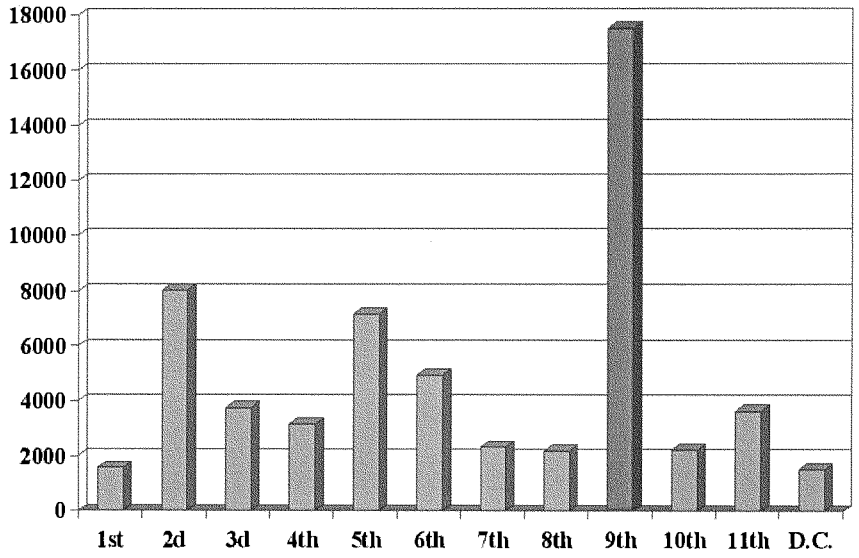
43383.285

Exhibit 16

# The Ninth Circuit has the largest backlog in the country by over 9,500 appeals.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html, for the twelve months ending June 30, 2006.



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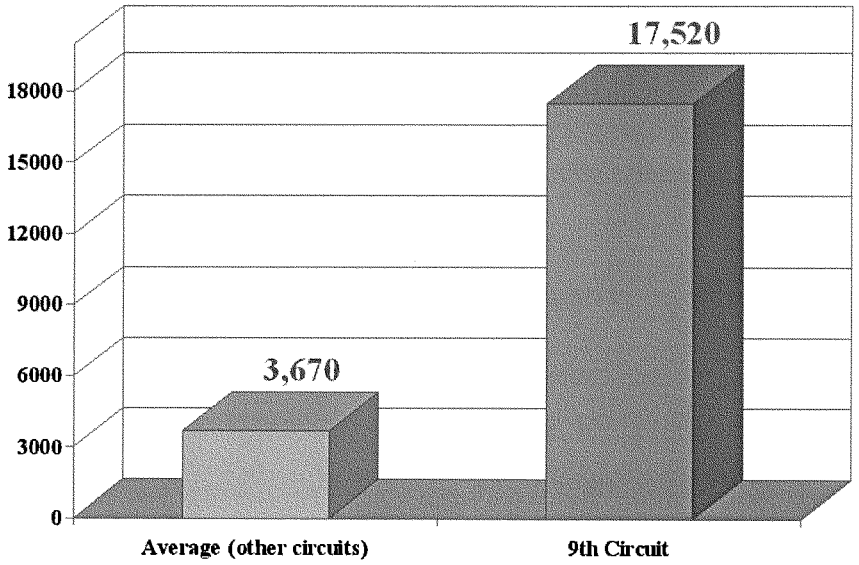
Exhibit 17

## The Ninth Circuit's backlog is nearly five times larger than that of the average circuit.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html, for the twelve months ending June 30, 2006.



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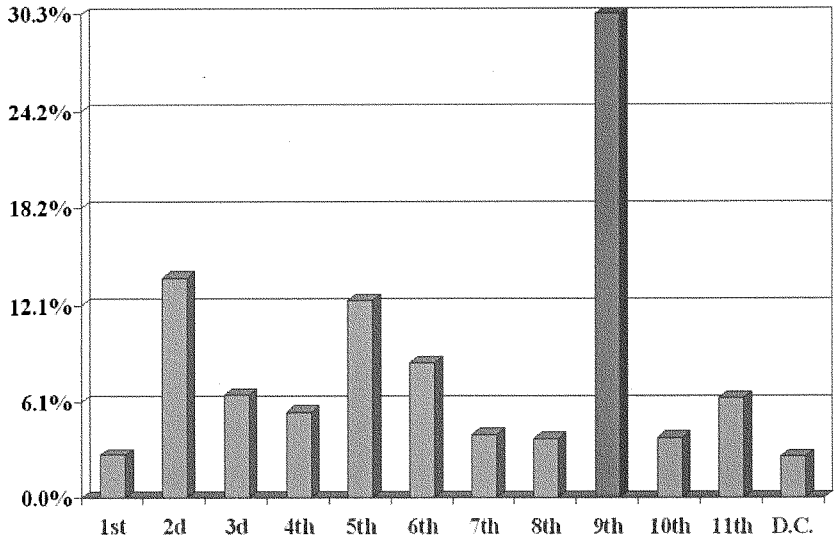
43383.287

Exhibit 18

# The Ninth Circuit has the highest backlog in the country—over 30% of all pending federal appeals.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html, for the twelve months ending June 30, 2006.



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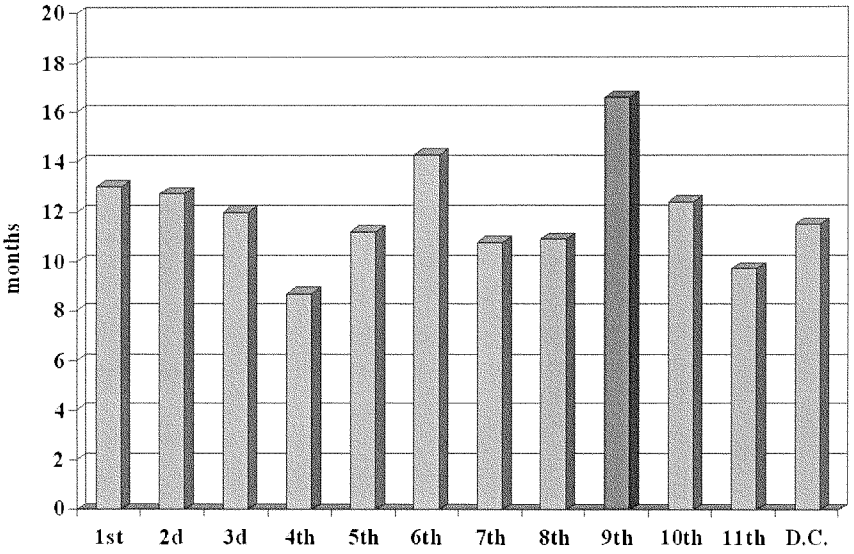
Exhibit 19

## The Ninth Circuit is the slowest circuit in the disposition of appeals.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html.



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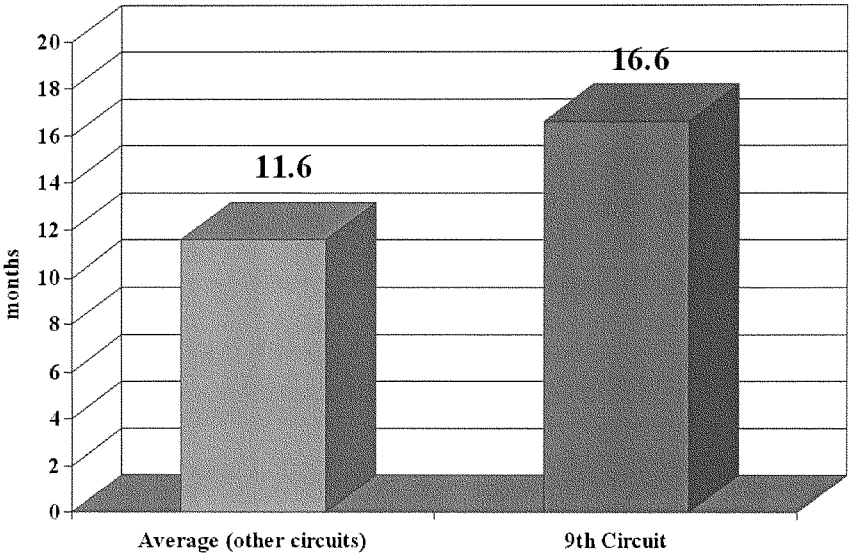
43383.289

Exhibit 20

## The Ninth Circuit takes over 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.



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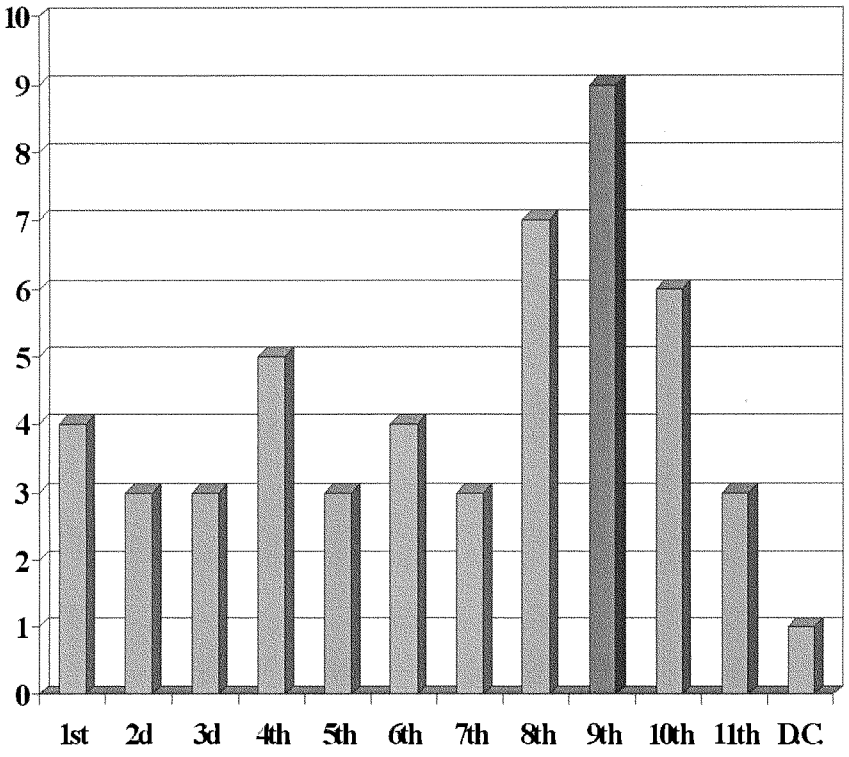
43383.290

Exhibit 21

## The Ninth Circuit encompasses more states than any other circuit.




SOURCE: 28 U.S.C. § 41 (2004).



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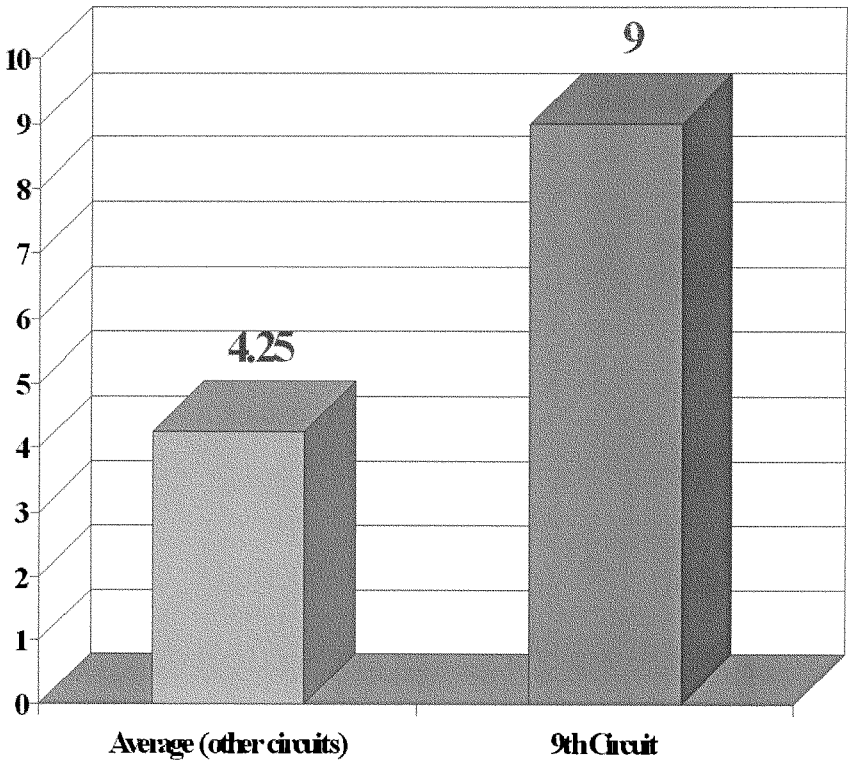
43383.291

Exhibit 22

## The Ninth Circuit has more than double the average number of states of all other circuits.




SOURCE: 28 U.S.C. § 41 (2004).



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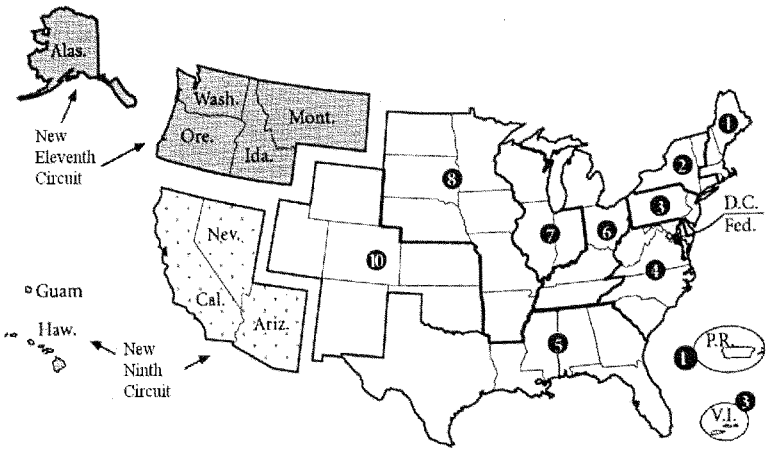
43383.292

Exhibit 26

# In 1955, Senator Warren Magnuson and Senator Henry Jackson introduced S. 2174, which would split the Ninth Circuit into a Pacific Northwest and a Pacific Southwest Circuit.



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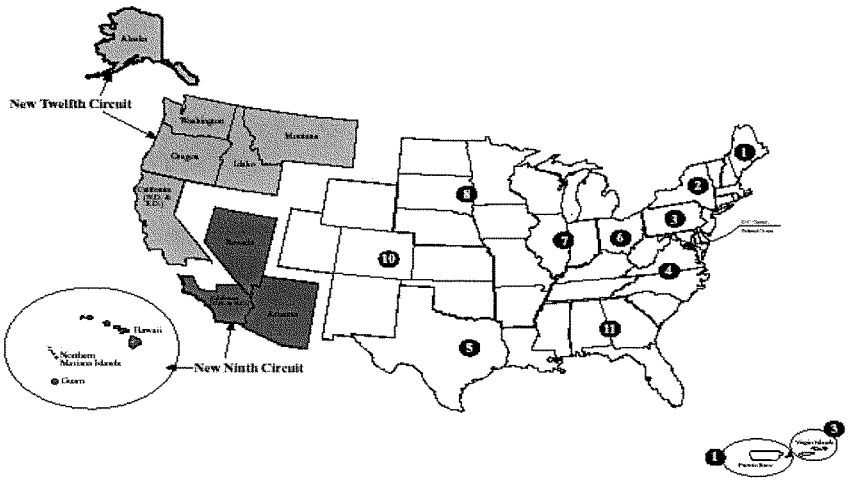
43383.293

Exhibit 27

**In 1973, the Hruska Commission recommended splitting the Ninth Circuit into a Pacific Northwest and a Pacific Southwest Circuit. The Commission also recommended splitting the Fifth Circuit, and the Eleventh Circuit was carved out shortly thereafter.**



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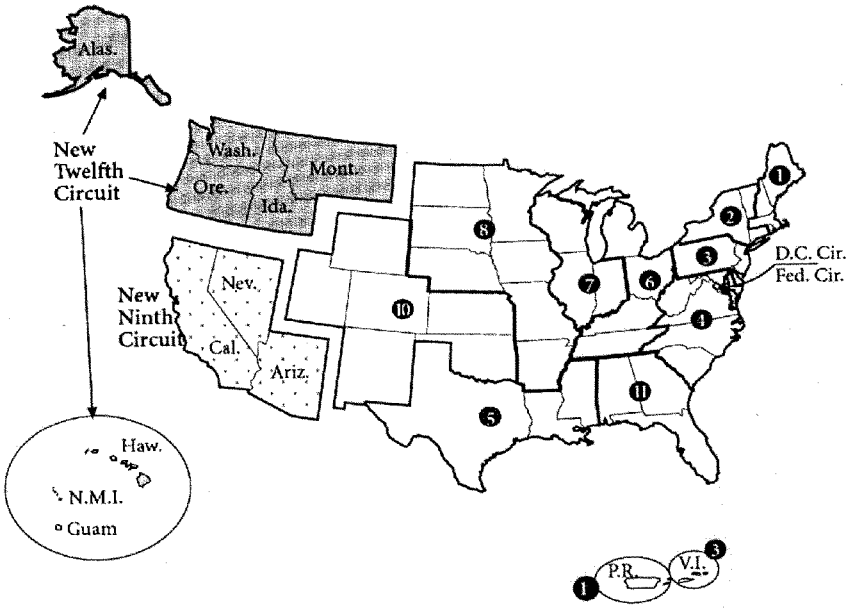
43383.294

Exhibit 31

**In 1989, Senator Slade Gorton introduced S. 948, which would split the Ninth Circuit into a Pacific Northwest and a Pacific Southwest Circuit. This is the same bill as H.R. 212 in the current session of Congress.**



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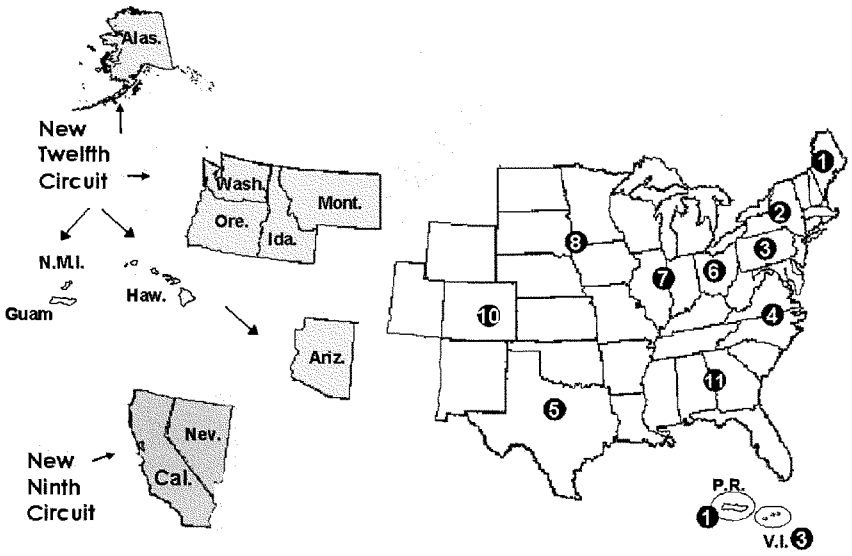
43383.295

Exhibit 35

**In 1997, the Senate passed S. 1022—an appropriations bill that included the Ninth Circuit split provision sponsored by Senator John Kyl—by a vote of 99-0.**



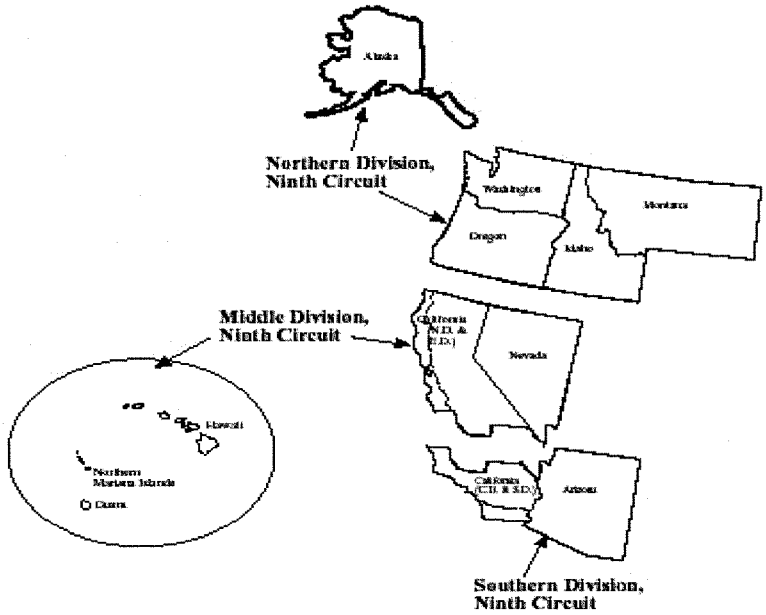



VerDate Nov 24 2008 13:02 Feb 09, 2009 Jkt 043383 PO 00000 Frm 00349 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43383.TXT SJUD1 PsN: CMORC

43383.296

Exhibit 39

**In 1998, the White Commission, created in response to Senate passage of S. 1022, recommended that the Circuit be split into three semi-autonomous divisions, leaving the Ninth Circuit as a shell.**



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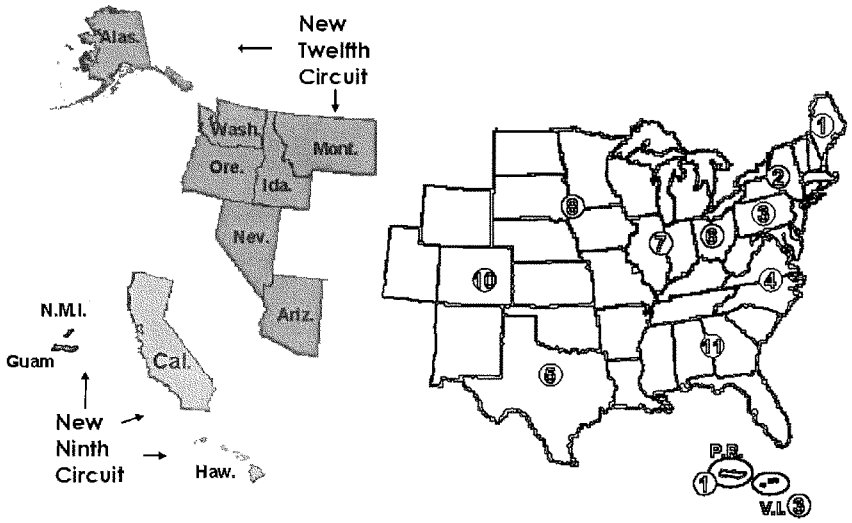
43383.297

Exhibit 44

**In 2005, the House passed H.R. 4093, a Ninth Circuit split bill sponsored by Chairman James Sensenbrenner, as an attachment to the budget bill, which was detached by the Senate. This bill contains the same configuration as S. 1845, now pending before the Senate.**



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Note: This is the supplemental appendix to the testimony of Judge Diarmuid O'Scannlain given to the Senate Judiciary Committee on September 20, 2006. All case filing figures refer to the period from January 1, 2005 to December 31, 2005 unless otherwise noted. All bill references are to the current 109th Congress, unless otherwise noted.

# SUPPLEMENTAL 2006 APPENDIX

**(updated September 20, 2006)**

## NINTH CIRCUIT RESTRUCTURING PROPOSALS

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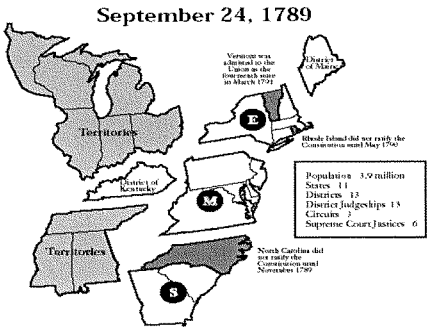
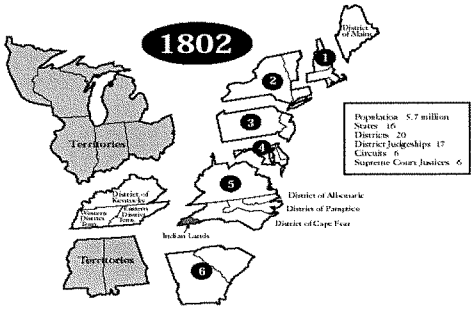
Exhibit 1

# The Evolution of the Circuits




The Judiciary Act of 1789 created three circuits: the Eastern, Middle, and Southern.




In 1802, three new circuits were created, bringing the total number to six. The Eastern Circuit was divided into two circuits by separating New York, Vermont, and Connecticut from Massachusetts, New Hampshire, and Rhode Island. The Middle Circuit, which encompassed the Mid-Atlantic region from Pennsylvania to Virginia, was split into three circuits.

SOURCE: RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM (2d ed. 1994).



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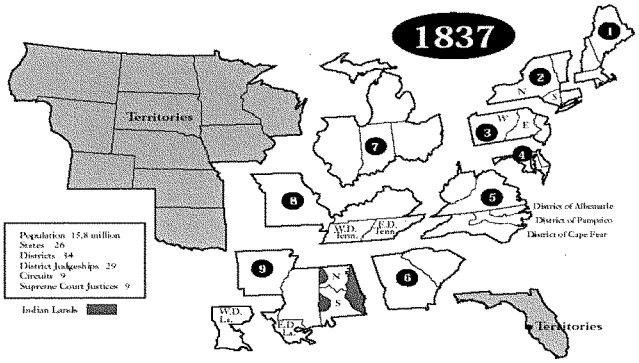
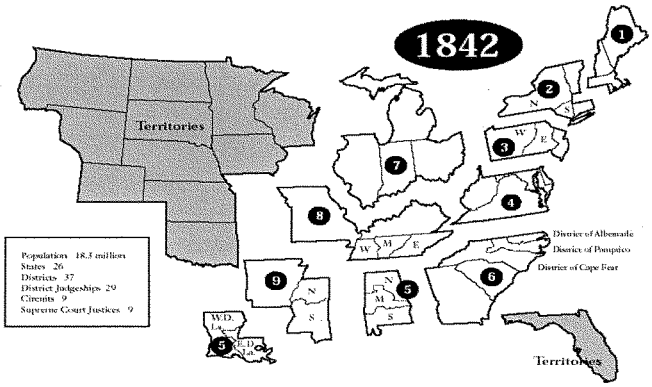
**Exhibit 1 (cont'd)**




Between 1802 and 1837, three new circuits were created, bringing the total number to nine.




In 1842, Congress split the four states of the Ninth Circuit into two circuits and created the noncontiguous Fifth Circuit comprised of Louisiana and Alabama.

SOURCE: RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM (2d ed. 1994).



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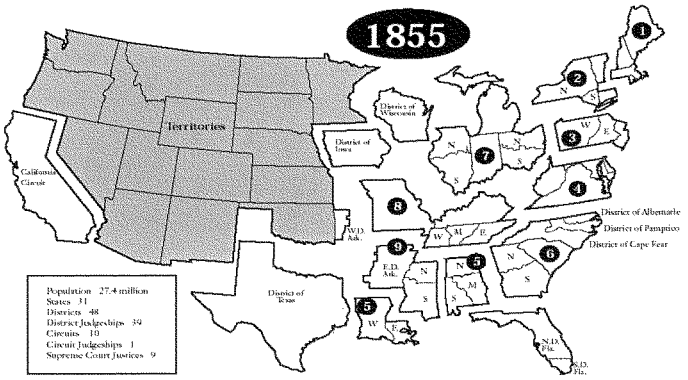
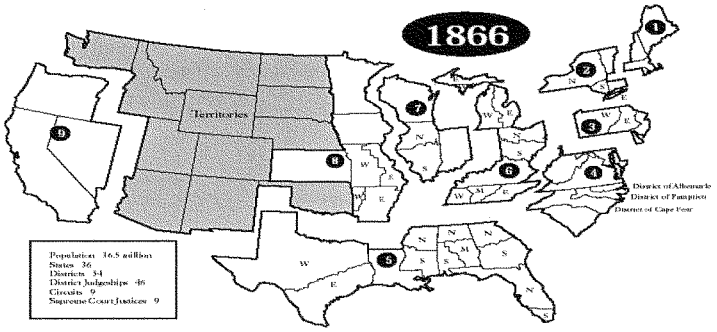
**Exhibit 1 (cont'd)**




In 1855, Congress created a separate judicial circuit, "constituted in and for the state of California, to be known as the circuit court of the United States for the districts of California," with the same jurisdiction as the numbered circuits. Rather than increasing the number of Supreme Court Justices, Congress authorized a circuit judgeship for the circuit.




As the United States expanded westward, the nine circuits' boundaries were realigned to reflect territorial gains and population shifts.

SOURCE: RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM (2d ed. 1994).



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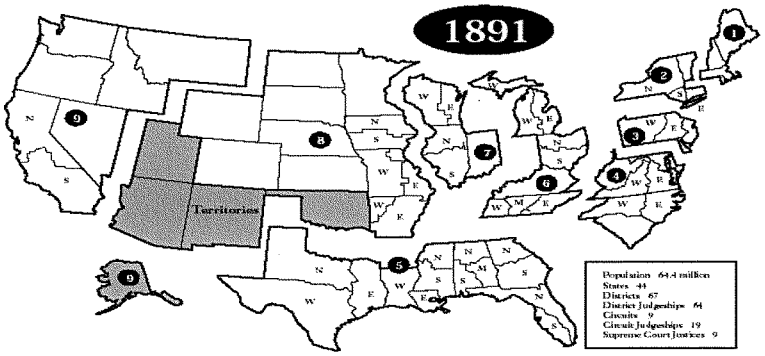
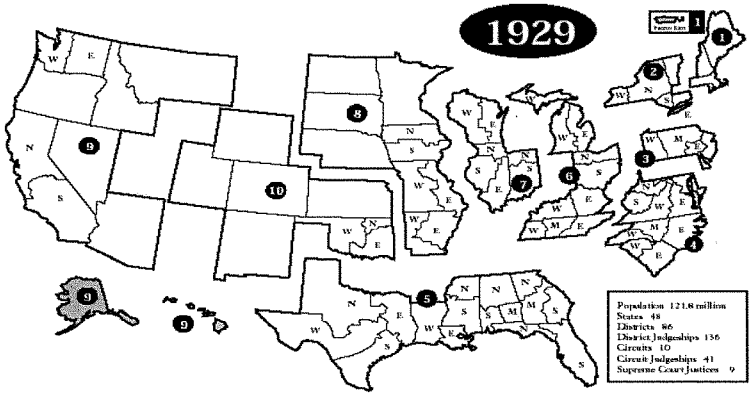
**Exhibit 1 (cont'd)**




In 1891, the Evarts Act created the nine circuit courts of appeals.




In 1929, the Tenth Circuit was created by splitting the Eighth Circuit in two.

SOURCE: RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM (2d ed. 1994).



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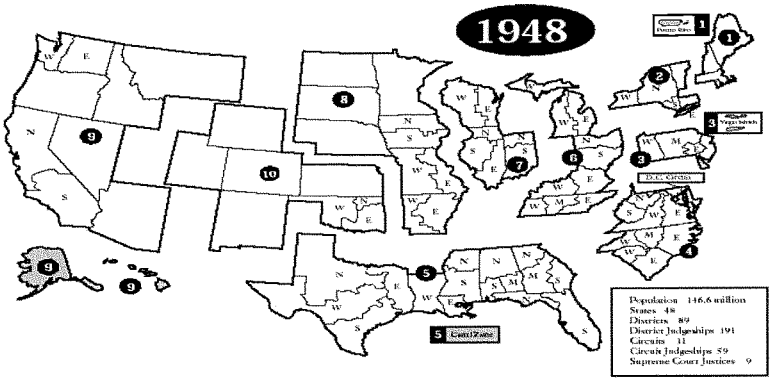
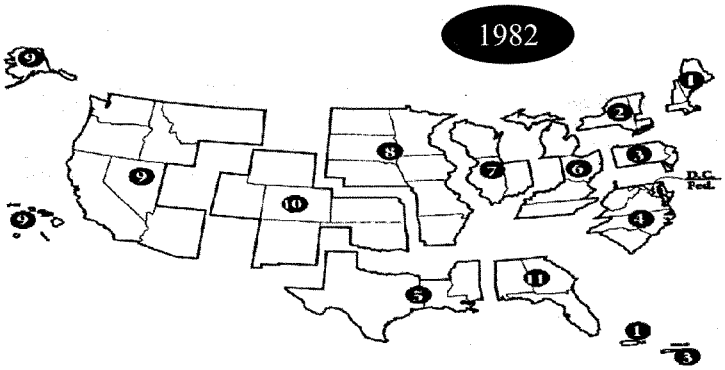
**Exhibit 1 (cont'd)**




In 1948, the District of Columbia Circuit was formally recognized.




In 1981, the Eleventh Circuit was created by splitting the Fifth Circuit in two. A year later, the Federal Circuit was created.

SOURCE: RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM (2d ed. 1994).



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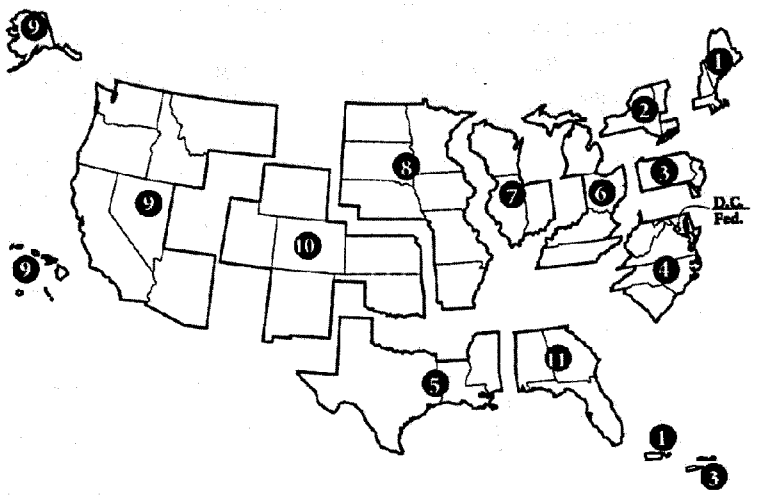
Exhibit 2

# 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 formally recognized
1981 - Eleventh Circuit carved out of Fifth Circuit
1982 - Federal Circuit created



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**Exhibit 3**

# All Ninth Circuit Judges by Seniority

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Browning | Kennedy | California | San Francisco | Senior |
| 2. Goodwin | Nixon | California | Pasadena | Senior |
| 3. Wallace | Nixon | California | San Diego | Senior |
| 4. Sneed | Nixon | California | San Francisco | Senior |
| 5. Hug | Carter | Nevada | Reno | Senior |
| 6. Skopil | Carter | Oregon | Portland | Senior |
| 7. Fletcher, B. | Carter | Washington | Seattle | Senior |
| 8. Schroeder (Chief) | Carter | Arizona | Phoenix | ACTIVE |
| 9. Farris | Carter | Washington | Seattle | Senior |
| 10. Pregerson | Carter | California | Woodland Hills | ACTIVE |
| 11. Alarcon | Carter | California | Los Angeles | Senior |
| 12. Ferguson | Carter | California | Santa Ana | Senior |
| 13. Nelson, D. | Carter | California | Pasadena | Senior |
| 14. Canby | Carter | Arizona | Phoenix | Senior |
| 15. Boochever | Carter | California | Pasadena | Senior |
| 16. Reinhardt | Carter | California | Los Angeles | ACTIVE |
| 17. Beezer | Reagan | Washington | Seattle | Senior |
| 18. Hall | Reagan | California | Pasadena | Senior |
| 19. Brunetti | Reagan | Nevada | Reno | Senior |
| 20. Kozinski | Reagan | California | Pasadena | ACTIVE |
| 21. Noonan | Reagan | California | San Francisco | Senior |
| 22. Thompson | Reagan | California | San Diego | Senior |
| 23. O'Scannlain | Reagan | Oregon | Portland | ACTIVE |
| 24. Leavy | Reagan | Oregon | Portland | Senior |
| 25. Trott | Reagan | Idaho | Boise | Senior |
| 26. Fernandez | G.H.W. Bush | California | Pasadena | Senior |
| 27. Rymer | G.H.W. Bush | California | Pasadena | ACTIVE |
| 28. Nelson, T. | G.H.W. Bush | Idaho | Boise | Senior |
| 29. Kleinfeld | G.H.W. Bush | Alaska | Fairbanks | ACTIVE |
| 30. Hawkins | Clinton | Arizona | Phoenix | ACTIVE |
| 31. Tashima | Clinton | California | Pasadena | Senior |
| 32. Thomas | Clinton | Montana | Billings | ACTIVE |
| 33. Silverman | Clinton | Arizona | Phoenix | ACTIVE |
| 34. Graber | Clinton | Oregon | Portland | ACTIVE |
| 35. McKeown | Clinton | California | San Diego | ACTIVE |
| 36. Wardlaw | Clinton | California | Pasadena | ACTIVE |
| 37. Fletcher, W. | Clinton | California | San Francisco | ACTIVE |
| 38. Fisher | Clinton | California | Pasadena | ACTIVE |
| 39. Gould | Clinton | Washington | Seattle | ACTIVE |
| 40. Paez | Clinton | California | Pasadena | ACTIVE |
| 41. Berzon | Clinton | California | San Francisco | ACTIVE |
| 42. Tallman | Clinton | Washington | Seattle | ACTIVE |
| 43. Rawlinson | Clinton | Nevada | Las Vegas | ACTIVE |
| 44. Clifton | G.W. Bush | Hawaii | Honolulu | ACTIVE |
| 45. Bybee | G.W. Bush | Nevada | Las Vegas | ACTIVE |
| 46. Callahan | G.W. Bush | California | Sacramento | ACTIVE |
| 47. Bea | G.W. Bush | California | San Francisco | ACTIVE |
| 48. M. Smith | G.W. Bush | California | Los Angeles | ACTIVE |
| 49. Ikuta | G.W. Bush | California | Pasadena | ACTIVE |
| 50. [Myers] | G.W. Bush | Idaho | Boise | Nominee |
| 51.[R. Smith] | G.W. Bush | Idaho | Boise | Nominee |

| | | |
|---|---|---|
| **SUMMARY:** | **ACTIVE Judges** | **26** |
| | **Nominees** | **+ 2** |
| | **Authorized Judgeships** | **28** |
| | **Senior Judges** | **+ 23** |
| | **TOTAL, including nominees and vacancies** | **51** |



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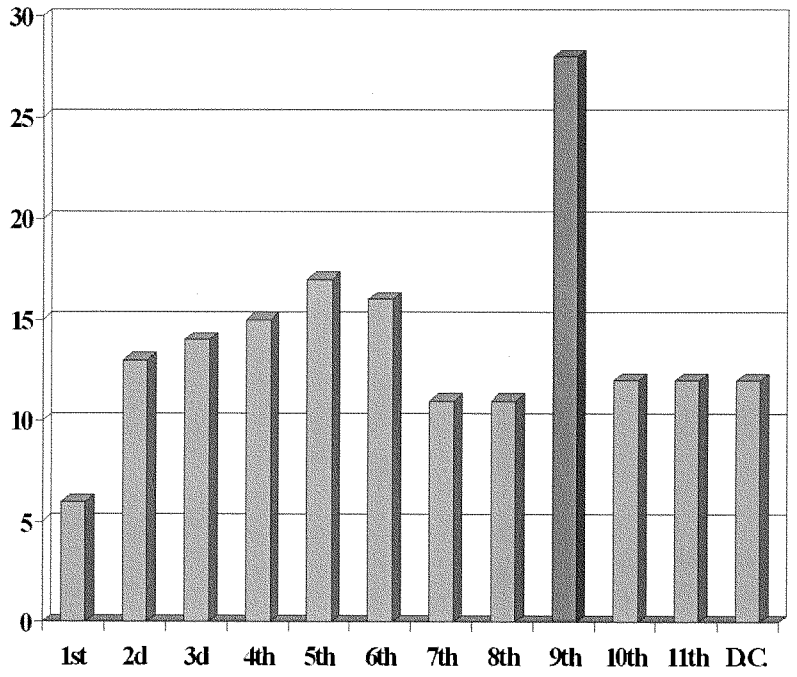
Exhibit 4

## The Ninth Circuit has eleven more authorized judgeships than the next-largest circuit.




SOURCE: 28 U.S.C. § 44 (2004).



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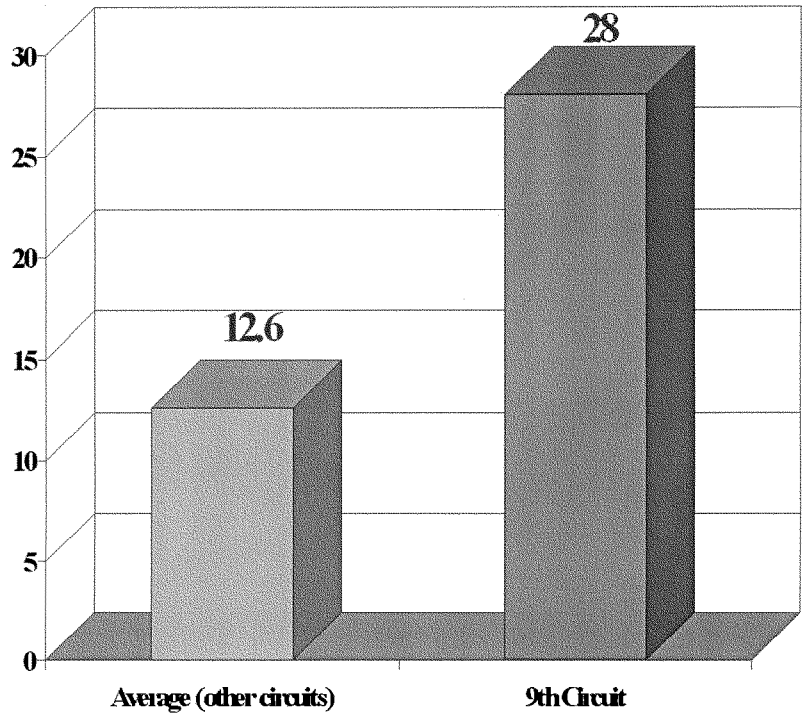
Exhibit 5

**The Ninth Circuit has more than double the average number of authorized judgeships of all other circuits.**




SOURCE: 28 U.S.C. § 44 (2004).



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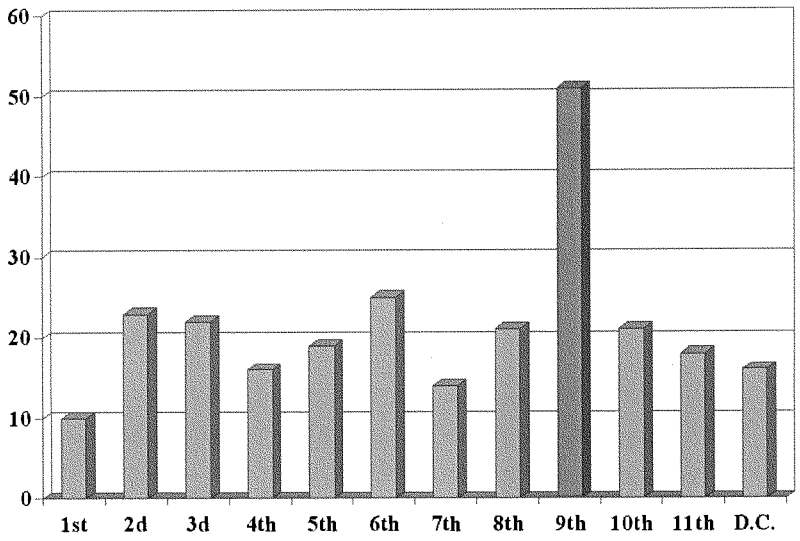
Exhibit 6

## The Ninth Circuit has twenty-six 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).



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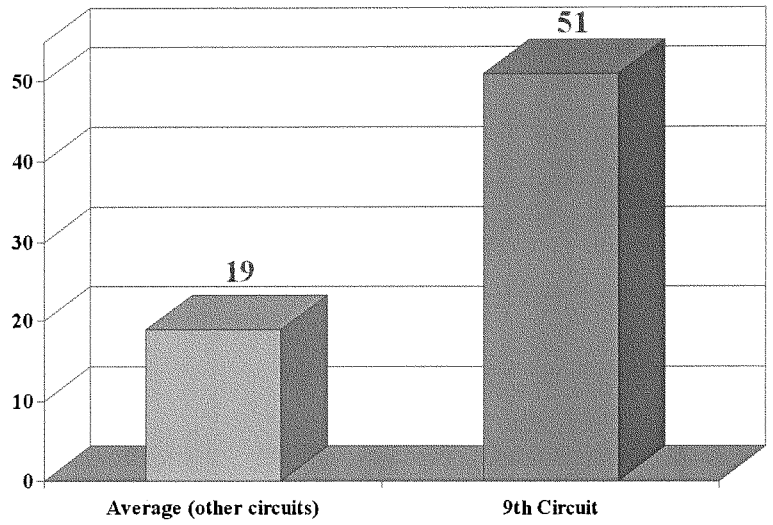
Exhibit 7

**The Ninth Circuit has more than double the average number of total judges (authorized + senior) of all other circuits.**




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).



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Exhibit 8

# Number of Authorized and Total Judges by Circuit

| Court | Headquarter City | Authorized Judgeships | % | Senior Judges | % | Total Judges* | % |
|---|---|---|---|---|---|---|---|
| First | Boston, MA | 6 | 3.6% | 4 | 4.5% | 10 | 3.9% |
| Second | New York, NY | 13 | 7.8% | 10 | 11.2% | 23 | 9.1% |
| Third | Philadelphia, PA | 14 | 8.4% | 8 | 9.0% | 22 | 8.7% |
| Fourth | Richmond, VA | 15 | 9.0% | 1 | 1.1% | 16 | 6.3% |
| Fifth | New Orleans, LA | 17 | 10.2% | 2 | 2.2% | 19 | 7.5% |
| Sixth | Cincinnati, OH | 16 | 9.6% | 9 | 10.1% | 25 | 9.8% |
| Seventh | Chicago, IL | 11 | 6.6% | 3 | 3.4% | 14 | 5.5% |
| Eighth | St. Louis, MO | 11 | 6.6% | 10 | 11.2% | 21 | 8.3% |
| Ninth | San Francisco, CA | 28 | 16.8% | 23 | 25.8% | 51 | 20.1% |
| Tenth | Denver, CO | 12 | 7.2% | 9 | 10.1% | 19 | 7.5% |
| Eleventh | Atlanta, GA | 12 | 7.2% | 6 | 6.7% | 18 | 7.1% |
| D.C. | Washington, DC | 12 | 7.2% | 4 | 4.5% | 16 | 6.3% |
| **Total** | | **167** | **100%** | **89** | **100%** | **254** | **100%** |

* Total judges includes authorized judgeships and senior judges.

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).



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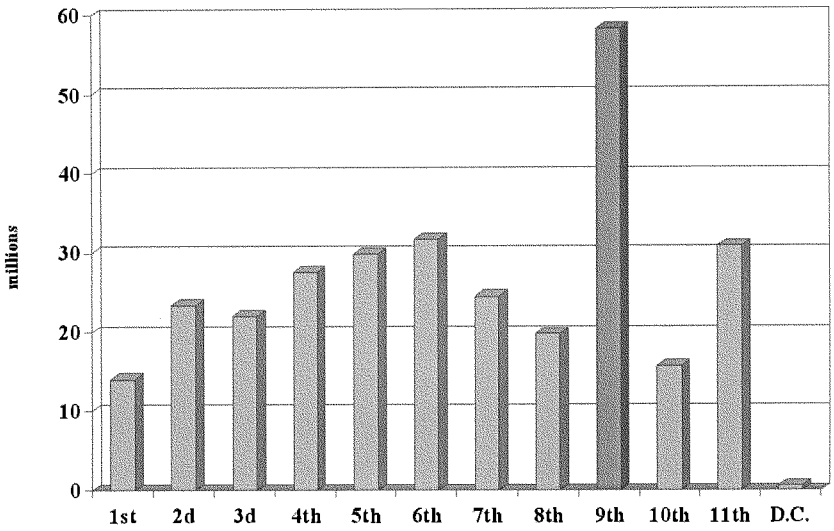
Exhibit 9

## The Ninth Circuit's population is 27 million more than the next-largest circuit.




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/.



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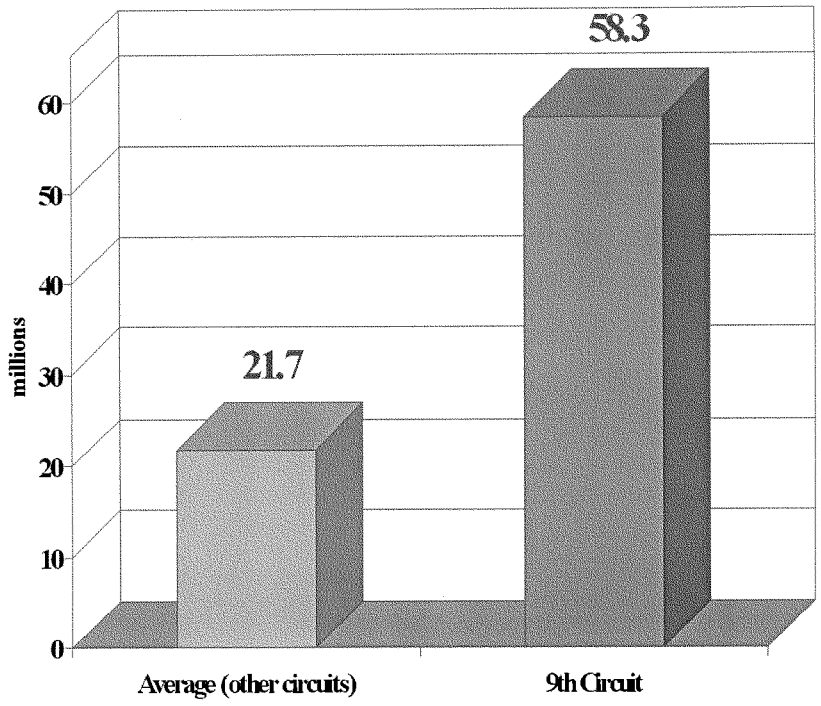
Exhibit 10

## 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/.



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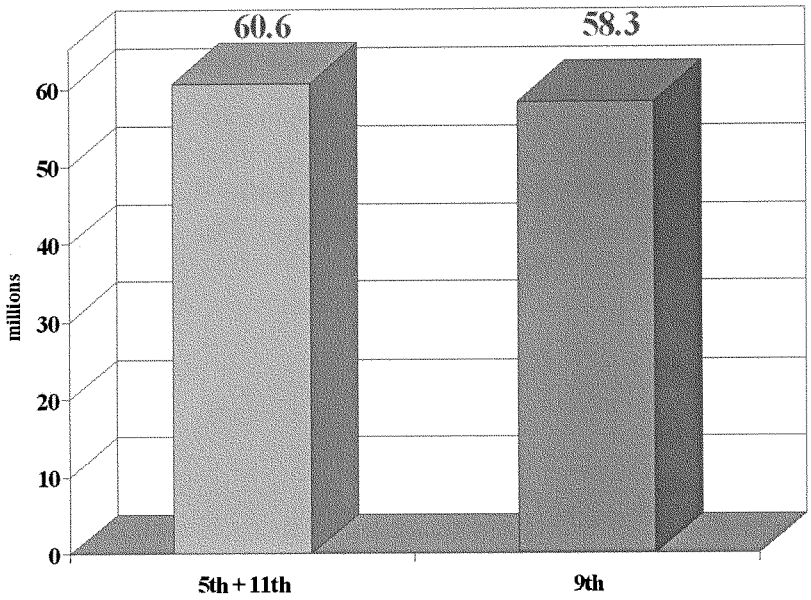
Exhibit 11

**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/.



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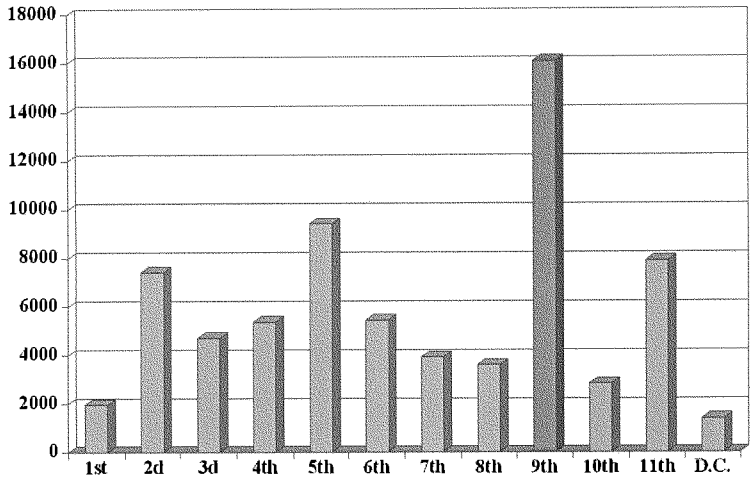
Exhibit 12

## The Ninth Circuit had almost 7,000 more filings in 2005 than the next-busiest circuit.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html.



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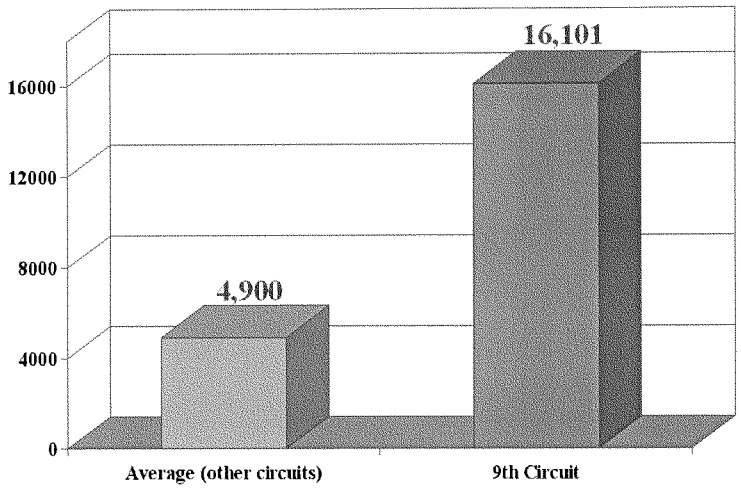
Exhibit 13

## The Ninth Circuit had more than triple the average number of appeals filed of all other circuits in 2005.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html.

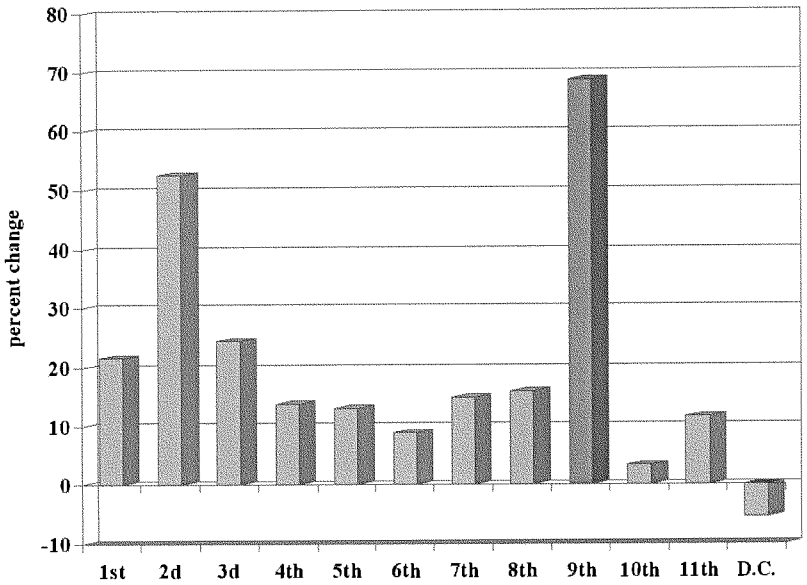


VerDate Nov 24 2008 13:02 Feb 09, 2009 Jkt 043383 PO 00000 Frm 00373 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43383.TXT SJUD1 PsN: CMORC

43383.320

Exhibit 14

## The Ninth Circuit's caseload increased more rapidly between 2000 and 2005 than did any other circuit's.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html.

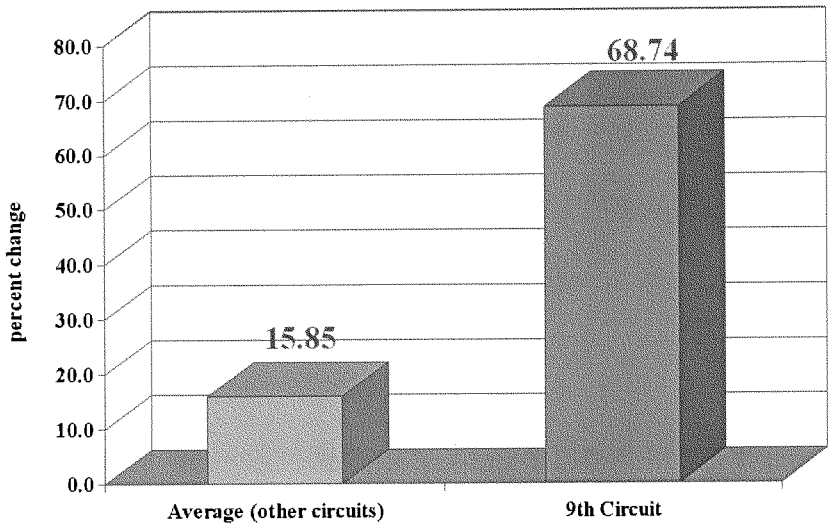


VerDate Nov 24 2008 13:02 Feb 09, 2009 Jkt 043383 PO 00000 Frm 00374 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43383.TXT SJUD1 PsN: CMORC

43383.321

Exhibit 15

**The Ninth Circuit's caseload increased nearly five times faster between 2000 and 2005 than did 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.

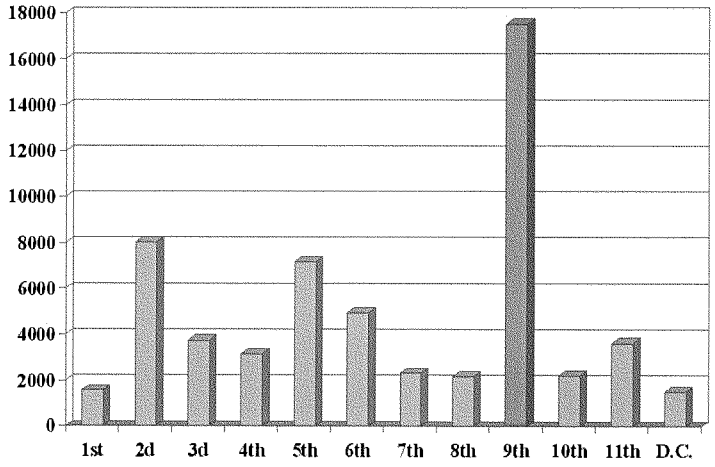


VerDate Nov 24 2008 13:02 Feb 09, 2009 Jkt 043383 PO 00000 Frm 00375 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43383.TXT SJUD1 PsN: CMORC

43383.322

Exhibit 16

## The Ninth Circuit has the largest backlog in the country by over 9,500 appeals.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html, for the twelve months ending June 30, 2006.

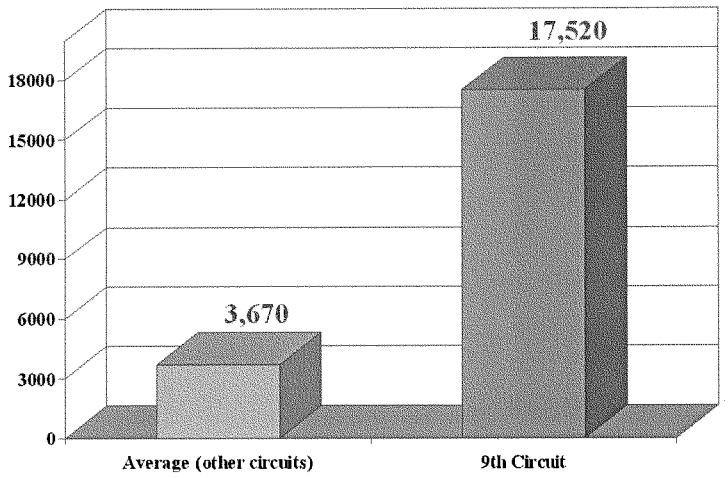


VerDate Nov 24 2008 13:02 Feb 09, 2009 Jkt 043383 PO 00000 Frm 00376 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43383.TXT SJUD1 PsN: CMORC

43383.323

Exhibit 17

## The Ninth Circuit's backlog is nearly five times larger than that of the average circuit.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html, for the twelve months ending June 30, 2006.

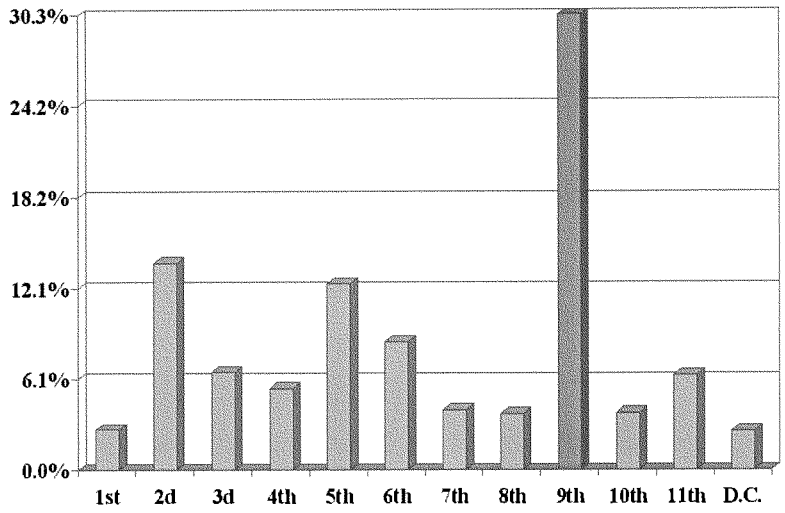


VerDate Nov 24 2008 13:02 Feb 09, 2009 Jkt 043383 PO 00000 Frm 00377 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43383.TXT SJUD1 PsN: CMORC

43383.324

Exhibit 18

## The Ninth Circuit has the highest backlog in the country—over 30% of all pending federal appeals.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html, for the twelve months ending June 30, 2006.

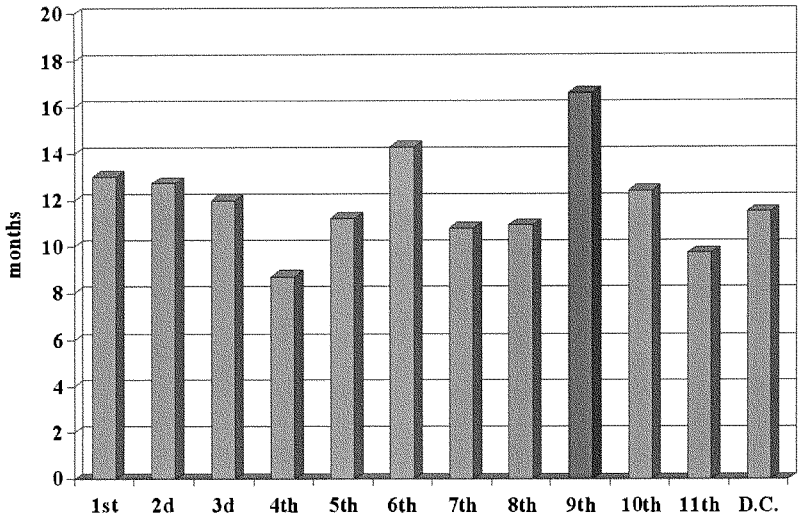


VerDate Nov 24 2008 13:02 Feb 09, 2009 Jkt 043383 PO 00000 Frm 00378 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43383.TXT SJUD1 PsN: CMORC

43383.325

Exhibit 19

# The Ninth Circuit is the slowest circuit in the disposition of appeals.




SOURCE: Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html.



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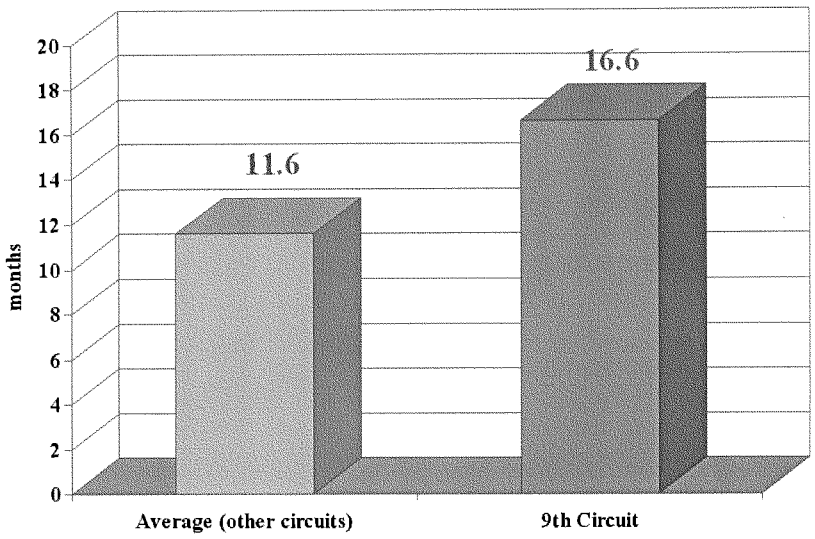
43383.326

Exhibit 20

## The Ninth Circuit takes over 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.

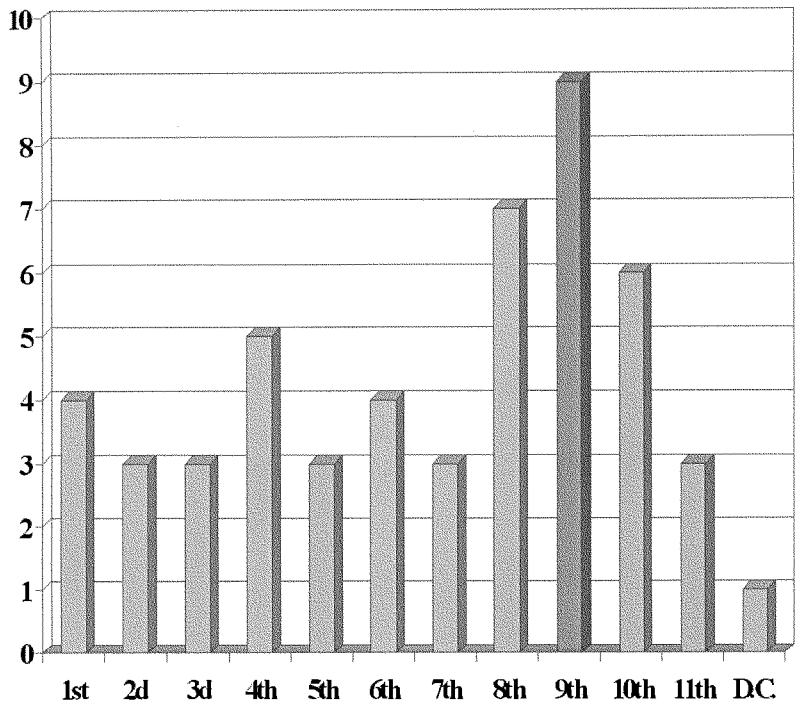


VerDate Nov 24 2008 13:02 Feb 09, 2009 Jkt 043383 PO 00000 Frm 00380 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43383.TXT SJUD1 PsN: CMORC

43383.327

Exhibit 21

## The Ninth Circuit encompasses more states than any other circuit.




SOURCE: 28 U.S.C. § 41 (2004).

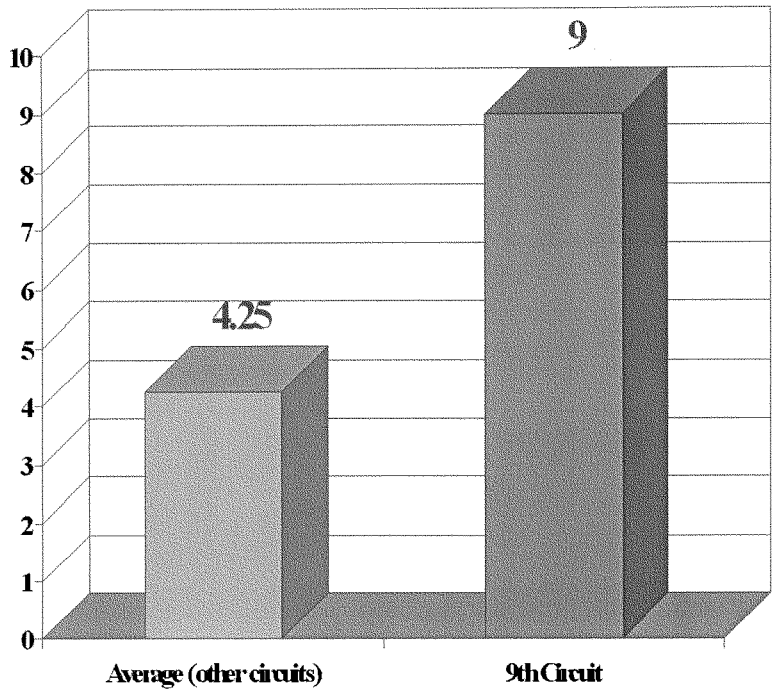


VerDate Nov 24 2008 13:02 Feb 09, 2009 Jkt 043383 PO 00000 Frm 00381 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43383.TXT SJUD1 PsN: CMORC

43383.328

Exhibit 22

**The Ninth Circuit has more than double the average number of states of all other circuits.**




SOURCE: 28 U.S.C. § 41 (2004).

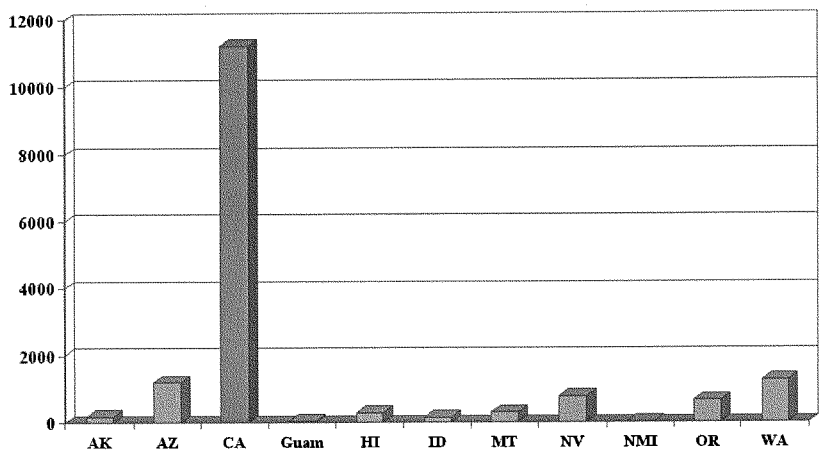


VerDate Nov 24 2008 13:02 Feb 09, 2009 Jkt 043383 PO 00000 Frm 00382 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43383.TXT SJUD1 PsN: CMORC

43383.329

Exhibit 23

## California alone accounts for nearly seventy percent of all appeals filed within the Ninth Circuit.




SOURCE: Ninth Circuit AIMS database.

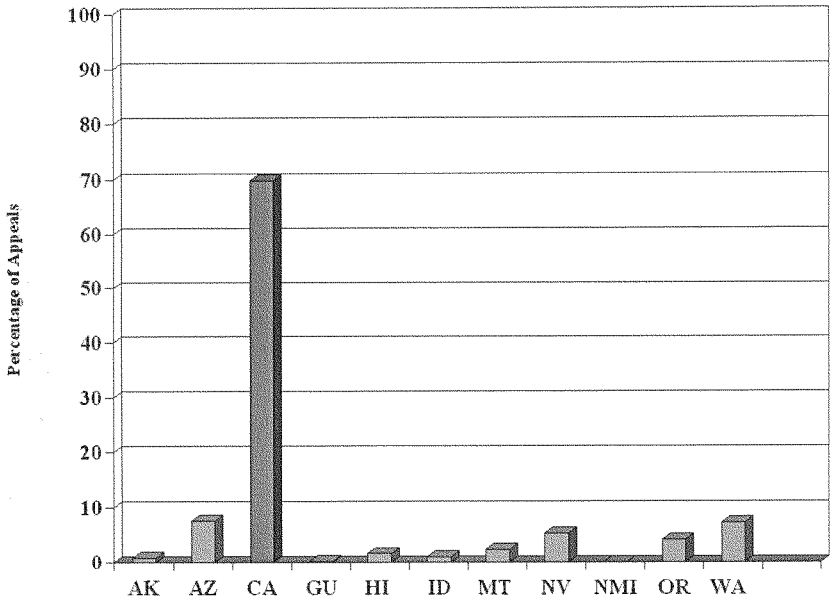


VerDate Nov 24 2008 13:02 Feb 09, 2009 Jkt 043383 PO 00000 Frm 00383 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43383.TXT SJUD1 PsN: CMORC

43383.330

Exhibit 24

## No state other than California accounts for even 10% of the appeals filed within the Ninth Circuit.




SOURCE: Ninth Circuit AIMS database.

Exhibit 25



VerDate Nov 24 2008 13:02 Feb 09, 2009 Jkt 043383 PO 00000 Frm 00384 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\43383.TXT SJUD1 PsN: CMORC

43383.331

# Judges, Population, and Appeals by State Within the Ninth Circuit, 2005

| State | Current Circuit Judgeships | % Judgeships | Population* | % Pop. | Appeals | % Appeals |
|---|---|---|---|---|---|---|
| Alaska | 1 | 3.6% | 655,435 | 1.1% | 172 | 1.1% |
| Arizona | 3 | 10.7% | 5,743,834 | 9.9% | 1,204 | 7.5% |
| California | 14 | 50.0% | 35,893,799 | 61.6% | 11,229 | 69.7% |
| Guam | 0 | 0.0% | 166,090 | 0.3% | 42 | 0.3% |
| Hawaii | 1 | 3.6% | 1,262,840 | 2.2% | 297 | 1.8% |
| Idaho | 2** | 7.1% | 1,393,262 | 2.4% | 149 | 0.9% |
| Montana | 1 | 3.6% | 926,865 | 1.6% | 300 | 1.9% |
| Nevada | 2 | 7.1% | 2,334,771 | 4.0% | 787 | 4.9% |
| N. Mariana Islands | 0 | 0.0% | 78,252 | 0.1% | 15 | 0.1% |
| Oregon | 2 | 7.1% | 3,594,586 | 6.2% | 653 | 4.1% |
| Washington | 2 | 7.1% | 6,203,788 | 10.6% | 1,261 | 7.8% |
| **TOTAL** | **28** | **100%** | **58,253,522** | **100%** | **16,109** | **100%** |

* All population figures were calculated using U.S. Census 2004 estimates.
** Includes two vacant judgeships for which nominees are currently pending.

SOURCE: 28 U.S.C. § 44 (2004); Ninth Circuit AIMS database; 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/.



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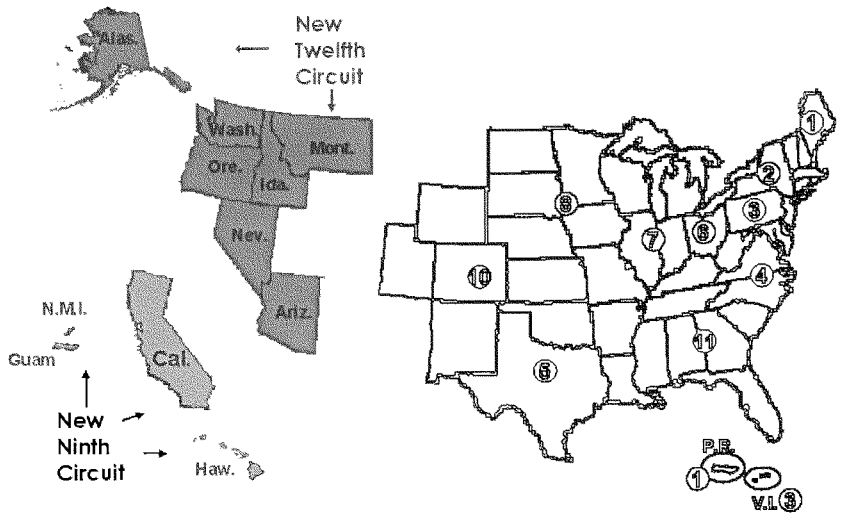
43383.332

Exhibit 26

## The Circuits After the Restructuring Proposed by S. 1845




Section 7 of the bill establishes Phoenix, Arizona, as the location of the Twelfth Circuit Headquarters.



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43383.333

Exhibit 27

# Judges for the "New" Ninth Circuit After S. 1845's Split

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Browning | Kennedy | California | San Francisco | Senior |
| 2. Goodwin | Nixon | California | Pasadena | Senior |
| 3. Wallace | Nixon | California | San Diego | Senior |
| 4. Sneed | Nixon | California | San Francisco | Senior |
| 5. Pregerson | Carter | California | Woodland Hills | ACTIVE |
| 6. Alarcon | Carter | California | Los Angeles | Senior |
| 7. Ferguson | Carter | California | Santa Ana | Senior |
| 8. Nelson, D. | Carter | California | Pasadena | Senior |
| 9. Boochever | Carter | California | Pasadena | Senior |
| 10. Reinhardt | Carter | California | Los Angeles | ACTIVE |
| 11. Hall | Reagan | California | Pasadena | Senior |
| 12. Kozinski | Reagan | California | Pasadena | ACTIVE |
| 13. Noonan | Reagan | California | San Francisco | Senior |
| 14. Thompson | Reagan | California | San Diego | Senior |
| 15. Fernandez | G.H.W. Bush | California | Pasadena | Senior |
| 16. Rymer | G.H.W. Bush | California | Pasadena | ACTIVE |
| 17. Tashima | Clinton | California | Pasadena | Senior |
| 18. McKeown | Clinton | California | San Diego | ACTIVE |
| 19. Wardlaw | Clinton | California | Pasadena | ACTIVE |
| 20. Fletcher, W. | Clinton | California | San Francisco | ACTIVE |
| 21. Fisher | Clinton | California | Pasadena | ACTIVE |
| 22. Paez | Clinton | California | Pasadena | ACTIVE |
| 23. Berzon | Clinton | California | San Francisco | ACTIVE |
| 24. Clifton | G.W. Bush | Hawaii | Honolulu | ACTIVE |
| 25. Callahan | G.W. Bush | California | Sacramento | ACTIVE |
| 26. Bea | G.W. Bush | California | San Francisco | ACTIVE |
| 27. M.Smith | G.W. Bush | California | Los Angeles | ACTIVE |
| 28. Ikuta | G.W. Bush | California | Pasadena | ACTIVE |
| 29. [New Judgeship]* | _____ | California | _____ | NEW |
| 30. [New Judgeship]* | _____ | California | _____ | NEW |
| 31. [New Judgeship]* | _____ | California | _____ | NEW |
| 32. [New Judgeship]* | _____ | California | _____ | NEW |
| 33. [New Judgeship]* | _____ | California | _____ | NEW |
| 34. [Temp. Judgeship]** | _____ | California | _____ | TEMPORARY |
| 35. [Temp. Judgeship]** | _____ | California | _____ | TEMPORARY |

| SUMMARY: | |
|---|---|
| **ACTIVE Judges** | **15** |
| **Nominees Pending** | **+ 0** |
| **Existing Judgeships** | **15** |
| **New Judgeships** | **+ 5** |
| **Permanent Judgeships** | **20** |
| **Temporary Judgeships** | **+ 2** |
| **Authorized Judgeships** | **22** |
| **Senior Judges** | **+ 13** |
| **TOTAL** | **35** |

*New judgeship created by S. 1845
**Temporary judgeship not to be filled after 10 years

## S. 1845



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43383.334

Exhibit 28

# Judges for the New Twelfth Circuit After S. 1845's Split

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Hug | Carter | Nevada | Reno | Senior |
| 2. Skopil | Carter | Oregon | Portland | Senior |
| 3. Fletcher, B. | Carter | Washington | Seattle | Senior |
| 4. Schroeder | Carter | Arizona | Phoenix | ACTIVE |
| 5. Farris | Carter | Washington | Seattle | Senior |
| 6. Canby | Carter | Arizona | Phoenix | Senior |
| 7. Beezer | Reagan | Washington | Seattle | Senior |
| 8. Brunetti | Reagan | Nevada | Reno | Senior |
| 9. O'Scannlain | Reagan | Oregon | Portland | ACTIVE |
| 10. Leavy | Reagan | Oregon | Portland | Senior |
| 11. Trott | Reagan | Idaho | Boise | Senior |
| 12. Nelson, T. | G.H.W. Bush | Idaho | Boise | Senior |
| 13. Kleinfeld | G.H.W. Bush | Alaska | Fairbanks | ACTIVE |
| 14. Hawkins | Clinton | Arizona | Phoenix | ACTIVE |
| 15. Thomas | Clinton | Montana | Billings | ACTIVE |
| 16. Silverman | Clinton | Arizona | Phoenix | ACTIVE |
| 17. Graber | Clinton | Oregon | Portland | ACTIVE |
| 18. Gould | Clinton | Washington | Seattle | ACTIVE |
| 19. Tallman | Clinton | Washington | Seattle | ACTIVE |
| 20. Rawlinson | Clinton | Nevada | Las Vegas | ACTIVE |
| 21. Bybee | G.W. Bush | Nevada | Las Vegas | ACTIVE |
| 22. [Myers] | G.W. Bush | Idaho | Boise | Nominee |
| 23. [R. Smith] | G.W. Bush | Idaho | Boise | Nominee |

| | | |
|---|---|---|
| **SUMMARY:** | **ACTIVE Judges** | **11** |
| | **Nominees Pending** | **+ 2** |
| | **Existing Judgeships** | **13** |
| | **New Judgeships** | **+ 0*** |
| | **Authorized Judgeships** | **13*** |
| | **Senior Judges** | **+ 10** |
| | **TOTAL** | **23** |

* S. 1845 specifies 14 authorized judgeships for the Twelfth Circuit but does not explicitly create a new one. This appears to be an error.

## S. 1845



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43383.335

Exhibit 29

# S. 1845's Reorganization—Judges, Population, and Caseload by Circuit

| Court | Authorized Judges | % Judges | Pop.* | % Pop. | Appeals | % Appeals | Appeals per Judgeship |
|---|---|---|---|---|---|---|---|
| First | 6 | 3.6% | 14,008,745 | 4.7% | 1,943 | 2.8% | 324 |
| Second | 13 | 7.8% | 23,352,086 | 7.8% | 7,384 | 10.5% | 568 |
| Third | 14 | 8.4% | 22,044,310 | 7.4% | 4,705 | 6.7% | 336 |
| Fourth | 15 | 9.0% | 27,572,528 | 9.3% | 5,362 | 7.7% | 357 |
| Fifth | 17 | 10.2% | 29,908,758 | 10.0% | 9,411 | 13.4% | 554 |
| Sixth | 16 | 9.6% | 31,618,515 | 10.6% | 5,429 | 7.8% | 339 |
| Seventh | 11 | 6.7% | 24,460,229 | 8.2% | 3,926 | 5.6% | 357 |
| Eighth | 11 | 6.7% | 19,715,119 | 6.6% | 3,601 | 5.1% | 327 |
| Ninth | 28 | 16.8% | 58,253,522 | 19.6% | 16,101 | 23.0% | 575 |
| Tenth | 12 | 7.2% | 15,659,315 | 5.3% | 2,857 | 4.1% | 238 |
| Eleventh | 12 | 7.2% | 30,756,726 | 10.3% | 7,889 | 11.3% | 657 |
| D.C. | 12 | 7.2% | 553,523 | 0.2% | 1,395 | 2.0% | 116 |
| **Total** | **167** | **100%** | **297,903,376** | **100%** | **70,003** | **100%** | **419** |
| "New" Ninth** | 22 | 13.2% | 37,400,981 | 12.6% | 11,583 | 16.5% | 527 |
| Twelfth** | 13 | 7.8% | 20,852,541 | 7.0% | 4,526 | 6.5% | 348 |

* All population figures are based on U.S. Census 2004 estimates. The total population for the United States, Puerto Rico, Guam, the Virgin Islands, and the Northern Mariana Islands in 2004 was estimated at 297,903,376.
** "New" Ninth and Twelfth Circuits based on alignments and additional judgeships as proposed by S. 1845. Percent judges for reconfigured circuits based on a total of 174 judges. Number of judges for new Twelfth Circuit omits the additional judgeship not expressly created by S. 1845, although the bill authorizes a total of 14 judgeships for the new circuit.

SOURCE: 28 U.S.C. § 44; Ninth Circuit AIMS database; Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html. 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/.

## S. 1845



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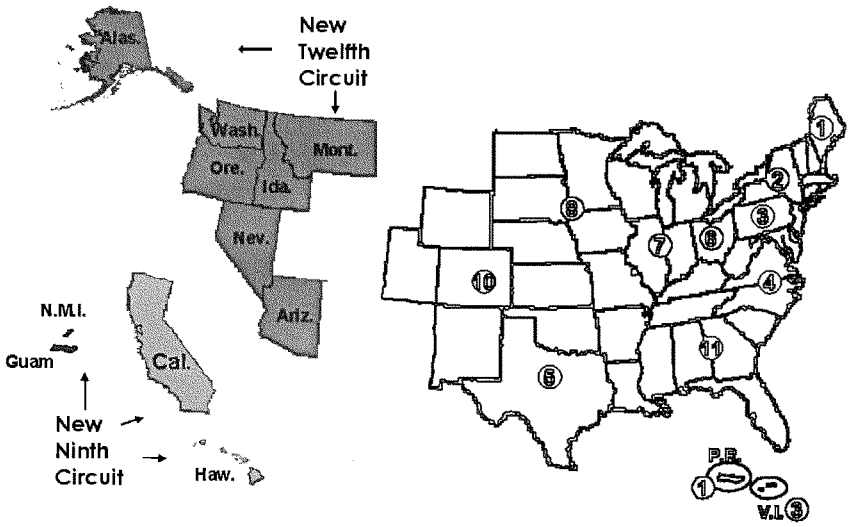
43383.336

Exhibit 30

## The Circuits After the Restructuring Proposed by H.R. 4093




**H.R. 4093**



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43383.337

Exhibit 31

# Judges for the "New" Ninth Circuit After H.R. 4093's Split

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Browning | Kennedy | California | San Francisco | Senior |
| 2. Goodwin | Nixon | California | Pasadena | Senior |
| 3. Wallace | Nixon | California | San Diego | Senior |
| 4. Sneed | Nixon | California | San Francisco | Senior |
| 5. Pregerson | Carter | California | Woodland Hills | ACTIVE |
| 6. Alarcon | Carter | California | Los Angeles | Senior |
| 7. Ferguson | Carter | California | Santa Ana | Senior |
| 8. Nelson, D. | Carter | California | Pasadena | Senior |
| 9. Boochever | Carter | California | Pasadena | Senior |
| 10. Reinhardt | Carter | California | Los Angeles | ACTIVE |
| 11. Hall | Reagan | California | Pasadena | Senior |
| 12. Kozinski | Reagan | California | Pasadena | ACTIVE |
| 13. Noonan | Reagan | California | San Francisco | Senior |
| 14. Thompson | Reagan | California | San Diego | Senior |
| 15. Fernandez | G.H.W. Bush | California | Pasadena | Senior |
| 16. Rymer | G.H.W. Bush | California | Pasadena | ACTIVE |
| 17. Tashima | Clinton | California | Pasadena | Senior |
| 18. McKeown | Clinton | California | San Diego | ACTIVE |
| 19. Wardlaw | Clinton | California | Pasadena | ACTIVE |
| 20. Fletcher, W. | Clinton | California | San Francisco | ACTIVE |
| 21. Fisher | Clinton | California | Pasadena | ACTIVE |
| 22. Paez | Clinton | California | Pasadena | ACTIVE |
| 23. Berzon | Clinton | California | San Francisco | ACTIVE |
| 24. Clifton | G.W. Bush | Hawaii | Honolulu | ACTIVE |
| 25. Callahan | G.W. Bush | California | Sacramento | ACTIVE |
| 26. Bea | G.W. Bush | California | San Francisco | ACTIVE |
| 27. M.Smith | G.W. Bush | California | Los Angeles | ACTIVE |
| 28. Ikuta | G.W. Bush | California | Pasadena | ACTIVE |
| 29. [New Judgeship]* | _____ | California | _____ | NEW |
| 30. [New Judgeship]* | _____ | California | _____ | NEW |
| 31. [New Judgeship]* | _____ | California | _____ | NEW |
| 32. [New Judgeship]* | _____ | California | _____ | NEW |
| 33. [New Judgeship]* | _____ | California | _____ | NEW |
| 34. [Temp. Judgeship]** | _____ | California | _____ | TEMPORARY |
| 35. [Temp. Judgeship]** | _____ | California | _____ | TEMPORARY |

| SUMMARY: | |
|---|---|
| **ACTIVE Judges** | **15** |
| **Nominees Pending** | **+ 0** |
| **Existing Judgeships** | **15** |
| **New Judgeships** | **+ 5** |
| **Permanent Judgeships** | **20*** ** |
| **Temporary Judgeships** | **+ 2** |
| **Authorized Judgeships** | **22** |
| **Senior Judges** | **+ 13** |
| **TOTAL** | **35** |

*New judgeship created by H.R. 4093

**Temporary judgeship not to be filled after 10 years

***H.R. 4093 authorizes nnly 19 judgeships, but such number appears to be a mistake because it would represent a reduction of one judgeship as compared to the circuit's current composition.

## H.R. 4093



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43383.338

Exhibit 32

# Judges for the New Twelfth Circuit After H.R. 4093's Split

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Hug | Carter | Nevada | Reno | Senior |
| 2. Skopil | Carter | Oregon | Portland | Senior |
| 3. Fletcher, B. | Carter | Washington | Seattle | Senior |
| 4. Schroeder | Carter | Arizona | Phoenix | ACTIVE |
| 5. Farris | Carter | Washington | Seattle | Senior |
| 6. Canby | Carter | Arizona | Phoenix | Senior |
| 7. Beezer | Reagan | Washington | Seattle | Senior |
| 8. Brunetti | Reagan | Nevada | Reno | Senior |
| 9. O'Scannlain | Reagan | Oregon | Portland | ACTIVE |
| 10. Leavy | Reagan | Oregon | Portland | Senior |
| 11. Trott | Reagan | Idaho | Boise | Senior |
| 12. Nelson, T. | G.H.W. Bush | Idaho | Boise | Senior |
| 13. Kleinfeld | G.H.W. Bush | Alaska | Fairbanks | ACTIVE |
| 14. Hawkins | Clinton | Arizona | Phoenix | ACTIVE |
| 15. Thomas | Clinton | Montana | Billings | ACTIVE |
| 16. Silverman | Clinton | Arizona | Phoenix | ACTIVE |
| 17. Graber | Clinton | Oregon | Portland | ACTIVE |
| 18. Gould | Clinton | Washington | Seattle | ACTIVE |
| 19. Tallman | Clinton | Washington | Seattle | ACTIVE |
| 20. Rawlinson | Clinton | Nevada | Las Vegas | ACTIVE |
| 21. Bybee | G.W. Bush | Nevada | Las Vegas | ACTIVE |
| 22. [Myers] | G.W. Bush | Idaho | Boise | Nominee |
| 23. [R. Smith] | G.W. Bush | Idaho | Boise | Nominee |

| | | |
|---|---|---|
| **SUMMARY:** | **ACTIVE Judges** | **11** |
| | **Nominees Pending** | **+ 2** |
| | **Existing Judgeships** | **13** |
| | **New Judgeships** | **+ 0*** |
| | **Authorized Judgeships** | **13*** |
| | **Senior Judges** | **+ 10** |
| | **TOTAL** | **23** |

* H.R. 4093 specifies 14 authorized judgeships for the Twelfth Circuit but does not explicitly create a new one. This appears to be an error.

## H.R. 4093



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Exhibit 33

# H.R. 4093's Reorganization—Judges, Population, and Caseload by Circuit

| Court | Authorized Judges | % Judges | Pop.* | % Pop. | Appeals | % Appeals | Appeals per Judgeship |
|---|---|---|---|---|---|---|---|
| First | 6 | 3.6% | 14,008,745 | 4.7% | 1,943 | 2.8% | 324 |
| Second | 13 | 7.8% | 23,352,086 | 7.8% | 7,384 | 10.5% | 568 |
| Third | 14 | 8.4% | 22,044,310 | 7.4% | 4,705 | 6.7% | 336 |
| Fourth | 15 | 9.0% | 27,572,528 | 9.3% | 5,362 | 7.7% | 357 |
| Fifth | 17 | 10.2% | 29,908,758 | 10.0% | 9,411 | 13.4% | 554 |
| Sixth | 16 | 9.6% | 31,618,515 | 10.6% | 5,429 | 7.8% | 339 |
| Seventh | 11 | 6.7% | 24,460,229 | 8.2% | 3,926 | 5.6% | 357 |
| Eighth | 11 | 6.7% | 19,715,119 | 6.6% | 3,601 | 5.1% | 327 |
| Ninth | 28 | 16.8% | 58,253,522 | 19.6% | 16,101 | 23.0% | 575 |
| Tenth | 12 | 7.2% | 15,659,315 | 5.3% | 2,857 | 4.1% | 238 |
| Eleventh | 12 | 7.2% | 30,756,726 | 10.3% | 7,889 | 11.3% | 657 |
| D.C. | 12 | 7.2% | 553,523 | 0.2% | 1,395 | 2.0% | 116 |
| **Total** | **167** | **100%** | **297,903,376** | **100%** | **70,003** | **100%** | **419** |
| "New" Ninth** | 22 | 13.2% | 37,400,981 | 12.6% | 11,583 | 16.5% | 527 |
| Twelfth** | 13 | 7.8% | 20,852,541 | 7.0% | 4,526 | 6.5% | 348 |

* All population figures are based on U.S. Census 2004 estimates. The total population for the United States, Puerto Rico, Guam, the Virgin Islands, and the Northern Mariana Islands in 2004 was estimated at 297,903,376.
** "New" Ninth and Twelfth Circuits based on alignments and additional judgeships as proposed by H.R. 4093. Percent judges for reconfigured circuits based on a total of 174 judges. Number of judges for new Twelfth Circuit omits the additional judgeship not expressly created by H.R. 4093, although the bill authorizes a total of 14 judgeships for the new circuit.

SOURCE: 28 U.S.C. § 44; Ninth Circuit AIMS database; Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html. 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/.



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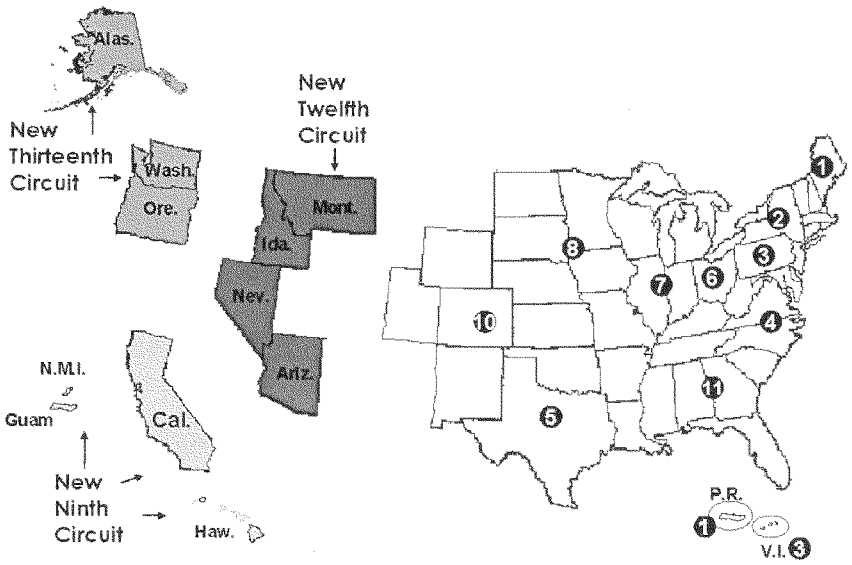
43383.340

Exhibit 34

## The Circuits After the Restructuring Proposed by H.R. 211 and S. 1301 (passed by the House on October 5, 2004, as S. 878)




**H.R. 211 & S. 1301**



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Exhibit 35

# Judges for the "New" Ninth Circuit After H.R. 211's and S. 1301's Split

| | Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|---|
| 1. | Browning | Kennedy | California | San Francisco | Senior |
| 2. | Goodwin | Nixon | California | Pasadena | Senior |
| 3. | Wallace | Nixon | California | San Diego | Senior |
| 4. | Sneed | Nixon | California | San Francisco | Senior |
| 5. | Pregerson | Carter | California | Woodland Hills | ACTIVE |
| 6. | Alarcon | Carter | California | Los Angeles | Senior |
| 7. | Ferguson | Carter | California | Santa Ana | Senior |
| 8. | Nelson, D. | Carter | California | Pasadena | Senior |
| 9. | Boochever | Carter | California | Pasadena | Senior |
| 10. | Reinhardt | Carter | California | Los Angeles | ACTIVE |
| 11. | Hall | Reagan | California | Pasadena | Senior |
| 12. | Kozinski | Reagan | California | Pasadena | ACTIVE |
| 13. | Noonan | Reagan | California | San Francisco | Senior |
| 14. | Thompson | Reagan | California | San Diego | Senior |
| 15. | Fernandez | G.H.W. Bush | California | Pasadena | Senior |
| 16. | Rymer | G.H.W. Bush | California | Pasadena | ACTIVE |
| 17. | Tashima | Clinton | California | Pasadena | Senior |
| 18. | McKeown | Clinton | California | San Diego | ACTIVE |
| 19. | Wardlaw | Clinton | California | Pasadena | ACTIVE |
| 20. | Fletcher, W. | Clinton | California | San Francisco | ACTIVE |
| 21. | Fisher | Clinton | California | Pasadena | ACTIVE |
| 22. | Paez | Clinton | California | Pasadena | ACTIVE |
| 23. | Berzon | Clinton | California | San Francisco | ACTIVE |
| 24. | Clifton | G.W. Bush | Hawaii | Honolulu | ACTIVE |
| 25. | Callahan | G.W. Bush | California | Sacramento | ACTIVE |
| 26. | Bea | G.W. Bush | California | San Francisco | ACTIVE |
| 27. | M. Smith | G.W. Bush | California | Los Angeles | ACTIVE |
| 28. | Ikuta | G.W. Bush | California | Pasadena | ACTIVE |
| 29. | [Future vacancy]* | | California | - - | Vacancy |
| 30. | [Future vacancy]* | | California | - - | Vacancy |
| 31. | [Future vacancy]* | | California | - - | Vacancy |
| 32. | [Future vacancy]* | | California | - - | Vacancy |
| 33. | [Future vacancy]* | | California | - - | Vacancy |
| 34. | [Future temporary vacancy]** | | California | - - | Vacancy |
| 35. | [Future temporary vacancy]** | | California | - - | Vacancy |

| SUMMARY: | | |
|---|---|---|
| | **ACTIVE Judges** | **15** |
| | **Nominees pending** | **+ 0** |
| | **Existing Judgeships** | **15** |
| | **New Judgeships** | **+ 5** |
| | **Permanent Judgeships** | **20** |
| | **Temporary Judgeships** | **+ 2** |
| | **Authorized Judgeships** | **22** |
| | **Senior Judges** | **+ 13** |
| | **TOTAL** | **35** |

* New judgeship created by H.R. 211 and S. 1301

** Temporary judgeship not to be filled after 10 years

## H.R. 211 & S. 1301



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Exhibit 36

# Judges for the New Twelfth Circuit After H.R. 211's and S. 1301's Split

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Hug | Carter | Nevada | Reno | Senior |
| 2. Schroeder | Carter | Arizona | Phoenix | ACTIVE |
| 3. Canby | Carter | Arizona | Phoenix | Senior |
| 4. Brunetti | Reagan | Nevada | Reno | Senior |
| 5. Trott | Reagan | Idaho | Boise | Senior |
| 6. Nelson, T. | G.H.W. Bush | Idaho | Boise | Senior |
| 7. Hawkins | Clinton | Arizona | Phoenix | ACTIVE |
| 8. Thomas | Clinton | Montana | Billings | ACTIVE |
| 9. Silverman | Clinton | Arizona | Phoenix | ACTIVE |
| 10. Rawlinson | Clinton | Nevada | Las Vegas | ACTIVE |
| 11. Bybee | G.W. Bush | Nevada | Las Vegas | ACTIVE |
| 12. [Myers] | G.W. Bush | Idaho | Boise | Nominee |
| 13. [R. Smith] | G.W. Bush | Idaho | Boise | Nominee |

| | | |
|---|---|---|
| **SUMMARY:** | **ACTIVE Judges** | **6** |
| | **Nominees** | **+ 2** |
| | **Existing Judgeships** | **8** |
| | **New Judgeships** | **+ 0** |
| | **Authorized Judgeships** | **8** |
| | **Senior Judges** | **+ 5** |
| | **TOTAL** | **13** |

# H.R. 211 & S. 1301



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Exhibit 37

# Judges for the New Thirteenth Circuit After H.R. 211's and S. 1301's Split

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Skopil | Carter | Oregon | Portland | Senior |
| 2. Fletcher, B. | Carter | Washington | Seattle | Senior |
| 3. Farris | Carter | Washington | Seattle | Senior |
| 4. Beezer | Reagan | Washington | Seattle | Senior |
| 5. O'Scannlain | Reagan | Oregon | Portland | ACTIVE |
| 6. Leavy | Reagan | Oregon | Portland | Senior |
| 7. Kleinfeld | G.H.W. Bush | Alaska | Fairbanks | ACTIVE |
| 8. Graber | Clinton | Oregon | Portland | ACTIVE |
| 9. Gould | Clinton | Washington | Seattle | ACTIVE |
| 10. Tallman | Clinton | Washington | Seattle | ACTIVE |

| | | |
|---|---|---|
| **SUMMARY:** | **ACTIVE Judges** | **5** |
| | **Vacancies** | **+ 0** |
| | **Existing Judges** | **5** |
| | **New Judgeships** | **+ 0** |
| | **Authorized Judgeships** | **5** |
| | **Senior Judges** | **+ 5** |
| | **TOTAL** | **10** |

## H.R. 211 & S. 1301



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Exhibit 38

# H.R. 211's and S. 1301's Reorganization—Judges, Population, and Caseload by Circuit

| Court | Authorized Judgeships | % Judgeships | Pop.* | % Pop. | Appeals | % Appeals | Appeals per Judgeship |
|---|---|---|---|---|---|---|---|
| First | 6 | 3.6% | 14,008,745 | 4.7% | 1,943 | 2.8% | 324 |
| Second | 13 | 7.8% | 23,352,086 | 7.8% | 7,384 | 10.5% | 568 |
| Third | 14 | 8.4% | 22,044,310 | 7.4% | 4,705 | 6.7% | 336 |
| Fourth | 15 | 9.0% | 27,572,528 | 9.3% | 5,362 | 7.7% | 357 |
| Fifth | 17 | 10.2% | 29,908,758 | 10.0% | 9,411 | 13.4% | 554 |
| Sixth | 16 | 9.6% | 31,618,515 | 10.6% | 5,429 | 7.8% | 339 |
| Seventh | 11 | 6.7% | 24,460,229 | 8.2% | 3,926 | 5.6% | 357 |
| Eighth | 11 | 6.7% | 19,715,119 | 6.6% | 3,601 | 5.1% | 327 |
| Ninth | 28 | 16.8% | 58,253,522 | 19.6% | 16,101 | 23.0% | 575 |
| Tenth | 12 | 7.2% | 15,659,315 | 5.3% | 2,857 | 4.1% | 238 |
| Eleventh | 12 | 7.2% | 30,756,726 | 10.3% | 7,889 | 11.3% | 657 |
| D.C. | 12 | 7.2% | 553,523 | 0.2% | 1,395 | 2.0% | 116 |
| **Total** | **167** | **100%** | **297,903,376** | **100%** | **70,003** | **100%** | **419** |
| "New" Ninth** | 22 | 12.6% | 37,400,981 | 12.6% | 11583 | 16.5% | 527 |
| Twelfth** | 8 | 4.6% | 10,398,732 | 3.5% | 2440 | 3.5% | 305 |
| Thirteenth** | 5 | 2.9% | 10,453,809 | 3.5% | 2086 | 3.0% | 417 |

* All population figures are based on U.S. Census 2004 estimates. The total U.S. population in 2004 (excluding Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands) was estimated at 293,655,404.
** "New" Ninth, Twelfth, and Thirteenth Circuits based on alignments and additional judgeships as proposed by H.R. 211 and S. 1301. Percent judges for reconfigured circuits based on a total of 174 judges.

SOURCE: 28 U.S.C. § 44 (2004); Ninth Circuit AIMS database; Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html; 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/.



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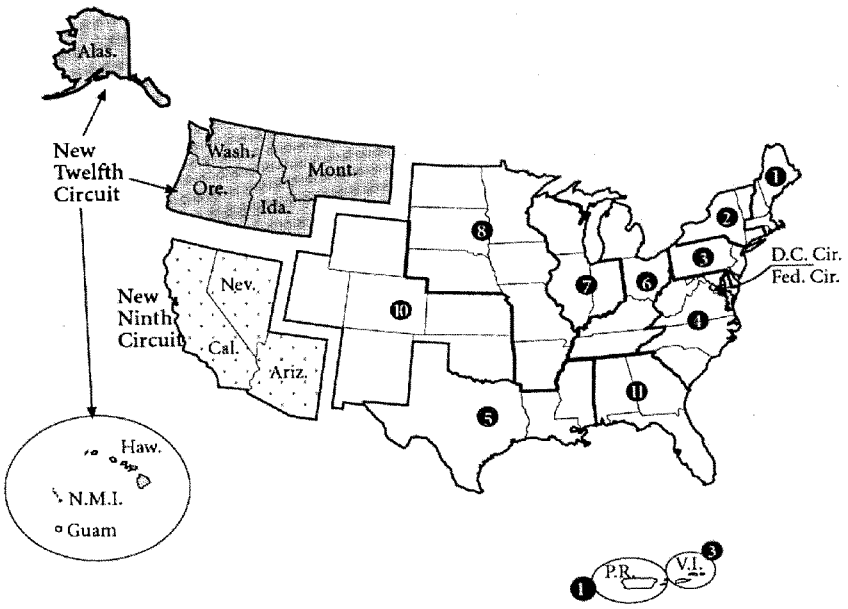
43383.346

Exhibit 39

## The Circuits After the Restructuring Proposed by H.R. 212




**H.R. 212**



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43383.347

Exhibit 40

# Judges for the "New" Ninth Circuit After H.R. 212's Split

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Browning | Kennedy | California | San Francisco | Senior |
| 2. Goodwin | Nixon | California | Pasadena | Senior |
| 3. Wallace | Nixon | California | San Diego | Senior |
| 4. Sneed | Nixon | California | San Francisco | Senior |
| 5. Hug | Carter | Nevada | Reno | Senior |
| 6. Schroeder | Carter | Arizona | Phoenix | ACTIVE |
| 7. Pregerson | Carter | California | Woodland Hills | ACTIVE |
| 8. Alarcon | Carter | California | Los Angeles | Senior |
| 9. Ferguson | Carter | California | Santa Ana | Senior |
| 10. Nelson, D. | Carter | California | Pasadena | Senior |
| 11. Canby | Carter | Arizona | Phoenix | Senior |
| 12. Boochever | Carter | California | Pasadena | Senior |
| 13. Reinhardt | Carter | California | Los Angeles | ACTIVE |
| 14. Hall | Reagan | California | Pasadena | Senior |
| 15. Brunetti | Reagan | Nevada | Reno | Senior |
| 16. Kozinski | Reagan | California | Pasadena | ACTIVE |
| 17. Noonan | Reagan | California | San Francisco | Senior |
| 18. Thompson | Reagan | California | San Diego | Senior |
| 19. Fernandez | G.H.W. Bush | California | Pasadena | Senior |
| 20. Rymer | G.H.W. Bush | California | Pasadena | ACTIVE |
| 21. Hawkins | Clinton | Arizona | Phoenix | ACTIVE |
| 22. Tashima | Clinton | California | Pasadena | Senior |
| 23. Silverman | Clinton | Arizona | Phoenix | ACTIVE |
| 24. McKeown | Clinton | California | San Diego | ACTIVE |
| 25. Wardlaw | Clinton | California | Pasadena | ACTIVE |
| 26. Fletcher, W. | Clinton | California | San Francisco | ACTIVE |
| 27. Fisher | Clinton | California | Pasadena | ACTIVE |
| 28. Paez | Clinton | California | Pasadena | ACTIVE |
| 29. Berzon | Clinton | California | San Francisco | ACTIVE |
| 30. Rawlinson | Clinton | Nevada | Las Vegas | ACTIVE |
| 31. Bybee | G.W. Bush | Nevada | Las Vegas | ACTIVE |
| 32. Callahan | G.W. Bush | California | Sacramento | ACTIVE |
| 33. Bea | G.W. Bush | California | San Francisco | ACTIVE |
| 34. M. Smith | G.W. Bush | California | Los Angeles | ACTIVE |
| 35. Ikuta | G.W. Bush | California | Pasadena | ACTIVE |
| 36. [Future vacancy]* | | -- | -- | Vacancy |
| 37. [Future vacancy]* | | -- | -- | Vacancy |
| 38. [Future vacancy]* | | -- | -- | Vacancy |
| 39. [Future vacancy]* | | -- | -- | Vacancy |
| 40. [Future vacancy]* | | -- | -- | Vacancy |
| 41. [Future temporary vacancy]** | | -- | -- | Vacancy |
| 42. [Future temporary vacancy]** | | -- | -- | Vacancy |

| SUMMARY: | |
|---|---|
| ACTIVE Judges | 19 |
| Nominees | + 0 |
| Existing Judgeships | 19 |
| New Judgeships | + 5 |
| Permanent Judgeships | 24 |
| Temporary Judgeships | + 2 |
| Authorized Judgeships | 26 |
| Senior Judges | + 16 |
| TOTAL | 42 |

* New judgeship created by H.R. 212
** Temporary judgeship not to be filled after 10 years

## H.R. 212



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Exhibit 41

# Judges for the New Twelfth Circuit After H.R. 212's Split

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Skopil | Carter | Oregon | Portland | Senior |
| 2. Fletcher, B. | Carter | Washington | Seattle | Senior |
| 3. Farris | Carter | Washington | Seattle | Senior |
| 4. Beezer | Reagan | Washington | Seattle | Senior |
| 5. O'Scannlain | Reagan | Oregon | Portland | ACTIVE |
| 6. Leavy | Reagan | Oregon | Portland | Senior |
| 7. Trott | Reagan | Idaho | Boise | Senior |
| 8. Nelson, T. | G.H.W. Bush | Idaho | Boise | Senior |
| 9. Kleinfeld | G.H.W. Bush | Alaska | Fairbanks | ACTIVE |
| 10. Thomas | Clinton | Montana | Billings | ACTIVE |
| 11. Graber | Clinton | Oregon | Portland | ACTIVE |
| 12. Gould | Clinton | Washington | Seattle | ACTIVE |
| 13. Tallman | Clinton | Washington | Seattle | ACTIVE |
| 14. Clifton | G.W. Bush | Hawaii | Honolulu | ACTIVE |
| 15. [Myers] | G.W. Bush | Idaho | Boise | Nominee |
| 16. [R. Smith] | G.W. Bush | Idaho | Boise | Nominee |

| | | |
|---|---|---|
| **SUMMARY:** | **ACTIVE Judges** | **7** |
| | **Nominees** | **+ 2** |
| | **Existing Judgeships** | **9** |
| | **New Judgeships** | **+ 0** |
| | **Authorized Judgeships** | **9** |
| | **Senior Judges** | **+ 7** |
| | **TOTAL** | **16** |

# H.R. 212



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43383.349

Exhibit 42

# H.R. 212's Reorganization—Judges, Population, and Caseload by Circuit

| Court | Authorized Judgeships | % Judgeships | Pop.* | % Pop. | Appeals | % Appeals | Appeals per Judgeship |
|---|---|---|---|---|---|---|---|
| First | 6 | 3.6% | 14,008,745 | 4.7% | 1,943 | 2.8% | 324 |
| Second | 13 | 7.8% | 23,352,086 | 7.8% | 7,384 | 10.5% | 568 |
| Third | 14 | 8.4% | 22,044,310 | 7.4% | 4,705 | 6.7% | 336 |
| Fourth | 15 | 9.0% | 27,572,528 | 9.3% | 5,362 | 7.7% | 357 |
| Fifth | 17 | 10.2% | 29,908,758 | 10.0% | 9,411 | 13.4% | 554 |
| Sixth | 16 | 9.6% | 31,618,515 | 10.6% | 5,429 | 7.8% | 339 |
| Seventh | 11 | 6.7% | 24,460,229 | 8.2% | 3,926 | 5.6% | 357 |
| Eighth | 11 | 6.7% | 19,715,119 | 6.6% | 3,601 | 5.1% | 327 |
| Ninth | 28 | 16.8% | 58,253,522 | 19.6% | 16,101 | 23.0% | 575 |
| Tenth | 12 | 7.2% | 15,659,315 | 5.3% | 2,857 | 4.1% | 238 |
| Eleventh | 12 | 7.2% | 30,756,726 | 10.3% | 7,889 | 11.3% | 657 |
| D.C. | 12 | 7.2% | 553,523 | 0.2% | 1,395 | 2.0% | 116 |
| **Total** | **167** | **100%** | **297,903,376** | **100%** | **70,003** | **100%** | **419** |
| "New" Ninth** | 26 | 14.9% | 43,972,404 | 14.8% | 13,220 | 18.9% | 508 |
| Twelfth** | 9 | 5.2% | 14,281,118 | 4.8% | 2,889 | 4.1% | 321 |

* All population figures are based on U.S. Census 2004 estimates. The total U.S. population in 2004 (excluding Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands) was estimated at 293,655,404.
** "New" Ninth and Twelfth Circuits based on alignments and additional judgeships as proposed by H.R. 212. Percent judges for reconfigured circuits based on a total of 174 judges.

SOURCE: 28 U.S.C. § 44 (2004); Ninth Circuit AIMS database; Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html; 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/.

## H.R. 212



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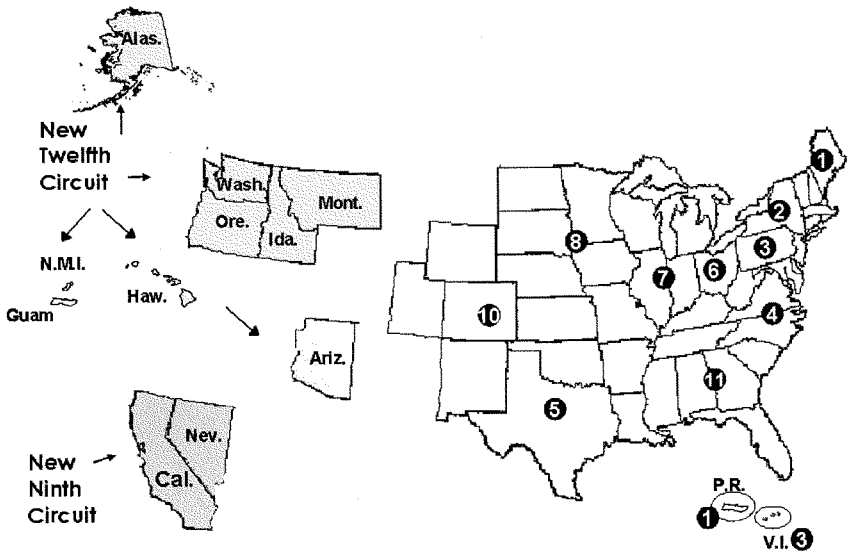
Exhibit 43

## The Circuits After the Restructuring Proposed by S. 1022 (passed by the Senate on July 29, 1997)




**S. 1022 (1997)**



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Exhibit 44

# Judges for the "New" Ninth Circuit After S. 1022's Split

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Browning | Kennedy | California | San Francisco | Senior |
| 2. Goodwin | Nixon | California | Pasadena | Senior |
| 3. Wallace | Nixon | California | San Diego | Senior |
| 4. Sneed | Nixon | California | San Francisco | Senior |
| 5. Hug | Carter | Nevada | Reno | Senior |
| 6. Pregerson | Carter | California | Woodland Hills | ACTIVE |
| 7. Alarcon | Carter | California | Los Angeles | Senior |
| 8. Ferguson | Carter | California | Santa Ana | Senior |
| 9. Nelson, D. | Carter | California | Pasadena | Senior |
| 10. Boochever | Carter | California | Pasadena | Senior |
| 11. Reinhardt | Carter | California | Los Angeles | ACTIVE |
| 12. Hall | Reagan | California | Pasadena | Senior |
| 13. Brunetti | Reagan | Nevada | Reno | Senior |
| 14. Kozinski | Reagan | California | Pasadena | ACTIVE |
| 15. Noonan | Reagan | California | San Francisco | Senior |
| 16. Thompson | Reagan | California | San Diego | Senior |
| 17. Fernandez | G.H.W. Bush | California | Pasadena | Senior |
| 18. Rymer | G.H.W. Bush | California | Pasadena | ACTIVE |
| 19. Tashima | Clinton | California | Pasadena | Senior |
| 20. McKeown | Clinton | California | San Diego | ACTIVE |
| 21. Wardlaw | Clinton | California | Pasadena | ACTIVE |
| 22. Fletcher, W. | Clinton | California | San Francisco | ACTIVE |
| 23. Fisher | Clinton | California | Pasadena | ACTIVE |
| 24. Paez | Clinton | California | Pasadena | ACTIVE |
| 25. Berzon | Clinton | California | San Francisco | ACTIVE |
| 26. Rawlinson | Clinton | Nevada | Las Vegas | ACTIVE |
| 27. Bybee | G.W. Bush | Nevada | Las Vegas | ACTIVE |
| 28. Callahan | G.W. Bush | California | Sacramento | ACTIVE |
| 29. Bea | G.W. Bush | California | San Francisco | ACTIVE |
| 30. M.Smith | G.W. Bush | California | Los Angeles | ACTIVE |
| 31. Ikuta | G.W. Bush | California | Pasadena | ACTIVE |

| SUMMARY: | | |
|---|---|---|
| | ACTIVE Judges | 16 |
| | Nominees | + 0 |
| | Existing Judgeships | 16 |
| | New Judgeships | + 0 |
| | Authorized Judgeships | 16 |
| | Senior Judges | + 15 |
| | TOTAL | 31 |

# S. 1022 (1997)



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43383.352

Exhibit 45

# Judges for the New Twelfth Circuit After S. 1022's Split

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Skopil | Carter | Oregon | Portland | Senior |
| 2. Fletcher, B. | Carter | Washington | Seattle | Senior |
| 3. Schroeder | Carter | Arizona | Phoenix | ACTIVE |
| 4. Farris | Carter | Washington | Seattle | Senior |
| 5. Canby | Carter | Arizona | Phoenix | Senior |
| 6. Beezer | Reagan | Washington | Seattle | Senior |
| 7. O'Scannlain | Reagan | Oregon | Portland | ACTIVE |
| 8. Leavy | Reagan | Oregon | Portland | Senior |
| 9. Trott | Reagan | Idaho | Boise | Senior |
| 10. Nelson, T. | G.H.W. Bush | Idaho | Boise | Senior |
| 11. Kleinfeld | G.H.W. Bush | Alaska | Fairbanks | ACTIVE |
| 12. Hawkins | Clinton | Arizona | Phoenix | ACTIVE |
| 13. Thomas | Clinton | Montana | Billings | ACTIVE |
| 14. Silverman | Clinton | Arizona | Phoenix | ACTIVE |
| 15. Graber | Clinton | Oregon | Portland | ACTIVE |
| 16. Gould | Clinton | Washington | Seattle | ACTIVE |
| 17. Tallman | Clinton | Washington | Seattle | ACTIVE |
| 18. Clifton | G.W. Bush | Hawaii | Honolulu | ACTIVE |
| 19. [Myers] | G.W. Bush | Idaho | Boise | Nominee |
| 20. [R. Smith] | G.W. Bush | Idaho | Boise | Nominee |

| | | |
|---|---|---|
| **SUMMARY:** | **ACTIVE Judges** | **10** |
| | **Nominees** | **+ 2** |
| | **Existing Judgeships** | **12** |
| | **New Judgeships** | **+ 0** |
| | **Authorized Judgeships** | **12** |
| | **Senior Judges** | **+ 8** |
| | **TOTAL** | **20** |

# S. 1022 (1997)



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43383.353

Exhibit 46

# S. 1022's Reorganization—Judges, Population, and Caseload by Circuit

| Court | Authorized Judgeships | % Judgeships | Pop.* | % Pop. | Appeals | % Appeals | Appeals per Judgeship |
|---|---|---|---|---|---|---|---|
| First | 6 | 3.6% | 14,008,745 | 4.7% | 1,943 | 2.8% | 324 |
| Second | 13 | 7.8% | 23,352,086 | 7.8% | 7,384 | 10.5% | 568 |
| Third | 14 | 8.4% | 22,044,310 | 7.4% | 4,705 | 6.7% | 336 |
| Fourth | 15 | 9.0% | 27,572,528 | 9.3% | 5,362 | 7.7% | 357 |
| Fifth | 17 | 10.2% | 29,908,758 | 10.0% | 9,411 | 13.4% | 554 |
| Sixth | 16 | 9.6% | 31,618,515 | 10.6% | 5,429 | 7.8% | 339 |
| Seventh | 11 | 6.7% | 24,460,229 | 8.2% | 3,926 | 5.6% | 357 |
| Eighth | 11 | 6.7% | 19,715,119 | 6.6% | 3,601 | 5.1% | 327 |
| Ninth | 28 | 16.8% | 58,253,522 | 19.6% | 16,101 | 23.0% | 575 |
| Tenth | 12 | 7.2% | 15,659,315 | 5.3% | 2,857 | 4.1% | 238 |
| Eleventh | 12 | 7.2% | 30,756,726 | 10.3% | 7,889 | 11.3% | 657 |
| D.C. | 12 | 7.2% | 553,523 | 0.2% | 1,395 | 2.0% | 116 |
| **Total** | **167** | **100%** | **297,903,376** | **100%** | **70,003** | **100%** | **419** |
| "New" Ninth** | 23 | 13.2% | 38,228,570 | 12.8% | 12,016 | 17.2% | 522 |
| Twelfth** | 12 | 6.9% | 20,024,952 | 6.7% | 4,093 | 5.8% | 341 |

* All population figures are based on U.S. Census 2004 estimates. The total U.S. population in 2004 (excluding Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands) was estimated at 293,655,404.
** "New" Ninth and Twelfth Circuits based on alignments as proposed by S. 1022. Numbers assume that S. 1022 would add seven new judges as H.R. 4093, H.R. 211, and H.R. 212 do, with resulting percentages based on a total of 174 judges. Percent judges for reconfigured circuits based on a total of 174 judges.

SOURCE: 28 U.S.C. § 44 (2004); Ninth Circuit AIMS database; Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html; 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/.

## S. 1022 (1997)



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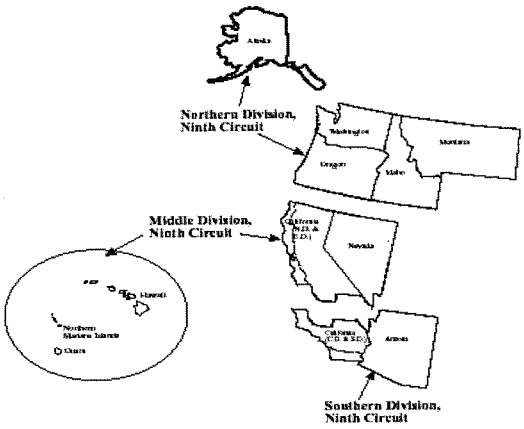
43383.354

Exhibit 47

## The Ninth Circuit After the Restructuring Proposed by the White Commission




## White Commission Proposal (1998)



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43383.355

Exhibit 48

# Judges for the Ninth Circuit (Southern Division) After the White Commission's Restructuring

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Goodwin | Nixon | California | Pasadena | Senior |
| 2. Wallace | Nixon | California | San Diego | Senior |
| 3. Schroeder | Carter | Arizona | Phoenix | ACTIVE |
| 4. Pregerson | Carter | California | Woodland Hills | ACTIVE |
| 5. Alarcon | Carter | California | Los Angeles | Senior |
| 6. Ferguson | Carter | California | Santa Ana | Senior |
| 7. Nelson, D. | Carter | California | Pasadena | Senior |
| 8. Canby | Carter | Arizona | Phoenix | Senior |
| 9. Boochever | Carter | California | Pasadena | Senior |
| 10. Reinhardt | Carter | California | Los Angeles | ACTIVE |
| 11. Hall | Reagan | California | Pasadena | Senior |
| 12. Kozinski | Reagan | California | Pasadena | ACTIVE |
| 13. Thompson | Reagan | California | San Diego | Senior |
| 14. Fernandez | G.H.W. Bush | California | Pasadena | Senior |
| 15. Rymer | G.H.W. Bush | California | Pasadena | ACTIVE |
| 16. Hawkins | Clinton | Arizona | Phoenix | ACTIVE |
| 17. Tashima | Clinton | California | Pasadena | Senior |
| 18. Silverman | Clinton | Arizona | Phoenix | ACTIVE |
| 19. McKeown | Clinton | California | San Diego | ACTIVE |
| 20. Wardlaw | Clinton | California | Pasadena | ACTIVE |
| 21. Fisher | Clinton | California | Pasadena | ACTIVE |
| 22. Paez | Clinton | California | Pasadena | ACTIVE |
| 23. M. Smith | G.W. Bush | California | Los Angeles | ACTIVE |
| 24. Ikuta | G.W. Bush | California | Pasadena | ACTIVE |

| | | |
|---|---|---|
| **SUMMARY:** | **ACTIVE Judges** | **13** |
| | **Nominee** | **+ 0** |
| | **Existing Judgeships** | **13** |
| | **New Judgeships** | **+ 0** |
| | **Authorized Judgeships** | **13** |
| | **Senior Judges** | **+ 11** |
| | **TOTAL** | **24** |

# White Commission Proposal (1998)



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43383.356

Exhibit 49

# Judges for the Ninth Circuit (Middle Division) After the White Commission's Restructuring

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Browning | Kennedy | California | San Francisco | Senior |
| 2. Sneed | Nixon | California | San Francisco | Senior |
| 3. Hug | Carter | Nevada | Reno | Senior |
| 4. Brunetti | Reagan | Nevada | Reno | Senior |
| 5. Noonan | Reagan | California | San Francisco | Senior |
| 6. W. Fletcher | Clinton | California | San Francisco | ACTIVE |
| 7. Berzon | Clinton | California | San Francisco | ACTIVE |
| 8. Rawlinson | Clinton | Nevada | Las Vegas | ACTIVE |
| 9. Clifton | G.W. Bush | Hawaii | Honolulu | ACTIVE |
| 10. Bybee | G.W. Bush | Nevada | Las Vegas | ACTIVE |
| 11. Callahan | G.W. Bush | California | Sacramento | ACTIVE |
| 12. Bea | G.W. Bush | California | San Francisco | ACTIVE |

| | | |
|---|---|---|
| **SUMMARY:** | **ACTIVE Judges** | **7** |
| | **Nominee** | **+ 0** |
| | **Existing Judgeships** | **7** |
| | **New Judgeships** | **+ 0** |
| | **Authorized Judgeships** | **7** |
| | **Senior Judges** | **+ 5** |
| | **TOTAL** | **12** |

# White Commission Proposal (1998)



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43383.357

Exhibit 50

# Judges for the Ninth Circuit (Northern Division) After the White Commission's Restructuring

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Skopil | Carter | Oregon | Portland | Senior |
| 2. B. Fletcher | Carter | Washington | Seattle | Senior |
| 3. Farris | Carter | Washington | Seattle | Senior |
| 4. Beezer | Reagan | Washington | Seattle | Senior |
| 5. O'Scannlain | Reagan | Oregon | Portland | ACTIVE |
| 6. Leavy | Reagan | Oregon | Portland | Senior |
| 7. Trott | Reagan | Idaho | Boise | Senior |
| 8. Nelson, T. | G.H.W. Bush | Idaho | Boise | Senior |
| 9. Kleinfeld | G.H.W. Bush | Alaska | Fairbanks | ACTIVE |
| 10. Thomas | Clinton | Montana | Billings | ACTIVE |
| 11. Graber | Clinton | Oregon | Portland | ACTIVE |
| 12. Gould | Clinton | Washington | Seattle | ACTIVE |
| 13. Tallman | Clinton | Washington | Seattle | ACTIVE |
| 14. [Myers] | G.W. Bush | Idaho | Boise | Nominee |
| 15. [R.Smith] | G.W. Bush | Idaho | Boise | Nominee |

| | | |
|---|---|---|
| **SUMMARY:** | **ACTIVE Judges** | **6** |
| | **Nominees** | **+ 2** |
| | **Existing Judgeships** | **8** |
| | **New Judgeships** | **+ 0** |
| | **Authorized Judgeships** | **8** |
| | **Senior Judges** | **+ 7** |
| | **TOTAL** | **15** |

# White Commission Proposal (1998)



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43383.358

Exhibit 51

# The White Commission's Reorganization—Judges, Population, and Caseload by Circuit

| Court | Authorized Judgeships | % Judgeships | Pop.* | % Pop. | Appeals | % Appeals | Appeals per Judgeship |
|---|---|---|---|---|---|---|---|
| First | 6 | 3.6% | 14,008,745 | 4.7% | 1,943 | 2.8% | 324 |
| Second | 13 | 7.8% | 23,352,086 | 7.8% | 7,384 | 10.5% | 568 |
| Third | 14 | 8.4% | 22,044,310 | 7.4% | 4,705 | 6.7% | 336 |
| Fourth | 15 | 9.0% | 27,572,528 | 9.3% | 5,362 | 7.7% | 357 |
| Fifth | 17 | 10.2% | 29,908,758 | 10.0% | 9,411 | 13.4% | 554 |
| Sixth | 16 | 9.6% | 31,618,515 | 10.6% | 5,429 | 7.8% | 339 |
| Seventh | 11 | 6.7% | 24,460,229 | 8.2% | 3,926 | 5.6% | 357 |
| Eighth | 11 | 6.7% | 19,715,119 | 6.6% | 3,601 | 5.1% | 327 |
| Ninth | 28 | 16.8% | 58,253,522 | 19.6% | 16,101 | 23.0% | 575 |
| Tenth | 12 | 7.2% | 15,659,315 | 5.3% | 2,857 | 4.1% | 238 |
| Eleventh | 12 | 7.2% | 30,756,726 | 10.3% | 7,889 | 11.3% | 657 |
| D.C. | 12 | 7.2% | 553,523 | 0.2% | 1,395 | 2.0% | 116 |
| **Total** | **167** | **100%** | **297,903,376** | **100%** | **70,003** | **100%** | **419** |
| Ninth Circuit (Northern Division)** | 8 | 4.6% | 12,773,936 | 4.3% | 2,535 | 3.6% | 317 |
| Ninth Circuit (Middle Division)** | 11 | 6.3% | 18,475,255 | 6.2% | 5,409 | 7.7% | 492 |
| Ninth Circuit (Southern Division)** | 16 | 9.2% | 27,004,331 | 9.1% | 8,165 | 11.7% | 510 |

* All population figures are based on U.S. Census 2004 estimates.
** Ninth Circuit divisions based on restructuring proposed by the White Commission with assumption of seven new judgeships, with resulting percentages based on a total of 174 judges.

SOURCE: 28 U.S.C. § 44 (2004); Ninth Circuit AIMS database; Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html; 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/.

## White Commission Proposal (1998)



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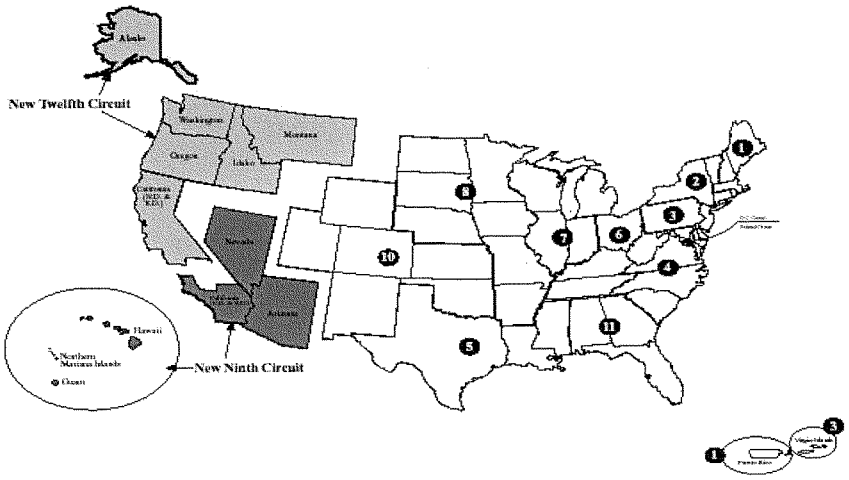
43383.360

Exhibit 52

## The Circuits After the Restructuring Proposed by the Hruska Commission




## Hruska Commission Proposal (1973)



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43383.361

Exhibit 53

# Judges for the "New" Ninth Circuit After the Hruska Commission's Split

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Goodwin | Nixon | California | Pasadena | Senior |
| 2. Wallace | Nixon | California | San Diego | Senior |
| 3. Hug | Carter | Nevada | Reno | Senior |
| 4. Schroeder | Carter | Arizona | Phoenix | ACTIVE |
| 5. Pregerson | Carter | California | Woodland Hills | ACTIVE |
| 6. Alarcon | Carter | California | Los Angeles | Senior |
| 7. Ferguson | Carter | California | Santa Ana | Senior |
| 8. Nelson, D. | Carter | California | Pasadena | Senior |
| 9. Canby | Carter | Arizona | Phoenix | Senior |
| 10. Boochever | Carter | California | Pasadena | Senior |
| 11. Reinhardt | Carter | California | Los Angeles | ACTIVE |
| 12. Hall | Reagan | California | Pasadena | Senior |
| 13. Brunetti | Reagan | Nevada | Reno | Senior |
| 14. Kozinski | Reagan | California | Pasadena | ACTIVE |
| 15. Thompson | Reagan | California | San Diego | Senior |
| 16. Fernandez | G.H.W. Bush | California | Pasadena | Senior |
| 17. Rymer | G.H.W. Bush | California | Pasadena | ACTIVE |
| 18. Hawkins | Clinton | Arizona | Phoenix | ACTIVE |
| 19. Tashima | Clinton | California | Pasadena | Senior |
| 20. Silverman | Clinton | Arizona | Phoenix | ACTIVE |
| 21. McKeown | Clinton | California | San Diego | ACTIVE |
| 22. Wardlaw | Clinton | California | Pasadena | ACTIVE |
| 23. Fisher | Clinton | California | Pasadena | ACTIVE |
| 24. Paez | Clinton | California | Pasadena | ACTIVE |
| 25. Rawlinson | Clinton | Nevada | Las Vegas | ACTIVE |
| 26. Clifton | G.W. Bush | Hawaii | Honolulu | ACTIVE |
| 27. Bybee | G.W. Bush | Nevada | Las Vegas | ACTIVE |
| 28. M. Smith | G.W. Bush | California | Los Angeles | ACTIVE |
| 29. Ikuta | G.W. Bush | California | Pasadena | ACTIVE |

| | | |
|---|---|---|
| **SUMMARY:** | **ACTIVE Judges** | **16** |
| | **Nominees** | **+ 0** |
| | **Existing Judgeships** | **16** |
| | **New Judgeships** | **+ 0** |
| | **Authorized Judgeships** | **16** |
| | **Senior Judges** | **+ 13** |
| | **TOTAL** | **29** |

# Hruska Commission Proposal (1973)



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43383.362

Exhibit 54

# Judges for the New Twelfth Circuit After the Hruska Commission's Split

| Judge | Appointed by | State | City | Status (Active/Senior) |
|---|---|---|---|---|
| 1. Browning | Kennedy | California | San Francisco | Senior |
| 2. Sneed | Nixon | California | San Francisco | Senior |
| 3. Skopil | Carter | Oregon | Portland | Senior |
| 4. B. Fletcher | Carter | Washington | Seattle | Senior |
| 5. Farris | Carter | Washington | Seattle | Senior |
| 6. Beezer | Reagan | Washington | Seattle | Senior |
| 7. Noonan | Reagan | California | San Francisco | Senior |
| 8. O'Scannlain | Reagan | Oregon | Portland | ACTIVE |
| 9. Leavy | Reagan | Oregon | Portland | Senior |
| 10. Trott | Reagan | Idaho | Boise | Senior |
| 11. Nelson, T. | G.H.W. Bush | Idaho | Boise | Senior |
| 12. Kleinfeld | G.H.W. Bush | Alaska | Fairbanks | ACTIVE |
| 13. Thomas | Clinton | Montana | Billings | ACTIVE |
| 14. Graber | Clinton | Oregon | Portland | ACTIVE |
| 15. W. Fletcher | Clinton | California | San Francisco | ACTIVE |
| 16. Gould | Clinton | Washington | Seattle | ACTIVE |
| 17. Berzon | Clinton | California | San Francisco | ACTIVE |
| 18. Tallman | Clinton | Washington | Seattle | ACTIVE |
| 19. Callahan | G.W. Bush | California | Sacramento | ACTIVE |
| 20. Bea | G.W. Bush | California | San Francisco | ACTIVE |
| 21. [Myers] | G.W. Bush | Idaho | Boise | Nominee |
| 22. [R. Smith] | G.W. Bush | Idaho | Boise | Nominee |

| | | |
|---|---|---|
| **SUMMARY:** | **ACTIVE Judges** | **10** |
| | **Nominees** | **+ 2** |
| | **Existing Judgeships** | **12** |
| | **New Judgeships** | **+ 0** |
| | **Authorized Judgeships** | **12** |
| | **Senior Judges** | **+ 10** |
| | **TOTAL** | **22** |

# Hruska Commission Proposal (1973)



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43383.363

Exhibit 55

# The Hruska Commission's Reorganization—Judges, Population, and Caseload by Circuit

| Court | Authorized Judgeships | % Judgeships | Pop.* | % Pop. | Appeals | % Appeals | Appeals per Judgeship |
|---|---|---|---|---|---|---|---|
| First | 6 | 3.6% | 14,008,745 | 4.7% | 1,943 | 2.8% | 324 |
| Second | 13 | 7.8% | 23,352,086 | 7.8% | 7,384 | 10.5% | 568 |
| Third | 14 | 8.4% | 22,044,310 | 7.4% | 4,705 | 6.7% | 336 |
| Fourth | 15 | 9.0% | 27,572,528 | 9.3% | 5,362 | 7.7% | 357 |
| Fifth | 17 | 10.2% | 29,908,758 | 10.0% | 9,411 | 13.4% | 554 |
| Sixth | 16 | 9.6% | 31,618,515 | 10.6% | 5,429 | 7.8% | 339 |
| Seventh | 11 | 6.7% | 24,460,229 | 8.2% | 3,926 | 5.6% | 357 |
| Eighth | 11 | 6.7% | 19,715,119 | 6.6% | 3,601 | 5.1% | 327 |
| Ninth | 28 | 16.8% | 58,253,522 | 19.6% | 16,101 | 23.0% | 575 |
| Tenth | 12 | 7.2% | 15,659,315 | 5.3% | 2,857 | 4.1% | 238 |
| Eleventh | 12 | 7.2% | 30,756,726 | 10.3% | 7,889 | 11.3% | 657 |
| D.C. | 12 | 7.2% | 553,523 | 0.2% | 1,395 | 2.0% | 116 |
| **Total** | **167** | **100%** | **297,903,376** | **100%** | **70,003** | **100%** | **419** |
| "New" Ninth** | 19 | 10.9% | 30,846,284 | 10.4% | 9,306 | 13.3% | 490 |
| Twelfth** | 16 | 9.2% | 27,407,238 | 9.2% | 6,803 | 9.7% | 425 |

* All population figures are based on U.S. Census 2004 estimates.
** Ninth Circuit divisions based on restructuring proposed by the Hruska Commission with assumption of seven new judgeships, with resulting percentages based on a total of 174 judges.

SOURCE: 28 U.S.C. § 44 (2004); Ninth Circuit AIMS database; Administrative Office of the United States Courts, U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html; 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/.

# Hruska Commission Proposal (1973)



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43383.364

# FEDERALISM AND SEPARATION OF POWERS

## A COURT UNITED: A STATEMENT OF A NUMBER OF NINTH CIRCUIT JUDGES*

***Editor's Note: This article is the second installment of a series entitled "Ninth Circuit Split: Point/Counterpoint." This article is the counterpoint to Judge Diarmuid F. O'Scannlain's previous article in this series that was featured in the October 2005 issue of Engage. Judge O'Scannlain will author a final rebuttal to this article which will be published in the next issue of Engage, scheduled to be released in early Fall of 2006.***

Last issue, in this space, our colleague, Judge Diarmuid O'Scannlain, wrote a lengthy article, heavily footnoted and adorned with numerous graphs, arguing that the Ninth Circuit should be split. To those of us who went to college in the early 70s, Judge O'Scannlain's article is reminiscent of a then widely read book titled, appropriately enough, *The Limits to Growth*. The book's authors, writing on behalf of an organization calling itself The Club of Rome, purported to demonstrate that, by the year 2000, the world would run out of land, food and clean drinking water to satisfy the needs of an out-of-control global population. Like Judge O'Scannlain's article, *The Limits to Growth* tried to make its point by the use of graphs, charts and opinions of so-called experts—all leading to the "inevitable" conclusions favored by the book's authors.

The year 2000 has come and gone and we find ourselves in a world much different from that predicted by The Club of Rome and its experts. The book's tone of urgency and inevitability—like that of Judge O'Scannlain's article—was based on false assumptions and selective use of statistics; it painted a distorted picture that ignored the ability of people and institutions to adapt to inevitable changes in a complex world.

Any discussion of splitting the Ninth Circuit must take into account two very important and immutable facts: First, any circuit that includes California will always be the largest circuit in the country, and the one with the greatest caseload. California is our most populous state, boasts the world's fifth largest economy and has the busiest Mexican border crossing point in the country. Appeals from California now number something like eleven thousand a year, accounting for seventy percent of our caseload. Unless California is split between two circuits, the circuit containing it will always dwarf all the others and require a very large number of appellate judges.

All split proposals now on the table, for example, would leave California in the Ninth Circuit, which would be comprised of between twenty-one and twenty-six judges, not many fewer than the twenty-eight now authorized. Even then, the circuit will be under-staffed, so that in a few short years we'll be back up to twenty-eight judges or more. At the same time, the eleven Ninth Circuit judges, like Judge O'Scannlain, who would wind up in the new circuit will see their work cut to a bit more than half. In other words, a substantial number of new judges will have to be added to our circuit so that judges in the new circuit(s) will have the luxury of a reduced caseload.

The second immutable fact that any split proposal must take into account is that the territory of the western states is huge and will always require substantial travel time by both lawyers and judges—whether or not the circuit is split. Any circuit that includes Alaska will, of necessity, have the largest territory. The current split proposal, as approved by the House and endorsed by some Senators, would create a sparsely-populated Twelfth Circuit spanning more than four thousand miles, from the Mexican border in Arizona to the Bering Strait in Alaska. No split will eliminate the need for judges and lawyers to travel across the Pacific for hearings on cases from Hawaii, Guam and Saipan. Rather than traveling to Los Angeles and San Francisco—large hubs, with frequent flights and relatively cheap airfares, where most of our cases are now heard—judges and lawyers from the southern part of the new circuit would have to travel to Seattle, Missoula or Portland for some hearings, while those in the north would sometimes have to travel to Phoenix or Las Vegas. What is now an easy one-hop trip would turn into a travel nightmare for many judges and lawyers. Thus, many of the problems Judge O'Scannlain points out—to the extent they are problems at all—will not be eliminated, and may in fact be exacerbated, by splitting the Ninth Circuit.

The remaining issues do not remotely justify a split. Judge O'Scannlain, for example, points to the number of opinions—about seven hundred—published by the Ninth Circuit each year, and complains about the "daunting task" of keeping track of such a colossal body of caselaw. However, the Eighth Circuit issued even more opinions, and the Seventh Circuit issued only about one hundred fewer, during the same twelve-month period, yet we hear no complaints from the lawyers and judges in those circuits.

* By Chief Judge Mary M. Schroeder and Judges James R. Browning, Alfred T. Goodwin, J. Clifford Wallace, Procter Hug, Jr., Otto R. Skopil, Betty B. Fletcher, Jerome Farris, Harry Pregerson, Warren J. Ferguson, Dorothy W. Nelson, William C. Canby, Jr., Robert Boochever, Stephen Reinhardt, Melvin Brunetti, Alex Kozinski, John T. Noonan, Jr., David R. Thompson, Michael D. Hawkins, A. Wallace Tashima, Sidney R. Thomas, Barry G. Silverman, Susan P. Graber, M. Margaret McKeown, Kim M. Wardlaw, William A. Fletcher, Raymond C. Fisher, Richard A. Paez, Marsha S. Berzon, Johnnie B. Rawlinson, Richard R. Clifton, Consuelo M. Callahan & Carlos T. Bea, all of the Ninth Circuit Court of Appeals.



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In reality, this is no more than a debater's point. Lawyers practice in discrete areas of the law and are generally unconcerned with caselaw in other areas; criminal lawyers care not a whit about our antitrust cases, and trademark lawyers seldom read our immigration opinions. The number of opinions any lawyer need worry about is thus far fewer than the seven hundred we issue every year. When it comes to caselaw in their area of expertise, lawyers generally complain that there are too few opinions. Judges, of course, rely on lawyers to bring relevant caselaw to their attention, and have law clerks to help them. We are surprised to learn that Judge O'Scannlain considers this to be a problem, as he always displays a firm command of our circuit's caselaw during case sittings and our internal *en banc* debates.

Then there is the shopworn argument that we are too big to maintain consistency in our caselaw. This supposed problem has been much mooted, and we have spent considerable time and resources trying to track it down. We have invited lawyers to bring inconsistencies to our attention, even if they have no case raising the issue pending before us, and have provided electronic and conventional access points for them to do so. For several years, we maintained a panel of judges and staff charged with identifying caselaw-inconsistencies. We are, each of us, mindful of the need to maintain consistency, and take very seriously any suggestion in a brief or petition for rehearing that our cases on a particular point are in conflict. After many years of devoting time and attention to the issue, we have concluded that conflicts in our caselaw do occur, but they are very rare. And when they are brought to our attention, even on relatively trivial points, we immediately take steps to correct them. The charge that our caselaw is riddled with hidden inconsistencies is simply not true—as demonstrated by the fact that Judge O'Scannlain, who meticulously documents many other propositions in his article, offers not a single example.

Judge O'Scannlain also expresses concern about the fact that we are one of the slowest among the circuits in disposing of our cases. But size bears no relation to the speed with which a court decides cases, as is borne out by the fact that the First Circuit, though the smallest, with only six judges, is not nearly the fastest circuit. The mix of cases and the number of judicial vacancies are what make a difference; they bear directly on how many cases the court can decide in a given period.

At this time and for some years past, the Ninth Circuit has had four vacancies, accounting for some fourteen percent of its authorized positions; within the recent past we had as many as ten vacancies, more than a third of our positions. The delay in filling vacancies has, not surprisingly, caused delay in getting cases to the judges, pushing our average case disposition time approximately four months above the national average. However, what Judge O'Scannlain fails to mention is that, once the cases are submitted to the judges, we are the second-fastest among the circuits in disposing of them. If size were the dispositive factor, one would expect our court to be dead last. In fact, quite the opposite is the case; once our judges receive the cases, we are unusually fast in deciding them. When our court is fully staffed, the delay in deciding cases will be eliminated; size has nothing to do with it.

Then there is the bugaboo about collegiality, and the supposed absence of it on a large court. Collegiality is an elusive concept and few judges or lay people agree about what it means. One common meaning concerns the ability of judges to get along with each other on friendly terms—enjoying an atmosphere of bonhomie and mutual respect. In that sense, we consider ourselves as collegial as any other court, far more than many. Though we often disagree, we seldom engage in the kind of ad hominem attacks that some other courts are known for. And, whatever our differences, we have not resorted to publicly impugning each other's integrity, or filing charges of misconduct, as has happened in other circuits and state supreme courts, all of them much smaller than ours. Though we have very different views on a variety of matters, including whether our court should be divided, our disagreements are highly professional, never mean-spirited or personal. Indeed, among the reasons we oppose the split is the sad prospect of losing our excellent working relationship with some of our colleagues, like Judge O'Scannlain.

Judge O'Scannlain also seems to say that we lack collegiality in the sense that we can't gain insight into each other's thinking processes, and this prevents us from reaching consensus in difficult cases. The quaint notion that judges on a small court engage in a Vulcan mind meld where they come to assimilate each other's points of view is easily disproved. One need only consider the Rehnquist Court, where the same nine justices worked together for eleven years straight. Were Judge O'Scannlain's theory correct, one would expect that, by the end of that period, disagreements among the justices would have been rare and unanimous opinions the rule. As we know, the opposite is true; differences that existed at the beginning of that period remained—and often grew more pronounced—by the end.

The simple reality of modern appellate judging is that we do not spend endless hours in face-to-face debate trying to hammer out a mutually acceptable solution. Rather, conferences tend to be short; few minds get changed there. The real debate on hard cases takes the form of inter-office memos, and in majority and separate opinions, where judges articulate their views precisely and at length. We all read these memos and opinions, and gain a fairly accurate insight into each other's thinking; sometimes we reach consensus, sometimes we don't. But there is absolutely no evidence that judges who spend more quality time together end up agreeing more often. Indeed, experience teaches that on smaller courts, where judges are forced to deal with each other constantly, acrimony and disagreement may be more common.

Nor is our use of visiting judges remarkably high, as Judge O'Scannlain suggests. During the past year, only 3.4 percent of our cases included the use of such judges, below the national average of 5.1 percent and well below the 11



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percent in the Second Circuit and 22.5 percent in the Sixth Circuit. Again there is no relationship between a circuit's size and its use of visiting judges.

Our colleague also disparages our limited *en banc* process, which calls for a panel of fifteen judges (formerly eleven) to decide cases taken *en banc* by vote of the full court. He overlooks the fact that splitting the circuit will not resolve this problem, for the same reason it will not resolve many of the other issues he raises. Under any of the pending split proposals, the remaining Ninth Circuit would have at least twenty-one authorized positions, far too large for a viable all-hands *en banc* panel; this is just two short of the number of judges we had when we first adopted the limited *en banc* process in 1980. Whether or not the circuit is split, the great majority of the circuit's cases will continue to be decided by a court where a limited *en banc* is the only workable procedure. Moreover, as other circuits are now approaching twenty judges, it is only a matter of time before they too will have to adopt this procedure.

There is nothing sinister or illegitimate about a limited *en banc* court. Traditionally, *en banc* meant hearing by the full court, but this practice arose in an era when circuits were small and a full-court *en banc* was not a problem. Nothing about *en banc* consideration requires the participation of the full court. Having circuit law made by a limited *en banc* court, which consists entirely of the court's active judges, is certainly no less legitimate than the widespread practice of making circuit law by three-judge panels consisting of a single active judge, a senior judge and a judge visiting from another court.

Cases are taken *en banc* largely for two reasons: First, there is a conflict in the law of the circuit which cannot be resolved by a three-judge panel because such panels have no authority to overrule circuit precedent. And, second, because the case is one of exceptional importance, it merits consideration by more than three judges. Neither of these functions requires the participation of every single judge of the court of appeals. A limited *en banc* court, consisting of a representative portion of the full complement of judges, ensures that all competing views will be considered and reflected in majority, concurring and dissenting opinions. And, because the judges are drawn randomly for *en banc* panels, the results will be the same as would be reached by the full court in the overwhelming number of cases. Since eighty-five percent of our *en banc* cases have been decided by seven-to-four or greater majorities, it is the rare case that would have been decided differently by a full-court *en banc*.

Finally, Judge O'Scannlain relies on history, but history cuts largely against him. To begin with, the redrawing of circuit lines—at least as to modern circuits—has occurred very rarely, and never over the opposition of the affected judges. Judge O'Scannlain's reference to the frequent redrawing of circuit borders prior to the Civil War era is entirely beside the point. While circuits existed from the early days of the Republic, they meant something very different from what they do today because there were no circuit judges and no permanent courts of appeals. Rather, until late in the 19th century, Supreme Court justices rode circuit, and heard appeals on panels consisting of themselves and local district judges. Thus, a change in circuit boundaries affected only what geographic area a particular justice would be required to patrol.

The circuits as we know them were first created in 1891 when Congress established the courts of appeals. Since that time, Congress has been chary about re-drawing circuit lines, and has done so only twice—when it split off the Tenth Circuit from the Eighth in 1929, and then, again, in 1981, when it divided the Fifth Circuit to create the Eleventh Circuit. In both instances, the split enjoyed the support of the affected courts, because the circuits could be divided into units of roughly equal size in terms of territory and caseload. For reasons already explained, this is impossible to do in the Ninth Circuit.

By contrast, the overwhelming number of Ninth Circuit judges have repeatedly and consistently opposed a split; only three active judges support it. Split opponents include judges appointed by Republican and Democratic presidents; judges appointed as early as 1961 and as late as 2003; judges from California, Arizona, Nevada, Oregon, Washington, Hawaii and Montana; active and senior judges; men and women. Neither ideology nor personal convenience animates this opposition; indeed, personal convenience for many of us points the other way. Our opposition, rather, stems from a firm conviction, based on our collective experience, that splitting the Ninth Circuit is a very bad idea for the public we serve.

Aside from the weakness of the arguments supporting the split, we see some very potent arguments militating against it. Because of our size, we have been both required and enabled to work smarter and become more productive. To ensure consistency in our caselaw, we have implemented a case monitoring and issue-spotting system that alerts panels to other pending cases raising the same legal issues. We have a pre-publication report that digests upcoming cases and alerts our judges before opinions are actually published; on numerous occasions, this has resulted in halting publication of opinions because of a previously-unidentified conflict. We were the first circuit to institute a Bankruptcy Appellate Panel, which now hears five hundred appeals a year, easing caseload pressure for our district judges. We have an active appellate mediation program that resolves one thousand cases a year. We are the only circuit with an appellate commissioner, who resolves over eleven hundred fee applications and four thousand motions a year; the appellate commissioner has helped resolve these matters more quickly and consistently than before, gaining the unanimous acclaim of our bar. Long before anyone had heard of the Internet, we pioneered the use of e-mail for the conduct of court business. We have also made active use of tele-conferencing for motions, screening and administrative work. These procedures have saved our judges many days of travel every year. The White Commission, which studied the operations of the circuit courts, noted in its 1998 report that the Ninth Circuit was well run and remarked on the



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court's many innovative procedures. It concluded that "[s]plitting the Ninth Circuit itself would be impractical and is unnecessary. As an administrative entity, the circuit should be preserved without statutory change."

Only forty years ago, every circuit had fewer than ten judges; today, only one circuit, the First, does. Every other circuit now has more judges than the Ninth Circuit had in 1965. It will be no more than a generation or two until other circuits are as large as we are today. The idea of splitting circuits in order to keep the number of appellate judges small is a pipe dream. How, for example, could one profitably split the Fifth Circuit—which now has seventeen judges—without splitting Texas? Or the Second Circuit without splitting New York? And what will the repeated splitting do to the burden on the Supreme Court in resolving inter-circuit conflicts? Soon, probably very soon, other circuits will find themselves in the situation in which the Ninth Circuit finds itself today, and they will have no choice but to adapt, as we have. Our innovations will provide valuable experience about how to deal with the inevitable problem of size.

In addition, by aggregating its resources, a large circuit can provide to districts with smaller caseloads significant assistance that would not otherwise be available, such as courthouse design and maintenance, human resource consulting and technology support. Through close communication among the district courts, the Ninth Circuit has been able to supply visiting district judges when a region experiences unexpected vacancies or a surge in case filings. These reasons, among many others, are why numerous bar associations including those of Arizona, Washington, Montana and Hawaii oppose a split of the Ninth Circuit.

We also believe that splitting the Ninth Circuit will have another important, though subtle, deleterious effect. While district courts have traditionally been considered local in character, circuits have been national or at least regional. It has been a strength of the federal appellate courts that their judges hail from several states, thus bringing to bear a wider perspective than their district court colleagues. Having several states in the same circuit also ensures that a multitude of senators are involved in vetting judicial appointments to the courts of appeals. Thus, no circuit today—save the D.C. Circuit, which is sui generis—comprises fewer than three states. Splitting the Ninth Circuit will break with this important tradition; under the legislation that is currently under consideration, the new Ninth Circuit would consist of only two states—California and Hawaii. Because of California's hugely disproportionate size, the overwhelming number of the new Ninth Circuit's judges will be appointed from California. This will change the regional and national character of our court and turn it, in effect, into a California Federal Court of Appeals. Once the three-state precedent is cast aside, it will not be too long before we have a Texas Federal Court of Appeals, a New York Federal Court of Appeals and perhaps a Florida or Illinois court as well. We believe this course is neither wise nor prudent, as we have found that a diversity of experiences and viewpoints, brought to us by judges from a multitude of states and geographic regions, has had a positive and invigorating influence on our decision-making process. The principle of the regional federal circuits is important and should not be lightly discarded.

We do not dispute that the increase in the federal caseload, and the appellate caseload in particular, presents a serious challenge to the orderly administration of justice. We do disagree, however, with those who would answer this challenge by breaking up what we consider to be an effective, well-organized and efficiently-run organization. Splitting the Ninth Circuit would be a costly enterprise, estimated by the Administrative Office of the United States Courts at some $96 million, plus additional costs of $16 million a year for operating two circuits rather than one. At a time of budget austerity, it seems wasteful and counterproductive to spend that kind of money for a net loss in efficiency.

There are, indeed, measures Congress might consider to deal with our caseload problem. In addition to adequately staffing our court by filling vacancies, Congress might look to the reasons for the increase in appellate caseloads. For example, we and the Second Circuit have suffered a huge number of filings (some six thousand cases in our court) in immigration cases. This has come as a direct result of what is known as "streamlining" on the part of the Board of Immigration Appeals, which has recently released thousands of cases from its docket after giving them only cursory review. These cases have found their way into the federal courts of appeals, and our court and the Second Circuit are the ones most directly affected by this practice. While this problem may be only temporary, Congress may well want to consider providing a more effective administrative appeal process.

Finally, we oppose the proposed split of the Ninth Circuit to the extent it is motivated by partisan political considerations or unhappiness with some of our decisions. In this regard, we are confident that we speak not just for ourselves, but also for those judges who favor a split. Whatever our other disagreements, we are united in our view that whether to split the Ninth Circuit should be governed by the kind of administrative and efficiency issues we have discussed in these pages, and not by a desire to punish our court for its decisions.

In sum, we believe the case for splitting the circuit has not been made. Yes, we are big and our territory is wide, but we have shown that we can function effectively and efficiently despite—indeed because of—our size. Large organizations, whether they be corporations or courts, profit from economies of scale. We have made size our friend rather than our enemy; other courts of appeals will have no choice but to follow suit, because in one generation, two at the most, they will be where we are today. Which is why the overwhelming number of judges of the Ninth Circuit, and the lawyers who practice before us—the people who know the most about the court's operation—strongly oppose the split. The time has come to put this bad idea behind us and get on with the business of administering justice.



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FROM : FRANK ADAMS 702-346-0693 FAX NO. : 7023460693 JUL. 17 2006 12:42PM P2

**Ronald Pierini, President**
**Mark Paresi, Vice President**
**Tony DeMeo, Treasurer**
**Michael Mancebo, Sgt-at-Arms**

## *RESOLUTION*

Supporting the organization of the Ninth Circuit Court of Appeals

**WE**, the members of the Nevada Sheriffs' and Chiefs' Association, respectfully represent as follows:

***WHEREAS,*** *the responsibilities of our circuit courts have evolved greatly over the last century while the structure of the Ninth Circuit Court of Appeals has remained largely unchanged since 1866, and*

***WHEREAS,*** *the Ninth Circuit Court of Appeals suffers from an overwhelming caseload and unreasonable delays in issuing decisions, and*

***WHEREAS,*** *there are twenty-eight judges on the Ninth Circuit Court of Appeals, which is nearly twice the recommended maximum, and which has led to inconsistent decisions and reduced authority for the Circuit, and*

***WHEREAS,*** *the judges of the Ninth Circuit Court of Appeals are seeking to increase their numbers in order to relieve the burdensome workload, and*

***WHEREAS,*** *the division of the Ninth Circuit Court of Appeals is long overdue, having been recommended over twenty years ago, now*

***THEREFORE BE IT RESOLVED,*** *this 8th day of December, 2005, that the Nevada Sheriffs' and Chiefs' Association at their regularly scheduled meeting in Mesquite, Nevada support: the reorganization of the Ninth Circuit Court of Appeals into two new circuits in order to streamline the appeals process and allow for more consistent decisions and we further encourage Congress to pass this legislation during the second session of the 104th Congress.*

*Ronald Pierini, President*

*Attested By:*

*Mark Paresi, Vice President*

P.O. Box 3247 Mesquite, NV 89024
1-866-266-9870

United States Senate
Committee on the Judiciary

Hearing on:
Examining the Proposal To Restructure the Ninth Circuit
Wednesday, September 20, 2006, 2:00 P.M.
Dirksen Senate Office Building Room 226
Washington, D.C.

Written Testimony of
**JOHN M. ROLL**
**Chief United States District Judge**
**United States District Court for the District of Arizona**
Evo A. DeConcini U.S. Courthouse
Tucson, AZ 85701-5053
520-205-4520



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## INTRODUCTION

It is an honor and a privilege to be invited to testify before this esteemed Committee.

I enthusiastically support S. 1845, which provides for a two-way split of the Ninth Circuit. The Ninth Circuit, whether viewed from the vantage point of population, number of states, number of judges, or caseload, has proved simply too large to function properly. All nine states of the Ninth Circuit would benefit by S. 1845, and the administration of justice would be well served.

## S. 1845

The Ninth Circuit's boundaries have not been reduced for the past 115 years.

S. 1845 would divide the Ninth Circuit into two new circuits. The new Ninth Circuit would consist of California, Hawaii, Guam, and the Mariana Islands. The new Twelfth Circuit would be made up of the remaining seven states of the current Ninth Circuit (Arizona, Nevada, Idaho, Montana, Oregon, Washington, and Alaska). (Attachment A).

Objective analysis demonstrates the compelling need for a split of the Ninth Circuit.

## CASELOAD

The most recent statistics (through June 30, 2006) show that the Ninth Circuit has 17,520 appeals pending. This represents 30% of all pending federal appeals. (Attachment B). This caseload is almost five times the average pending caseload for the other 11 circuits.

On July 16, 1999, Ninth Circuit Judge Pamela Ann Rymer told a subcommittee of this Committee that "the court's output is too large to read, let alone for each judge personally to keep abreast of, think about, digest or influence" with a resulting toll, over time, "on coherence and consistency, predictability, and accountability."[1] Since Judge Rymer offered this testimony, the Ninth Circuit's caseload has doubled.

As of March 31, 2006, the Ninth Circuit ranked first in filings with 6,600 more filings than the closest circuit; as of June 30, 2006, it ranked first by 6,346 filings.

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[1] *Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and the Ninth Circuit Reorganization Act: Hearing on S. 253 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 60 (July 16, 1999) [hereinafter 1999 Senate Subcomm. Hearing] (statement of Hon. Pamela Ann Rymer, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, and Member, Commission on Structural Alternatives for the Federal Courts of Appeals).



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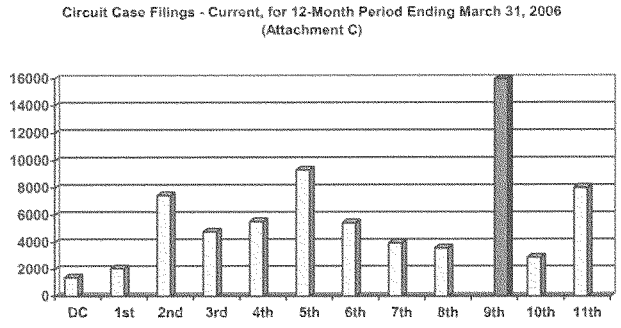
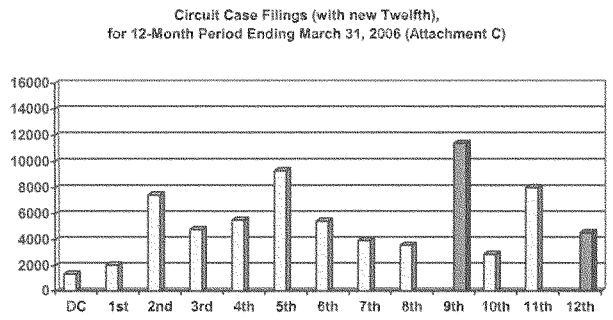



| Circuit | Filings |
|---|---|
| D.C | 1,380 |
| 1st | 2,055 |
| 2nd | 7,453 |
| 3rd | 4,787 |
| 4th | 5,527 |
| 5th | 9,326 |
| 6th | 5,441 |
| 7th | 3,951 |
| 8th | 3,584 |
| 9th | 15,967 |
| 10th | 2,894 |
| 11th | 8,024 |

If the Ninth Circuit is divided pursuant to S. 1845, the new Ninth Circuit will continue to have the largest caseload in the nation and the new Twelfth Circuit will have a caseload larger than five other circuits (D.C., First, Seventh, Eighth, and Tenth Circuits). (Attachment C).




| Circuit | Filings |
|---|---|
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| 4th | 5,527 |
| 5th | 9,326 |
| 6th | 5,441 |
| 7th | 3,951 |
| 8th | 3,584 |
| 9th** | 11,402 |
| 10th | 2,894 |
| 11th | 8,024 |
| 12th** | 4,565 |

S.1845, in addition to dividing the highest caseload in the country between two circuits, would also reduce the caseload per judge. The Ninth Circuit currently has the third highest number of cases per active judge (570 cases) and, with the addition of seven new judgeships, would drop to the fourth highest (518 cases). The new Ninth Circuit would also benefit from the assistance of 13 senior circuit judges. The caseload per judge of the new Twelfth Circuit would be seventh of the 13 circuits. (Attachment D).



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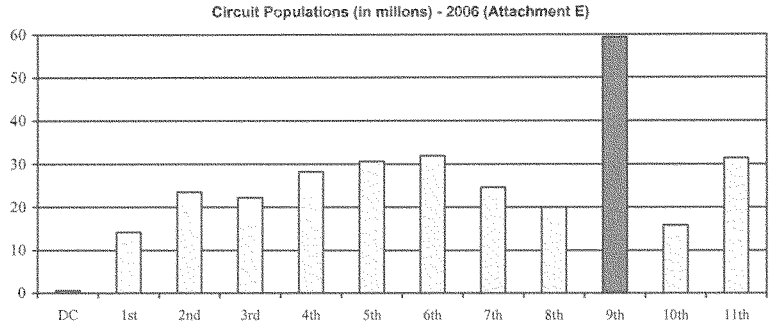
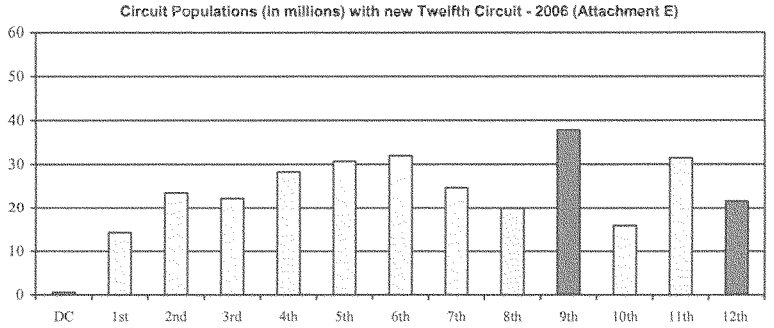
## POPULATION

In 1891, when the Ninth Circuit was created by the Evarts Act, six million people inhabited the area that now comprises the Ninth Circuit.[2] Today, nearly 60 million people reside within the Ninth Circuit. This is 27 million more than the next largest circuit. Not counting the Ninth Circuit, the average federal geographical circuit has a population of 22.1 million people. (Attachment E).




The new Twelfth Circuit, as proposed in S. 1845, would have a population of 21.3 million people.




Because very few cases receive further review, nearly every Ninth Circuit case is decided by a three-judge panel; that panel decides the law for nearly 60 million people.

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[2] U.S. Census Bureau, Dep't of Com., Thirteenth Census of the United States Taken in the Year 1910 vol. 1, ch. 2, at 30, *available at* http://www2.census.gov/prod2/decennial/documents/36894832v1ch02.pdf



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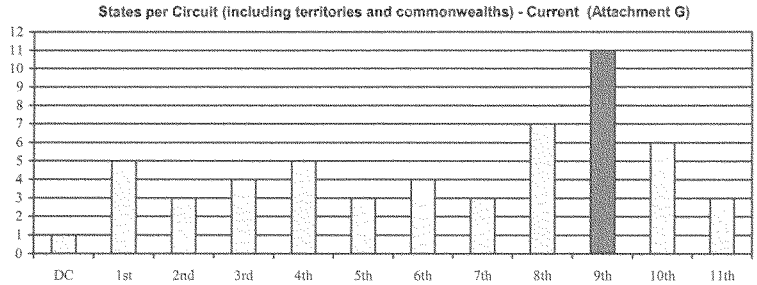
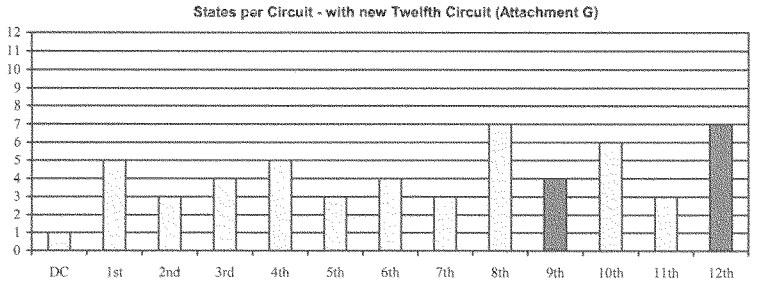
In 1998, Justice Anthony M. Kennedy, who sat on the Ninth Circuit before being appointed to the Supreme Court, wrote to the Commission on Structural Alternatives for the Federal Courts of Appeals ("White Commission") in support of a circuit split. Justice Kennedy said that any circuit claiming the right "to bind nearly one fifth of the people of the United States by decisions of its three-judge panel . . . must meet a heavy burden of persuasion." (Attachment F, at 2).

## NUMBER OF STATES

The current Ninth Circuit consists of nine states, a commonwealth, and a territory. Excluding the Ninth Circuit, the average circuit has fewer than four states. The nine states of the Ninth Circuit include the most populous state in the country (California) and the two fastest growing states (Nevada and Arizona).




The new Twelfth Circuit, consisting of seven states, would be tied with the Eighth Circuit for the most states within a circuit.




The dramatic disproportionality of joining California with eight other states in a single circuit is demonstrated when the filings of the individual Ninth Circuit states are compared to those of the Eighth Circuit's seven states and the Tenth Circuit's six states. (Attachment G).



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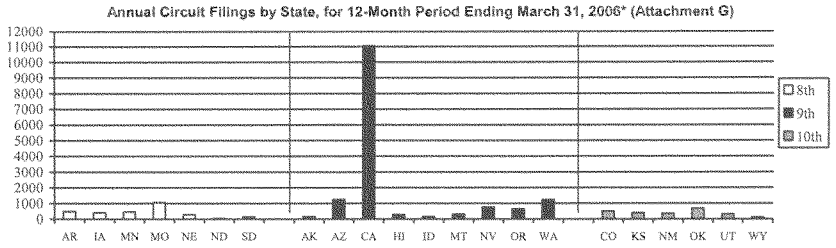


Clearly, the seven states of the new Twelfth Circuit would have a caseload significantly larger than either the Eighth or Tenth Circuit. There is no justification for continuing to tether these seven states to California.

## NUMBER OF JUDGES

The Ninth Circuit has 28 authorized active circuit judgeships and 23 senior circuit judges. It has requested and is clearly in need of seven more active circuit judgeships, which would result in the Ninth Circuit having a staggering total of 35 active circuit judges.

In 1999, Judge Rymer observed that "[t]wo-thirds of the circuit judges throughout the country (including one-third of my colleagues on the Court of Appeals for the Ninth Circuit) believe that the maximum number of judges for an appellate court to function well lies somewhere between eleven and seventeen. Beyond this range there are too many judges . . . ."[3]

The next largest circuit has 17 authorized active circuit judgeships.

The other circuits average less than 14 active circuit judges.

Justice Byron R. White, Chair of the White Commission, in a 1999 statement to a subcommittee of the House Judiciary Committee, stated that although the Commission "found no administrative malfunctions in the Ninth Circuit sufficient to call for a division or realignment of the circuit," the Ninth Circuit Court of Appeals "presents a different picture. The Court has 28 authorized judgeships and has requested more; it will undoubtedly need still more judges in the years ahead. From its study, the Commission concluded that an appellate court of that size, attempting to function as a single decisional entity, encounters special difficulties that will worsen with continued growth."[4]

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[3] Hon. Pamela Ann Rymer, *How Big Is Too Big?*, 15 J.L. & Pol. 383, 384 (1999).

[4] *Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. app. at 220 (July 22, 1999) [hereinafter 1999 House Subcomm. Hearing] (prepared statement of Hon. Byron R. White, Chair, White Commission).



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Ninth Circuit Judge Diarmuid F. O'Scannlain has estimated that a court of 50 circuit judges, active and senior, results in 19,600 possible three-judge panel combinations.

## "MINI-EN BANC" PROCEDURE

Because it has so many judges, since 1980 the Ninth Circuit has chosen (with congressional authorization) to hear cases en banc with fewer than all active circuit judges. It is the only circuit court of appeals to do so.

Since adopting the "mini-en banc" procedure, the Ninth Circuit has never conducted a full en banc hearing with all active circuit judges participating.

Until this year, mini-en banc panels in the Ninth Circuit consisted of 11 active judges; as of January 2006, 15 active circuit judges now sit on mini-en banc panels.

Enactment of S. 1845 would enable the seven states of the new Twelfth Circuit to experience the benefits of full en banc review of cases which are now enjoyed by all other circuits except the current Ninth Circuit.

The new Ninth Circuit may choose to continue conducting mini-en banc hearings, particularly with the addition of seven new judges. However, under S. 1845, these mini-en banc panels would consist of 15 of the court's 22 active judges—more than two thirds of the court. If the Ninth Circuit remains structurally unchanged and the seven requested judgeships are authorized, a significantly lower proportion—less than half—of active circuit judges will participate in mini-en banc hearings.

## ADVERSE CONSEQUENCES OF NINTH CIRCUIT'S DISPROPORTIONATE SIZE

The Ninth Circuit's enormously disproportionate size has resulted in several serious and adverse consequences. A non-exhaustive summary of these consequences is set forth below.

### a. Structurally flawed "mini-en banc" procedure

#### *Widespread criticism of mini-en banc procedure by Supreme Court Justices and others*

As described above, the Ninth Circuit is the only circuit to hold all "en banc" hearings with fewer than all active circuit judges.

Judge Rymer, who served as one of five members of the White Commission, has said, a "'limited' en banc is an oxymoron, because 'en banc' means 'full bench.'"[5]

[5] Hon. Pamela Ann Rymer, *The 'Limited' En banc: Half Full, or Half Empty?*, 48 Ariz. L. Rev. 317, 317 (2006).



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In 1998, Supreme Court Justice Sandra Day O'Connor was one of four justices to write to the White Commission in support of a Ninth Circuit split (the other Justices were Anthony M. Kennedy, Antonin Scalia, and John Paul Stevens). In her letter, Justice O'Connor said that the Ninth Circuit's mini-en banc hearings "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." (Attachment H, at 2). Justices Kennedy and Scalia, in their letters, also referred to the Ninth Circuit's mini-en banc process.[6]

In December 2003, former Seventh Circuit Chief Judge Richard A. Posner criticized what he referred to as the Ninth Circuit's "bob-tailed en banc procedure."[7]

This year, the Ninth Circuit increased the number of active circuit judges participating in its mini-en banc hearings from 11 to 15. The addition of four judges is cosmetic only. When the Ninth Circuit is at full strength, this will still result in only 15 of 28 active judges of the court participating in en banc reviews. Judge Rymer has pointed out that "the limited en banc means that the views of off-panel judges are not necessarily known or taken into account in the collaborative effort to craft an opinion."[8]

***15 votes required for mini-en banc rehearing***

In order for a case to be reheard en banc, a majority of the active circuit judges must vote in favor of rehearing. In the Ninth Circuit, when the Court is at full strength, at least 15 judges must vote for rehearing en banc. This is more judges than sit on most of the other circuit courts. Since the White Report was issued in 1998, six or more Ninth Circuit judges have unsuccessfully voted for rehearing en banc 34 times. (Attachment I). The Supreme Court granted review in nine of these 34 cases; seven were reversed and two are still pending. (Attachment I).

In one recent case in which a three-judge panel reached a conclusion contrary to that arrived at by five other circuits, nine active Ninth Circuit judges unsuccessfully voted for rehearing en banc.[9] In another recent case, on two occasions en banc review was denied and both times the Supreme Court granted review.[10]

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[6] *See* Attachment F (Justice Anthony M. Kennedy Letter to White Commission - Aug. 17, 1998); Letter from Justice Antonin Scalia, to Hon. Byron R. White, Chair, White Commission (Aug. 21, 1998), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/Scalia1.pdf.

[7] Interview by Howard Bashman with Hon. Richard A. Posner, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, How Appealing's 20 Questions Site (Dec. 1, 2003) at Question 9, http://20qappellateblog.blogspot.com/2003_12_01_20q-appellateblog_archive.html#107025481874565902 [hereinafter Posner Interview].

[8] Hon. Pamela Ann Rymer, *supra* note 5, at 323.

[9] *Bockting v. Bayer*, 418 F.3d 1055 (9th Cir. 2005).

[10] *Belmontes v. Woodford*, 359 F.3d 1079 (9th Cir. 2004) (denying en banc review), *vacated sub nom. Brown v. Belmontes*, 544 U.S. 945 (2005), *en banc reh'g denied*, 427 F.3d 663 (9th Cir. 2005), *cert. granted sub nom. Ornaski v. Belmontes*, 126 S.Ct. 1909 (2006).



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Finally, as Judge Rymer has pointed out, even if a majority of active circuit judges vote to rehear a case "limited en banc," since not all active circuit judges will be drawn to hear the case en banc, there is no assurance that all of the active circuit judges who vote for en banc review will be selected to hear the case.[11]

***Close votes are now common in mini-en banc rehearings***

When the White Report was issued in December 1998, the White Commission stated that the Ninth Circuit's mini-en banc procedure was not problematic because the mini-en banc votes were seldom close.[12] This is no longer true. Since 1998, 33% (42 of 127) of the Ninth Circuit's mini-en banc rulings have been by 6-5 or 7-4 votes. (Attachment J).

Beginning in 2006, the Ninth Circuit now has 15 active circuit judges participate in mini-en banc hearings. However, this does nothing to change the fact that far fewer than all active circuit judges will continue to participate in the Ninth Circuit's unique en banc procedure. The only likely change will be close votes of 8-7 or 9-6, with eight or nine judges speaking for a court of 28. It is both counter-intuitive and speculative for split opponents to argue that in the 42 cases with close votes, participation by the other active circuit judges would have made no difference.

***Three-judge panel members frequently are not picked for mini-en banc hearings***

Since the mini-en banc panels do not include all active circuit judges, there have been occasions when none of the three-judge panel members who decided a case were picked to hear the case en banc. In one highly publicized case, a unanimous three-judge panel was unanimously reversed 11-0 by a mini-en banc court. None of the three judges who participated in the panel decision were selected to rehear the case en banc.[13]

Judge Rymer has pointed out that when no panel member is drawn to hear the case on "limited en banc" (something that occurred in 22 of 95 limited en banc cases between 1999-2005), the limited en banc panel "lacks the benefit of input from colleagues who are well-versed in the record and law applicable to the case, and whose work would bring a different perspective to en banc deliberations."[14]

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[11] Hon. Pamela Ann Rymer, *supra* note 5, at 321.

[12] Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 35 (1998), *available at* http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf [hereinafter White Report].

[13] *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir.), *reh. en banc*, 344 F.3d 914 (9th Cir. 2003) (addressing the California gubernatorial recall procedure).

[14] Hon. Pamela Ann Rymer, *supra* note 5, at 323.



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**b. Most reversed circuit**

The Ninth Circuit is the most reversed circuit. (Attachment K). Even more extraordinary, however, is the fact that since the White Report was issued in 1998, the Ninth Circuit has been reversed at least 62 times *unanimously*, i.e., with no dissent. No other circuit is close to having so many unanimous reversals. In only two of these 62 cases had the Ninth Circuit heard the matter en banc; the other 60 unanimous reversals were of three-judge panel decisions.

In effect, the Supreme Court is performing a review of Ninth Circuit panel decisions that should be addressed by the Ninth Circuit in full en banc hearings.

In the Supreme Court term recently completed, 18 Ninth Circuit cases were reviewed and 15 were reversed—most of them unanimously. (Attachment K).

**c. Slowest circuit in decisional time**

The Ninth Circuit is the slowest circuit in decisional time when measured from the time of filing of notice of appeal to disposition. As of June 30, 2006, the Ninth Circuit takes 16.3 months per case. The Ninth Circuit is more than two months slower than the next slowest circuit and four months slower than the average circuit. (Attachment L). The Ninth Circuit now takes two months longer per case than it did when the White Report was issued in 1998.[15]

**d. Under-representation in Judicial Conference**

Every circuit is entitled to two representatives to the U.S. Judicial Conference, the policy-making body for the federal courts. Nine states with a combined population of nearly 60 million people and accounting for 30% of all pending federal appeals should have 2-3 times the Judicial Conference representation received by the current Ninth Circuit.

Splitting the Ninth Circuit would give better representation to all nine states.

**THE REASONS OFFERED BY SPLIT OPPONENTS CANNOT WITHSTAND SCRUTINY**

In 1998, Justice Kennedy wrote that split opponents bear a "heavy burden of persuasion . . . ." (Attachment F, at 2). Split opponents woefully fail to meet this burden.

**a. "It would cost too much."**

Despite claims to the contrary, a circuit split would not "break the bank." Existing facilities requiring modest modifications with relatively small price tags would meet the

[15] White Report, *supra* note 12, at 32.



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immediate needs for a new Twelfth Circuit headquarters in Phoenix, Arizona.[16]

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. However, closer analysis shows that either of two Phoenix locations, the Sandra Day O'Connor U.S. Courthouse at 401 W. Washington ("401") or the 230 N. 1st Ave U.S. Courthouse ("230"), have adequate space to fully serve as a circuit headquarters for the midterm.

Attached to my written testimony are executive summaries, courthouse floor plans and conceptual estimates developed by HBJL Collaborative, LLC ("HBJL") and a letter from former Chief Judge Robert C. Broomfield. (Attachment M).

As reflected in the executive summaries, 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 $9,683,697.29. Judge Broomfield concurs with HBJL's conclusion that adequate space exists at both 401 and 230. Judge Broomfield has authorized me to inform this Committee that he stands by the statements and conclusions contained in his letter of Oct. 19, 2005.

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 35 years, including 14 years on the Superior Court of Arizona in Maricopa county and nearly 21 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 courts), Judge Broomfield was its presiding judge for 11 years. On the U.S. District Court, he served as chief judge for over five 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 term as chair, the Judicial Conference directed that the Space and Facilities Committee be combined with the then-Committee on Security, which resulted in a new Committee on Security, Space, and Facilities. Recently, the Judicial Conference split that committee into its original committees. The U.S. Courts Design Guide was formulated during Judge Broomfield's tenure on the Space and Facilities Committee.

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[16] *Revisiting Proposals to Split the 9th Circuit: An Inevitable Solution to a Growing Problem: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 109 Cong. 126-27 (Oct. 26, 2005) [hereinafter 2005 Senate Subcomm. Hearing] (prepared statement of Hon. John M. Roll, District Judge, U.S. District Court for the District of Arizona).



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In addition, in 1997 Judge Broomfield was appointed to the Judiciary's Budget Committee and chaired its Economy Subcommittee for several years. 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.

In the past, the cost of additional circuit judgeships was sometimes included as a significant part of the cost of a circuit split. However, the reality is that seven new judgeships are needed, with or without a circuit split.

**b. "The Ninth Circuit doesn't want a split."**

Initially, it should be noted that a significant number of Ninth Circuit judges support a split of the circuit. Ninth Circuit Judges Diarmuid F. O'Scannlain, Richard C. Tallman, and Andrew J. Kleinfeld testified last year in support of a split of the Ninth Circuit.[17]

The fact that a strong majority of Ninth Circuit judges opposes a split of the circuit (33 of 47 Ninth Circuit judges recently co-authored a Federalist Society magazine piece in opposition of a split) should not be given undue weight.

In expressing her support of a circuit split to the White Commission in 1998, Justice O'Connor said that "[i]t is human nature that no circuit is readily amenable to changes in boundary or personnel" and observed that "it is unrealistic to expect much sentiment for change from within any circuit." (Attachment H, at 2).

Despite this institutional bias against change referred to by Justice O'Connor, 24 federal judges who sit in the Ninth Circuit recently signed a letter sent to this Committee in support of S. 1845. (Attachment N).

Judge Rymer, shortly after the White Commission issued its report, wrote that "many circuit judges, lawyers who practice within the [Ninth Circuit], and a majority of justices on the United States Supreme Court question how well the court of appeals performs its adjudicative functions."[18]

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[17] 2005 Senate Subcomm. Hearing, *supra* note 16, at 13, 89 (oral and prepared statements of Hon. Diarmuid F. O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* at 15, 149 (oral and prepared statements of Hon. Richard C. Tallman, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* at 36, 57 (oral and prepared statements of Hon. Andrew J. Kleinfeld, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

[18] Hon. Pamela Ann Rymer, *supra* note 3, at 386.



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**c. "There is a need for a unified law of the west."**

Although split opponents have argued that the law of the west should be decided by a single circuit, no other circuit spans an entire border or coast. The eastern seaboard, for example, is subdivided into five circuits.

**d. "California can't be separated from Arizona, Seattle from San Francisco, etc."**

Split opponents argue that because of close historic and economic ties, Arizona and California must remain in the same circuit. However, on the east coast, New Jersey and New York are in different circuits, as are Massachusetts and Connecticut, Delaware and Maryland, and South Carolina and Georgia. Without any apparent difficulty, intellectual property cases as well as maritime law cases are distributed among multiple circuits on the eastern seaboard.

**e. "California and Arizona are border courts and shouldn't be separated."**

Split opponents argue that the Ninth Circuit should not be split because two of the five southwest border districts are in the Ninth Circuit. However, the five southwest border districts are already separated into three circuits—the Ninth (S.D. Cal. and D. Ariz.), Fifth (S.D. Tex. and W.D. Tex.) and Tenth (D. N.M) Circuits.

**f. "As a result of technological advances and creative case processing, the Ninth Circuit is able to cope with its large number of judges and vast caseload."**

Split opponents argue that as a result of technological advances (e-mail, teleconferences, blackberries, etc.), and creative case processing techniques (such as the widespread use of screening panels, commissioners, and staff attorneys), the Ninth Circuit is able to cope with its vast caseload and disproportionate number of judges.

Ninth Circuit Judge O'Scannlain, however, recently questioned whether such shortcuts may ultimately deprive litigants of Article III review of their cases. (Attachment O, at 11).

**g. "Rather than reduce the size of the Ninth Circuit, other circuits should be bigger."**

Some Ninth Circuit judges have argued that other federal circuits should be consolidated and have larger caseloads so as to follow the lead of the Ninth Circuit. However, no other circuit has expressed an interest in becoming more like the Ninth Circuit.



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Seventh Circuit Judge Posner has said: "The Ninth Circuit is performing badly, a case reinforced by the impressions that almost everyone has who appears before the Ninth Circuit or reads its opinions."[19]

In 1999, former Chief Judge William D. Browning, who served as one of the five members of the White Commission, testified before a subcommittee of this Committee regarding the White Report. He said that he repeatedly asked split opponents, "when will the Ninth Circuit be too big?" but was never given an answer by split opponents.[20] In 2004, he submitted a letter to that subcommittee urging that if more judges are added to the Ninth Circuit, it should be divided. (Attachment P).

How big *is* too big? When the White Report was issued, the Ninth Circuit's caseload was about 8,500 cases (of a national total of 52,271) and it had a population of 51,450,000 people (of a national total of over 271 million). In the interim, the Ninth Circuit's caseload has doubled (17,520 pending cases as of June 30, 2006) and the population has increased by 8 million people.

**h. "The Ninth Circuit is a national beacon and cutting-edge innovator."**

Although the Ninth Circuit sometimes depicts itself as a national beacon for the other federal courts and a cutting edge innovator, it is actually just one of 12 regional circuit courts. It is not entitled to a position of preeminence over all other circuits.

**i. "More studies are needed."**

Some split opponents have urged that more hearings and studies are required.

Whether to divide the Ninth Circuit has been the subject of many hearings, the most recent having been held on October 26, 2005, by a subcommittee of this Committee.

In a little more than three decades, two national commissions, the Hruska Commission (1973) and the White Commission (1998), studied the Ninth Circuit and made recommendations. The Hruska Commission recommended that both the Fifth and Ninth Circuits be divided. In 1998, the White Commission recommended what has been described as a "de facto split" of the Ninth Circuit, proposing that the Ninth Circuit be subdivided into three semi-autonomous divisions. Prior to issuance of the White Report, the White Commission held several hearings in the Ninth Circuit.

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[19] Posner Interview, *supra* note 7, at Question 9.

[20] 1999 Senate Subcomm. Hearing, *supra* note 1, at 127 (statement of Hon. William D. Browning, Senior District Judge, U.S. District Court for the District of Arizona, and Member, White Commission).



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No further studies or hearings are warranted; they would only delay the necessary and the inevitable.

**j. "The White Commission's recommendations are an attractive alternative to a circuit split."**

The five members of the White Commission included Justice Byron R. White and two judges who sit in the Ninth Circuit—Ninth Circuit Judge Pamela Ann Rymer and former Chief Judge William D. Browning (D. Ariz.). The Commission unanimously concluded that the adjudicative (but not the administrative) functioning of the Ninth Circuit was seriously flawed and required structural changes.

Judge Rymer strongly supports the recommendations of the White Commission as the appropriate solution to the Ninth Circuit's adjudicative ills. In testifying in support of the White Commission's recommendations, Judge Rymer said that "the Court of Appeals for the Ninth Circuit is broke and should be fixed but cannot be fixed without structural change."[21]

In 1998, nearly eight years ago, the White Commission recommended that the Ninth Circuit be subdivided into three semi-autonomous divisions.[22] One crucial goal of the White Commission was to obtain decisional units of 11-17 active circuit judges with each division having full en banc hearings. To this end, the White Commission proposed that appeals in each division be heard by three-judge panels, and that full divisional en banc review of the panel decisions be heard as necessary. The decisions of any division were not to be binding on the other two divisions. Finally, and only in the event of intracircuit "substantial and square conflict," a limited en banc panel (consisting of the Chief Judge of the Ninth Circuit and four active circuit judges from each of the three semi-autonomous divisions) would entertain further review.[23] The White Commission recommended these changes because, from an adjudicative standpoint, the Ninth Circuit is "broke" and needs to be "fixed;" "structural change" is required.[24]

At the time the White Report was issued, then-Ninth Circuit Chief Judge Proctor Hug, Jr., wrote that the White Commission's proposal would cause the law of the Ninth Circuit to "steadily drift apart." He said that the White Report recommended, in effect, a "de facto split."[25] (Attachment Q).

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[21] 1999 Senate Subcomm. Hearing, *supra* note 1, at 60 (statement of Hon. Pamela Ann Rymer).

[22] White Report, *supra* note 12, at 44.

[23] Hon. Pamela Ann Rymer, *supra* note 3, at 383; White Report, *supra* note 12, at 45.

[24] 1999 Senate Subcomm. Hearing, *supra* note 1, at 60 (1999) (statement of Hon. Pamela Ann Rymer).

[25] Hon. Proctor Hug, Jr., *Potential Effects of the White Commission's Recommendations on the Operation of the Ninth Circuit*, 34 U.C. Davis. L. Rev. 325, 330 (2000).



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At a House subcommittee hearing, Chief Judge Hug testified against the White Report's recommendations. There he said, "[m]y view that the disadvantages far outweigh any advantages of the proposed restructurings is shared by a great majority of the judges on the Ninth Circuit Court of Appeals . . . ."[26]

Chief Judge Hug dismissed the White Commission's recommendations as "radical," "untested," and "flawed," providing for a divisional approach that "abrogates circuit-wide stare decisis," jeopardizing "uniformity, coherence, and predictability."[27]

The American Bar Association and the Federal Bar Association opposed the White Commission's recommendation of three semi-autonomous divisions.[28]

The White Commission's recommendations represent a valiant, extraordinary and unprecedented effort to prevent the division of a circuit that has simply grown to unworkable dimensions from an adjudicative standpoint.

The White Report was vehemently rejected in 1999 by today's split opponents. Since the White Report was issued, the population in the nine states of the Ninth Circuit has increased by eight million people and the caseload has doubled. Even assuming that today's split opponents believe the White Report's key recommendations are now appropriate (i.e., three semi-autonomous divisions with full divisional en banc review, nonbinding interdivisional caselaw, and circuit-wide limited en banc restricted to "substantial and square conflicts"), the split proposed in S. 1845 is the best solution.

**k. "Disparity in caseload is unfair."**

Opponents of S. 1845 have suggested that it would create unfair disparity in caseload between the new Ninth Circuit and the new Twelfth Circuit. The Ninth Circuit currently ranks third in caseload, with 570 cases per active circuit judge.

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[26] 1999 House Subcomm. Hearing, *supra* note 4, at 52 (statement of Hon. Proctor Hug, Jr., Chief Judge, U.S. Court of Appeals for the Ninth Circuit).

[27] Hon. Proctor Hug, Jr. & Carl Tobias, *A Split by Any Other Name*, 15 J.L. & Pol. 397, 407-08 (1999).

[28] Elizabeth Rogers, *ABA Opposes Plan to Restructure 9th Circuit Court of Appeals*, 85 A.B.A. J. 101 (Nov. 1999); Bruce Moyer, *FBA Opposes Ninth Circuit Division Proposal*, 76 Fed. Law. 8 (Aug. 1999).



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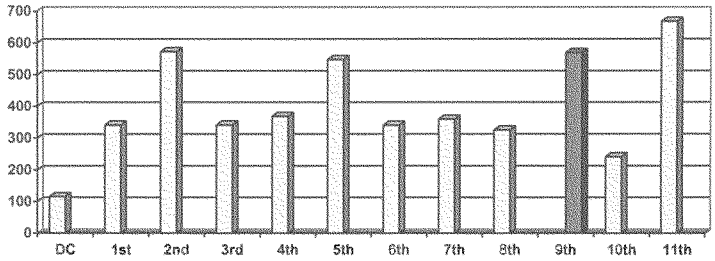
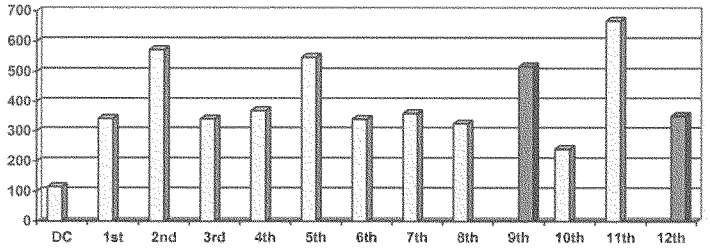
Number of Cases Per Active Judge - Current, for 12-Month Period Ending March 31, 2006 (Attachment D)




| | 11th | 2nd | 9th | 5th | 4th | 7th | 1st | 3rd | 6th | 8th | 10th | DC |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cases Filed | 8024 | 7453 | **15967** | 9326 | 5527 | 3951 | 2055 | 4787 | 5441 | 3584 | 2894 | 1380 |
| Active Judgeships | 12 | 13 | **28** | 17 | 15 | 11 | 6 | 14 | 16 | 11 | 12 | 12 |
| Cases Per Judge | 668 | 573 | **570** | 548 | 368 | 359 | 342 | 341 | 340 | 325 | 241 | 115 |

Under S. 1845, the new Ninth Circuit's caseload would be significantly reduced—dropping from 570 cases per active circuit judge to 518 cases per active circuit judge. The new Ninth Circuit would also have 13 senior circuit judges to assist with this caseload. Overall, the caseload of the new Ninth Circuit judges would be less than three other circuits. In addition, although the new Twelfth Circuit would have a caseload of 351 cases per active circuit judge, this would be larger than that of six other circuits. (Attachment D).

Number of Cases Per Active Judge - After Two-Way Split of the Ninth Circuit, for 12-Month Period Ending March 31, 2006 (Attachment D)




| | 11th | 2nd | 5th | 9th | 4th | 7th | 12th | 1st | 3rd | 6th | 8th | 10th | DC |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Cases Filed | 8024 | 7453 | 9326 | **11402** | 5527 | 3951 | **4565** | 2055 | 4787 | 5441 | 3584 | 2894 | 1380 |
| Active Judgeships | 12 | 13 | 17 | **22** | 15 | 11 | **13** | 6 | 14 | 16 | 11 | 12 | 12 |
| Cases Per Judge | 668 | 573 | 548 | **518** | 368 | 359 | **351** | 342 | 341 | 340 | 325 | 241 | 115 |



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**l. "This is just politically motivated."**

Despite the overwhelming and compelling evidence in support of a circuit split, some split opponents continue to rely upon the unfounded claim that attempts to split the Ninth Circuit are simply politically motivated. However, judges who support a split have consistently focused on the impracticality of having a single circuit court of such enormous proportions.

While there is little or no evidence of pro-split judges and lawyers articulating political reasons for a division of the circuit, this has not been true of all split opponents. (Attachment R).

The reasons why a split is necessary far transcend politics. No one can seriously maintain that the Ninth Circuit is proportionate to the other geographic circuit courts or that it adjudicates well despite its enormous caseload and number of judges.

**m. "All that is needed is for current vacancies to be filled."**

More judges will not solve the insurmountable imbalance caused by the limited en banc procedure. Judge Rymer, in testifying before a subcommittee of this Committee nine years ago, said that "no amount of [good will or good administration] can make it possible for 30, 40, or 50 or more judges to decide cases together. It simply cannot be done, and that is the problem."[29]

## CONCLUSION

The administration of justice is not well-served by having one of 12 federal circuit courts entertain 30% of the nation's federal appeals, house over one-fifth of the nation's population, and contain nearly one-fifth of the nation's states (including the most populous state). The consequences of having a single circuit encompass so many states and hear so many cases resonate in many ways, including too many judges, lengthy dispositional time, utilization of a structurally-flawed mini-en banc process, an extraordinary unanimous reversal rate, and gross under-representation in the U.S. Judicial Conference.

For 115 years there has been no diminution in the boundaries of the Ninth Circuit despite a tenfold increase in population. The need for a split has been discussed in earnest for over three decades, including studies by two national commissions. The situation has become exacerbated and, without a division of the Ninth Circuit, will continue to deteriorate. This issue will not go away.

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[29] 1999 Senate Subcomm. Hearing, *supra* note 1, at 60 (statement of Hon. Pamela Ann Rymer).



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As the western population continues to increase, so will the need for a circuit split. There is nothing "rash" or "peremptory" about dividing the circuit at this time. In 1999, highly-respected law professor Daniel J. Meador, who served as Executive Director of the White Commission, provided a written statement to a House subcommittee, in support of the White Commission's recommendations. He said that unless Congress acts, "the controversy over the Ninth Circuit will continue to fester, with debilitating consequences . . . ."[30]

Both the new Ninth and new Twelfth circuits would benefit from a split as provided for in S. 1845.

For Congress to divide the Ninth Circuit is not an attack upon judicial independence; it is the wise exercise of authority expressly entrusted to Congress by the Constitution. This Congress has a unique, historic opportunity to take much-needed remedial action regarding a circuit which now dwarfs all others.

I most respectfully urge passage of S. 1845. Thank you.

[30] 1999 House Subcomm. Hearing, *supra* note 4, app. at 209 (prepared statement of Daniel J. Meador, James Monroe Professor of Law Emeritus, University of Virginia, and Executive Director, White Commission).



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# United States Senate
# Committee on the Judiciary

## Hearing on Senate Bill 1845
## Wednesday, September 20, 2006

**Written Testimony of**
**Mary M. Schroeder**
**Chief Judge**
**United States Court of Appeals for the Ninth Circuit**
**401 W. Washington Street**
**Phoenix, AZ 74003-2156**
**602-322-7320**



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**STATEMENT OF CHIEF JUDGE MARY M. SCHROEDER**
**TO THE SENATE JUDICIARY COMMITTEE ON S. 1845**
**Wednesday, September 20, 2006**

Good afternoon Mr. Chairman. My name is Mary M. Schroeder and I am Chief Judge of the Ninth Circuit, a position I have occupied since December 2000. I very much appreciate the opportunity to be with you this afternoon, and especially appreciate the fact that the committee has before it a specific proposal for division of the circuit, not just an abstract proposition that the circuit be divided. This Bill, S. 1845, illustrates the problems inherent in any proposal to divide the circuit, but it also serves to illustrate the particularly dramatic inequities that flow from a proposal that splits California and Hawaii off from the majority of the states in the circuit.

I am pleased to have with me to testify here today, in opposition to S.1845, my colleague Sidney Thomas of Montana, who is in line to become Chief and has a special expertise in dealing with case volume. We are joined in the hearing room by several of our colleagues who may be familiar to you, a number of whom were confirmed by your Committee within the last few years. They are Alex Kozinski of Los Angeles, California, Consuelo Callahan of Sacramento, California, Richard Clifton, of Honolulu, Hawaii, Johnnie Rawlinson, of Reno, Nevada, and Carlos Bea of San Francisco. As recent additions to our court, they have a vital interest in



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the continuity and stability of the circuit that they were nominated and confirmed to serve.

As the Chief, it is my obligation to do my best to insure the economical, efficient, and fair administration of justice throughout the circuit. The concern for the administration of justice forms the basis for my opposition to division of the Ninth Circuit. This view has been shared by all of my predecessors as Chief within living memory, beginning with my predecessor from Arizona, Richard Chambers, appointed by President Eisenhower and extending through chiefs appointed by Presidents Kennedy, Nixon, and Carter, and the two future chiefs, Judges Kozinski and Thomas, appointed by Presidents Reagan and Clinton respectively. The overwhelming majority of our Court of Appeals judges oppose a division of the circuit. This has never been a partisan political issue for us.

The Ninth Circuit Court of Appeals is sometimes confused with the larger administrative entity of the Ninth Circuit. The Ninth Circuit itself comprises all of the district courts, and bankruptcy courts within its geographic jurisdiction, as well as the Court of Appeals. This bill would split them all. Yet the district judges and bankruptcy judges don't want division either.

You will have before you two letters declaring opposition to division. One is signed by more than 50 district judges. The other is signed by more than 50



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bankruptcy judges. They believe that a division of the circuit will lead to confusion, unnecessary costs, and delay. Court administration experts agree. The subject has been studied and studied, most recently by the White Commission. None of the studies have found any serious administrative problem unique to our circuit, much less a problem that would be solved by circuit division.

What about the Bar? The lawyers don't want a split either. The Federal Bar Association, the American Bar Association, state bar associations, including those of Arizona, Montana, Nevada, Washington, and Alaska, plus numerous county and local Federal Bar Chapters throughout California and the rest of the Circuit are on record as opposing division.

The closest followers of case law teach in our law schools. You also have a statement signed by more than 350 law professors opposing a division.

From the most practical standpoint, division would make the practice of law more expensive. There may be a lack of understanding of the real costs for lawyers and their clients inherent in Circuit division. The fact is that while the ire of a few in Congress is focused on a handful of the decisions from our Court of Appeals, all of the proposals are to dismantle the entire Circuit. The Circuit law for California would be different from that of its neighbors. Yet, as we all know, there is a lot of interstate commerce conducted within the states of our Circuit. Lawyers should



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not be forced to track new and different Circuit law in bankruptcy or commercial litigation for example, that spans Arizona and California.

The Ninth Circuit has become the home of intellectual property and technology, with Microsoft, Intel and the Silicon Valley. Circuit division makes the practice of law and litigation more complicated and more expensive, with no commensurate gain in administrative efficiency. As the United States looks toward the Pacific for increasing foreign trade, and major law firms are opening offices in Asia daily, the nation can benefit from the Ninth Circuit as an unfragmented source of federal law. Of course, the East Coast has been fragmented from the 18th Century, but why, in the 21st Century, should we set out to create a similar system in the west?

From the standpoint of the courts, technology and communication have made the business of court administration easier, not more difficult. In fact, Senior Circuit Judge J. Clifford Wallace of San Diego, who served with distinction as our Chief Judge a few years back, has outspokenly opposed division and has repeatedly suggested that the small Circuits ought to think about merging. As 34 of our active and senior circuit judges said resoundingly in a recent article in *Engage*: "yes, we are big and our territory is wide, but we have shown that we can function effectively and efficiently despite – indeed because of – our size . . . we



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have made size our friend rather than our enemy."

The Ninth Circuit has been the leading innovator in the federal system. We have utilized data bases of issues presented in pending cases ever since the computer was in its infancy. We began the Bankruptcy Appellate Panel, an institution now recognized by statute and utilized in many circuits. We were among the first federal courts to experiment with televised appellate arguments, and the first to have high profile cases telecast live and nationwide.

Why are our judges and those who have studied the circuit, and those who practice in our courts opposed to division? There are many reasons. One reason is our fine staff, that serves our courts well. Our Clerk's Office of the Court of Appeals is headed by Cathy Catterson, nationally admired for her superb administrative and people skills. Cathy has received the highest award of the Administrative Office, the Director's Award, for her work. Her office of skilled staff attorneys handles emergency matters from the trial courts promptly and efficiently. Her staff helps our judges decide a motion in a very serious matter, as for example, a motion for stay of a district court order enjoining the construction of a dam, within 72 hours, and then put the case on the appropriate track for resolution. We also have staff experts in death penalty litigation who have compiled an on-line handbook for use by staff in district courts clerks' offices



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throughout the circuit. This helps all our courts handle difficult and often complex death penalty cases.

In addition, our staff works up hundreds of cases, principally uncounseled cases, for presentation to panels of three judges of our Court of Appeals each month. Headquartered in our geographic hub city of San Francisco, our staff helps us serve the courts and the litigants of the entire circuit both fairly and promptly.

This bill, S. 1845, would separate the majority of states in the circuit from that circuit staff and circuit headquarters. Seven states, from Alaska to Arizona, would constitute a new circuit that has no headquarters, no administrative resources to process the cases and no legal staff to assist in presenting them to judges. All of these would have to be created. That would not promote the administration of justice in those states.

I have been speaking about administrative resources, but what about judicial resources? Here the geographic and demographic realities, and the inequities of division come into even sharper focus.

Seventy percent of the circuit's cases presently emanate from the State of California. This bill would add seven judgeships, all of which would have to be allocated to California. Even if those judgeships were added, and, more to the point, actually filled, the imbalance of caseload between the Ninth and the new



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Twelfth would be palpable. Circuit judges in the Ninth, the California circuit, would have more than 500 cases per judgeship, while judges in the remaining circuit would have only about 300. Division would leave the California circuit with an experienced staff, (assuming our existing staff were willing to put up with the disruption of schism,) but it would leave the remaining Ninth Circuit without the available assistance we now enjoy from the dozens of district and circuit judges outside California and Hawaii and familiar with the same circuit law. As Chief Judge of the Circuit responsible for its administration, this possibility presents an administrative nightmare.

In sum, this Bill, S. 1845, would leave California alone with Hawaii in a circuit containing more than 70% of the cases of the existing circuit, 18% of the cases in the entire country, far too few judges, much of the Pacific Ocean and only four Senators. Such a circuit would lose the capacity to make interchangeable use of the district or circuit judges from the other seven states in the new Twelfth Circuit, since they would be operating under a different circuit law. The new Ninth Circuit, that would include California and Hawaii, would be overwhelmed and would need at least 13 additional judges to bring its case load even with the load of the judges in the new Twelfth Circuit.

Of the remaining seven states in the new Twelfth, or"string-bean" circuit, as



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the late Chief Judge Chambers of Tucson described it when a similar division situation was first discussed 40 years ago, it would have a very busy Arizona border and a long border with Canada, giving it large scale security issues to cope with. It would take years for a new circuit to assemble a staff with the experience of the existing Ninth Circuit staff, and there seems to be some disagreement as to where the staff would live since that circuit would have no geographic hub city.

Thus a new Ninth Circuit would need many more judges, and the Twelfth would need a headquarters, a staff, and a hefty travel budget, as judges and staff would have to fly from the two population centers of a new circuit, one located close to the Canadian border and the other near the Mexican border.

All of this is very costly. Our latest estimates of cost were drawn up several years ago. We now have a new Director of the Administrative Office and a new Chief Justice who have not had an opportunity to examine the real impact of circuit division, not only on the states of the West, but on the entire federal court system. This has been a period of severe budget constraint on all of the courts, and I would urge you not to consider this or any other reconfiguration of the circuit seriously without comprehensive up to date cost estimates. At a minimum, however, start up costs for a new circuit, including a new headquarters and equipment, would exceed $100 million. Annual salary costs for a Circuit Executive, Clerk of Court,



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technicians, staff attorneys, and other support staff would run into the millions per year. All of these costs would essentially duplicate resources now provided in the Ninth Circuit.

It is said that the Ninth Circuit Court of Appeals has grown too big. Yet we have not had a new judgeship since 1984. We are authorized 28 judgeships, but we have never actually had the full 28 positions filled for more than five minutes. At one point in the 90's, we were down ten active judgeships out of 28, and it has taken us nearly ten years to come close to achieving out full complement. We currently still have two vacancies.

At the present time the court is experiencing growth in the number of case filings, particularly administrative and civil cases emanating from issues relating to the border. The Arizona border now has the heaviest illegal immigrant traffic. California processes a huge volume of asylum cases. The Governors of the border states, including the Governors of Arizona and California, recently met and announced the urgent need for comprehensive immigration legislation. Many of you and members of your staff have heard me say that whatever legislative policy Congress eventually adopts, our judges and staff can be helpful in ironing out the administrative details so that the law can be administered efficiently and well in our courts. Each of our branches has an important role. We need to work together.



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There are, of course, proponents of Circuit division and have been for decades. They have predominantly come from the Pacific Northwest out of a desire to create a Pacific Northwest Circuit that would, it is said, better represent regional interests unhappy with decisions of the Ninth Circuit Court of Appeals that have been perceived as adversely affecting economic interests such as fishing and timber. That is not a good reason to divide circuits.

One of my heroes is the late Judge John Minor Wisdom, appointed by President Eisenhower, who was an outspoken opponent of division of the Fifth Circuit, and who recognized that circuits should not be divided in order to promote regional interests. He believed that Circuits should be large, so that the Circuit Court of Appeals could reflect diverse interests. He decried efforts to divide Circuits in order to create smaller courts that reflected only local interests. In an article after division of the Fifth Circuit, entitled "*Requiem for a Great Court,*" 26 Loyola Law Review 788 (1980), Judge Wisdom said: "The federal courts rose to bring local policy in line with the Constitution and national policy. The federalizing role of circuit courts should not be diluted by the creation of a circuit court so narrowly based that it will be difficult for such a court to overcome the influence of local prides and prejudices." I agree. So did my late colleague Chuck



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Wiggins, a former Congressman who often expressed his view that Congress legislates one law for the entire country, and we should not attempt to restructure courts to reflect regional views.

There are some myths driving proponents of dividing the Circuit. But they also serve to highlight important reasons why the Circuit should remain intact.

There is, for example, the notion that the Circuits should all look alike: that the map of federal Circuits west of the Mississippi should look like the map of Circuits on the East Coast. But the western states don't look like the eastern states. The Circuits in the East were formed from the original 13 colonies, while the West has its roots in the Louisiana Purchase. This pro-split argument is most frequently phrased as "it's too big." But the truth is that any Circuit with Alaska is going to be larger than any other Circuit geographically, and any Circuit containing California is going to be larger than any other Circuit in case load and population. I live in Maricopa County, Arizona. That County is bigger than the State of Connecticut. As Judge Shirley Hufstedler once said, "you can't legislate geography." And in this great country you can't legislate demographics either.

An argument related to size relates to our *en banc* process. For many years we operated quite happily with an *en banc* court of eleven, and recently began an experiment with fifteen judges on an *en banc* court. Congress by statute has



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authorized any court with more than 15 judges to use a limited *en banc* court, and we like it. We could adopt a rule that all of our active judges sit on each *en banc* court, but we haven't done so because we think the limited *en banc* is a better use of resources. We encourage other Circuits to try it. If there were to be a Circuit division, so many additional judgeships would have to be created for California, that the California Circuit would use the limited *en banc* process. Nothing would be gained by splitting the Circuit except cost and confusion.

There are other myths that proponents of circuit division propagate. There is the myth that smaller courts are more collegial than larger courts. This is not borne out by the experiences of our judges or by the expert opinions of those who have studied small group dynamics. Those of us who have sat on both a small court of nine appellate judges and on the Ninth Circuit can attest to the greater collegiality of a larger court that comes with greater freedom of association.

There is a related myth that, as one of my colleagues frequently likes to put it, division of circuits is in the "natural order of things." They point to the division of the Fifth Circuit nearly 30 years ago. This view reflects a misunderstanding, and assumes that the Fifth Circuit was divided for reasons of judicial administration. Indeed, some members of the current Fifth and Eleventh Circuits themselves tend to see that division has an inevitable product of some kind of court



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reform. That was the face put on it when the division eventually became effective in 1980. But division came only after two decades of a titanic struggle over civil rights decisions, decisions that angered powerful Southern Senators who refused to add needed judgeships for the circuit until it was geographically cut in half. Eventually new active judges replaced the judges responsible for the desegregation of the old South, and the circuit court itself requested a division. But even the judges on the Fifth did not think division was a long term solution to caseload problems.

The real story of the Fifth is told in a remarkable book by Deborah J. Barrow and Thomas G. Walker, published by Yale University Press, and entitled "A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform."[1] As the very first pages state: "The gloss of simple administrative change [and] judicial unanimity . . . masks the reality of a long and often bitter eighteen-year controversy."[2] Division was a direct result of the civil rights decisions of the 60s, and was opposed by the judges of that court who had participated in those decisions and who, by the time this division played out, were all semi-retired. The force that

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[1] DEBORAH J. BARROW AND THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM (Yale 1988).

[2] Id. at 1-2.



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brought about the division was the power of a stubborn member of Congress who made good on his threat to prevent the court from getting any judges until it was divided. The point was to separate Judge Wisdom and Judge Brown in Texas from Judges Tuttle in Georgia and Frank Johnson in Alabama. Division was administratively quite feasible because there were three states on each side of the divide, with a large state, Texas, on one side and another, Florida, on the other.

Throughout the struggle for the preservation of the Fifth Circuit, the Ninth Circuit remained firm that it did not wish to be divided, and eventually a compromise was worked out that the Fifth Circuit could choose to divide and the Ninth Circuit could choose not to. At the hearings on S.11 in 1977 to

create, *inter alia*, 45 additional district court judgeships in the country and ten additional judgeships for the Ninth Circuit, the chief judge of the Ninth Circuit, Jim Browning, testified on questions about an en banc process with a court of 23 judges, rather than 13. He said "we could deal with 23 judges sitting en banc, but we cannot deal with 13 judges trying to do the work that it requires 23 to do."[3] He put it as well as anyone. Then Judiciary

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[3]U.S. Congress Senate Committee on the Judiciary Omnibus Judgeship Bill, 95th Cong. 241 (1977) (Testimony of Chief Judge James Browning, Ninth Circuit Court of Appeals), cited in BARROW AND



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Committee Member McClellan reluctantly agreed that Browning should prevail, for unlike the Fifth, there was no easy way to divide the Ninth into roughly similarly sized groupings of states. As Barrow and Walker note, McClellan realized both the need for more judgeships and the "almost insurmountable problems associated with trying to divide a geographically huge circuit in which one state, California, generated most of the case filings." That observation is even more true today than it was 30 years ago.

Will there be a time when the circuit should be divided? Will the circuit become too big? Clearly its geography won't change. Through advances in technology unthinkable when the Fifth Circuit struggled with 97 cases per judge, the Ninth Circuit has absorbed increases in district court judgeships, administered record appellate filings and skyrocketing criminal border prosecutions – all without an increase in circuit judgeships since 1984.

Is there an absolute limit to the number of judges an appellate court should have? Who knows until we come close to experiencing it, and we haven't come close yet. In the 60s it was said no court should be larger than nine, and now every circuit court in the country, save the First Circuit, is larger than nine. There are in fact more state court judges in the State of Arizona than there are federal judges in

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WALKER, A COURT DIVIDED, at 189 n. 9.



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the entire Ninth Circuit. The Ninth Circuit has twenty-eight authorized judgeships. If we ever actually receive and fill the seven additional judgeships we have requested, we will gain more experience, but I, for one, am not holding my breath for that day ever to come.

Let me close by trying to build some shared perspective on our work. As government officers in two of the branches of our federal government, we as judges and you as Senators, deal with difficult issues. You, however choose the questions to address by legislation. We do not choose the cases we must decide in the district and circuit courts.

In the years I have served as a circuit judge, I have participated from the bench in many cases emanating from the great issues that you have addressed through legislation over nearly 30 years. To list just a few: Amendments to update Civil rights and employment discrimination laws, Sweeping changes in bankruptcy law (twice), Immigration Reform, Habeas corpus and death penalty legislation, Sentencing Guidelines.

At the present time we are experiencing a deluge of immigration cases as a result of decisions in the Executive Branch to reduce administrative review of immigration judge decisions and to increase enforcement at the border. These demands affect all the Circuit Courts, but the most dramatically affected is the



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Ninth Circuit because close to 50% of all the administrative immigration cases emanate from California.

We do need additional help in dealing with these cases, particularly additional judges. We are exploring many ways of avoiding delay in the calendaring of non-priority civil cases. My colleague, Judge Thomas will address how technology is helping us. Division of the Circuit would not be a solution, it would instead create a serious handicap.

Thank you.



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MARY M. SCHROEDER
CHIEF JUDGE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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July 20, 2006

The Honorable Arlen Specter, Chairman
United States Senate
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510
*via facsimile 202/224-3799*
*202/224-9102*

Dear Mr. Chairman:

We, the undersigned circuit judges of the Ninth Circuit Court of Appeals, reiterate our opposition to legislation dividing the Ninth Circuit, including S. 1845. We have previously detailed our reasons for opposing a circuit split in the attached article, *A Court United: A Statement of a Number of Ninth Circuit Judges,* Engage, Volume 7, Issue 1 (March 2006). In our view, division of the Ninth Circuit would be costly, inefficient and would harm the administration of justice in the West.

Very truly yours,

Mary M Schroeder

Mary M. Schroeder
Chief United States Circuit Judge
Phoenix, Arizona

cc: The Honorable Patrick Leahy
Ranking Member

/s James R. Browning
Senior United States Circuit Judge
San Francisco, California

/s J. Clifford Wallace
Senior United States Circuit Judge
San Diego, California

/s Otto R. Skopil
Senior United States Circuit Judge
Portland, Oregon

/s Jerome Farris
Senior United States Circuit Judge
Seattle, Washington

/s Warren J. Ferguson
Senior United States Circuit Judge
Santa Ana, California

/s William C. Canby, Jr.
Senior United States Circuit Judge
Phoenix, Arizona

/s Stephen Reinhardt
United States Circuit Judge
Los Angeles, California

/s Alex Kozinski
United States Circuit Judge
Pasadena, California

/s Michael Daly Hawkins
United States Circuit Judge
Phoenix, Arizona

/s Sidney R. Thomas
United States Circuit Judge
Billings, Montana

/s Alfred T. Goodwin
Senior United States Circuit Judge
Pasadena, California

/s Procter Hug, Jr.
Senior United States Circuit Judge
Reno, Nevada

/s Betty Binns Fletcher
Senior United States Circuit Judge
Seattle, Washington

/s Harry Pregerson
United States Circuit Judge
Woodland Hills, California

/s Dorothy W. Nelson
Senior United States Circuit Judge
Pasadena, California

/s Robert Boochever
Senior United States Circuit Judge
Pasadena, California

/s Melvin Brunetti
Senior United States Circuit Judge
Reno, Nevada

/s David R. Thompson
Senior United States Circuit Judge
San Diego, California

/s A Wallace Tashima
Senior United States Circuit Judge
Pasadena, California

/s Susan P. Graber
United States Circuit Judge
Portland, Oregon



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/s M. Margaret McKeown
United States Circuit Judge
San Diego, California

/s William A. Fletcher
United States Circuit Judge
San Francisco, California

/s Richard A. Paez
United States Circuit Judge
Pasadena, California

/s Johnnie B. Rawlinson
United States Circuit Judge
Las Vegas, Nevada

/s Consuelo M. Callahan
United States Circuit Judge
Sacramento, California

/s Kim McLane Wardlaw
United States Circuit Judge
Pasadena, California

/s Raymond C. Fisher
United States Circuit Judge
Pasadena, California

/s Marsha S. Berzon
United States Circuit Judge
San Francisco, California

/s Richard R. Clifton
United States Circuit Judge
Honolulu, Hawaii

/s Carlos T. Bea
United States Circuit Judge
San Francisco, California



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June 14, 2006

The Honorable Arlen Specter
Chairman
U.S. Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member
U.S. Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators:

On behalf of the 1.8 million members of the Service Employees International Union (SEIU), I urge you to oppose the politically motivated efforts to split the U.S. Court of Appeals for the Ninth Circuit into separate appellate courts. Among other bills, I ask that you oppose the Ninth Circuit Judgeship and Reorganization Act of 2005 (S. 1301) and the Circuit Court of Appeals Restructuring and Modernization Act of 2005 (S. 1845).

Those who are dissatisfied with certain decisions of the Ninth Circuit have long advocated dividing the court in order to achieve different results in particular cases. But these results-driven considerations should not determine the make-up and structure of our courts. Indeed, splitting the Ninth Circuit to satisfy the ideological positions of certain parties would do a great injustice to our federal judicial system.

Given the ideological basis for these attempts to divide the Ninth Circuit, it is no surprise that opposition to a circuit split has been bi-partisan and broad. California Governor Arnold Schwarzenegger, Arizona Governor Janet Napolitano, and former Washington Governor Gary Locke, are all opposed to splitting the court. In addition, a vast majority of current Ninth Circuit judges are also opposed, including Chief Judge Mary Schroeder; Senior Judge Clifford Wallace, a former Chief Judge nominated by a Republican President; Alex Kozinski, a conservative jurist appointed by President Reagan; and several judges appointed by President Bush who have joined the court since 2000, including Judges Bea, Clifton and Callahan. The American Bar Association, the Federal Bar Association, and the Bar Associations of Arizona, Montana, Washington, and Hawaii have also opposed the circuit split.

Finally, dividing the Ninth Circuit would not only allow ideological considerations to set judicial policy, it would also exacerbate the fiscal crisis in the federal judiciary. The circuit split would result in new costs that simply cannot be borne by our already overburdened courts.

We accordingly urge you oppose all efforts to split the Ninth Circuit Court of Appeals. Thank you for considering our views.

Sincerely,

Anna Burger

Anna Burger
International Secretary-Treasurer

ANDREW F. STERN
International President

ANNA BURGER
International Secretary-Treasurer

MARY KAY HENRY
Executive Vice President

GERRY HUDSON
Executive Vice President

HUGO MEDINA
Executive Vice President

TOM WOODRUFF
Executive Vice President

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AB:AR:gmb

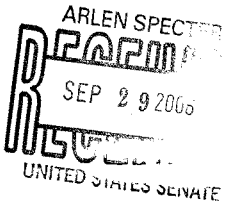
opeiu#2
afl-cio, clc

bcc: All Dem. Members of Senate Judiciary Committee
Senator Barbara Boxer

06/20/2006 2:45PM

Michelle

# Affiliated Tribes of Northwest Indians




September 19, 2006

Hon. Arlen Specter, Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter,

Enclosed please find a resolution adopted by the Affiliated Tribes of Northwest Indians that opposes proposals to divide the United States Court of Appeals for the Ninth Circuit. Please include this resolution in the record for the Committee's hearing on "Examining the Proposal to Restructure the Ninth Circuit" which is scheduled for Wednesday, September 20, 2006. Thank you very much.

Sincerely,

Ernest L. Stensgar

Ernest L. Stensgar, President
Affiliated Tribes of Northwest Indians

cc: Chief Judge Mary M. Schroeder
Ninth Circuit Court of Appeals
ATNI Executive Board
file

1827 NE 44th Ave., Suite 130 · Portland, OR 97213
Phone: 503/249-5770 · Fax: 503/249-5773



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Affiliated Tribes of Northwest Indians

# 2006 Annual Conference
# Lincoln City, Oregon

## RESOLUTION #06–83

## "OPPOSING S. 1845 AND OTHER LEGISLATIVE EFFORTS TO SPLIT THE NINTH CIRCUIT COURT OF APPEALS"

## PREAMBLE

We, the members of the Affiliated Tribes of Northwest Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants rights secured under Indian Treaties and benefits to which we are entitled under the laws and constitution of the United States and several states, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the welfare of the Indian people, do hereby establish and submit the following resolution:

**WHEREAS,** the Affiliated Tribes of Northwest Indians (ATNI) are representatives of and advocates for national, regional, and specific tribal concerns; and

**WHEREAS,** the Affiliated Tribes of Northwest Indians is a regional organization comprised of American Indians in the states of Washington, Idaho, Oregon, Montana, Nevada, Northern California, and Alaska; and

**WHEREAS,** the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of Affiliated Tribes of Northwest Indians; and

**WHEREAS,** the sovereignty of tribes, our rights of self-government, our rights and title to land and resources, and much more are often addressed and confirmed through federal court decisions; and

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**WHEREAS**, the ATNI Member Tribes are located in states within the jurisdiction of the United States Court of Appeals for the Ninth Circuit; and

**WHEREAS**, even though ATNI Member Tribes may not always agree with every decision of the Ninth Circuit affecting tribal interests, it is beyond dispute that the Ninth Circuit has the most extensive experience with issues related to tribal self-government, sovereignty, lands and resources management and a variety of other issues of any of the federal courts of appeals; and

**WHEREAS**, in fact even beyond ATNI's membership, more than 400 of the 500 federally recognized Native American Tribes in the United States are located within the jurisdiction of the Ninth Circuit; and

**WHEREAS**, proposals to divide the Ninth Circuit have intensified recently and include, among others, S.1845 which is pending in the U.S. Senate; and

**WHEREAS**, proposals to divide the Court originated more than two decades ago largely in response to Ninth Circuit rulings favorable to tribes, such as those involving tribal fishing rights in the Pacific Northwest; and

**WHEREAS**, despite the long history of these proposals, every empirical study of the Ninth Circuit, including the most recent report by the 1998 White Commission, has concluded that the Court operates efficiently and effectively; and

**WHEREAS**, despite the Ninth Circuit's case load (which is the largest in the country and has grown rapidly in recent years due largely to a massive increase in immigration appeals), the Court resolved more than 12,000 appeals in 2005 and had among the shortest time from argument of an appeal to decision of any Circuit; and

**WHEREAS**, even if the Court were divided, the new Ninth Circuit would remain by far the largest circuit in the country in terms of the number of active Judges and case load; and

**WHEREAS**, even a new circuit as proposed in S.1845 would still span geography from Arizona to Alaska; and

**WHEREAS**, Congress has only redrawn Circuit boundaries twice since the modern courts of appeals were established in 1891 and in both instances the Judges of the affected circuits strongly supported a division (in 1929 when Congress split off the Tenth Circuit from the Eighth Circuit and in 1981 when it divided the Fifth Circuit to create an Eleventh Circuit); and

**WHEREAS**, a large majority of the Ninth Circuit's active and senior Judges oppose any division or restructuring of the Court; and



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**WHEREAS**, the estimated start-up costs for a new Circuit could approach $100 million and have annual costs of $10 million or more, money that could be far better used to increase the efficiency and effectiveness of the current federal courts both in and outside the Ninth Circuit; now

**THEREFORE BE IT RESOLVED**, that ATNI and its Member Tribes strongly oppose dividing the Ninth Circuit, whether through S.1845 or any other similar bill; and

**THEREFORE BE IT FINALLY RESOLVED**, that ATNI calls upon all tribes to convey this opposition to the U.S. Senate and House of Representatives, to the committees on the judiciary in each of these bodies, and to the individual members of the congressional delegations from the states that include ATNI Tribes as expeditiously as possible.

**CERTIFICATION**

The foregoing resolution was adopted at the 2006 Annual Conference of the Affiliated Tribes of Northwest Indians, held at the Chinook Winds Casino and Resort in Lincoln City, Oregon on September 15, 2006 with a quorum present.

Ernest L. Stensgar, President

Norma Jean Lodie, Secretary



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United States Senate
Committee on the Judiciary

Hearing on:
"Examining the Proposal to Restructure the Ninth Circuit"
Wednesday, September 20, 2006
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 Sixth Avenue, 21st Floor
Seattle, Washington 98101-3123



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**United States Senate Committee on the Judiciary**

**Hearing on Senate Bill No. 1845**

Mr. Chairman and Members of the Judiciary Committee,

I am Richard C. Tallman, United States Circuit Judge on the Ninth Circuit Court of Appeals, with chambers in Seattle, Washington. Thank you for inviting me once again to discuss the configuration of a reorganized federal court of appeals to better serve the western United States and the Pacific Islands. I respectfully refer the Committee to my prior testimony in support of splitting the existing Ninth Circuit.[1] On behalf of the two dozen circuit and district judges who wrote the Chairman on June 29, 2006, urging prompt action in approving Senate Bill No. 1845 to reorganize the existing Ninth Circuit, we all appreciate the recognition that it is time for action.[2]

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[1] *See* Statement of Richard C. Tallman, Hearing Before Subcommittee on Administrative Oversight and the Courts, United States Senate, *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem* (Oct. 26, 2005), *available at* http://judiciary.senate.gov/testimony.cfm?id=1635&wit_id=4727; Statement of Richard C. Tallman, Hearing Before Subcommittee on Administrative Oversight and the Courts, United States Senate, *Improving the Administration of Justice: A Proposal to Split the Ninth Circuit* (Apr. 7, 2004), *available at* http://judiciary.senate.gov/testimony.cfm?id=1141&wit_id=3264.

[2] *See* Exh. 1.



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The proposed legislation under Senate Bill No. 1845 divides the Ninth Circuit into two circuits: California, Hawaii, the Northern Mariana Islands and Guam in a reduced Ninth Circuit, and Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington in a new Twelfth Circuit. Any split configuration will greatly alleviate the increasing workload burden on our overtaxed circuit. It is better to split the circuit now than to wait for the problem to get worse. And it will get worse. We currently have on our docket almost one-third of all pending appellate cases in the federal courts of appeals; historical indicators show that this percentage will continue to grow.[3] Splitting the Ninth Circuit now will ensure that Congress will not have to reconsider this question in the West for many decades to come.

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[3]I join my judicial colleagues, Hon. Diarmuid F. O'Scannlain, United States Circuit Judge for the Ninth Circuit, and Hon. John M. Roll, Chief United States District Judge for the District of Arizona, who are also appearing today in support of reorganizing our circuit. The statistical evidence they append to their written submissions amply demonstrates the unceasing upward trend in the number of cases appealed to the Ninth Circuit and the disproportionate size of our circuit compared to every other circuit in the country. I concur in all of their arguments as to why reorganization is overdue and will not belabor the points by repeating them here. The case for reorganization based upon this evidence is compelling and unassailable.



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According to U.S. Census Bureau projections, Arizona and Nevada alone are projected to have tremendous population growth in the 25 years between July 1, 2005, and July 1, 2030: Arizona is projected to grow by 82.6% and Nevada by 82.1%.[4] If the Ninth Circuit remains as it is now configured, with Arizona and Nevada tied to California, the certain increase in workload purely from population growth in the Southwest will overwhelm a circuit already stretched to its limit. A split which places California either on its own or with the Pacific Islands will substantially decrease the caseload of all the judges in all the states of the current Ninth Circuit now, for the next 25 years, and beyond.

Absent an agreement to divide California among the newly formed circuits, it is impossible to equalize the caseload per judge throughout the West. That is why Senate Bill No. 1845 adds seven new judgeships to California. But seven new positions is not enough to achieve perfect caseload parity. However, I believe that if we must choose between a slight disparity in caseload with everyone's caseload reduced after the split, and a completely equal, but currently overwhelming, caseload on circuit judges in the existing Ninth Circuit that increases every year, the better alternative is to choose the former. Furthermore, the

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[4]U.S. Census Bureau, Population Division, Interim State Population Projections, 2005, *available at* http://www.census.gov/population/projections/SummaryTabA1.pdf.



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proposed split legislation provides that judges placed in the newly created Twelfth Circuit would continue sitting in the reduced Ninth Circuit for an indeterminate period of time to help with the caseload in California while new judges are nominated and confirmed. This holdover will alleviate a good portion of the workload imbalance following the split.

If the Ninth Circuit is not split simply because the caseloads between the newly created circuits are not even, then all the western states will be held hostage to the ever-increasing workload of California and the southwestern states. U.S. Supreme Court Associate Justice Anthony H. Kennedy has trenchantly observed:

> The States of 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. If the solution for the latter states is not at hand, that could be studied and debated while the Northwest states concentrate their energies on at once forming a cohesive and effective circuit.[5]

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[5] *See* Letter of Hon. Anthony H. Kennedy to Hon. Byron R. White (Aug. 17, 1998), appended to the Statement of John M. Roll, Hearing Before the Committee on the Judiciary, United States Senate, *Examining the Proposal to Restructure the Ninth Circuit*, Attachment D, p. 5 (Sept. 20, 2006).



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Within the twelve-month period ending June 30, 2006, the Ninth Circuit was able to terminate 13,582 appeals—more than any other circuit.[6] However, during that same time period, the Ninth Circuit also received 15,311 new filings—again, more than any other circuit.[7] No matter how efficient the existing Ninth Circuit tries to be, in its current form it simply cannot keep pace with its increasing workload. There were over 17,000 cases pending on our docket as of June 30, 2006, comprising 30.3% of the nation's entire federal appellate caseload.[8]

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[6]Administrative Office of the United States Courts, *Appeals Commenced, Terminated, and Pending, by Circuit During the Twelve Month Periods Ending June 30, 2005 and 2006* (Aug. 16, 2006).

[7]*Ibid.*

[8]*Ibid.*



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Of the 17,000 cases currently pending before the Ninth Circuit, approximately 8300 of those are immigration appeals.[9] In fiscal year 2005, there were 6583 immigration appeals filed, but only 4966 terminated.[10] The Ninth Circuit could only dispose of 40% of the immigration appeals filed and pending before the court, and the percentage of dispositions will most assuredly decrease as the workload grows.[11] California accounts for almost 70% of the Ninth Circuit's filed cases and a substantial portion of the immigration appeals arise from the Golden State.

The reality is that absent a substantial increase in the number of authorized judgeships in California, perfect mathematical parity between judicial caseloads in the new Ninth Circuit and the new Twelfth Circuit is simply unattainable. However, if our circuit is not split, every litigant who seeks justice,

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[9]Administrative Office of the United States Courts, *Appeals Commenced, Terminated, and Pending, by Circuit and Judgeship During the Twelve Month Periods Ending March 31, 2006* (June 29, 2006); Administrative Office of the United States Courts, *Appeals (Excluding Board of Immigration Appeals) Commenced, Terminated, and Pending, by Circuit and Judgeship During the Twelve Month Periods Ending March 31, 2006* (June 29, 2006).

[10]Office of the Clerk, United States Court of Appeals for the Ninth Circuit, *BIA Appeals Filed and Terminated - 9th Circuit, FY 1999 – FY 2005.*

[11]*Ibid.*



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wherever located, will continue to suffer the ever-increasing backlog of pending cases and longer delays, and all of the judges will face an increasing burden to work at an irresponsibly accelerated speed. The quality of our decisions will continue to suffer as evidenced by our circuit's dismal reversal rate by the Supreme Court. And the limited en banc review process simply cannot keep pace with the staggering increase in appeals, yielding greater chances of erroneous decisions by three-judge panels that are for all intents and purposes unreviewable under the current makeup of the circuit. President Jimmy Carter recognized the burden of an overly large circuit court when the Fifth Circuit was divided into the current Fifth Circuit and the Eleventh Circuit in 1980:

> There is a limit to the number of judgeships an appellate court can accommodate and still function effectively.
>
> Some time ago it became clear that if the rapid growth in the caseload of the Fifth Circuit continued, necessitating the addition of more and more judges, an unwieldy bench would result. When the size of this court reached 26 active judges, the practical problems of having all the judges take part in a single case became unmanageable. At the same time, it became increasingly difficult to preserve the consistency and predictability among the decisions of three-judge panels.[12]

[12]President Jimmy Carter, *Fifth Circuit Court of Appeals Reorganization Act of 1980 Statement on Signing H.R. 7665 into Law* (Oct. 15, 1980), *available at* http://www.presidency.ucsb.edu/ws/?pid=45291.



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I ardently support Senate Bill No. 1845 because I believe the time for action is at hand, and urge its passage should its proposed two-way split configuration be deemed most viable by Congress. But if for some reason, Congress prefers a different split, I want to take this opportunity to offer for consideration a different configuration. Given the growth patterns in the southwestern part of the country, I favor a three-way split. This configuration would be less expensive to employ now, while building space is currently vacant and available, than it will be in the future. First, create a true Pacific Northwest Circuit composed of Alaska, Washington, Oregon, Idaho and Montana, with headquarters in Seattle or Portland. This solution was posed by Washington's United States Senator Warren G. Magnuson in 1955[13] and by Senators from each of the Pacific Northwest states in 1995.[14] Second, let California once again become a standalone circuit.[15] Third, establish a new Southwest Circuit comprised of Nevada

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[13]Carl L. Cooper, *New Judicial Circuit Urged*, SEATTLE POST-INTELLIGENCER, June 9, 1955, *reprinted in* WASHINGTON BENCH & BAR CLIPPINGS, v. 1955, pt. 3 at 604 (Univ. of Wash. Gallagher Law Library). *See* Exh. 2.

[14]Co-sponsors of S. 956, 104th Cong. (1995), included Alaska Senators Ted Stevens and Frank Murkowski, Montana Senator Conrad Burns, Idaho Senators Larry Craig and Dirk Kempthorne, Oregon Senator Mark Hatfield, and Washington Senator Slade Gorton. S. REP. NO. 104-197, at 32 n.11 (1995).

[15]Congress created a separate judicial circuit in 1855 "constituted in and for the state of California, to be known as the circuit court of the United States for the



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and Arizona with headquarters in either Phoenix or Las Vegas. Hawaii and the Pacific Island Territories could either join the Southwest Circuit or the Pacific Northwest Circuit in order to balance workloads while giving the smaller states and territories more influence than they would enjoy appended to California.[16]

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districts of California." It had the same jurisdiction as the numbered circuits. *Creating the Federal Judicial System*, p. 15 (Fed. Jud. Ctr., 3d ed. 2005). *See* Map appended as Exh. 3.

[16]*See* Exh. 4, showing populations, caseload, and judgeships of this three-way configuration.



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As I previously testified in my last appearance before this Committee,[17] a significant amount of money and time can be saved if we house a circuit headquarters in the now-empty ten-story Nakamura Courthouse, located at 1010 Fifth Avenue in Seattle.[18] Repairing and renovating the Nakamura Courthouse for use as a court of appeals building is already underway by the General Services Administration, and, with or without a split, the Nakamura Courthouse renovation will be finished by late 2008. Congress has previously authorized GSA to spend up to $58 million in seismic repairs and renovation costs in approving GSA's budget for fiscal year 2005.[19] Preparing it to serve as the headquarters for the Twelfth Circuit will not add excessive work or unreasonable additional cost to the planned renovation. I understand from informal talks with

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[17]*See* Statement of Richard C. Tallman, Hearing Before Subcommittee on Administrative Oversight and the Courts, United States Senate, *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem* (Oct. 26, 2005), *available at* http://judiciary.senate.gov/testimony.cfm?id=1635&wit_id=4727.

[18]*See* Exh. 5, a photo of the currently empty Nakamura Courthouse in Seattle, Washington.

[19]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.). Pursuant to its authority to increase the budget of the project for cost contingencies, GSA has since increased the project's budget by 10% from $53 million to $58 million.



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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 make 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.

Alternatively, the Gus J. Solomon United States Courthouse is available in Portland.[20] It has even more square footage available, though it too requires seismic repair and renovation similar to that already underway at the Nakamura Courthouse. 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

[20]*See* Exh. 6, a photo of the Solomon Courthouse in Portland, Oregon.



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business. What is clear, however, is that we do not need to build new courthouses. We should also 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 Pacific Northwest Circuit's headquarters for decades to come. Chief Judge Roll has appended to his testimony the projected costs for locating the Southwest Circuit headquarters in Phoenix.[21]

The cost of a split will be reduced by reallocating up to 30% of the existing Ninth Circuit's costs to the new circuits (to correspond to the reduction in the old Ninth Circuit's caseload) and by the corresponding decrease in current travel costs for everyone. The sheer size of the existing Ninth Circuit requires me and my colleagues to spend countless hours in airports and on airplanes. The government currently expends substantial sums necessitated by having current Ninth Circuit judges, and their support staff, regularly travel great distances to hear cases all over the western United States, including Alaska and out into the Pacific. While some travel is inevitable given the vast landmass we serve, real cost reductions will follow reconfiguration.

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[21] *See* Statement of John M. Roll, Hearing Before the Committee on the Judiciary, United States Senate, *Examining the Proposal to Restructure the Ninth Circuit*, Attachment K (Sept. 20, 2006).



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Reorganization will also significantly reduce the need to bring visiting judges from all over the country to sit on panels of the Ninth Circuit by designation. Last year, approximately 134 visiting judge days[22] were necessary to help fill the 414 panel days[23] in which oral argument was heard. In 2006 the number of visiting judge days is projected to reach 157 out of 425 panel days as our existing circuit struggles to manage its ever-growing caseload.[24] With reorganization, this need, and the corresponding expense associated with importing visiting judges, will be reduced.

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[22]Office of the Clerk, United States Court of Appeals for the Ninth Circuit, *Calendar Statistics, 1984 – 2006*. Visiting judge days are the total number of days a non-Ninth Circuit judge sits on a three-judge panel to hear cases for the Ninth Circuit.

[23]Panel days are the total number of days three-judge panels in the Ninth Circuit have convened to hear cases.

[24]Office of the Clerk, United States Court of Appeals for the Ninth Circuit, *Calendar Statistics, 1984 – 2006*.



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Under my proposed configuration, and based on the current duty stations of existing judges, the 36 million people in California would have 21 active and 13 senior judges to manage approximately 11,000 cases per year. The Southwest Circuit, with about 10 million residents, would have 6 active and 3 senior judges for about 2400 cases per year. And the Pacific Northwest Circuit, with 13 million people, would have 8 active and 7 senior judges for just over 2500 cases per year.[25]

The three-way split would also serve to reduce the caseload of all judges in the current Ninth Circuit.[26] While the reduction for California judges will be modest under my proposed configuration (or any configuration that does not involve splitting California or adding the 15 or more judges to the new Ninth Circuit required to achieve caseload parity with the Southwest Circuit), the judges in the Pacific Northwest and Southwest Circuits would see a tremendous reduction in their caseload. In fact, the Pacific Northwest and Southwest judges would have caseloads that are much more closely aligned with the other circuits in our nation.[27]

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[25]Exh. 4.

[26]*Compare* Exh. 7 *with* the current average caseload of 547 cases per judge for all judges of the current Ninth Circuit. Administrative Office of the United States Courts, *Appeals Commenced, Terminated, and Pending, by Circuit During the Twelve Month Periods Ending June 30, 2005 and 2006* (Aug. 16, 2006).

[27]*Ibid.*



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As of June 30, 2006, all circuits have an average caseload of 382 cases per judge.[28] With the three-way split, the Southwest Circuit judges would have just over that average number: 384; the Northwest Circuit judges would have a slightly lower number: 308 cases. And to the extent that these numbers reveal too much of a disparity with California, with 502 cases per judge on average, Congress could always realign judicial positions as they become vacant, moving judgeships to the new Ninth Circuit from either the Pacific Northwest or Southwest Circuits. For example, if the Pacific Northwest had only seven active judges, the average caseload per judge would increase to 352, putting it immediately after the Ninth and Southwest Circuits; California would decrease to 459 cases per active judge if two positions were moved there.

[28]Administrative Office of the United States Courts, *Appeals Commenced, Terminated, and Pending, by Circuit During the Twelve Month Periods Ending June 30, 2005 and 2006* (Aug. 16, 2006).



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Given U.S. Census Bureau projections that most western states are expected to experience significant population growth in the coming 25 years, the average caseloads will grow quickly over time. The average caseload per judge in the Pacific Northwest Circuit will likely move significantly closer to the other circuits as the projected growth is realized. The U.S. Census Bureau projects a 31.2% population increase for Alaska, a 40.0% increase for Idaho, a 34.4% increase for Oregon, and a 39.0% increase for Washington during the 25-year period between July 1, 2005, and July 1, 2030.[29] The total expected population growth of 11.9 million people in the Pacific Northwest and Southwest Circuits[30] suggests that if we see a lower caseload per judge today, the disparity in caseloads will change over time to bring the smaller western circuit averages higher.

No matter how Congress configures the split, however, action is needed now. Some form of reorganization, either through Senate Bill No. 1845, or under a different configuration, will greatly increase the efficiency and manageability of our courts in the West, and reduce delay in processing and

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[29]U.S. Census Bureau, Population Division, Interim State Population Projections, 2005, *available at* http://www.census.gov/population/projections/SummaryTabA1.pdf.

[30]*Ibid.*



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deciding cases, while saving money and improving productivity by substantially reducing extended travel time for most of the judges. Faster case processing and higher quality decisions with greater opportunity for full court en banc review will be the result. While the current reality is that there can never be exact parity in caseloads among judges of the new circuits, the key point is that reorganization of the existing Ninth Circuit, coupled with seven or more new judgeships for California, as currently proposed by pending legislation, will reduce the average number of cases being handled by each and every judge in California and the other western states, no matter how Congress chooses to configure the circuits.

Opponents argue that the result of any split will be an unfair, disproportionate caseload between the judges of the new Ninth Circuit and the newly created circuit(s). However, as I have already noted, absent dividing California as part of the reorganization, complete mathematical parity is impossible. Yet at the same time, it is important to note that the average caseload per active circuit judge varies widely among the existing circuit courts of appeals.

I have prepared a chart which uses current caseloads and authorized judgeships to show what the average caseload might be based upon the two-way



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split proposed in Senate Bill No. 1845.[31] Under the Bill, all seven newly established positions (five permanent and two temporary) are assigned to the new Ninth Circuit in California. Congress could move judgeships from the Twelfth Circuit to the new Ninth Circuit to further improve parity of caseloads, but the proposed legislation would need to be amended to do so. Whatever happens in Congress, it is important to recognize that the numbers will vary annually based upon judicial vacancies and growing caseloads. Nor should we forget that in restructuring the courts of appeals, the current occupant of a particular judicial seat or the political affiliation of those who appoint or confirm judges is irrelevant. We are talking about structural reorganization to administer justice in the West for many decades to come, long after incumbent judges are gone.

A reconfiguration will produce the benefits we have long extolled in discussing the need for this split: greater efficiency in processing cases which will significantly reduce the current 16-month delay from the time of filing of the Notice of Appeal to disposition on the merits; greater accountability by panels whose decisions can be scrutinized more easily by full-court en banc review when warranted; greater representation of western judges on the Judicial Conference of the United States and on its committees which impact the day-to-day work of the

[31]Exh. 8.



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federal judiciary; the opportunity to circulate opinions to the entire court prior to filing; and improved collegiality among judges in smaller circuits. The transaction costs of investing in improving the delivery of justice are far smaller than the productivity costs of maintaining the status quo.

In short, reorganization as contemplated by Senate Bill No. 1845 restores proportionality and accountability to the administration of justice in the West. I applaud your efforts, Mr. Chairman, and those of the sponsors of this urgently needed reorganization bill, to discharge your constitutional authority under Article III, § 1, to "ordain and establish" the lower federal courts which, subject to the supervision of the Supreme Court, exercise the judicial power of the United States.



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# United States Senate
# Committee on the Judiciary

## Hearing on Senate Bill 1845
## Wednesday, September 20, 2006

**Written Testimony of**
**Sidney R. Thomas**
**United States Circuit Judge**
**United States Court of Appeals for the Ninth Circuit**
**P.O. Box 31478**
**Billings, MT 59101-1478**
**406-657-5950**



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Good afternoon, 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 Judiciary Committee for the opportunity to testify on S. 1845. The views I express are my own.

I oppose Senate Bill 1845. Circuit division would have a devastating effect on the administration of justice in the western United States. The region covered by the Ninth Circuit will not shrink if two circuits are carved out of it, nor will the total caseload decrease. The primary results will be the loss of critical programs and the creation of redundant infrastructures to process those cases, leading to increased delay and additional impediments to access to justice. The suggestion by supporters of S. 1845 that judicial administration would benefit from duplicating existing staff and structures is counterintuitive.

It's axiomatic in the business world that efficiency results from economies of scale. The same is true of the Ninth Circuit. The Circuit's recent experiences and administrative innovations prove the point. Instead of making the Ninth Circuit more like the smaller circuits, with the attendant restrictions and inefficiencies of having the same resources split into smaller parcels, the other circuits might benefit from some of the unique programs the Ninth Circuit has been able to implement.

First, I will address the significant damage to judicial administration that would be caused by a structural division of the Ninth Circuit. Next, I will respond to the flawed arguments for a circuit split. Finally, I will highlight some of the specific problems with S. 1845.

## Damage Caused by a Circuit Split

### 1. Critical Programs At The Forefront Of Modern Day Case Management Would Be Lost In A Circuit Split.

Rather than increasing our operational capacity, splitting the circuit would have a devastating effect on the judiciary's ability to manage the caseload of the western United States. As one circuit or two, the region covered by our court handles roughly 15,000 cases per year. A circuit split would not reduce caseload; it



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would only divide it. The only way to handle a caseload of that size is through effective use of court management techniques, made possible by a consolidation of resources.

The present structure 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 resulting circuit courts of these resources, leading to judges wasting time on matters that could be resolved without spending valuable judicial resources.

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.** Last year, the Appellate Commissioner resolved 1,125 Criminal Justice Act fee voucher matters that otherwise would have been handled by judges. He resolved 4,062 substantive motions previously heard by judges. This position would likely be eliminated in any division and most certainly would not be available to smaller units.

- **Circuit Mediator.** The Ninth Circuit Mediator's office has been a remarkable success story. In 2005, the Circuit Mediator resolved 993 appeals out of a total of 1047 cases referred to it – a 95% success rate. In 2004, the Circuit Mediator's office settled 881 appeals out of 977 cases referred, 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 difference is attributable to our being able to devote more resources to hiring mediators and less to duplicative overhead. 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. This critical mass has allowed our Mediator's office to succeed 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



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crisis. The Mediator's office and its success would be significantly reduced with a circuit division.

- **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.

  - **Habeas appeals.** In 2005, the staff attorneys presented 1,292 habeas petitioners' requests for a Certificate of Appealability. Panels denied 90% of the requests, terminating 1,163 appeals at that stage. This result is consistent with previous years' experience. For example, in 2004, the staff attorneys presented 1,421 habeas petitioners' requests for a COA. Panels denied 89% of the requests, terminating 1,265 appeals.

  - **Merits screening cases.** In 2005, staff attorneys presented 2,130 appeals on the merits to screening panels, resulting in the resolution of 1,958 appeals. This result is consistent with prior years' experience. In 2004, staff attorneys 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 2005, they terminated 1,149 cases and 1,987 cases respectively. In comparison, during the month of July, 2006, the judges on the Ninth Circuit screening panel issued merits decisions in 512 cases based on staff presentations.

  - **Motions.** In 2005, staff motions attorneys disposed of 10,793 motions through clerk orders that would otherwise be handled by judges. This is also consistent with prior experience. In 2004, there were 10,948 motions resolved through clerk orders. In total, the staff attorneys processed more than 19,000 motions in 2005. Judicial screening panels resolved 5,834 motions; the Appellate Commissioner decided 2,296 motions, and the remainder were resolved by clerk orders. The staff attorneys office would be considerably reduced in a smaller circuit.



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- **Pro Se Unit.** The Pro Se Unit of the staff attorneys office handled well over 6,000 pro se filings.

- **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. More than 40% of total appeals in the Ninth Circuit are filed by *pro se* litigants. Last year, for example, there were 6,568 *pro se* appeals filed in the Ninth Circuit out of 15,317 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 when we consider that approximately half of the *pro se* volume consists of immigration cases.

The vast majority of immigration cases, which account for 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.



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Our staff resources are particularly well suited to handling immigration cases. A careful examination of immigration cases indicates that the most effective method of managing them 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. 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.

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 of the cases 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. This efficiency allows judges to focus on the most important cases and not waste time on frivolous or procedurally barred appeals.

By comparison, no other circuit has an Appellate Commissioner, no other circuit has the staff resources for case tracking, no circuit has a mediation program that even comes close to the size of our Mediation Unit, few circuits have a Bankruptcy Appellate Panel, and no circuit has a staff attorneys office to match the size of ours. Because allocation of funding in the judiciary is formula-driven, we know what resources would be available to the two new circuits resulting from circuit division by an examination of what similarly sized circuits can afford at present. Thus, we can conclude that Circuit division would reduce or eliminate many of these essential resources.

The inevitable result will be inefficiency, waste of judicial time, loss of services, and substantially increased delay. A division of the circuit will mean far fewer staff resources available to handle these cases, specifically the non-oral argument calendar appeals, which account for 80% of the region's work. Absent significant budget increases, splitting the Circuit will take existing resources and divide them. Moreover, core functions will be replicated, and additional



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management positions required, while the "new" Ninth will be forced to lay off a substantial number of valuable staff. Thus, there will be far less staff available for case processing. The new Twelfth will not have the resources to replicate the current Ninth Circuit case processing mechanisms. Delay will inevitably increase, and will increase substantially.

2. Additional Benefits Of The Ninth Circuit's Aggregated Resources Would Be Lost.

Aside from those issues that are unique to the Court of Appeals, there are other, significant cost savings that would be lost were the Ninth Circuit 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. The district judges who have served on this committee 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 has saved taxpayers significant sums of money by assisting in the construction of courthouses that are more efficient and less costly. An excellent example of their effective planning is the new district courthouse in Seattle, which utilizes courtroom space in an innovative and efficient manner. Two smaller circuits would not be able to maintain the planners of the Circuit Executive's office, who have been invaluable to smaller states like Montana and Idaho to assist in courthouse planning given those states' very unique needs.

Further, the large number of judges in the Ninth Circuit means that it is better able to handle the problems caused by persistent judicial vacancies or by judicial disability than a circuit with a small number of circuit judges. If a judge on a small court 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, it would have a significant impact on the functioning of that circuit.



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Another significant advantage of a large circuit is its ability to deploy visiting district judges to needed areas. Several years ago in my home state of Montana, for example, we 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. When the border states experienced a significant spike in case volume, judges flew in from throughout the Circuit to assist. That is a luxury of a larger circuit – to be able to have the flexibility to reallocate judicial resources during times of need.

Much of this flexibility would be lost with circuit division. Although it is possible to share district judges across circuit lines, it is quite difficult in practice because of the administrative approvals required. Further, district judges are sometimes reluctant to sit in a different circuit because different circuit law applies. The net effect of circuit division will be to reduce significantly our ability to deploy district judges where needed. This will inevitably lead to demands for more judgeships, which may not be necessary in the long term.

3. Splitting The Circuit Would Duplicate Overhead Costs.

While the loss of the programs and efficiencies I have discussed would be deeply regrettable, it makes even less sense when those resources would be diverted to unnecessarily replicating fixed assets, such as buildings, libraries and technical infrastructure.

Construction cost and rent are significant cost issues. Circuit division will require the unnecessary construction of new courthouse space. S. 1845 calls for a circuit headquarters in Phoenix and places of holding court in Las Vegas, Portland, Seattle and Missoula. Though we have current space in Portland, Seattle, and possibly Las Vegas (using current facilities in the Foley Building, which currently houses the bankruptcy court), we would have to construct new facilities in Phoenix for a circuit headquarters and in Missoula, Montana.

The General Services Administration has estimated the current cost of construction of a new Phoenix headquarters to be $91,058,000, which does not



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include the cost of acquiring approximately four acres of land. This is based on the following fairly modest assumptions: (a) en banc courtroom @ 3000 square feet; (b) two panel courtrooms @ 1800 square feet each; (c) eight resident chambers; (d) nine visiting chambers; and (e) 30 parking spaces. Staffing and judge numbers were projected out approximately 20 years, resulting in an estimate of 120,000 required usable square feet, which is the equivalent of 179,105 gross square feet.

We estimate that the required space in Missoula, Montana, would be similar to the space we currently lease in Honolulu for holding oral arguments. Assuming that, approximately 3,000 usable square feet would be needed. This translates into approximately 4,000 rentable square feet. The current market in Missoula is approximately $20 per square foot for appropriate office space. This would cost approximately $80,000 in rent per year. However, the small caseload indicates that this new facility would only be used for three or four weeks per year. Despite that fact, the building would have to be staffed and secured, requiring personnel.

Judicial resources would be duplicated as well. As it stands, 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. This duplicative cost would extend beyond the judiciary to litigants as well, as private actors operating in multiple states would potentially have to litigate the same issues twice.

Not only is unnecessary duplication a problem, but the cost of maintaining assets continues to increase. For example, from Fiscal Year 1999 to Fiscal Year 2006, library subscription prices have increased approximately 55%. In Fiscal Year 1999, the Ninth Circuit spent $6.4 million on subscriptions. Those same subscriptions would cost $9.9 million this year. While the cost of subscriptions continues to increase, available funding has decreased. We actually received less money for library subscriptions this year than we did seven years ago. Circuit division will exacerbate this problem. The core library will have to be replicated, with duplication of the rising subscription cost.



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As the Committee well knows, the problem of escalating rent is one of the most serious issues facing the judiciary. The rent paid to the General Services Administration constitutes over 20% of the judiciary's budget. In fiscal year 2000, the Ninth Circuit paid $146,000,000 in rent to GSA. By fiscal year 2005, that figure had grown to $212,800,000–an increase of 45.8%. S. 1845 would compound that problem by forcing the construction of expensive, unneeded buildings.

All of these fixed cost requirements will reduce the amount available to fund personnel, which in turn will reduce efficient circuit operation. The inevitable result is poorer judicial administration, increased cost, and substantially increased delay in case processing.

4. The Inefficiencies Caused By The Proposed Split Could Not Come At A Worse Time In Terms Of Budgetary Considerations.

We are in a period of static to modest budget increases. During the last several years, the entire judiciary has prepared contingency plans involving significant personnel layoffs and other cost-saving measures. Fortunately, most of those measures did not have to be implemented. Given recent budgetary history, it would be unrealistic for the judiciary to plan for substantial budgetary increases, especially given the other important budgetary demands. Unless there is some unforseen change in the near term, the judiciary must plan to live within their present budgetary means, and to administer justice in the most efficient manner possible within those means. Thus, not only can we not expect the new circuits to receive sustained substantial new revenue, but imposing the burden of funding this colossal undertaking on the judiciary at this juncture would have devastating ripple effects.

Further, merely increasing the judiciary budget to add operating revenue will not solve the problem. As the Committee is 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 amount equal to the bottom line of any circuit's budget. The alternative would be to take money from other circuits. This



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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.

The fact of the matter is that the size and resources of the Ninth Circuit are an advantage and not an impediment. This should not be surprising as it comports with every basic principle of consolidation adhered to religiously in the private sector. Splitting the circuit would not just lose these advantages, it would delay our administration of justice immeasurably for years to come.

**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 this time – given the growth of immigration cases and the budget 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. Circuit Division Will Actually Increase Delay.

Proponents of a split contend that the Ninth Circuit should be divided because case processing time is too slow. Proponents of a split assume, without explaining, that any division of the Ninth Circuit will improve case processing time. They offer no data to support this conclusion. In fact, for the reasons I have already discussed, the opposite is true. Circuit division will increase, not decrease delay.

First, historically, the causes of delay in case processes are not structural, but due to external factors. The Ninth Circuit, like many other circuits, has experienced increases in case processing time when there have been significant unfilled judicial vacancies. The statistics show that, nationwide, when a court has 20% or more of its judgeships vacant, it will experience case delay. That was certainly true for the Ninth Circuit in the late 1990's, when one-third of its judgeships were vacant. It has been true for the Sixth Circuit and the Second Circuit in recent years, when those courts experienced significant vacancies. Indeed, at the end of fiscal year 2005, the Sixth and the Ninth Circuits had the highest number of vacant judgeship months in



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the nation. At the end of fiscal year 2005, the Sixth Circuit reported 40.5 vacant judgeship months. The Ninth Circuit had 45.0 vacant judgeship months.

The problem of judicial vacancy has been more pronounced in the Ninth Circuit than other circuits. In the more than 22 years since Congress authorized 28 judges for the Ninth Circuit, we have had a full complement of judges for only 23 months. Put another way, in the last 22 years, we have had a full complement of active judges only 8.5% of the time. The last time the Ninth Circuit had all of its judgeships filled was November, 1992–nearly 14 years ago.

Another historical factor that caused delay in the Ninth Circuit case processing time was the Loma Prieta earthquake of 1989, which forced the Circuit to move out of its San Francisco headquarters for seven years.

*(a) Despite dramatic caseload Increases, the Ninth Circuit's backlog has not increased significantly, while other circuits' backlogs have grown*

As I previously noted, the Ninth Circuit's backlog has not increased significantly over the past five years, even though its caseload has dramatically increased. In calendar year 2001, the median case processing time from filing of notice of appeal to disposition was 16.1 months. For the twelve month period ending in June, 2006, the median disposition time was 16.3 months. During that period, when the Ninth Circuit caseload was increasing by over 50%, median case processing time only increased 1.2%. The other circuit most affected by the deluge of immigration cases is the Second Circuit. From 2001 to June 2006, the Second Circuit's caseload increased 64.5%. During the same period, its median case processing time increased by 22.9%.

A comparison of the Ninth Circuit's performance with the performance of other circuits over the past five years shows that the Ninth Circuit is doing extremely well in case processing. Indeed, case processing time in other circuits has increased significantly, even without significant caseload increases.



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The following table demonstrates the point:

| Circuit | % Caseload Growth (2001-6/2006) | % Change in Median Case Processing Time (2001-6/2006) |
|---|---|---|
| Sixth | 12.9% | - 9.9% |
| Eleventh | 2.4% | - 6.8% |
| Ninth | 52.3% | + 1.2% |
| Third | 30.0% | + 4.2% |
| Eighth | 12.7% | + 8.0% |
| Seventh | 10.3% | + 9.9% |
| First | 9.1% | +17.1% |
| Second | 64.5% | +22.9% |
| Fourth | 5.0% | +30.1% |
| Fifth | 3.6% | +35.8% |
| D.C. | - 0.6% | +40.0% |

During the first several years, the Ninth Circuit actually improved its case processing time, despite the increases in caseload, as illustrated by this table:

**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 | - 0 .8% | + 38.2% |



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Given these figures, one cannot say that the Ninth Circuit's case processing time justifies Circuit division. If anything, the data underscores the administrative advantages of the Ninth Circuit structure in case processing.

Perhaps the real questions are the goals in terms of case processing time, what structure best achieves them, and at what cost. For example, the difference between median case processing time for all circuits and the Ninth last year was approximately 4 months. If, by using management techniques, the Ninth Circuit could reduce total case processing time by 2.4 months in just two years, as it did between 2001 and 2004, 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?

Dismantling the present Ninth Circuit, making wholesale personnel layoffs, and starting a new circuit from scratch cannot possibly reduce case processing time in the short term. The significant increases in delay would take many years to reverse, if ever.

*(b) Delay is unrelated to the size of the circuit.*

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. Commission on Structural Alternatives for the Federal Courts of Appeal, Final Report, p. 39 (1998).

Circuit division does not eliminate caseload; it merely reallocates it. The cases still need to be decided. In this regard, the division of the Fifth Circuit is instructive. According to Professors Deborah Barrow and Thomas Walter, who conducted the seminal study of the division of the Fifth Circuit, the division was never envisioned to provide a permanent solution to the problem of caseload growth; rather, it was intended to be a "stop-gap" remedy.



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As they put it:

> Circuit division, then, cannot be considered a long-term solution. Even strong advocates realize that it is a stop-gap remedy. Charles Clark, for example, estimated that circuit division would confer its benefits for ten to fifteen years before caseload growth would once again outstrip court capacity. Repeated reliance on realignment as a response to increases in caseload will only result in ever-smaller circuits, inevitably leading to the dangers of excessive parochialism about which John Wisdom so cogently warned. Sooner or later, those responsible for policies affecting the federal judiciary must confront the fundamental causes of caseload increase.

Deborah Barrow and Thomas Walter, A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform (Yale University Press, 1988) p. 248.

Those insights proved true. The Fifth Circuit judges felt overworked with a caseload of 4,200 cases per year for 25 active judges (or 168 cases per judgeship). Id. at 233. In the 12 months ending June 2006, the combined filings of the Eleventh and Fifth Circuits were 16,751 (8,965 for the Fifth; 7,786 for the Eleventh), with 578 cases per authorized judgeship.

*(c) Present delays have been caused by external factors such as the spike in immigration appeals.*

Finally, a significant external factor causing case delay is an unexpected increase in appellate volume. The primary cause of our current backlog is the extraordinary increase in immigration appeals. The Circuit's immigration caseload increased 582.7% from 2001 to 2005 (from 955 cases to 6,520). The court's non-immigration caseloads have actually decreased during that period by .2% (from 9,713 cases to 9,692). This increase in immigration appeals stemmed from a decision of the Attorney General to eliminate the backlog of 56,000 cases waiting in the Board of Immigration Appeals, resulting in the resolution of tens of thousands of cases by the BIA in a matter of months. Over half the petitions for judicial review from those cases were venued in the Ninth Circuit.



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The following numbers illustrate the point:

| Fiscal Year | Immigration Appeals | Non-Immigration Appeals |
|---|---|---|
| 2001 | 955 | 9,713 |
| 2002 | 2,662 | 8,975 |
| 2003 | 4,191 | 8,919 |
| 2004 | 5,361 | 9,692 |
| 2005 | 6,520 | 9,692 |

The simple fact is that, but for the unprecedented increase in immigration cases due to the flood of BIA appeals, the Ninth Circuit would not have a backlog. As the caseload and backlog tables in part (a) of this section indicate, we have held our ground in case processing time while experiencing a more than 500% growth in immigration cases, and a 50% increase in overall caseload. Thanks to the court management techniques described above, the Ninth Circuit has been able to absorb the enormous spike in immigration cases without losing ground. As the statistics from the early years of the immigration onslaught show–when we were reducing delay despite enormous case increases–we would be well within the national average for case processing, but for the increase in the immigration docket.

In fact, the Ninth Circuit is now starting to gain ground. Our most recent statistics showed that in two of the last four months, the number of cases terminated exceeded the number of cases filed. From historical experience, we know that this is a key indicator that the Circuit is beginning to reduce the backlog. If Congress were to restructure immigration appeals, our caseload would decrease 40% and the Circuit would rapidly become current in its workload.

In addition, the BIA has reported that it has reduced its backlog considerably, indicating that, while 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. For the twelve month period ending June 2006, the total number of petitions for view of BIA decisions filed in the Ninth Circuit was 2% less than the number of petitions filed the previous twelve month period. Other factors, such as the implementation of the Real ID Act may also have an impact on decreasing immigration caseload.



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It is important to note that, in the immigration context, delay has been furthered by 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 increases and distorts the delay statistics for the Ninth Circuit. We have been working with the Department of Justice to resolve this problem through creation of electronic records and other means.

In addition to the surge in immigration cases, the federal judiciary has experienced an increase in criminal appeals as part of the fallout from the Supreme Court's decision in *Booker v. United States*, 453 U.S. 220 (2005). Having remained stable since 2002, criminal filings in the Ninth Circuit increased 28% in 2006. *Booker* and its progeny also caused a large number of cases to be stayed pending resolution of key *Booker* issues, increasing the Ninth Circuit's median case processing time. Due to the delays imposed by the court's review of the issues raised by *Booker*, the increase in median times for processing criminal appeals should return to normal after the law is settled.

Temporary spikes in caseload are nothing new. From time to time, our Circuit and others have experienced temporary increases due to particular circumstances. In addition to the immigration spike, the California energy crisis caused 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. Administrative flexibility is the key to managing unexpected caseload increases. Large circuits have more flexibility to respond to a caseload crisis than small circuits do, because larger circuits have the resources to deal with the specialized needs posed by increase in case volume from specific sectors.

In sum, although the volume of immigration cases will pose a challenge for the next several years, the Ninth Circuit is uniquely suited to deal with the volume. 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. Dividing the Circuit will do nothing to address these external factors and will actually increase delays.



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*(d) The adjusted filings per panel in the Ninth Circuit is not significantly higher than circuits with comparable volumes*

The Committee on Judicial Resources of the Judicial Conference of the United States, which is charged with evaluating requests for additional judgeships, recently promulgated its analysis of filings per authorized judgeship, adjusted for pro se filings. The results indicate that Ninth Circuit does not have a disproportionately higher number of filings per judicial panel.

The following table provides the Committee's analysis:

| Circuit | Adjusted Filings Per Panel |
|---|---|
| Ninth | 1,251 |
| Eleventh | 1,246 |
| Second | 1,226 |
| Fifth | 1,206 |
| First | 787 |
| Sixth | 719 |
| Seventh | 716 |
| Third | 705 |
| Eighth | 694 |
| Tenth | 510 |
| D.C. | 283 |

If caseload growth is the justification for circuit division, then three other circuits should be divided because their adjusted filings per panel are statistically indistinguishable from the Ninth's.

2. Circuit Division Would Only Barely Decrease The Geographic Size Of The Proposed Twelfth Circuit.

The proponents of a circuit split argue that the circuit is simply too large geographically. However, it has been the same size since 1948 when the Territory of Alaska was added to the Ninth Circuit. Act of June 25, 1948, 62 Stat 869. It is difficult to discern why, after half a century, geography would suddenly become a problem. After all, travel and communications have improved significantly since



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President Truman was in office.

In any case, S. 1845 would not alter any perceived problems associated with geographic size. It would only shift approximately 10% of the total land mass, leaving nearly 90% of the land mass to the new Twelfth Circuit. The following graph illustrates the point:

| Proposed New 9th | Land Mass (Sq. Miles) | Proposed New 12th | Land Mass (Sq. Miles) |
|---|---|---|---|
| California | 155,959 | Alaska | 571,951 |
| Hawaii | 6,223 | Montana | 145,552 |
| Guam | 210 | Arizona | 113,635 |
| CMNI | 179 | Nevada | 109,826 |
| | | Oregon | 95,997 |
| | | Idaho | 82,747 |
| | | Washington | 66,544 |
| Total | 162,771 | | 1,186,252 |
| % of Current Ninth | 12.06% | | 87.9% |

3. Circuit Division Would Actually Increase Travel Burdens.

As part of their argument concerning geographic size, proponents of a split argue that circuit division would decrease travel burdens on the judges in the new Twelfth. As an initial observation, although I am greatly affected by travel requirements, I do not believe that the personal comfort of judges should dictate circuit structure. Serving as a circuit court judge is a privilege.

Leaving the philosophic underpinnings aside, a closer examination of the data reveals that the travel burdens would actually increase under S. 1845 for the judges in the new Twelfth Circuit.



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Here are the respective distances from the resident chambers of proposed Twelfth Circuit judges to the current circuit headquarters in San Francisco, compared to the proposed circuit headquarters in Phoenix:

| City | Distance to San Francisco | Distance to Phoenix | Change |
|---|---|---|---|
| Seattle (5 judges) | 810 | 1,470 | + 98.4% |
| Portland (4) | 640 | 1,270 | + 81.48% |
| Boise (2) | 650 | 980 | + 50.77% |
| Billings (1) | 1,190 | 1,200 | + 0.8% |
| Las Vegas (2) | 570 | 290 | - 49.12% |
| Reno (2) | 230 | 730 | +217.39% |
| Fairbanks (1) | 2,132 | 2,628 | + 23.26% |

Thus, for fifteen of the judges in the new Twelfth, the travel distance to circuit headquarters would increase substantially–an average increase of 78.6%. For six judges, travel to circuit headquarters would decrease. For virtually all judges, the travel to places of sitting would increase.

The average time of air travel for judges within a Twelfth Circuit would also increase, as indicated by the following chart:

| City | Shortest Air Time (in hours) | | |
|---|---|---|---|
| | San Francisco | Phoenix | % Change |
| Seattle (5) | 2 | 3 | +50% |
| Portland (4) | 1.5 | 2.5 | +66.7% |
| Boise (2) | 1.5 | 2 | +33.3% |
| Billings (1) | 4 | 3.5 | -12.5% |
| Las Vegas (2) | 1.4 | 1 | -28.6% |
| Reno (2) | 1 | 1.7 | +70% |
| Fairbanks (1) | 6.75 | 7.5 | +11.1% |
| Average | | | +21.4% |



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Moving the circuit headquarters would also, on the whole, reduce the number of nonstop flights from the various judges' chambers to the circuit headquarters, as illustrated by the following chart:

| City | Number of Nonstop Flights (avg. midweek day) | | |
|---|---|---|---|
| | SFO/OAK | Phoenix | % Change |
| Seattle (5 judges) | 17 | 8 | -52.9% |
| Portland (4) | 17 | 8 | -52.9% |
| Boise (2) | 5 | 2 | -60.0% |
| Billings (1) | 0 | 0 | 0.0% |
| Las Vegas (2) | 20 | 19 | - 5.0% |
| Reno (2) | 7 | 12 | +71.4% |
| Fairbanks (1) | 0 | 0 | 0.0% |
| Average | | | -34.6% |

In sum, under S. 1845, travel time to the circuit headquarters will increase and nonstop air travel options will decrease. The travel to new places of hearing will add additional travel burdens. For example, there are only two cities in which proposed Twelfth Circuit judges would reside with nonstop air service to Missoula, Montana: Billings and Boise. In addition, these figures only describe the travel of circuit judges. On average, the travel time of district judges, bankruptcy judges, magistrate judges, lawyer representatives, and others who attend meetings at the circuit headquarters will increase under S. 1845.

To be sure, these figures are extremely generalized. However, the data illustrates the point that circuit division will actually increase travel burdens on judges.

4. Other Circuits Produce More Opinions Than The Ninth Circuit.

Some outside observers and 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 outset, 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.



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More importantly, the Ninth Circuit is not the largest producers of opinions. The latest statistics show that both the Eighth Circuit and Seventh Circuits produced more opinions than the Ninth Circuit. This result is consistent with the experience of prior years. 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: 2005

| Circuit | Number of Opinions | Authorized Judgeships | # of Opinions per Auth. Jdshp |
|---|---|---|---|
| Eighth Circuit | 825 | 11 | 75.0 |
| Seventh Circuit | 608 | 11 | 55.2 |
| Ninth Circuit | 606 | 28 | 21.6 |
| Sixth Circuit | 434 | 16 | 27.1 |
| First Circuit | 417 | 6 | 69.5 |
| Second Circuit | 400 | 13 | 30.8 |
| Tenth Circuit | 393 | 12 | 32.7 |
| Fifth Circuit | 388 | 17 | 22.8 |
| Third Circuit | 330 | 14 | 23.6 |
| Eleventh Circuit | 250 | 12 | 20.8 |
| D.C. Circuit | 207 | 12 | 17.2 |
| Fourth Circuit | 205 | 15 | 13.7 |

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 former Chief Judge John Coughenour of Washington testified to this Committee several years ago. Indeed, when a court does not have a large volume of case law, the inevitable result is instability and unpredictability. Courts are forced to search the law of other circuits for guidance, knowing full well that the case authority is not controlling. In a large court, the parties know that the panels are bound by circuit law.



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Finally, circuit division would create the need for multiple panels in each new circuit to revisit issues, creating an enormous waste of judicial resources.

5. Population Growth Is Unrelated To The Number Of Appellate Filings.

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. If there were such a correlation, we would expect to see an increase in caseload that corresponded with population growth, but that has not happened.

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 Alaska, Washington, Oregon, Idaho, and Montana, collectively, 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%.

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, such as the flood of immigration appeals. To address these problems, the best solution is a larger Circuit that has the flexibility to reallocate resources internally and the administrative mechanisms to efficiently process the caseload.

Further, S. 1845 does not proportionally divide the Circuit by population. The "new" Ninth would retain 65% of the present population and would still have more population within its boundaries than any other circuit.



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6. Concerns About En Banc Procedure Are Unwarranted.

Proponents of a circuit split cite the Ninth Circuit's limited en banc procedure 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, S. 1845 will not eliminate the limited en banc court. Under S. 1845, the "new" Ninth will have 20 permanent judgeships and two temporary judgeships – far too many for a permanent full court en banc panel. So, to the extent that the limited en banc procedure is viewed as problematic, S. 1845 does not address it.

Second, this involves an extraordinarily small number of cases. Out of the 13,363 cases decided in the Ninth Circuit during 2005, only 16 (or 0.1%) were reheard en banc. This experience is consistent with the practices of other circuits. Of 21,759 cases decided nationally within the same period, only a total of 46 (or .2%) were heard en banc. The following chart for the time period:

En Banc Hearings: All Circuits (2005)

| | |
|---|---|
| Second Circuit | 0 |
| Fourth Circuit | 0 |
| District of Columbia | 1 |
| Seventh Circuit | 1 |
| Third Circuit | 2 |
| Fifth Circuit | 3 |
| Tenth Circuit | 3 |
| Eleventh Circuit | 3 |
| Sixth Circuit | 4 |
| First Circuit | 4 |
| Eighth Circuit | 9 |
| Ninth Circuit | 16 |

The experience of smaller circuits also discounts the theory, propounded by split proponents, that division of the circuit will increase the number of en banc hearings. In fact, the general experience of smaller circuits is that those circuits have very few en banc hearings.



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Third, 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.

Fourth, 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.

Fifth, 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.

Sixth, 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



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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 former eleven-judge draw was effective in providing a representative en banc court. The current fifteen-judge draw has only improved representation.

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 Law to 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.

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. Having too many judges can interfere with the deliberative process; limiting the panel number to eleven or fifteen strikes an appropriate balance between the number required for legitimacy and



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representativeness and the number required for effective deliberations. It also strikes the proper balance of resources needed to resolve en banc-worthy issues. 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.

Eighth, to the extent that the split proponents worry that the Ninth Circuit does not rehear cases en banc often enough, Congress could simply reduce the requirement that a majority of the active, non-recused judges vote in favor of rehearing en banc by amending 28 U.S.C. § 46(c).

Finally, although the tradition in this country has been for en banc courts to consist of all active judges on a court, other judicial systems use an en banc system similar to the Ninth Circuit's. For example, the British courts have long since moved away from that model. The House of Lords ordinarily sits in panels of five, but particularly important cases (including cases in which the overruling of a prior House of Lords decision is considered) are heard by panels of seven, rather than the full compliment of law lords. In the Israeli judiciary, the Chief Justice designates how the size of the panel.

For all of these reasons, the limited en banc system employed by the Ninth Circuit does not justify a circuit division.

7. There Is No Evidence That Case Conflict Is A Greater Problem In The Ninth Circuit.

Proponents of a circuit split contend that the size of the Ninth Circuit produces case conflict. However, there is no credible evidence that the Ninth Circuit experiences this phenomenon more than other circuits.

All academic studies of the Ninth Circuit have concluded that conflict in panel decisions is not a significant problem. In *Restructuring Justice* (Cornell University Press, 1990), Professor Arthur Hellman published a collection of articles analyzing the Ninth Circuit and commenting on the future of the judiciary. Professor Hellman's empirical study found that the feared inconsistency in the decisions of a large court simply has not materialized. Professor Daniel J. Meador



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described Hellman's study as "the most thoroughgoing, scholarly attempt that has yet been made. . . on the issue, and concluded that it . . . goes far toward rebutting the assumption that such a large appellate court, sitting in randomly assigned three-judge panels, will inevitable generate and uneven body of case law.

The Ninth Circuit Evaluation Committee studied this in detail. The Committee sought information from those who are in the best position to know if conflicts exist – the members of the Ninth Circuit legal community. The Committee circulated a memorandum to all Ninth Circuit district judges, magistrate judges and bankruptcy judges, lawyer representatives, senior advisory board members, all law school deans within the Ninth Circuit and to other members of the academic community asking to bring to the court's attention examples of possible conflicts involving unpublished memorandum dispositions. A response form was established to permit responses to be sent to the court's Web site. Only a handful of responses were received, and none revealed conflicts between unpublished and published dispositions. After reviewing these responses and all of the other available data, the Evaluation Committee concluded that there was no credible evidence that the Ninth Circuit experienced conflict problems in a greater proportion than that of other circuits.

The Ninth Circuit takes the possibility of case conflict extremely seriously. 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. The Case Management Unit of the Clerk's office tracks cases by issue and maintains extensive records to alert panels of pending decisions that may affect the outcome of cases.

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. This has proven extremely effective in assuring consistency.

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



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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.

Fourth, by circuit rule, we have allowed parties to call conflicts between published and non-published cases to our attention in petitions for rehearing or requests for publication. (Next year, by national rule, parties may cite non-published cases in initial briefing.) In only a handful of cases have panels found true conflicts.

To the extent inevitable conflicts will arise, splitting the circuit merely shifts them intra- to inter-circuit conflicts, adding new burdens to the Supreme Court that could otherwise have been worked out at the court of appeals level.

8. Contrary to Conventional Wisdom, Other Circuits Are Reversed More Frequently Than The Ninth Circuit.

Proponents of a circuit split often cite the Ninth Circuit reversal rate as a rationale for a circuit split. There is no evidence that the structure of the Ninth Circuit has any effect on reversal rate, nor any evidence that circuit size has an impact.

In addition, the record must be corrected. In recent years, the reversal rate of the Ninth Circuit has not deviated much from the rest of the circuits. In the 2005-2006 term, the national reversal rate was 73%; the reversal rate for the Ninth Circuit was 83%. The Ninth Circuit was not the most reversed Circuit, as illustrated by the following table:

| Circuit | Reversal Rate (2005-06) |
|---|---|
| D.C. Circuit | 100% |
| First Circuit | 100% |
| Third Circuit | 100% |
| Seventh Circuit | 100% |
| Second Circuit | 86% |
| Ninth Circuit | 83% |
| Eleventh Circuit | 80% |



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| | |
|---|---|
| Sixth Circuit | 71% |
| Fifth Circuit | 67% |
| Fourth Circuit | 60% |
| Eighth Circuit | 33% |
| Tenth Circuit | 25% |

In sum, during the 2005-06 Term, five circuits were reversed more often than the Ninth Circuit; six circuits were reversed less often. In the 2004-05 term, the national reversal rate was 73%; the Ninth's was 84%. Three circuits–the First, Second, and Tenth–had higher reversal rates that Term. The statistics for the last few Terms demonstrate that the Ninth Circuit's reversal rate does not differ significantly from other circuits:

| Term | Total Average Reversal Rate | Ninth Circuit Reversal Rate |
|---|---|---|
| 2003-04 | 77% | 76% |
| 2002-03 | 73% | 75% |
| 2001-02 | 75% | 76% |
| 2000-01 | 63% | 71% |

Even in the Term most cited by critics, the 1995-1996 Term in which a large percentage of Ninth Circuit cases were reversed, four other circuits had a higher percentage of cases reversed: the First, Second, Seventh, D.C., and Federal Circuits.

In addition, Supreme Court review affects only a handful of cases. For example, in the 12 months ending September 30, 2004, 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.



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9. Circuit Division is not Part of the Natural Evolution of the Federal Judiciary.

Proponents of splitting the Ninth Circuit often speak of circuit division as part of the "natural evolution" of the federal judiciary, as though the judiciary was a biological organism. This is a mis-reading of the history of the federal judiciary, and it should not be a guide to future intelligent design of our judicial system.

The history of the federal circuits does not show a consistent pattern of caseload growth, followed by division. Certainly, circuit division has occurred. However, the history of our judiciary often shows consolidation, with states being added to circuits.

The history of the Fifth and Eleventh Circuits provides a good example. During the early history of the area, the states were grouped into a number of different circuit combinations. By 1842, the area comprising what is now the Fifth and Eleventh Circuits was divided into four different circuits. Finally, in 1866, the four circuits were combined into one.

Likewise, the Ninth Circuit's "evolution" was not a pattern of growth and division. Rather, it evolved as a series of additions. California was designated a separate circuit in 1855. Oregon and Nevada were added to the circuit in 1866. Montana, Washington, Idaho and Oregon were added in 1891. The Territories of Alaska and Hawaii became part of the Circuit in 1900. Arizona became part of the Ninth Circuit in 1913. Guam joined the Ninth Circuit in 1951 and the Commonwealth of the Northern Mariana Islands followed in 1977.

Thus, history does not support the thesis that division is an inevitable part of the "evolution" of the federal judiciary. To the contrary, history reflects a varied pattern of restructuring and circuit consolidation. True circuit division has been relatively rare.

The more important question is how we should approach the future. If we assume, as the proponents of a split do, that federal caseload will continue to grow, then what is the long term solution? If we adopt the theory of the split proponents, growth would require continuing division. How would the Supreme Court and litigants deal with thirty or forty circuit courts? Adoption of this theory would lead



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to what former Chief Judge Cliff Wallace termed the "balkanization of federal law." It would promote what Judge John Minor Wisdom called "excessive parochialism." It would also lead to gross inefficiencies and duplication.

The more sensible long term approach is to examine circuit consolidation, rather than division.

10. Ninth Circuit Judges Enjoy a Collegial Atmosphere.

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 a model 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 often sit 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



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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.

11. Technology Has Permitted The Ninth Circuit To Forge Connections With The Community.

Loss of connection with localities has been cited as a reason to divide the Circuit. 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 headquartered 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



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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.

12. 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 S. 1845**

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. In previous testimony, I have detailed how various proposals to divide the Ninth Circuit fail to satisfy the criteria.

Without belaboring all of the factors, the division proposed by S. 1845 fails to satisfy many of the import factors. Let me discuss a few.

1. Proportionality. S. 1845 does not divide cases equally among the resulting circuits. Indeed, 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



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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 by dividing California into two circuits.

S. 1845 would place 72% of the circuit's caseload (11,583 cases as of calendar year 2005) into the "new" Ninth Circuit, while placing 28% (4,426 cases) into the new Twelfth. However, although being allocated 72% of the total work, the "new" Ninth would only receive 59% of the permanent judgeships (61% if the two temporary judgeships are included). The case allocation per authorized judgeship (using calendar 2005 figures) would be as follows:

| | |
|---|---|
| "New" Ninth Circuit | 526 cases/judgeship |
| Twelfth Circuit | 316 cases/judgeship |

However, allocation of cases per judgeship does not tell the real story. The "new" Ninth would start with seven vacant judgeships. The Twelfth would have one vacant judgeship, and presently has two vacancies. The immediate real world impact on the "new" Ninth would be much more dramatic:

| | |
|---|---|
| "New" Ninth Circuit | 772 cases/filled judgeship |
| Twelfth | 402 cases/filled judgeship |

The allocation of complex cases is also imbalanced. Seventy percent of present and future capital cases would be allocated to the "new" Ninth Circuit.

Under S. 1845, the "new" Ninth would still have the largest caseload in the country, but the resources available to it to manage the caseload would be diminished significantly.

2. Geographic coherence. The split proposed in S. 1845 lacks geographic coherence. As indicated by my previous analysis of travel, it would place the circuit headquarters for the Twelfth Circuit farther away from most of the affected states. A circuit reaching to the Arctic Circle administered out of the Sonoran desert does not make much sense. Travel would be more complicated for both lawyers and



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judges in the new Twelfth Circuit.

3. Jurisprudential coherence. Any division will disrupt Ninth Circuit jurisprudence. 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.

A good example of how jurisprudential coherence would be impaired under S. 1845 is the governance of Lake Tahoe. Lake Tahoe straddles the California/Nevada border with approximately two-thirds of the watershed area located in California and one-third in Nevada. To provide for coherent development and administration of the lake, California, Nevada, and Congress created an interstate compact in 1969 to develop a consolidated regional administration of the largest alpine lake in North America. To date, all federal appeals concerning Lake Tahoe have been venued in the Ninth Circuit. Enactment of S. 1845 would place federal appellate review of Lake Tahoe issues in two circuits.

4. 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.

5. 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 26 active judges of the circuit favor circuit division.

## Conclusion

The Long Range Plan for the Federal Courts proposed in 1990 observed that:

> Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.



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Not only is there a lack of compelling empirical evidence demonstrating the need to undertake the drastic solution of a circuit split, there is compelling evidence that the best means of administering justice in the western United States. Division will be costly, inefficient, ineffective, and result in the significant impairment of the administration of justice in the Western United States.

For these reasons, I oppose S. 1845.

I thank the Committee for its consideration of my views and those of my colleagues.



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WSBA
BOARD OF GOVERNORS

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President

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October 12, 2005

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
2449 Rayburn HOB
Washington, D.C. 20515-4905

The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
2426 Rayburn HOB
Washington, D.C. 20515-2214

The Honorable Lamar S. Smith
Chair, Subcomm on Courts, the Internet
and Intellectual Property
United States House of Representatives
2231 Rayburn HOB
Washington, D.C. 20515-4321

The Honorable Howard L. Berman
Ranking Member, Subcomm. on Courts,
the Internet and Intellectual Property
United States House of Representatives
2221 Rayburn HOB
Washington, D.C. 20515

The Honorable Maria Cantwell
United States Senate
717 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Patty Murray
United States Senate
173 Russell Senate Office Building 2
Washington, D.C. 20510

RE: Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2005 (H.R.211 and 212) – OPPOSE

Dear Chairman Sensenbrenner, Chairman Smith, Ranking Members Conyers and Berman, and Washington Senators Cantwell and Murray:

The Washington State Bar Association strongly opposes both H.R.211 and 212, the latest in a series of proposals to split the Ninth Circuit. 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 important matter.

*Working Together to Champion Justice*

403 South Peabody Street / Port Angeles, WA 98362-3210 • 360-457-3327 / fax: 360-452-5010

Chairman F. James Sensenbrenner, Jr.
Chairman Lamar S. Smith
Ranking Member John Conyers, Jr.
Ranking Member Howard L. Berman
Senator Maria Cantwell
Senator Patty Murray
October 12, 2005
Page Two

The WSBA debated the issues of size, regional differences among the states in the current Ninth Circuit, judicial collegiality, and necessary consistency in rulings. The Board of Governors of our organization unanimously concluded that splitting the Ninth Circuit Court of Appeals would not serve the interests of justice or the citizens of the state of Washington.

We found the arguments that the split would diffuse case law and work against inter-regional commerce case law were compelling. There is no legitimate reason to duplicate administration costs, when caseloads are currently being handled as well as in smaller circuits.

The Washington State Bar Association urges you to oppose both H.R. 211 and 212.

Sincerely,

S. Brooke Taylor
WSBA President

*Working Together to Champion Justice*

403 South Peabody Street / Port Angeles, WA 98362-3210 • 360-457-3327 / fax: 360-452-5010



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STATEMENT OF HONORABLE PETE WILSON
IN OPPOSITION TO S. 1845
to
THE COMMITTEE ON JUDICIARY
of
THE UNITED STATES SENATE
Wednesday, September 20, 2006

Mr. Chairman and Members of the Committee,

Thank you for this opportunity to appear before you on this important legislation. It is a particular pleasure for me to see a number of old friends with whom I had the pleasure and privilege of serving more years ago than I care to realize. For your part, you may well have tired of seeing me, hearing me, or reading the letters I have written repeatedly opposing proposals to split the Ninth Circuit Court of Appeals. I am here today to do so yet again.

But though the subject is not new and though I cannot offer a new face or a new voice, I do believe that I can offer a powerful practical new argument for rejecting this split--- and any other proposal whereby proponents seek to "free" a new Twelfth Circuit from the jurisprudence presently governing the Ninth Circuit. To the best of my knowledge, the argument I present today has not been proposed or considered before by this distinguished Committee.

Historically the purpose of seeking a circuit court split, and the issues that framed consideration of any proposed split, have been logistical in nature, relating to caseload and the ability of an existing court to adequately perform its duties. These are issues of fundamental importance, deserving of the most careful and objective examination. Chief Judge Mary Schroeder and Judge Sidney Thomas, distinguished jurists of the Ninth Circuit Court of Appeals, will present the strong case in opposition to this proposed split from the standpoint of its logistical implications. Rather than echo these powerful arguments, I will simply go on record as subscribing to them.

With regard to an entirely different consideration--- based upon the desire of split proponents for a new court to achieve a new and

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different judicial philosophy, and new and different precedents---allow me first to acknowledge that I personally have not always been happy with decisions of the Ninth Circuit, and that I have on occasion publicly criticized the Court's decisions.

Nonetheless, whatever the temptation to support a split for philosophical rather than logistical reasons, the principal aim of my testimony today is to establish the following point:

Nothing Congress does will enable a new Twelfth Circuit to create precedents anew as if on a blank canvas. To the contrary, any new circuit will be bound to all the Ninth Circuit's precedents, and any change will be so gradual and time-consuming as to not likely be noticed much in our own lifetimes.

How can I deliver this prediction with such certainty? Because history offers us legal authority for what body of precedents will govern the decisions of a newly-created circuit. Indeed, while there is scant authority on this point, it is crystal clear . . . and it makes clear to those wishing for a new court to produce wholesale new precedents that wishing will not make it so.

There have been only two splits permitted by Congress in the entire history of our federal appellate courts. In the first, which in 1929 created the "new" Tenth Circuit out of the "old" Eighth Circuit, two district court decisions simply announced that all the courts of the newly-created Circuit would be bound by the precedents of the old; and did so without any explicit Court of Appeals decision subsequently.

In marked contrast, in the very first case heard by the "new" Eleventh Circuit Court of Appeals in 1981 and the first opinion to be published by the Eleventh Circuit, the court expressly held "that the decisions of the United States Court of Appeals for the Fifth Circuit . . . shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit." (*Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (1981).)

The *Bonner* court noted that the act creating the Eleventh Circuit "did not address the issue of what body of law would be adopted" and that



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"[t]o decide this case, and later Eleventh Circuit cases, we must decide whether this court shall adopt some established body of law as its body of precedent . . . ." "For several reasons," the court concluded, it chose to adopt "the decisions of the . . . Fifth Circuit . . . ." (*Bonner*, 661 F.2d at 1209.)

What were the reasons for the court's choice?

The first consideration recited was that "[s]tability and predictability are essential factors in the proper operation of the rule of law." The court relied upon the reasoning of the United States Supreme Court expressed in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970):

> The law [must] furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; . . . furthering [the importance of] fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and [by] maintaining [necessary] public faith in the judiciary as a source of impersonal and reasoned judgments.

(*Bonner*, 661 F.2d at 1209.)

The court in *Bonner* rejected its own procedural rulemaking power as totally inappropriate for "establishing a body of precedent." It went still further in defining its concern about having to relitigate "every relevant proposition in every case" as risking a requirement for a rehearing en banc under Federal Rule of Appellate Procedure 35 on the ground that each new precedent would involve a "question of exceptional importance." The result, said the court, would be a "burden that this court could not discharge without seriously damaging its effectiveness, and it would mean years of waiting to determine the law of the circuit." Hardly the way to begin for a court dedicated to achieving predictability and stability. Said the new court, quite predictably, "We choose instead to begin on a stable, fixed, and identifiable base while maintaining the capacity for change." (*Bonner*, 661 F.2d at 1211.)



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This is a very practical decision. The burdens of relitigation which it avoids, while preserving the capability to make responsible change, cannot be responsibly ignored either by a court conscientiously seeking to decide truly important new issues without inordinate delay, or---I respectfully submit--- by responsible legislators seeking to avoid imposing those burdens and unconscionable delays upon the bench, bar, and the public of the proposed Twelfth Circuit. Rather, any evolution in the direction of Twelfth Circuit law ought to occur slowly, by increments, and pursuant to the considered process of en banc consideration.

As the court pointed out,

> The decisions of the former Fifth Circuit, adopted as precedent by the Eleventh Circuit, will, of course, be subject to the power of the Eleventh Circuit sitting en banc to overrule any such decision.

(*Bonner*, 661 F.2d at 1210.)

But, again, the requirement for an infinite number of such en banc rehearings of Fifth Circuit precedents was rightly reckoned by the new Eleventh Circuit as imposing intolerable burdens and delays. That was the entirely practical basis for their choice of Fifth Circuit precedent.

Yet an even more compelling motivation for this choice appears to have been the court's profound concern about and determination to avoid the uncertainty sure to flow from any other choice. The court clearly recoiled from the prospect of injury to the rule of law were it to be "cast adrift" upon a metaphoric sea of unpredictable precedents:

> Theoretically this court could decide to proceed with its duties without any precedent, deciding each legal principle anew, and relying upon decisions of the former Fifth Circuit and other circuit and district courts as only persuasive authority and not binding. This court, the trial courts, the bar and the public are entitled to a better result than to be cast adrift among the differing precedents of other jurisdictions, required to examine afresh every legal principle that eventually arises



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> in the Eleventh Circuit. This approach would be inconsistent with the virtually wholesale adoption in this country of English common law.

(*Bonner*, 661 F.2d at 1211.)

From this anxiety and the court's deep concern that the public perceive and accept the integrity of its choice of precedent, the judges imposed upon themselves the requirement that their choice be taken en banc rather than by "an informal and unrevealed consensus of individual judges . . . which could be upset by changes in the composition of the court."

Underlying the importance which the court attaches to its choice of precedent, the court in *Bonner* concludes its analysis with a brief but incisive exposition of the doctrine and a clear warning to any who would ignore or flout its commandments:

> We tend to think of *stare decisis* as only 'it is decided.' The full phrase is *stare decisis et non quieta movere* – 'to adhere to precedents and not to unsettle things which are established.' The prospect of decades of writing on a clean slate in pursuit of the possibility that in some case or cases we might find a rule we like better (or even conclude that an old Fifth Circuit decision is wrong) is at best unappealing, at worst catastrophic.

(*Bonner*, 661 F.2d at 1211.)

Mr. Chairman and Members of the Committee, I would like to think the court's admonition is needless. I concede that nowhere in the now too ample record of pending or rejected proposals to split the Ninth Circuit – including S. 1845, the measure presently before this Committee – can ideological change be found as the explicit purpose. But it is difficult to dismiss the inference as a straw man when so many split proposals over so many years, however they may vary in details, have in common the isolation of California.

Let us assume, moreover, that some day Congress were to entertain a proposal that purported to accomplish *explicitly* a jurisprudential

change that heretofore has been sought only by way of a gerrymandering of judicial circuit boundaries. Were such a brazen measure ever introduced – say, one directing a Twelfth Circuit to follow the law of a circuit other than the Ninth Circuit – such a suspect measure would face the gravest of challenges under the separation of powers doctrine and other constitutional mandates.

Furthermore, any such measure would contravene sound public policy by effecting a radical divorce from "former" Ninth Circuit judges, lawyers, resident businesses and inhabitants, of the case law that had been created by and through them, and that for more than a century had governed them.

As the *Bonner* court stated in choosing Fifth Circuit precedent,

> Lawyers from Alabama, Georgia and Florida, through litigation of thousands of cases, have made significant contributions to the development of this jurisprudence. Bench and bar are schooled in it. Citizens of these states and their legal advisers have relied upon it and structured their legal relationships with one another and conducted their affairs in accordance with it. By adopting the former Fifth Circuit precedent we maintain the stability and predictability previous enjoyed.

(*Bonner*, 661 F.2d at 1210.)

And so, any such effort by Congress to foist upon a new circuit a law not of its own heritage would, I suspect, quickly meet its demise. No statute could so harness a "new" circuit without imposing on it all the ills and perils generated by a flagrant contravention of stare decisis principles.

In concluding my remarks this afternoon, I can only say that if a new circuit is created in this or some future session of Congress, I hope the judges of that new circuit court--- on the day they hear their first case and publish their first opinion--- act with as much respect for precedent and for the stability and predictability it brings as did the new Eleventh Circuit Court of Appeals. Those who seek and envision

immediate and wholesale change of "old" Ninth Circuit precedents are destined to be disappointed---if the new court exercises its unquestioned power to create new precedents and overrule old ones only by en banc rehearings.

If indeed there are some who would by some means seek to force wholesale change that unsettles "established things" and undermines the rule of law, they will find that *Bonner* is at the table, like Banquo's Ghost, to haunt them. They will be required to learn patience and respect for *stare decisis.*

In fact it is quite predictable that before such broad change is legitimately achieved by a new circuit court of appeals, several other circuits will have attained the size of the present Ninth Circuit and apply for a split to a Judiciary Committee of the next generation.

Mr. Chairman and Members of the Committee, thank you for your patience and courtesy.

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**UNITED STATES DISTRICT COURT**
DISTRICT OF IDAHO
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**B. LYNN WINMILL**
Chief District Judge

September 19, 2006

The Honorable Arlen Specter
Chairman
Judiciary Committee
United States Senate
Washington D.C. 20510

Dear Mr. Chairman:

I want to express my opposition to legislation dividing the Ninth Circuit Court of Appeals, including S. 1845. My opposition to the split is based on many of the concerns expressed in the recent statement prepared by thirty-three judges of the Ninth Circuit: *A Court United: A Statement of a Number of Circuit Judges*, Engage, Volume 7, Issue 1 (October 2005). But, I have additional concerns. I believe that a circuit court should only be split when a compelling case has been made that such a step will substantially improve the administration of justice.

I am convinced that such a case has not been made. The administrative services provided in the Ninth Circuit are excellent. They are certainly equal, or superior, to those provided in other circuits. Indeed, the size of the Ninth Circuit provides unique opportunities to pursue initiatives and programs that would be difficult to support in a smaller circuit. As a member of the Ninth Circuit Judicial Council and Chair of the Chief District Judges of the Circuit, I have personally observed and participated in a number of innovative programs unique to the Circuit in areas as diverse as jury trial improvements, case management, public outreach, and IT training. I am also convinced that any perceived shortcomings of the Circuit are not attributable to its size, but to a large number of unfilled judgeships and the disproportionate impact of a tidal wave of immigration appeals that have been filed over the past few years.

The Honorable Arlen Specter
Page Two
September 19, 2006

In short, the proposed split of the Circuit will not solve the concerns expressed by its proponents, and will divide an institution that is innovative and which works both effectively and well.

Very truly yours,

B. Lynn Winmill
Chief Judge
District of Idaho

cc: Honorable Patrick Leahy
Ranking Member



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*UNITED STATES BANKRUPTCY COURT*
*DISTRICT OF NEVADA*
*300 BOOTH STREET, FIFTH FLOOR*
*RENO, NEVADA 89509*

*CHAMBERS OF*
*GREGG W. ZIVE*
*CHIEF JUDGE*

*TELEPHONE*
*(775) 784-5017*

July 27, 2006

The Honorable Arlen Specter
Chairman
Judiciary Committee
United States Senate
Washington D.C. 20510
*via facsimile 202/224-3799 and 202/224-9102*

Dear Mr. Chairman:

We, the undersigned bankruptcy judges within the Ninth Circuit, would like to express our opposition to legislation dividing the Ninth Circuit, including S. 1845. We believe that the reasons for such opposition have been well articulated in the recent statement prepared by thirty-three judges of the Ninth Circuit: *A Court United: A Statement of a Number of Circuit Judges,** Engage, Volume 7, Issue 1 (October 2005). In particular, we believe that a split would severely damage our circuit's well-functioning Bankruptcy Appellate Panel and would degrade the excellent administrative services now provided to courts of all levels by our Circuit Executive's office.

In our view, division of the Ninth Circuit would severely harm the administration of justice in the West.

Very truly yours,

Gregg W. Zive
Chief Nevada Bankruptcy Judge
Reno, Nevada &
Chair, Conference of Chief Bankruptcy
Judges of the Ninth Circuit

c: Honorable Patrick Leahy, Ranking Member

/s Louise Decarl Adler
Bankruptcy Judge
San Diego, California

/s Theodor C. Albert
Bankruptcy Judge
Santa Ana, California

/s Peter W. Bowie
Chief Bankruptcy Judge
San Diego, California

/s Samuel L. Bufford
Bankruptcy Judge
Los Angeles, California

/s Ellen A. Carroll
Bankruptcy Judge
Los Angeles, California

/s Charles G. Case
Bankruptcy Judge
Phoenix, Arizona

/s Thomas B. Donovan
Bankruptcy Judge
Los Angeles, California

/s Randall L. Dunn
Bankruptcy Judge
Portland, Oregon

/s Randolph Haines, Jr.
Bankruptcy Judge
Phoenix, Arizona

/s Alan Jaroslovsky
Bankruptcy Judge
Santa Rosa, California

/s Meredith A. Jury
Bankruptcy Judge
Riverside, California

/s Alan M. Ahart
Bankruptcy Judge
Los Angeles, California

/s Sheri Bluebond
Bankruptcy Judge
Los Angeles, California

/s Philip H. Brandt
Bankruptcy Judge
Tacoma, Washington

/s Thomas E. Carlson
Bankruptcy Judge
San Francisco, California

/s Peter H. Carroll
Bankruptcy Judge
Riverside, California

/s Sarah Sharer Curley
Bankruptcy Judge
Phoenix, Arizona

/s Dorian J. Brett
Bankruptcy Judge
Fresno, California

/s Robert J. Faris
Bankruptcy Judge
Honolulu, Hawaii

/s John J. Hargrove
Bankruptcy Judge
San Diego, California

/s Edward D. Jellen
Bankruptcy Judge
Oakland, California

/s Victoria S. Kaufman
Bankruptcy Judge
Los Angeles, California



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/s Ralph B. Kirscher
Chief Bankruptcy Judge
Butte, Montana

/s Frank Kurtz
Bankruptcy Judge
Yakima, Washington

/s James M. Marlar
Bankruptcy Judge
Tucson, Arizona

/s Dennis Montali
Bankruptcy Judge
San Francisco, California

/s Geraldine Mund
Bankruptcy Judge
Woodland Hills, California

/s Richard Neiter
Bankruptcy Judge
Los Angeles, California

/s George B. Nielsen, Jr.
Bankruptcy Judge
Phoenix, Arizona

/s Robin L. Riblet
Bankruptcy Judge
Santa Barbara, California

/s Ernest M. Robles
Bankruptcy Judge
Los Angeles, California

/s John A. Rossmeissi
Bankruptcy Judge
Spokane, Washington

/s John E. Ryan
Bankruptcy Judge
Santa Ana, California

/s Christopher M. Klein
Bankruptcy Judge
Sacramento, California

/s Bruce A. Markell
Bankruptcy Judge
Las Vegas, Nevada

/s James W. Meyers
Bankruptcy Judge
San Diego, California

/s Marilyn Morgan
Bankruptcy Judge
San Jose, California

/s David N. Naugle
Bankruptcy Judge
Riverside, California

/s Randall J. Newsome
Chief Bankruptcy Judge
Oakland, California

/s Karen A. Overstreet
Chief Bankruptcy Judge
Seattle, Washington

/s Linda B. Riegle
Bankruptcy Judge
Las Vegas, Nevada

/s Herbert A. Ross
Bankruptcy Judge
Anchorage, Alaska

/s Barry Russell
Chief Bankruptcy Judge
Los Angeles, California

/s Paul B. Snyder
Bankruptcy Judge
Tacoma, Washington



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/s Leslie Tchaikovsky
Bankruptcy Judge
Oakland, California

/s Kathleen H. Thompson
Bankruptcy Judge
Woodland Hills, California

/s Arthur S. Weissbrodt
Bankruptcy Judge
San Jose, California

/s Patricia C. Williams
Chief Bankruptcy Judge
Spokane, Washington



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