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IMPROVING THE ADMINISTRATION OF JUSTICE: A PROPOSAL TO SPLIT THE NINTH CIRCUIT

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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WEDNESDAY, APRIL 7, 2004

UNITED STATES SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS, COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:02 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Jeff Sessions, Chairman of the Subcommittee, presiding.

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

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

Chairman SESSIONS. Good morning. The Subcommittee on Administrative Oversight and the Courts will come to order. I am pleased to convene this hearing on the division issue of the Ninth Circuit. I think we have great panels today, and I look forward to a very interesting and informative hearing.

I guess the first question one would ask is why are we discussing a division of the Ninth Circuit now. To answer that question, we need to appreciate the basic purposes of a Federal court of appeals. In our Federal judicial system, an appellate court has two basic functions. First, it must review lower court and agency decisions. In this regard, it acts effectively as a court of last resort, since the Supreme Court reviews very few courts of appeals decisions each year.

Second, to borrow from Chief Justice Marshall's famous opinion in *Marbury* v. *Madison*, it must say clearly and consistently "what the law is" for that circuit. Uncertainty in the law frustrates litigants, encourages wasteful lawsuits and undermines the rule of law.

We will discuss today with regard to the circuit the fundamental facts of it, its size, and discuss the pros and cons of division. We will not be discussing opinions or judicial philosophy or matters of that nature. I think that is not really what we should be about today.

How well does the Ninth Circuit fulfill the basic functions I outlined earlier? We start with some facts. The Ninth Circuit is the largest circuit in our system by far. It covers almost 40 percent of the land mass of the United States. It stretches from the Arctic

Circle to the border of Mexico and rules almost one-fifth of the population of the country.

It now has 28 authorized judgeships—11 more than the next circuit, as this chart shows, and almost 17 more than the average circuit. It has 21 senior judges, who provide a great service to the court. Many senior judges carry virtually a full caseload, and I know with the caseload you have in the Ninth Circuit you wouldn't be able to get along without them.

It is therefore not much of an exaggeration to say that the Ninth Circuit panel assigned to a particular case, when you have as many judges as you can draw from, is a sort of luck-of-the-draw panel. In addition, district judges are called up to sit, and visiting judges from other circuits are called to sit on panels.

The Judicial Conference of the United States has recommended that the Congress create seven additional judgeships for the Ninth Circuit. If we did so, the court would have 35 active judges, making it even larger. Nobody would claim that our Supreme Court could function with 35 justices. In fact, I am not aware of any court in America of this size.

Why should we feel any different about the Ninth Circuit with 35 active and 21 senior judges, given that the court of appeals is the court of last resort in the vast majority of cases? Counting senior judges, the Ninth Circuit would be twice the size of any other circuit.

Moreover, as this chart illustrates, the caseload of this large circuit has exploded in recent years. In 1997, about 8,700 appeals were filed. In 2003, there were almost 13,000—a 48-percent increase, or over 4,000 more appeals in just 6 years. This huge increase in caseload appears to have impaired the administration of justice. The Ninth Circuit's efficiency in deciding appeals—that is, the time the court takes between the filing of a notice of appeal and the final disposition of a case—consistently has lagged behind other circuits. In 2003, for instance, the Ninth Circuit had 418 cases pending for 3 months or more—25 shy of the next five circuits combined. The next highest circuit had 98 cases.

The next chart shows that 138 cases were pending in the Ninth Circuit for over a year. This was more than every other circuit in the Federal court system combined, with the next highest circuit at a mere 19 cases. This delay cannot be explained solely by lack of judgeships. Although the caseload is high, several other circuits have higher caseloads per judge. Thus, it appears that the first function of a court of appeals—reviewing decisions from below—may not be performed as well as it could be.

If population growth is any indication, the problem is quite likely to get worse. As you can see from this chart, the population of the States within the Ninth Circuit grew faster than that of any other circuit between 1990 and 2000. That population is projected to grow even more substantially between 1995 and 2025, as this chart demonstrates. With the higher caseload that those millions of new residents will bring, the administrative challenges can only grow.

How about the second function? Are Ninth Circuit judges able to speak with clarity and consistency on what the law of the circuit is? This, too, appears doubtful. Because the circuit has so many

judges, it is difficult to preserve the collegiality that is so important to judicial decisionmaking.

As D.C. Circuit Judge Harry T. Edwards eloquently argued, quote, "In the end, collegiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions. In other words, the more collegial the court, the more likely it is that the cases that come before it will be determined on their legal merits."

Additionally, the Ninth Circuit employs a limited en banc procedure under which it is not the full court of appeals, but a random draw of ten judges, plus the chief judge, that reviews three-judge panel decisions. This can result, and often has resulted in a mere six judges making the law for the entire circuit. In all other circuit, en banc means en banc—the full court.

Finally, with so many cases decided each year, it is hard for any one judge to read the decisions of his or her peers, and it is virtually impossible for lawyers who practice in the circuit to stay abreast of the law. Judge Becker, a distinguished judge of the Third Circuit, has explained that, quote, "When a circuit gets so large that an individual judge cannot truly know the law of his or her circuit...the circuit is too large and must be split...I cannot imagine a judge in a circuit as large as the Ninth, with its staggering volume of opinions, being able to do what we in the Third Circuit do." These factors—loss of collegiality, the limited en banc, and an inability to monitor new law—undermine the goal of maintaining a coherent law of the circuit.

Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia and Kennedy publicly have agreed that structural reform was needed. No Justice on the Supreme Court has disagreed. These jurists voiced their concern 6 years ago. Today, the Ninth Circuit issues almost 50 percent more decisions than it did then. It is difficult to argue that Ninth Circuit judges and lawyers receiving the flood of opinions find the law any more coherent.

So is this a circumstance in which the Congress should exercise its constitutional power to ordain and establish new inferior courts? Several of my colleagues are here today to help answer that question. Senator Murkowski, of Alaska, has been a leader in addressing reorganization of the Ninth Circuit and has introduced a bill to that effect. I am sure her comments, in a moment, based on her experience as a Senator from Alaska and a lawyer who has practiced within the Ninth Circuit, will give us a useful context for understanding the issue.

I would also like to commend my colleague, Senator Dianne Feinstein, who is the Ranking Member for this hearing, for her interest in Ninth Circuit reorganization. Senator Feinstein has long advocated that the Congress look at objective measures in determining whether or not to split the circuit, and has wisely insisted that any division serve administrative, not political purposes.

In fact, the very title of this hearing borrows from a speech she gave on the Senate floor several years ago in which she stated, "That is the fundamental question: Would a split improve the administration of justice and, if so, what should that split be?" Senator Feinstein asked the precise question that we intend to focus

on in this hearing, and I look forward to the insights from our distinguished group of witnesses.

Senator Feinstein, would you like to make opening remarks?

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

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I would like to begin by welcoming our distinguished witnesses. I also particularly want to thank the Chief Judge, Judge Schroeder. I know she had other plans and she changed those plans to be here. I think it is very important that she be here, and I am delighted that you were able to accommodate the Subcommittee. It means a great deal to us, so thank you very much.

The issue of whether to split the Ninth Circuit has come before us many times before. It was introduced in the 98th session of Congress and virtually every session since that time. Some have said the court, with its 57 million citizens, is simply too large and that there need to be greater efficiencies and those efficiencies could be done if the court were smaller. Others hint that California judges have a liberal bent which is coloring decisionmaking in that circuit.

I believe that we really have to look at this circuit in view of its increasing size. Frankly, I was amazed to see that the caseload in 1 year, from 2002 to 2003, has gone up by 13 percent, with 12,782 additional cases. That is more than some circuits even have in the entire year, and it is just the increase in the Ninth Circuit.

I think we have to look anew at travel time and how much time is spent in extraordinary travel; the circuit is so large. In reading last night the comments of some of the judges who are going to testify, I would like to urge them to spend some time in their remarks before us about the en banc proceedings.

I, for one, very much appreciate the court's accommodation to our request that you hold more en banc hearings, and I believe, in fact, you have. But the question arises, even with 11 judges en banc, it still means that 6 judges effectively determine precedent for the entire circuit.

The final one, and where most, I think, students of circuit split come down is do the judges themselves and the legal profession itself want a split in the circuit. Now, we have eight judges, senior and active judges, who say they would like to have a split. I think those reasons are very important to be examined.

Additionally, the circuit has instituted a number of new administrative procedures. I think it is very important that we take a look at those procedures and see if technology alone is enough to accommodate reduced collegiality.

Some feel the Ninth Circuit has become extraordinarily impersonal. Does that meet the test of circuit law in an adequate way? Some say judges are so stressed and busy with the largest caseloads in the Nation that they can't really keep up with the law. Is that, in fact, the case today or is it not?

One of the problems we have had is that people take sides in this. You are either for a split or you are against a split, and you develop a defensive posture and therefore you really can't look, I think, with an open mind at changing needs of the circuit. So I actually welcome this hearing, and perhaps I look at it with a much

more open mind than I have in the past. And this really driven by this enormous 13-percent increase in caseload 1 year after the other.

Mr. Chairman, the American Bar Association, under date of April 6 of this year, has produced a letter which I would like to enter in the record, but I would like to read one paragraph from it, if I might.

"Statistics compiled by the Administrative Office of the United States Courts and submitted to Congress annually demonstrate that the circuit is functioning very well and utilizes its resources effectively. In fact, even though filings increased by 13 percent during the 2002 fiscal year, the Ninth Circuit terminated 11.7 percent more cases in 2003 than in 2002. Disposition times for the Ninth Circuit also have steadily improved over the last few years and compare favorably with times of other circuits in many respects. For example, the Ninth Circuit was the second fastest circuit in terms of median time from the date of first hearing to final disposition—one-and-a-half months. Similarly, the Ninth Circuit's median time from submission to disposition was a record-breaking .2 months. These and other statistics readily available from the statistical reports presented by the Administrative Office amply demonstrate that the Ninth Circuit continues to cope admirably with its rising caseload without jeopardizing the quality of justice, and that its overall performance is on par with that of other judicial circuits."

I actually believe this is fact and truth. However, I am not sure it is the whole story. I do think that circuits can become so overburdened, so impersonal, so harassed that they can't keep up with the law, and that the collegiality on which many of the circuits seem to base some of their decisionmaking gets lost.

So I would be hopeful that our witnesses today would address some of these questions, and I would ask unanimous consent to place this letter from the bar association in the record, if I might.

Chairman SESSIONS. Without objection, it will be made a part of the record.

Senator FEINSTEIN. That completes my statement. Thank you.

Chairman SESSIONS. I will be glad to hear briefly from our other two Senators, Senator Kyl and Senator Larry Craig.

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

Senator KYL. Thank you, Mr. Chairman. I know that we are all anxious to get to the panel, and I know Senator Murkowski is anxious to testify as well. I want to make a couple of preliminary comments, though, if I could.

This hearing kind of snuck on me and as a result I have another meeting that I have got to go to at 10:30, but I will return and will review very carefully the written comments that I miss in any event.

I want to thank you, Mr. Chairman, for holding the hearing. The reasons for it were well laid out by both you and Senator Feinstein. I also want to note I think we have incredible panels here. It is hard to imagine more judicial firepower, given the fact that the Su-

preme Court is unlikely to come visit us at this site. So I want to acknowledge that.

If I could take the personal privilege of introducing Chief Judge Schroeder, since I will not be here when she begins her testimony, and thank her for making herself available. She did have to change her schedule, as Senator Feinstein said.

She received her law degree from the University of Chicago Law School, and after serving as a trial attorney in the U.S. Justice Department's Civil Division, spent several years in private practice in Phoenix, Arizona. She was appointed to the court of appeals in Arizona in 1975, and in 1979 was elevated by President Carter to the U.S. Court of Appeals for the Ninth Circuit. She has served as chief judge of the circuit since the year 2000. She brings a unique and valuable perspective to the topic of this hearing.

Mr. Chairman, the subject, whether to divide the Ninth Circuit, is one that I have been involved in for many years. Prior to coming to Congress, I spent nearly two decades in private practice in Phoenix, and in that capacity represented clients before every level of both the State and Federal courts, including much litigation before the Court of Appeals for the Ninth Circuit.

As a Senator from Arizona, I have supported and submitted written comments to the White Commission on structural alternatives for the Federal courts of appeals that was issued in 1998. Commenting on the commission's draft report, I urged commissioners to consider and evaluate multiple proposals for reconfiguring the Ninth Circuit.

Among the proposals that I suggested to the commission were making California into a separate division of the Ninth Circuit, or into a separate circuit; creating four divisions, with central California alone as its own division, in order to more evenly distribute caseload; even adding Arizona to the Tenth Circuit.

Mr. Chairman, I am very open-minded about this subject, as you can see, and I agree with Senator Feinstein that all of us need to be open-minded and constructive to our approach to this.

Each of the various ideas presents its own issues for consideration, but ultimately the path that Congress chooses to follow will depend upon which criteria we deem to be most important in configuring a circuit. Is top priority to be given to evenly balanced caseload, to preserve geographic contiguity, to avoid subdividing a State, to maintain compactness? And there are other issues, as well.

As this process moves forward, I hope that all of us can keep in mind one criterion above others, and that is to ask how do any of the proposed configurations, including the status quo, affect litigants who have matters before the court? How does it affect their ability to gain access to a stable and reliable body of law by which they can arrange their affairs? And when disputes arise, how does the circuit's structure affect their ability to have a case decided quickly and efficiently and correctly?

I think by devoting our good-faith energies to this matter and deciding which criteria are most important, while always holding the interests of the court's customers above all others, we should be able to come to an agreement on how the U.S. Court of Appeals for the Ninth Circuit should be configured in the future.

Again, I commend you for addressing this subject and for all of our witnesses for taking the time to be here and help inform us on the subject.

Thank you.

Chairman SESSIONS. Thank you, Senator Kyl. I know that you have taken a real interest in this as a full-time practicing lawyer who has, I am sure, argued before the Ninth Circuit. I know you have had several cases you have argued before the U.S. Supreme Court, so you are one of our premier lawyers in the Senate.

Senator Craig.

STATEMENT OF HON. LARRY CRAIG, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAIG. Mr. Chairman, thank you very much, and let me reflect, as all have, our appreciation for having these most prestigious panels before us this morning to consider with us what we believe in the West to be a very necessary and important issue.

I also want to thank the Chairman and the Ranking Member for their objective approach to this issue. There are a lot of reasons to look at the Ninth Circuit, and many of them have been expressed and I will hold to those objective reasons. We have two bills introduced here in the Senate. We have a bill introduced in the House. Senator Murkowski is before us. She has faced this issue and has introduced legislation that I am supportive of.

I am here also to say I don't know of the magic of the design or the geography, but I do believe, based on all the statistical work I have read and the opinions that I am hearing—and I have had the opportunity to read some of your testimony already—that a day is rapidly coming when this Senate, this Congress, has to face the issue and resolve what I think Senator Feinstein has appropriately asked this morning.

I am one of the few non-lawyers on the Judiciary Committee, so I will make only one political statement and then I will retain the balance of the time to listen. If I want to be assured of one applause line that is the loudest I can get in any single bipartisan audience in the State of Idaho, it is to suggest that I am openly and aggressively supportive of redesigning and reshaping the Ninth Circuit.

For any who would argue that this is too expensive to do, most Idahoans would suggest that failure to do it is too expensive for my State to put up with. That is the feeling in Idaho and that is the feeling in many Western States today. So it is incumbent upon this Congress to look at it in an objective way and to try to determine if it is necessary and appropriate to do.

I have concluded that it is; others have already concluded it. But I will also tell you I don't know quite how effectively to do it in a right and responsible manner that gets the citizens of our country the best legal actions and activities through the courts they can have.

Thank you, Mr. Chairman.

Chairman SESSIONS. Thank you, Senator Craig.

We will hear from two panels of witnesses today. On the first, we will discuss whether a division of the Ninth Circuit is warranted. We will also address the merits of the various proposals to

effect such a division, including Senator Ensign's bill, who is not here today but who has offered legislation, and Senator Murkowski, who is here today.

The witnesses on the first panel will include Judge Diarmuid O'Scannlain, appointed to the Ninth Circuit in 1986; Judge Mary Schroeder, appointed to the Ninth Circuit in 1979; Judge Richard Tallman, appointed in 2000; and Judge Clifford Wallace, appointed in 1972.

On the second panel, we will focus on the administrative aspects of a division, with respect to the most recent restructuring of a Federal circuit. In 1981, Florida, Georgia and my home State of Alabama were carved out of the Fifth Circuit to become the Eleventh Circuit.

Judge Tjoflat, I was sort of surprised. I thought you were too young to have been on the old Fifth Circuit and been a part of that split. I don't know why I didn't remember that. I remember being at the opening ceremonies in Atlanta when Judge Godbold formed the new Eleventh Circuit.

This reorganization was initiated in large part because of the size of that circuit and has proven to be a tremendous success in terms of administration. Two witnesses will share their wisdom. The first will be Judge Gerald Bard Tjoflat, appointed to what was then the Fifth Circuit by President Ford in 1975, and has served on the Eleventh Circuit since 1981. The second witness will be Judge John Coughenour, appointed to the Western District of Washington by President Reagan in 1981.

I mentioned Judge Schroeder, did I not?

Judge Schroeder, we are delighted to have you. You are Chief Judge of the circuit and you were appointed to the circuit in 1979.

Senator Murkowski.

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

Senator MURKOWSKI. Thank you. Good morning, Mr. Chairman, Senator Feinstein, members of the Subcommittee. I thank you for holding a hearing on this very important matter of the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit has a direct and dramatic impact on my State.

And, Senator Craig, your comment about the sentiment of Idahoans on this issue—I can assure you that in Alaska it also is extremely important and one of those issues that generates huge response, as you have indicated.

For 20 years, we have examined the need to make changes and actively considered how the Ninth Circuit should be restructured. The court's administration, the physical size of the circuit, the length of time that the court takes to resolve cases and the huge and diverse caseload for judges create considerable problems in dispensing justice.

Last year, in response to these problems, I introduced S. 562, the Ninth Circuit Court of Appeals Reorganization Act of 2003. I was joined by Senators Stevens, Burns, Craig, Crapo, Inhofe and Smith. S. 562 would split the Ninth Circuit by leaving Nevada and California in the Ninth Circuit and create the Twelfth Circuit, containing Alaska, Arizona, Hawaii, Idaho, Montana, Oregon, Wash-

ington, along with the territories of Guam and the Northern Mariana Islands.

The bill provides that the present Ninth Circuit would cease to exist for administrative purposes on July 1, 2005. To allow the prudent administration of the court system, the Ninth Circuit and the newly-created Twelfth Circuit could meet in each other's jurisdiction for 10 years after the enactment of the bill.

The bill also provides that judges in the Ninth Circuit may elect in which circuit they wish to practice. Each circuit judge who is in regular, active service and each judge who is a senior judge of the former Ninth Circuit on the day before the effective date of the Act may elect to be assigned to the new Ninth Circuit or to the Twelfth Circuit, and shall notify the director of the Administrative Office of the United States Courts of such election.

Let's talk a little bit about the numbers. As the Subcommittee members have indicated, some of the problems of the circuit can be traced to issues related to its geographic size, the caseload, the lack of geographic diversity in its sitting judges and many other issues unique to the Ninth Circuit.

In 2003, the Ninth Circuit had 11,277 cases pending before it—a 17-percent increase over the previous year of 9,625 cases. In comparison, in 2003, the Second Circuit had the next highest caseload, with 6,767 cases pending, or over 4,500 fewer cases than the Ninth. Next in line is the Fifth Circuit, with 4,444 cases in 2003.

The Ninth Circuit takes an average of 5.8 months between the notice of appeal and the filing of the last brief. But from notice of appeal to final disposition, it averages 14 months. Now, in comparison, the Fifth Circuit averages 5.6 months between the notice of appeal to the filing of the last brief. But from the filing of the notice of appeal to a final decision, in the Fifth Circuit the average time is 9.4 months—nearly 5 months faster. So it takes 5 months longer in the Ninth Circuit, with close to 7,000 more cases pending. With such a large caseload and the length of time involved, the reality is that the Ninth Circuit will only fall farther and farther behind the other circuits.

Part of the problem with the Ninth Circuit is its sheer size. The three-judge panels cannot circulate opinions to all of their colleagues for corrections or review. This breeds conflict of decision between three-judge panels all within the same circuit. There are 27 judges. There is no telling how some issues will be decided. In the Ninth Circuit, the court cannot really sit en banc. Instead, 11 judges are picked to review a decision of a 3-judge panel. And once again the process ensures that a decision of the whole court is, in reality, the luck of the draw sometimes.

I am committed to the belief that the people and institutions that comprise the Ninth Circuit support splitting the circuit and creating a new circuit. On March 21, 2003, Greg Mitchell, in the Recorder, wrote that the Ninth Circuit Court should be split not as a means to punish it for bad decisions, but that it, quote, "should be split for the ho-hum reason that it is just too big to operate as intended and needs to become bigger still to carry what has become the heaviest caseload in the country."

According to Mitchell, the Judicial Conference said it would seek 11 new circuit judges from Congress, with 7 to be for the Ninth

Circuit. If that happens, there would be over 35 active judges in that circuit, with another 20 on senior status.

An editorial in the Oregonian newspaper dated July 25, 2002, encourages the splitting of the Ninth Circuit not because of the court's decisions, but because, quote, "The hard facts make the case." The paper pointed out that the Ninth Circuit comprises nine States and two territories which contain a population of over 56 million people. The next largest-populated circuit is the Sixth Circuit, with a population of 32 million. The Ninth Circuit has twice the population of the average appeals court.

The Oregonian cited Judge O'Scannlain, who sits on the Ninth Circuit and who is with us this morning, and he said his support of the split, quote, "is solely based on judicial administration grounds, not premised on reaction to unpopular decisions or Supreme Court batting averages." I do look forward to hearing his comments this morning.

Seven years ago, the U.S. Congress was considering legislation to split the Ninth Circuit. The split did not occur then, but the legislative effort resulted in a commission being convened to consider and make recommendations on the issue. The White Commission, in the 1990's, did not recommend the split, but suggested administrative changes that subsequently seem unworkable and do not address the problems we have today.

So here we are this morning considering my legislation, S. 562, as well as S. 2278. I am pleased to see that Senator Ensign and Senator Craig have put forward another proposal to address the problem. Senator Ensign's bill would create two new circuits. One circuit would keep California, Hawaii and the two territories in the Ninth Circuit. The new Twelfth would include Arizona, Nevada, Montana and Idaho. The State of Alaska would join the States or Oregon and Washington to create the Thirteenth Circuit. This proposal is intriguing and I am anxious to hear more about it. The several administrative changes that are suggested in Senators Ensign and Craig's bill are also attractive.

Quite honestly, Mr. Chairman, I am just pleased to see some progress and further discussion on any of these proposals. I thank Senator Ensign for his leadership on this.

Mr. Chairman, I thank you for holding the hearing this morning and I am looking forward to the presentations from the various judges.

Thank you.

Chairman SESSIONS. Thank you, Senator Murkowski. Your leadership in moving this issue forward has been helpful. I know you are a lawyer and a member of the Ninth Circuit bar and care about it deeply and want to see the court reach its highest potential.

I think it is interesting to have the different ideas, as Senator Kyl said, that have been floating about. So I guess your position is somewhat like Senator Kyl's. You are open to discussion, but you have presented a proposal that you believe would work.

Senator MURKOWSKI. Absolutely. I think what is happening now with the various proposals that are out on the table and the discussions and a review of what we can do to better provide for justice within the Western States is what we are all looking for.

Chairman SESSIONS. Very good. Well, we thank you for that presentation.

Senator MURKOWSKI. Thank you.

Chairman SESSIONS. We would be delighted to have you stay with us, but if you have other things to do, you are free to go as you choose.

Senator MURKOWSKI. Thank you.

Chairman SESSIONS. All right. We will take our first panel now—Judge O'Scannlain, Chief Judge Schroeder, Judge Tallman and Judge Wallace.

If you would each stand and raise your right hand—okay, we won't swear you in this morning. You are officers of the court. You can pretend this is a court, but trust me, it is not. This is a political branch.

Chief Judge Schroeder, we would be delighted to hear from you and your observations on this subject, and we will just go down our list.

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

Judge SCHROEDER. Thank you very much, Mr. Chairman. I very much appreciate being here. My name is Mary M. Schroeder. I am the Chief Judge of the United States Court of Appeals for the Ninth Circuit, appointed to the court in 1979 by President Carter. I am the Chief Executive Officer of both the Court of Appeals and the Ninth Circuit Judicial Council, which governs the court of appeals, the district courts and the bankruptcy courts. My home chambers are in Phoenix, Arizona, and I welcome the opportunity to appear before you even on short notice.

Chairman SESSIONS. Thank you for that.

Judge SCHROEDER. I want to thank Senator Kyl for the comments that he made earlier, and I do look forward to the testimony of all of the witnesses.

Appearing with me today in opposition to the proposals to divide the circuit are two other judges with administrative experience in our circuit. The first is Senior Judge J. Clifford Wallace, of San Diego, who served as Chief Judge before I did, and he has a great deal of experience internationally in traveling around the world working with judges in other countries and showing them how our system of Government works and sharing our belief in the rule of law.

Also here testifying on the next panel is Chief District Judge Jack Coughenour. He is the Chief District Judge for the Western District of Washington. Judge Coughenour has been involved in administrative matters with our circuit for many years, as well. He is currently the Chair of our Conference of Chief District Judges.

Also present with us is our wonderful, superb clerk of court, Cathy Catterson, who formerly worked here in Washington for Senator Javits for many years, and also worked with the Deavitt Commission before coming to our court.

I believe it is very important at the outset that all of us understand at least three important points. The first does go to cost. When we discuss any of the proposals before you—and most of the

discussion so far this morning has been concerning the court of appeals, but when we talk about splitting up the judges of the existing court of appeals, we are not just talking about the court of appeals. We are actually talking about dividing the entire and well-integrated administrative structure of the Ninth Circuit in order to create two, or even three, separate and largely duplicative administrative structures.

This is costly and, I submit, wasteful. This is especially true when we face a budget crisis requiring us to lay off employees performing critical functions; for example, supervision of probationers and preparation of sentencing reports. So we are talking about district courts, bankruptcy courts, as well as the court of appeals.

The second point goes to geography. The Ninth Circuit includes California. Although there are nine States in the Ninth Circuit, more than two-thirds of the workload of the court of appeals is from California. There is no way to divide the circuit into multiple circuits of roughly proportionate size without dividing California. None of the proposals before you would do that. So, like Goldilocks, we find that one is too big and another too small. The proposals to divide the circuit—I am very pleased that they do now—several contain proposals to add additional judges for California. But under all, there would still be more than 20 judges in any circuit containing California.

The third point that I wish to make goes to history. Over the course of the extremely colorful history of the West, certain ties have developed that should be respected in circuit alignment in order to provide for continuity and stability.

Arizona, for example, may at one time have seen itself as a Rocky Mountain State. But the truth today is its economic and cultural ties are overwhelmingly closer to California than to Colorado or Wyoming. Another example is California and Nevada. Their bond is so great that they have joined in a compact to protect Lake Tahoe. Idaho and eastern Washington have essentially treated their district judges as interchangeable for years.

So the division proposed in S. 2278 into three circuits would sever all those ties by dividing Arizona from California, California from Nevada, and Idaho from Washington. A unified circuit keeps those ties intact.

As Chief, I am very proud of the manner in which we have been able to administer a rapidly growing caseload with innovative procedures possible only in a court with large judicial resources. Some examples: Our system of identifying issues and grouping cases is unique among the circuits and allows for efficient resolution of hundreds of cases at a time once the central issue is decided by a panel.

The staff attorney's office, and in particular our Pro Se Unit—and the largest growth in cases for some time was in pro se cases; it is now the immigration cases which make up that increase that has been referred to in the past year. But our Pro Se Unit efficiently processes approximately one-third of our cases each year, and these are cases in which jurisdictional problems dictate the result or in which the decision is compelled by existing case law.

Our bankruptcy appellate panel has successfully resolved a large number of bankruptcy appeals which would otherwise be decided

by circuit judges. Our mediation program, also unique in its breadth, resolves more than 800 appellate cases a year, and we are the leader in appellate mediation among the Federal circuits. Our mediators travel all over the country training others to follow in our stead.

Technology has dramatically changed court operations over the last few decades. Senator Feinstein referred to this and it is extremely important. Particularly, these changes have taken place since the time when the Fifth Circuit split almost 25 years ago. We now have automated case management and issue tracking systems, computer-aided legal research, electronic mail, video conferencing. These have all permitted the court to function as if the judges were in the same building.

Most important, the existence of a large circuit, with all circuit, district and bankruptcy judges bound by the same circuit law, gives us the flexibility to deal with the large concentrations of population and enormous empty spaces of the West. A large circuit has served our citizens well by allowing us to move judges from one part of the circuit to another, depending on where the needs are, as recently, for example, in the border districts of California and Arizona and in the widely scattered population centers of Idaho.

I recognize that the latest proposal contains a number of provisions intended to ameliorate the harm that would result from division. It would add circuit judgeships for California and it would postpone actual division until after that most uncertain point in time when the new judges are confirmed, but this makes long-range planning very difficult.

This proposal also envisions judges from the new Twelfth and the Thirteenth Circuit sitting with the Ninth Circuit on request. This would restore a bit of the lost flexibility, but not much. Judges would have to keep track of the law of multiple circuits to make it work. Most important, chief circuit judges are not anxious to see their active judges doing the work of other courts and not their own.

The commission chaired by former Justice Byron White studied the issues a few years ago. It recommended against dividing the circuit, it praised its administration and it cautioned against restructuring courts on the basis of particular decisions by particular judges. Judicial independence is a constitutional protection for all our citizens.

Circuit restructuring is, in fact, rare. It has happened only twice. The last was nearly a quarter of a century ago, when the Fifth Circuit divided into the Fifth and the Eleventh, upon the unanimous vote of the active circuit judges. Division should take place only after there is demonstrated proof that a circuit is not operating effectively and when there is consensus among the bench, the bar and the public it serves that division is the appropriate remedy. That burden has not been met here.

The latest proposal was introduced 5 days ago. It took me a day to travel here, so I have had only limited time to prepare and to study it. If you have any questions that I am unable to answer or if you would like a written follow-up on any matter that arises during this hearing, I would be happy to provide. I would also invite

any of you to visit our headquarters in San Francisco to see how we function.

I am pleased to be here with my colleague, Diarmuid O'Scannlain, with whom I have appeared before, and with my colleague, Richard Tallman, whose views appear to reflect those of our mutual mentor and very esteemed colleague, the late, great Eugene Wright, of Seattle. Judge Wallace and I never got him to see the light either.

We have had discussions within our court about this subject from time to time for several decades, but the great majority of our judges have consistently opposed division. We have 48 judges and I believe the latest list was 9 active and senior judges—9 of approximately 48 have supported division. The remainder do not. I am advised that the chief bankruptcy judge has opposed division as well.

We are scheduled to discuss this subject at our next court retreat in about ten days. The Chair of our Conference of Chief District Judges, Judge Coughenour, of Seattle, is here and he will share his trial court perspective with you.

To comment, if I may just briefly, on our en banc process, to respond to the Senator's question, our limited en banc process has been in place for about 25 years, since I came on board. We believe it has worked quite successfully. It has a failsafe device. If any judge is unhappy with the decision of 11 judges, a judge may call for a vote of all of the judges, and our rules provide that we will sit as an en banc court, with every member of the court sitting.

We have had, I think, two or three calls for a vote to sit en banc. I believe they were in death penalty cases. The court has never voted to sit its 28 judges. We believe this is testimony that the system has worked quite well. And, as noted, we have increased the number of en banc sittings in recent years.

The American Bar Association and the Federal Bar Association have both weighed in against a split. I also want to clarify that the increase in our caseload recently—there was reference to 12,000. That is the total number of cases. The increase has been approximately 3,000 and it is due to an immigration case surge due to the increasing number of cases decided by the Board of Immigration Appeals. The circuit receives about 50 percent of the appeals nationwide in immigration cases. Most of those are in California as well.

So I thank you very much for the privilege of appearing before you and I will answer any questions that you have.

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

Chairman SESSIONS. Thank you, Chief Judge Schroeder. We appreciate those comments and your insight.

Judge O'Scannlain.

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

Judge O'SCANNLAIN. Thank you, Mr. Chairman. Good morning, Mr. Chairman and members of the Subcommittee. My name is

Diarmuid F. O'Scannlain, Judge of the United States Court of Appeals for the Ninth Circuit, with chambers in Portland, Oregon.

I am especially honored to be called upon, along with my colleague, Judge Tallman, and my colleague from the Eleventh Circuit, Judge Tjoflat, to support restructuring the largest judicial circuit in the country. The urgency is manifest in the number of Ninth Circuit reorganization bills which are pending in this session of Congress. Last year, Senator Murkowski introduced S. 562, and Congressman Simpson of Idaho introduced H.R. 2723 in the House, which incidentally has already had a hearing in the House Judiciary Committee. Just last week, Senator Ensign introduced S. 2278. Each of these proposals offers distinct, but elegant solutions to the problem of our over-large and overburdened circuit.

Mr. Chairman, I speak not only on my own behalf, but on behalf of many circuit and district judges. Eight of my colleagues publicly support the restructuring of the Ninth Circuit—Judges Sneed of California, Beezer of Washington, Hall of California, Trott of Idaho, Fernandez of California, T.G. Nelson of Idaho, Kleinfeld of Alaska, and my colleague here, Judge Tallman of Washington.

You may recall that my colleague, Judge Rymer, from California served on the White Commission and is on record that our court of appeals is too large to function effectively. I can also report that the judges of the District of Oregon have recently voted 10 to 4 in favor of a split in a survey which was requested by the Oregon Chapter of the Federal Bar Association.

I appear before you as a judge of one of the most scrutinized institutions in the 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.

Yet, I believe that all of us testifying today would agree, supporters and opponents alike, that any restructuring proposal should be analyzed solely on the grounds of effective judicial administration, grounds that remain unaffected by the Supreme Court batting averages or public perception of any given decision.

Mr. Chairman, I won't repeat the detail of my written testimony, but I do want to emphasize a few points. Put very simply, the Ninth Circuit is now so large that the only reasonable solution is to reorganize it. We are the largest in every category—9 States; 13,000 annual case filings; 47 judges, soon to be 50; 40 percent of the geographic area of the country and 57 million people.

Indeed, your comments, Mr. Chairman, and those of Senators Feinstein, Kyl, Craig and Murkowski suggest that there may be a developing consensus that the size of the court bears very close scrutiny. Our increasingly gargantuan size relative to other circuits irrefutably demonstrates the necessity of a reorganization. No matter what metric one uses, the Ninth Circuit dwarfs all others.

If you would kindly turn with me to the appendix to my written testimony, specifically to Exhibit 7 on page 33, you will see the comparison of the total number of judges on the Ninth Circuit with the average number of judges on all of the other circuits. This chart dramatically illustrates that the Ninth Circuit has two-and-a-half times as many judges as the average of all other circuits.

Turning to the next page, Exhibit 8, page 34, you will see that Ninth Circuit law governs the lives of almost three times more human beings than the other circuits, on average, do. This is a truly extraordinary imbalance of judicial power. An opinion issued by the average circuit judge in this country establishes Federal law for about 20 million people, but the same opinion, if issued by a Ninth Circuit judge, adjudicates the Federal rights and obligations for close to 60 million citizens. That is a stunning discrepancy.

Turning to Exhibit 9 on page 35, you will see that the Ninth Circuit now houses nearly as many people as the Fifth and the Eleventh Circuits combined. These two circuits were formed by splitting a single circuit, the old Fifth Circuit, back in 1981 in a relatively straightforward process that went largely unchallenged. So I am mystified by the relentless refusal by past and present Ninth Circuit chief judges to entertain any reorganization at all.

Exhibit 10 on page 36 demonstrates the serious caseload gap between the Ninth Circuit and the average of all of the circuits. In overall appeals filed last court year—perhaps the most important metric of judicial administration—the Ninth Circuit dwarfed the other circuits by an almost three-to-one margin. And this will only get worse. As the Administrative Office has reported for several years now, the number of appeals in the Ninth Circuit keeps climbing at an ever-increasing rate.

Although we have elevated our productivity through various triage efforts, we have not been able to increase the resolution of our appeals at the same remarkable pace set by new filings. The Ninth Circuit Court of Appeals has not yet collapsed, but it is certainly poised at the edge of a precipice, and only a restructuring can bring us back.

Split opponents have long attempted to place the burden on Congress to demonstrate that a reorganization is absolutely necessary. There may have been some force to that argument in the past when the Ninth Circuit was the largest of our regional circuits, but by a relatively small margin.

Of course, complete parity is impossible and, by consequence, there will always be a largest and there will always be a smallest circuit. But, Mr. Chairman, I submit to you now that the tide has turned and the burden plainly has shifted, indeed the whole paradigm has shifted. As long as one accepts the underlying premise of appellate circuits in the first place that discrete decisionmaking units provide absolute benefits to the administration of justice, there is no denying that the Ninth Circuit must be reorganized.

I challenge any opponent of reorganization to articulate a reasonable justification for placing one-fifth of our citizens, one-fifth of the entire Federal appellate judiciary and one-fifth of all of the appeals filed by all of the Federal litigants in this country in just one of twelve regional subdivisions.

The Ninth Circuit's size has so far exceeded the other circuits in all relevant respects that it is difficult even to argue that it is part of the same appellate system. Indeed, opponents generally make precisely such an argument. They have to because there is no other justification for such a large deviation from the norm.

But then maybe the Ninth Circuit is something special. Maybe, as reorganization critics appear to believe, we are the exception to

every other circuit, and maybe we are some untouchable empire immune from scrutiny that should be allowed to swell to three times the size of all other circuits without consequence.

But if that is the case, then it is time for the critics of restructuring to defend that position. Clearly, it has become the job of those who oppose reconfiguration to demonstrate why such a wildly uneven distribution should stand, for there can be no dispute about what the numbers alone prove. The question that must now be answered is whether there is any compelling evidence to avoid a split.

There was at least one argument along these lines that warrants a specific response. In her most recent state of the circuit speech, our chief judge made the astonishing assertion that, and I quote, "Split proposals must realistically be viewed as a threat to judicial independence," end quote. I submit that this is directly contrary to over a century of Congressional attention to circuit structure, all of which is concededly within the legislature's purview, and it simply cannot be true.

Bills such as S. 562, H.R. 2723 and S. 2278, with many provisions directly responding to the concerns the chief judge and other critics have previously articulated, deserve considered commendation, not presumptive condemnation. They demonstrate the good-faith efforts made by the House and the Senate reasonably to restructure the judicial goliath of our court.

Calling for a circuit split based on a particular decision is counterproductive and unacceptable. But may I suggest so is attacking the integrity of our elected representatives when confronted with honest and fair proposals to divide our circuit.

Unfortunately, the Ninth Circuit's problems will not go away. Rather, they will only get worse. The case for a split has become self-evident. We have moved beyond the time for quibbles over presumptions and motivations. This issue has already spawned, both within and outside the court, too much debate, discussion, reporting, testifying, and for far too long. We judges need to get back to judging.

I ask that you mandate some sort 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 any reasonable restructuring proposal that might come before you.

Mr. Chairman, I thank you for allowing me to appear before you today and I will be very happy to answer any questions that you may have.

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

Chairman SESSIONS. Thank you, Judge O'Scannlain, and your complete remarks and the remarks of all of you will be put in the record. We appreciate the tale you gave us in your written statement.

Judge Tallman.

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

Judge TALLMAN. Good morning, Mr. Chairman, members of the Subcommittee and Senator Murkowski. My name is Richard C. Tallman and I am a circuit judge on the Ninth Circuit, with chambers in Seattle, Washington. I was appointed by President William J. Clinton in May of 2000. I thank you for the invitation to appear here today to discuss the reorganization of our court.

I again join my colleague, Judge Diarmuid O'Scannlain, and the other circuit and district judges throughout our circuit who publicly favor splitting our court to better serve the citizens of the West. Like so many of the contentious cases we decide, this topic also divides my colleagues. But I must respectfully disagree with the other point of view espoused by my distinguished chief judge, Judge Wallace and Chief Judge Coughenour. Size does affect the quality and efficiency of administering justice. Inevitable and continuing growth will not permit us to ignore this conundrum indefinitely.

I agree with the opening comments of the Senators this morning and with Judge O'Scannlain that the key consideration is identifying the best structure to permit our judges to serve the public. The public has the right to prompt, quality decisionmaking. Justice delayed is justice denied. The quality of our decisionmaking process is impacted by a variety of factors. I would like to touch upon a few in my oral remarks.

I am acutely aware of how the sheer size of our court impedes the critical development of strong personal working relationships with my fellow judges. The genius of the appellate process is the close collaboration of independent jurists who combine their judgment, experiences and collective wisdom to decide the issues presented in an appeal.

I came on the bench nearly 4 years ago, in June of 2000. Yet, to this day, I have not sat on a regular three-judge oral argument panel with all of my other active and senior colleagues. I am not alone. Professor Hellman, a noted expert on our court, testified in October 2003 about H.R. 2723, introduced by Congressman Mike Simpson of Idaho. Professor Hellman's research confirmed that even today the judges of my court sit with one another infrequently. He cited the example of Judge William Fletcher, who joined the court in February 1999 and who, four-and-a-half years later, had still not sat with all of the active judges appointed through 2000.

The White Commission observed 6 years ago that only by sitting together regularly can members of a court come to know one another and work most effectively together. The sheer volume of the nearly 13,000 appeals filed annually would be difficult for our active and senior judges to handle under the best of circumstances.

The problem is exacerbated by the enormous geographical size of our circuit; as some in Idaho and Montana describe it, "windshield time". The problem means that we have to travel long distances and spend substantial time away from our chambers in transit. Professor Hellman testified that judges need a working environ-

ment that is conducive to the thoughtful and efficient processing of their cases. Travel detracts from the creation of that environment.

For example, there are only some kinds of work that I can do in the many hours I spend in airports and on airplanes. To protect the confidentiality of the decisionmaking process, I cannot work on opinions not yet publicly filed, or read sealed materials or memoranda from other judges relating to such matters. I would gladly give up my premier frequent-flyer status for more time in chambers.

Turning to the aspect of our work that is most important to maintaining consistency in our decisions, I would like to tell you why our current system of limited en banc proceedings is not working fairly.

The Ninth Circuit is the only circuit in the country where all active circuit judges do not participate in rendering the most important decisions. Size prevents us from functioning as a democratic institution with majority rule—the rule in every other circuit court and in the United States Supreme Court. Only our chief judge is assured a seat on every en banc panel. The remaining 10, out of 26 active judges, are randomly drawn by lot using a jury wheel. The randomness of this selection process frequently results in en banc panels that do not contain any of the judges who originally sat on the three-judge panel.

This occurred in the California recall election case and two recent death penalty cases cited in my written testimony. The recall case, in particular, has been touted as a shining example of how quickly and efficiently our en banc process can work. But the en banc panels deliberated and voted to reverse the initial decisions in all three cases without the participation and benefit of the in-depth knowledge of the factual and procedural history of each case possessed by the three judges who initially heard them.

Most strikingly, a mere 6 judges on a limited en banc panel can set the law of the circuit for the other 20 judges, whether the resulting decision reflects the full majority's views or not. It is indisputable that some close cases with six-to-five or seven-to-four split votes would have been decided differently had different eligible judges been drawn for the en banc panels. I have provided specific examples in my written materials.

It also is theoretically possible that an 11-judge panel could contain none of the minimum of 14 judges who voted to accept the case for en banc review in the first place. A court's en banc process should be inclusive, encouraging participation by all judges. After all, these are by definition cases of great significance or those involving extraordinary legal error.

Yet, our limited en banc system discourages judges from making en banc calls, which again plays a key role in developing and maintaining our jurisprudence. Making an en banc call or opposing one is a tremendously time-consuming endeavor. Unseen by the public is the written advocacy of the judges supporting the call, who essentially write legal briefs in support of the reasons why the case should be reviewed en banc. The panel that issued the decision normally opposes the call and writes a brief urging that the decision stand.

All judges, active and senior, are free to join in the exchange of these internal memoranda, which can become quite voluminous. One reason that judges may not choose to participate in this process is because they will not know whether they have been randomly assigned to the 11-judge panel until after a majority of the 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.

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 only in a small percentage of our cases. For example, in 2003, out of 972 petitions for rehearing en banc filed by the parties, judges called for en banc votes in only 40 cases. Of those 40, only 13 were eventually reheard en banc. The Supreme Court lacks the capacity to correct the inevitable mistakes through its certiorari process that slip past our inadequate Ninth Circuit limited en banc process.

Whatever you decide about whether to split the Ninth Circuit, I am pleased to see that the various bills recognize that California needs more judges. I would certainly be willing to visit wherever needed during the transition period while new judges are nominated and are under consideration by you for appointment.

In terms of where a new circuit headquarters might be located, Seattle is home to the ten-story William K. Nakamura United States Courthouse, which the judges of the Western District of Washington will soon vacate when they move to a new facility. The Nakamura Courthouse has more than 100,000 square feet of usable space. It is certainly large enough to serve as a circuit headquarters and could be reconfigured for that purpose without excessive additional work or financial expenditure.

We are well past the point of asking whether the Ninth Circuit should be split. Instead, we ought to be asking how it should be accomplished. I appreciate the fact that Congress has been considering various proposals for what the split might look like. I recognize that the ultimate configuration of such a split is a decision best left to the considered judgment of the legislative branch. Whatever you decide, a smaller court would speed dispositions of appeals, improve our collegiality, and enhance predictability, which I learned from practicing law is crucial to maintaining the respect for the rule of law among the people we serve.

I thank the Subcommittee for the opportunity to testify and I look forward to your questions.

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

Chairman SESSIONS. Thank you, Judge Tallman.

Senator Feinstein, I believe you have a guest. Would you introduce her?

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Indeed, I do. I am privileged to have my granddaughter here. She is 11 years old. She lives in San Francisco. He mother, my daughter, is a judge, and so she is reviewing this process.

Chairman SESSIONS. Very good.

Senator FEINSTEIN. I am pleased to have her meet the panel.

Chairman SESSIONS. We are delighted to have you. We just couldn't be happier, and I hope you will give Senator Feinstein your best advice on how this matter should be settled.

Judge Wallace.

STATEMENT OF HON. J. CLIFFORD WALLACE, SENIOR JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, SAN DIEGO, CALIFORNIA

Judge WALLACE. Thank you, Mr. Chairman. My name is Clifford Wallace. I have been a judge on the United States Court of Appeals since 1972. I think that makes me senior. Prior to that, I was a district court judge, and before that I practiced as a trial lawyer in San Diego for 15 years handling major civil litigation.

Since my taking senior status, I have reoriented my views as to the best use of my time and now spend over 50 percent of my time working with judiciaries overseas, now having worked with nearly 60 countries. I only mention this because I come with a little different perspective which I intend to describe to you later.

I am very, very pleased to be asked to testify again on the division of the circuit. I want to make two points. The first point is whether or not the case has been made for a division of the Ninth Circuit, and second, if so, or if no? What is the alternative to division of the circuit.

I have testified in opposition to division of the circuit before, and one of the issues is who has the burden of proof. I notice my colleague, Judge O'Scannlain, was attempting to place the burden of proof on us, which is a very interesting ploy. In January I was in Indonesia. They have a new constitutional court and one of its duties is to certify election results. And the legislature gave them a very short time period, 30 days in one instance, 15 days in another, to certify over a country that has a huge numbers of islands and voting problems.

I was asked to help them decide how to organize this particular challenge, and it seemed clear to me that what they needed to do was put the burden proof on the complainer rather than litigate each complaint through hearings. They would never get completed.

The burden of proof has always been on those who wish to divide the circuit; that is, if you are going to make a change, a case must be made of a need. The long-range plan for Federal courts made this crystal clear: "Circuit restructuring should only occur 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".

My position is that case hasn't been made, the burden proof has not been met. I have outlined that in my written statement to this Committee. Rather than restating my opinions, I have attached a law review article I wrote in the Ohio State Law Journal.

What I would like to do today is move to another area. But first I just want to make a footnote here that I am very grateful, Mr. Chairman, that you have indicated to my colleague, Judge O'Scannlain, that we shouldn't decide issues as important as this based upon case decisions.

I noticed that the junior Senator from Nevada, when he introduced his bill, gave a press release indicating the circuit should be divided because of the Pledge of Allegiance case, which has now been argued before the Supreme Court. I point out, Mr. Chairman, that the person who wrote that decision is a judge from Oregon, and the very able dissent in the case was by a judge from Los Angeles. The idea of dividing circuits so that certain cases come out a certain way is problematic. I am grateful to the Committee that this is not going to be an issue.

What I would like to do is to bank upon your assurance that everyone has an open mind, because I want to go a little different direction. I think that what is needed is larger, fewer circuits in the 21st century. Those who champion division seem to express a preference for a small-court culture.

My good friend, Jerry Tjoflat, will testify in the next group, and he and I have been on opposite sides of this issue for quite a number of years. He equates the small, collegial court to life in the small town, which he contrasts to the big city where many people do not know, much less understand, their neighbors.

This is indeed a romantic and appealing notion, that of the small town, in which everyone knows each other intimately, and can reach decisions by consensus in town meetings. Then on the other side, Judge Tjoflat contrasts it with the so-called "jumbo" court, which he describes as less efficient and less predictable.

There is one issue that is bound to come collegiality: and that has been discussed this morning. There is no question that as you add judges, you decrease collegiality, but its significance depends on how much you try. My colleague, Judge Tallman, said there is too much time in travel. But that is because we have decided to travel, not because Congress has told us to travel. It is not because we can't do it another way. We have chosen to travel.

A few years before I came on the court of appeals in 1972, nearly every judge moved to San Francisco when they were appointed to the court of appeals. That is what we did. We lived at circuit headquarters. We saw each other everyday in circuit headquarters.

The judges of our court today can all move to San Francisco and do what we used to do when we were a collegial court. But we have chosen, for creature comfort, to live in different communities. That is fine, but we shouldn't object on the basis of collegiality when we were the ones who caused the decrease in collegiality.

If it is a problem as serious as indicated, then why not decide in the Ninth Circuit and in every other circuit in the United States that we will all live at circuit headquarters, which Judges used to do in the early days of our Republic?

The ultimate test is not the comfort of the judges, but what is best for the country. The Federal courts do not exist for the benefit of the judges; they exist, at taxpayers' expense, solely to serve and meet the needs of the public. Judges are, fundamentally, public servants. Judicial policy must be dictated by concerns for the judiciary's mission, not the personal preferences of its members.

Thus, I am not sure that we really gain very much by comparing life in the big city with life in the small town. All of us would like to go back to the days of Learned Hand where we could sit and contemplate and enjoy the slow process, but it is not going to hap-

pen. Life has gone on, and the people of the United States want something else. So what I would like to do is talk about regional courts.

I remember the time when the Fifth Circuit was divided. I had been on the Ninth Circuit for some years by then, and the Congress decided that the Ninth and the Fifth Circuit could split, if the Judges chose to do so, or the alternative would be that they could have what are called administrative units and limited en bancs. We chose the latter, the Fifth Circuit the former.

John Minor Wisdom, a judge of the old Fifth Circuit, told me that the Ninth Circuit is the last regional court left. With nostalgia, he said it. I want to talk to you a little bit about my view, which is consistent with Judge Wisdom's perception, about regional courts. Large circuits like the Ninth can enhance stability, predictability and efficiency in law—just the charges made by those who wish to divide. Let me talk about stability and predictability.

Critics maintain that a large court is inherently unstable and unpredictable. It is true the number of possible panel permutations in a court increases exponentially as the number of judges increases incrementally, and that one cannot predict which panel will hear one's appeal. It is also true that you don't sit as much with your colleagues on the bench. It does not follow, however, that the law in such a court will be unpredictable or unstable.

Of course, for lawyers and litigants, the best guide for predicting the outcome of any litigation is a case on point. Where there is no case on point, they are left to shrug their shoulders and speculate what the court will do. The more published decisions from which to work, the more guidance lawyers and trial judges will receive.

Recognizing this principle, some smaller jurisdictions with small courts voluntarily opt to follow the law of the State of California, the largest judiciary in our country, for the very purpose of providing guidance and predictability to lawyers and litigants. Guam is a typical example.

Attorneys who practice law in small jurisdictions where there is little precedent know how difficult it is to plan and predict. A larger court is capable of providing sufficient case law to provide truly useful precedent. It is precisely in such a court where one can find a case on point.

But will these added cases lead to conflict and inconsistency? Professor Arthur Hellman published a collection of articles analyzing the Ninth Circuit and commenting on the future of the judiciary. Hellman's empirical study—and I point out again, empirical study—found that the feared inconsistency in decisions of a large court simply has not materialized. I have heard lawyers and others tell us our opinions are inconsistent, I have heard a lot of people say they are unpredictable, but there is only one empirical study and that empirical study says those who believe this are wrong.

Hellman's study is the most thorough, scholarly attempt that has yet been made on this issue, according to Professor Daniel Meador of the University of Virginia, in that it goes far toward rebutting the assumption that such a large appellate court, sitting in randomly-assigned three-judge panels, will inevitably generate an uneven body of case law. The contrary view, though popular, is un-

supported by evidence and is really nothing more than seat-of-the-pants assumptions.

What about efficiencies? Chief Judge Schroeder has pointed out efficiencies in our court and I will not repeat: but let me state that statistics can be misleading. Statistics as to the time of filing to the time of disposition take more into account than the efficiency of judges. The efficiency of judges is determined from the time they get the case until the time they file the case.

Last year, the Ninth Circuit was second best of all circuits in judges' promptness as measured by median time from hearing to disposition, and, tied for first place for submission to disposition.

The Ninth is the big circuit. Why has the ABA indicated that there are efficiencies in the Ninth Circuit? Why does the organization which represents all the lawyers of the United States believe the Ninth Circuit is doing well?

The delay is before judges get the case. Judges in the Ninth Circuit are more prompt than most all in the United States. The question is getting the case to the panels, which means more judges. The issue is not how judges are doing in a large circuit; it is the lack of judges given to the circuit to dispose of its work.

Now, let me turn for a moment to the 11-judge en banc court. I was a member of the court when we decided to adopt this program, so it is probably appropriate that I make a comment on why we did it and how it can be changed, if our court decides to do so.

A court of 11 judges is designated when there is to be an en banc hearing. We were allowed by the Congress to do this by rule of courts. My colleague, Judge Tallman, says a three judge panel may not automatically be on the en banc court for that case. We can change that. We decided at that time that we wanted a fresh look at an en banc case and not have the three judges of the original panel automatically on the en banc court. The fresh look would mean we would have 11 new judges, although any of them may be drawn. If Judge Tallman is correct, we can change that tomorrow by local rule, if a majority of our judges can be convinced by him that the court should be so.

The question of panel autonomy has always been sacrosanct; that is, in most cases we rely on panels. Where we need to take a case en banc, we can. We can change it from 11 judges. That too is set by local rule. If Judge Tallman is correct that 11 is too small, change it to 13, change it to 15, change it to 21. It is all done by the court by local rule. Congress doesn't have to do a thing. So if the limited en banc is imperfect, and if we in the Ninth Circuit agree with Judge Tallman, we can change that by local rule.

Finally, what about the full court? The full court can always take the case. If a majority of the judges decide, after the limited en banc court opinion, to sit as a full court, we can do so by the same process that we voted for a limited en banc majority vote. The court has voted, but has never gone to full court. Why? Because I think the judges of the Ninth Circuit don't believe that every judge has to have his or her hand on the en banc pencil; that is, for purposes of finality, 11 judges have reached a decision, which is sufficiently final. If we are wrong about that, we have the solution in our hands and can take any case as a full court. We have two courtrooms where it can be held.

Now, let me point out that in 1990, the report of the Federal Courts Study Committee commented upon our limited en banc. This committee was made up of a group of judges and lawyers from across the country who looked at our system in-depth. Senators and Congressmen, this is the report: "The limited en banc appears to allow more efficient use of court of appeals resources and should be available to other courts of appeals, even those that do not regularly have 15 active judges. The growth in the number of circuit judges is likely to continue, increasing the potential for en banc courts of unwieldy size."

I have taken more time on that than I should, but let me talk about the alternative. Certainly, courts could be more congenial if they sat in smaller groups, et cetera. But once you divide the Ninth Circuit, where are you going in principle as a Congress? Are you going to set certain limits on the size of courts?

There isn't going to be a decrease in the number of cases coming to the courts, regardless of what you do with the Ninth Circuit. Filings will continue to increase. We will have more people. Our people understand their rights better. They are better educated. And I applaud these increases; it is showing that our courts are providing their useful purpose.

So what is the average size you want of a circuit court? One of the bills before you calls for a six-judge circuit. Using that model, we would now have 30 circuits. What happens as you continue to divide? What occurs when you have 30 circuits, when you have 40 circuits? We lose the whole ability of having coherent national Federal law.

It is not just the division of the Ninth Circuit that is at stake. The Congress will now decide what will be the Federal appellate governance for the future of our country. By the end of the 21st century, a Congress will once more have many more of these division proposals before it. Do we eventually want balkanization of the Federal system, or is it wiser at this time to learn how to work with larger courts? Should we not be considering combining courts and learning the process that we have studied and developed in the Ninth Circuit?

It is not that large is bad. Large is different. And it is not that we can go back to having small circuits of six or eight judges throughout the United States. It will not happen. We cannot turn the clock back. Our people demand more. The question is, at the end of the 21st century, what kind of structure do you want? And I suggest that continuing to divide will balkanize the Federal rule of law in the United States. We would be far better off with fewer, larger circuits. They have problems, certainly. Nothing is perfect, but we must look at what is best for the United States in the long term. And I suggest it is time to open our minds to another model—fewer, larger circuits.

Thank you very much, Mr. Chairman.

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

Chairman SESSIONS. Thank you, Judge Wallace, and thank you for your articulate support for the contrarian view that large is not bad. You have articulated it well and it gives us a good place to work from.

With regard to the question of burden of proof, I think I have learned in the Senate there is no burden of proof up here. It is however you feel when you cast your vote and whatever factors go into your mind. It is really a political world. As one who spent by far the biggest part of my professional life in court practicing law, it is something you have to get used to.

Justice Kennedy also in his letter to the White Commission noted that, quote, "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"—in effect, a three-judge panel binds 50 million people—"which include," he says, "visiting circuit and district judges, must meet a heavy burden of persuasion." So Justice Kennedy, who used to be a member of the Ninth Circuit, as I recall, saw the burden on the other side.

Do you disagree with that, Judge? Obviously, you do.

Judge WALLACE. I do. Justice Kennedy was my junior on the court.

[Laughter.]

Judge WALLACE. I disagreed with him at times then and I disagree with him now.

Chairman SESSIONS. Well, Judge O'Scannlain, do you have any thoughts on the burden question and how the politicians here should look at that issue?

Judge O'SCANNLAIN. Well, it seems to me that time has changed. As I indicated in my submitted testimony and in my remarks, the relentless growth that we have seen and the problems that it has created has called out for a resolution. And it seems to me that three very respectable proposals have been made in this session of Congress which I would hope our chief judge and the members of our court would be given an opportunity to review and perhaps get back to you, Mr. Chairman, and to your colleagues on the House side with some suggestions of how we might go about restructuring.

I see the burden issue as being responsive to these respectable suggestions, and it seems to me that now that that has been made from the legislative branch, the burden is on us at this point to respond, and respond intelligently with suggestions about why this particular restructuring has greater strengths than others, or suggested alternatives or whatever. But it seems to me that is our burden.

Chairman SESSIONS. Well, it is something that we would value. I think there really is a lack of concrete commitment to any one plan as being the absolute right way to do this. So I think if anybody has insight into what they think the circuit should look like if it were split, we would be delighted to hear it.

I know the empirical study that you referred to may indicate that there is not a concern among lawyers. But the White Commission's report found that lawyers in the Ninth Circuit report somewhat more difficulty discerning the circuit law and predicting outcomes of appeals than lawyers elsewhere. Ninth Circuit lawyers more often than others report a large or grave problem—the difficulty of discerning circuit law due to the conflicting precedents and the unpredictability of appellate results until the panel identity is known.

Judge O'Scannlain, in your remarks you made reference to the fact that frequently there is an embarrassing situation in which a panel unknowingly conflicts with another panel. I believe that was the point you made. Is that more likely to happen in a larger circuit, and what did you mean by that?

Judge O'SCANNLAIN. Well, it has happened and it is indeed more likely to happen in a larger circuit simply because of the fact that at any given time we have the potential for nine separate three-judge panels to be sitting at the same time. Whether it be in Pasadena or Honolulu or Anchorage or Portland or Seattle, wherever we routinely sit, we could very well have as many as nine panels sitting simultaneously, some of which panels might have identical issues without necessarily knowing that there is a case going to come down from one of the other panels or has recently come down and hasn't been published yet.

We do have an internal procedure that is designed to minimize that, but like everything it is not perfect. I respect the chief judge and our clerk of court for identifying that problem and coming up with a potential resolution of it. But it is not a perfect resolution, and it can't be so long as you have that kind of volume going on and that many panels which could sit simultaneously.

Chairman SESSIONS. Chief Judge Schroeder, you might want to comment on that, and then also I would like your thoughts on how important you think it is to have additional judges for the circuit.

Judge SCHROEDER. Yes, thank you, Mr. Chairman. I would like to comment on the issue of conflicts. I recall just before I went on the Ninth Circuit, I had a discussion with one of our most revered judges in the history of the country, Judge Coffin, of the First Circuit, and it was at the time when the Omnibus Judgeship Act of 1978 or 1979 had just passed. Ten judges were to be added to the Ninth Circuit and an additional judge to the First Circuit, Judge Coffin's circuit.

He said to me that he thought that the Ninth Circuit would have less trouble going from 13 to 23 judges than the First Circuit would have going from 3 to 4, because there are always problems of adjusting when you have different panels. We have attempted to minimize that with our system of issue identification.

We have, since the White Commission report, studied this question. We have attempted to quantify the nature of the conflicts. We have been unable to do so. We have put a website up so that lawyers who find conflicts in our decisions can send them to our website.

We have established a rule where we permit the citation of our unpublished decisions to us in petitions for rehearing or in requests for publication so that lawyers can cite to us instances where we have issued conflicting decisions. And we are getting almost no such citations, so the documentation, as Judge Wallace has pointed out, for the existence of multiple conflicts on a regular basis simply does not exist.

Chairman SESSIONS. How about the need for new judges?

Judge SCHROEDER. Thank you. The one thing I think that there is consensus here on is that additional judges needed to be added to serve the interests of the administration of justice in the West. That is true, no matter what you do.

Judge Wallace said it far better than I could. The real issue is what do we do with the courts, the Federal courts, as the cases grow. This is true in the West and it is true in the South. The Eleventh Circuit has chosen not to add judges and has instead made very extensive use of visiting judges from other circuits. Many of our own judges have been sitting in the Eleventh Circuit. And they have also added the number of cases per judge, so that now in the Eleventh Circuit the number of cases that a judge sits on is now more than 800. I just read a book on the division of the Fifth and the Eleventh Circuits. They were worried about being overloaded when each judge had 67 cases.

Chairman SESSIONS. Judge Tallman, you talked about the courthouse that might be existing in Seattle. I think maybe there is one in Portland that Judge O'Scannlain made reference to. But tell me, isn't it true that six district judges would require more space than six circuit judges, actual space, and how many courtrooms would you actually need in a courthouse for six circuit judges? I know each judge has got to have their office space, but in additional to the office space, you don't need six courtrooms, do you?

Judge TALLMAN. Senator, I am on the Seattle space Committee that is intimately involved in the planning for the renovation of that facility. What we are planning is essentially a regional court of appeals facility similar to what we have in Pasadena as a satellite to the headquarters at 7th and Mission in San Francisco.

The Seattle courthouse, as we are currently planning the earthquake retrofit and renovation, will have an en banc courtroom and two three-judge hearing rooms that will be carved out of the existing five courtrooms that the district court uses. We will use the fourth courtroom for a meeting room that would be large enough to hold the entire court, as it is currently comprised, if it wanted to come up and hear en banc cases in Seattle. And the fifth courtroom will be turned into a branch library for our circuit library.

But even under that configuration, and using the planning—I guess it is called any Court, which is the Administrative Office computer program for planning space needs—we still can't justify filling the entire 104,000 square feet that will be vacated by the district court. We are actually going to have to find some sub-tenants for the court of appeals. So there is plenty of room in the courthouse.

Chairman SESSIONS. The point is you have a library and an office in that building. Is there another circuit that is there?

Judge TALLMAN. We actually currently have three circuit judges in that building, and then two of us have been forced out, because of space shortages because of the needs of the district court, down the street in a nearby commercial office building.

Chairman SESSIONS. And when that gets fixed, you will already have three—

Judge TALLMAN. We will have five, in total, two active and three senior circuit judges.

Chairman SESSIONS. Already in Seattle, and already there is chambers space for them there?

Judge TALLMAN. Absolutely, and we are planning under the current planning documents resident judge chambers space for ten resident judges and for nine visiting judges.

Chairman SESSIONS. That is a generous plan.

Judge TALLMAN. It is a big building.

Chairman SESSIONS. It sounds like you have got a pretty good budget, Chief.

I am a little bit critical of the judiciary in feeling that every magistrate and every district judge has to have their own courtroom, when 75 to 80 percent of the time a judge is not in his courtroom, and so they are vacant. So I think from a cost point of view, we could probably do better.

But, regardless, you have, I think, brought us up to date than appellate court is not quite the demand that magistrates and district judges have, with jury rooms and all of that.

Judge TALLMAN. Mr. Chairman, we routinely share courtrooms all throughout the circuit for three-judge panel hearings. There is no such thing as a courtroom being assigned to a circuit judge. It is simply in existence for a three-judge panel to meet in, and the only reason we are planning two for the Nakamura Courthouse is that we do, every other month, have two three-judge panels sitting simultaneously in Seattle, so we could easily accommodate them.

I would also like to add that the money for the renovation is coming out of the rent money that we have already paid to GSA as tenants of the building. So the Congress would not have to appropriate new construction funds for that work. So with all due respect to the chief's cost figures that she submitted in connection with her written testimony, they are grossly overstated if the Nakamura Courthouse were to be utilized for a circuit headquarters.

Chairman SESSIONS. Chief Judge Schroeder, and then I will recognize Senator Feinstein.

Judge SCHROEDER. Thank you. I would like to comment to that briefly. There is a big difference between using a courthouse as a regional place of holding hearings for the Ninth Circuit Court of Appeals, which is what is being done in the Nakamura Courthouse, and converting that courthouse to a circuit courthouse.

I have studied this and we have studied it for some time. We believe—and we have consulted with the Administrative Office on this—we believe that the Nakamura Courthouse, if you were to have a circuit of six judges under one of the proposals, might be sufficient to be a circuit headquarters, but you would then have to—because that proposal creates three circuits, you would have to create another courthouse either in Phoenix or in Las Vegas.

If you were to convert the Nakamura Courthouse to a circuit headquarters for a larger circuit that is for more than six judges, it would have to be substantially reconfigured. It wouldn't work because you have to have space for files, for clerks' offices, for circuit executive, for computers, for all of the things that are now in San Francisco that would have to be moved to a circuit headquarters.

Judge O'SCANNLAIN. Mr. Chairman, if I could comment on that, the best way to analyze this is in terms of the total number of employees for the current Ninth Circuit and what would result.

Just hypothetically, suppose we were going to split into two circuits, one roughly two-thirds and one roughly one-third of where we are now. If we have 300 employees in San Francisco, San Francisco would reduce the number of employees presumably by 100. And whatever circuit headquarters would be needed in Seattle or

Portland or whatever, you are only talking about a smaller number, one-third of what used to be in San Francisco.

The assumption seems to be floating around here that somehow—

Chairman SESSIONS. That is the way business people think, Judge, but I am not sure judges think that way.

Judge O'SCANNLAIN. Well, some of us do.

Judge SCHROEDER. Again, I would like to invite you to come and see how the space is utilized. It is not just people, it is files and documents.

Chairman SESSIONS. Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I particularly want to make a comment on Judge Wallace because I remember him appearing, I think, when he was chief judge on this same subject. And you have lost none of your brilliance. I want you to do know that, and it is very much appreciated.

One of the problems we have, Judge Wallace, is that this comes back and back and back again, which, if you sit on our side of the dais, you have to come to believe means that there are people out there who want to split the court. And it is particularly in the Northwest where this view applies. Both Senator Craig and Senator Murkowski mentioned the popularity of it in their States. You have a relatively new Senator in Senator Ensign, and yet he makes a proposal as well.

So it is out there, and I would say to all of you I don't think it is going to subside. So the question is whether we tackle it or we don't tackle it. My view has been that I have seen no overriding reason up to this point to tackle it. I think it is much more complicated than we have looked at it to date. I will begin to get cost estimates now from CBO and others on each of the bills.

Respectfully, Judge Tallman, I don't think it is going to be that simple. I have found that courthouses become the redeeming fact of judges. I mean, they all want new courthouses. It just doesn't stop. I hear different States wanting the courthouse, et cetera.

Senator CRAIG. Senator, I think cost per square footage on courthouses is the highest of any Federal buildings in the Nation.

Senator FEINSTEIN. I am sure that is right. Thank you. I am sure that is right.

So the question comes, if you are going to do this, how do you do it to really serve the public the best? This is part of the point, and my own view is that the two-circuit split doesn't really accomplish very much at all because it leaves the heavy preponderance in the Ninth Circuit. The three-circuit split doesn't go much more than that because if you look, as has been suggested by one of the jurists, into sort of the split of business, under the Ensign proposal the Ninth Circuit would keep 69 percent of the cases, under the Murkowski proposal 72 percent of the cases, and under the House proposal 81 percent of the cases. So there is no way you can do a split without adding substantial new judges to the Ninth Circuit. I think that has to be the first point we have to have agreement on.

Then the second point comes in with precedent, and I want to ask each of your views on that. If there were to be a split, how would you handle the issue of precedent?

Why don't you begin, Chief Judge?

Judge SCHROEDER. Well, the precedent for precedent is the Fifth Circuit–Eleventh Circuit split, which was that all of the previous decisions of the Fifth Circuit were adopted as precedent for the Fifth and the Eleventh.

Senator FEINSTEIN. So you would say Ninth Circuit precedent be adopted among any new circuits?

Judge SCHROEDER. I think that would be the way probably that it would be handled, but I don't speak having discussed it.

Senator FEINSTEIN. Well, I think that is important.

Judge O'SCANNLAIN. Thank you, Senator. I would expect on the first official meeting of the new circuit that the judges would adopt a rule of court that all existing Ninth Circuit precedents shall become the law of the new circuit from day one. I think that is what happened in the Fifth Circuit and I think that particular fact goes a long way to dispelling the concerns of those who do worry about whether the law would be different if it were different judges or in different parts of the existing circuit. I think that is a very important point.

Senator FEINSTEIN. Thank you very much.

Judge Tallman.

Judge TALLMAN. Senator, I think that Judge Tjoflat can address your question directly because they had that problem and he can tell you how they resolved it. But my understanding is that for purposes of respecting precedent and the fact that, let's say, in business transactions lawyers have counseled clients in the past to rely upon existing Ninth Circuit precedent in structuring their transactions, you would have to leave that law in place initially until such time as the new circuit had occasion through future case development to perhaps address those issues in the future. Maybe new Supreme Court cases would come down that might change it, but I think you would have to, for the stability of the transition, adopt existing precedent.

Senator FEINSTEIN. Thank you, Judge.

Judge Wallace.

Judge WALLACE. I have nothing to add. I agree with my colleagues.

Senator FEINSTEIN. Thank you very much.

Another point I would like to raise is every time we have considered this before, we have always looked to the positions of the State bars, the individual State bars in all of the States. At this point, we have had just a smattering of response and I do think we need to get that.

I would suggest that if we were to do this and do it right, it is going to have substantial cost to it well in excess of $100 million. I think we need to at least begin to get some of those figures assembled and I would like to ask if the court could assemble some figures for us. You mentioned all of the technology that would have to be duplicated, and I think we need to get a handle at least on those as well.

Judge SCHROEDER. We would work with the Administrative Office to do that, and it is not just court figures; it is the circuit-wide.

Senator FEINSTEIN. Yes. Now, one question on the en banc proceedings. Because this was raised, let me go to the Pledge of Alle-

giance case. It would seem to me if there were any case where the circuit would sit as an absolute full circuit, it would be that case because judges must know the resounding impact of that case.

It would seem to me that rather than leave a case like that which so impacts the history of what this Nation is all about, a very solemn Pledge of Allegiance, the entire circuit would sit. So from the time this came down, I was puzzled why that didn't happen.

Could any of you take a crack at that?

Judge O'SCANNLAIN. As you may recall, Senator, I wrote the dissent from failure to rehear the case en banc. So the public knows that there was a call for a rehearing en banc, and what the public can surmise is that there were less than whatever it was, 14 votes at that point, in favor of taking that case en banc.

But I would like to suggest that there are probably a variety of reasons why judges would vote one way or the other on that proposition. For the same reason that you suggest that this is a very high-profile issue, some of my colleagues might very well have decided not to vote in favor of en banc rehearing so that the Supreme Court could get the case as quickly as possible, precisely because it is such a case of major importance. But there is no record of the individual views of the 26, or whatever there were at that time, judges. So we can't really go beyond that level of speculation.

Senator FEINSTEIN. Judge Wallace.

Judge WALLACE. Because I am a senior judge, I can speculate. As I indicated, the majority opinion was written by Judge Ted Goodwin. He was appointed to the district court and to the circuit court by Richard Nixon. He is from Oregon. He is a judge who looks very carefully at the dispositions.

I have read the case. I am more persuaded by the dissent, but the majority opinion makes a good point that a case in the Supreme Court leads them in that direction. It was a case authored by my former colleague, Justice Kennedy, and it may be that our the court thought this is an issue for the Supreme Court; it is their problem, they should look at it. And they have.

We aren't always happy with the decisions we have to write. We have to follow the Supreme Court and we have to follow our own precedent. I think that the opinion can be justified on that basis and that the action of our court was proper that this is one the Supreme Court is going to have to solve, and apparently they are going to if they can find standing.

Senator FEINSTEIN. Thank you.

One of the things that I have had a great deal of trouble throughout the years with as this has come up over and over and over again is the diversity issue, the three–State issue. Yet, there is so much diversity. I mean, just in California alone a test of diversity, in a sense, is met.

The question comes, too, because there is such feeling from the more agricultural States, I think, and I think Idaho is probably a classic example—and Senator Craig, I am sure, will not hesitate to correct me—that they don't belong in the circuit. There are feelings that some States have such different interests that they belong in a different circuit.

How do you look at that, how do you regard it? How should we look at that?

Judge O'SCANNLAIN. Senator, the notion that there is a minimum number of circuits, I believe, is one that arises in the academy. The law professors seem to think that it is very important to have a minimum number, presumably three. Now, I don't know why it has to be three, necessarily. Two might work. Theoretically, one could envisage a one–State circuit. After all, you have the District of Columbia Circuit, which is a one-district, one-entity circuit.

The reason why commentators have supported more than one State tends to have to do with impact on the State itself. For example, California has three different options. One, there could be an all–California circuit, a single–State circuit, but that would give rise to perhaps unhealthy competition between the circuit court of appeals, the Federal court, and the State supreme court, both of which have overlapping responsibilities on a number of issues. The other option would be to put California into two separate circuits, which was the recommendation of the Hruska Commission. But I recognize, Senator, I believe you have some reservations or concerns about that.

So the analysis has been, all right, assuming California is the building block, what are the least populace or least case-heavy States that could be added to it to accomplish a split that would result in a circuit which would still contain California and then the minimum addition, whether it is plus one or plus two.

So in a sense, you have a conundrum, the problem being that California is so large that it could certainly justify a circuit all by itself, with all the diversity that it represents and with the four separate judicial districts within the State. There is no question, based on population or even on caseload, that that would certainly be viable. The real question is what do we do with the notion that you have a Federal role and you also have a State role and you want to minimize the tensions the best you can.

Judge SCHROEDER. May I comment to that, Senator?

Senator FEINSTEIN. Please.

Judge SCHROEDER. Thank you. The reason historically that there has been a three–State principle has been, I believe, the need to have at least six Senators in order to get the resources for a circuit because the Senate has such a vital role in confirming judges.

As for the diversity, I think there is no question that California is diverse. The concern has been that the driving force here has been to create a new circuit in the Pacific Northwest from those States, and the concern has been that that is not a diverse interest because the reason for the movement to create a circuit and the concern is that there is driven by certain economic interests.

I will only reiterate the concern expressed by my distinguished late colleague, Judge Wiggins, who sat in Congress and who pointed out repeatedly in opposition to my distinguished colleagues that we should have a circuit made up of the Pacific Northwest. He said that Congress makes one law for the entire United States and we should not create courts in order to interpret that law differently for certain parts of the country. I share that concern.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Chairman SESSIONS. Thank you.

Senator Biden said that one time. I was presiding in the Chair and he said, well, there is only one Constitution and one Federal law; you ought to get the same ruling in every Federal court in America. Maybe the Northwest knows about salmon and Arizona judges have more expertise in immigration, but I think you make a good point.

Judge Wallace, I would just say that I sort of took your position when the panel rendered the Pledge case. Most of the Senators criticized the Ninth Circuit, including the Democratic Leader and Democratic Whip, pretty aggressively.

Senator FEINSTEIN. May I put Senator Leahy's statement in the record?

Chairman SESSIONS. Yes. Senator Leahy's statement will be made a part of the record.

I remember saying that, well, it is the Supreme Court's time to get this thing straight. They have muddled the law of separation of church and state in many, many ways, and ultimately they have got to call the question. I do believe that.

Senator Craig.

Senator CRAIG. I am learning a great deal this morning—and I appreciate that—from your differing points of view about a single issue and how we view it as objectively as we can.

As I said earlier, I am not an attorney. At the same time, I do believe it is my incumbent responsibility to attempt to reflect a majority opinion of my State as best I can. So in listening to all of you this morning, I am factoring several things in. So let me make several observations as it relates to some of what you all have said.

Judge Schroeder, it is interesting that politics would be the original designer of a circuit; so many Senators, therefore so many circuits. But the politics of that day did not understand that one State could become so very dominant. In the case of resource allocation today, the State of California controls a little better than a sixth of the votes in the House and the Chairman of the House and Ways Committee. So from the standpoint of California being impaired by resources in a division, that day has passed, and we must retain as best we can a certain amount of contemporary opinion. At the same time, reality suggests different kinds of things today than it might have at the time of that design. I don't dispute the original basis.

Judge SCHROEDER. May I comment?

Senator CRAIG. Please.

Judge SCHROEDER. I was giving the historic basis.

Senator CRAIG. Exactly.

Judge SCHROEDER. On the domination of California, no one understand your views more than a judge from Arizona because we are adjacent to California, but we know that we are tied to California. We don't want to lose that tie, we don't want to be dominated. Therefore, we believe that the balance of the existing circuit is the best way to achieve the kind of balance and efficient administration of justice for all the people in the West, which has to be my first priority.

Senator CRAIG. Let me now turn to an interesting observation that Judge Wallace has made as it relates to size. Size is inevitable, so we ought to learn to manage size. If that is true, let me

offer you this suggestion, Judge, as it relates to the Ninth Circuit and the Eleventh Circuit.

If you think you can manage what you have got now, give it another decade because of the rates of growth in those two circuits. If you look at the rate of growth in the three States of Arizona, Nevada and Idaho alone, I would suggest to you that that circuit will grow increasingly larger proportionate to other circuits, simply because many of us in the West would suggest that the rest of the world has discovered us and they are wanting to come there to live.

Be that as it may, the growth factors are substantial. I find it very interesting in my State, in a time of relative economic flatness, the growth hasn't changed; people are still coming in high numbers. So I do believe we are looking at a very large circuit that will grow larger than others, increasingly so, and that remains a problem. I think it is also true of the Eleventh, for a variety of maybe different reasons, but clearly growth is at hand in those two circuits, more so than almost any other circuits in the Nation. That is part of the frustration I think we are all looking at when we look at the facts of the circuit and the caseload involved and the time lines and whether justice is, in fact, being rendered in a timely way.

Let me go to another point that I find quite fascinating. Some would like to retain the small-town culture. That day has passed; let's get on with bigness. I would suggest to you that America does want to try to retain as best it can the small-town culture.

I find it very interesting that in almost attitudes today reflected in polls that Americans really want family and community to supersede the influence of a broader, larger culture, if you will. So reflective from some of the bases from which we make decisions here, I think we all take that into consideration. That is the political side of evaluating how a court or the process itself works.

I find it very fascinating that that remains true even in a State like Idaho that is now growing very rapidly. Of course, it is ironic that the growth itself is a product of those searching for the small town, and in searching for it they create the large town, and that is inevitably true. So it is an interesting struggle we are at. At the same time, I think what we now look at and must look at is numbers and timeliness and can, in fact, decisions be rendered that are consistent with law and precedent that is extremely important.

Lastly, I found it interesting, Judge Schroeder, your observation about the culture of the court and the character of the western growth. Idaho has grown at an unprecedented rate in the last decade. Certainly, for Idaho, it has been a struggle.

What is fascinating is that half of those who come to Idaho are from California. So it isn't that the California culture is going to escape Idaho. It is moving there. I would suggest that California is culturizing the West. Whether I like it or not, the reality is quite true.

Senator FEINSTEIN. Point of personal privilege. That is actually the nicest thing you have said in a long time.

[Laughter.]

Senator CRAIG. See, Dianne, you are seeing my kinder, gentler moments here.

But it is very true. That is the reality of how we grow in the West. As California grows, people from the West love the West, so they are not going to leave the West and they go elsewhere in the West. That is true of Idaho and I suspect it is extremely true of Nevada today. It has always been true of Arizona and other places. But, statistically, that is true. About half from California, half from the rest of the United States, come to Idaho.

What is at stake, I do believe—and I don't disagree with the Senator from California about differences as it relates to how Idahoans perceive a San Francisco judge judging on an Idaho agricultural, resource, or public land issue. They feel, and have expressed very openly, that there is an inherent urban bias, if you will, upon a State where its ruralness, or more importantly its historic and what I believe legal precedents of a relationship between its people and the land are, in part, different. That has always been a frustration, also, and I think that has helped push the issue of a division of the court to try to get judges that are more reflective of the culture that they are judging cases coming from.

Well, those are some observations. My bias toward splitting the court I have expressed for a good number of years. I do believe that I agree with Judge O'Scannlain. I believe that my bias is now being increasingly confirmed by a broader majority of citizens because of the sheer numbers involved and what is happening out there. What might have started as a political bias, if you will, or a bias based on politics is rapidly a bias that may well be justified by size and the ability of the court to effectively function.

Thank you all very much for your observations and your concern. We will rely on you as we must and should, because of your experience, as we draw toward what I think is an inevitable decision on how we handle this issue.

Thank you.

Chairman SESSIONS. Thank you, Senator Craig.

Counselor Kyl.

Senator KYL. Thank you, Mr. Chairman.

A lot of the concern about a potential split of the circuit has to do with the en banc review issue in a court as large as the Ninth Circuit. That was a significant focus of the White Commission which resolved it in a different and unique way that I think, by the way, Mr. Chairman, we should go back and review because there was a lot of work that went into that commission. I disagreed with the specific recommendation of the commission, but I thought it had a lot of very sensible things to day, and I think we should go back and review that thoroughly.

But this question of en banc review, especially with a court as large as the Ninth Circuit—and I wanted to review something that Judge Posner said that puts this at the top of the list of things we have to address. Judge Posner has called this limited en banc procedure a formula for in-fighting and doctrinal incoherence, among other things because of the possible discrepancy between the three-judge panel and the random draw of ten judges, plus the chief judge, on the en banc panel, the lack of collegiality and the other things that have been mentioned here.

Now, Judge Wallace says, well, we might as well get used to this because inevitably the population in all of the circuits is going to

grow. The caseloads will grow, and we should be using the Ninth Circuit in this situation as somewhat of a pilot project to figure out how to deal with the inevitable growth of all of the other circuits.

I suppose one response to that is, yes, that is certainly true, but is it still nevertheless healthy to have a mega circuit that not only is about as big as any two other circuits combined, but growing at a faster rate than any of the other circuits?

In other words, should we be trying to deal with that growth situation as a group of equal courts rather than one that is so substantially larger and growing at a faster rate? In other words, is there is a question of optimum size, even with growth, and of relative size that is important for us to address?

Could I ask, with that sort of obtuse observation, each of you to just address it as an open-ended question, but focused on especially the problems with en banc review that I think all of us would acknowledge are one of the driving forces in presenting this issue?

We will start with Judge Schroeder and go down the panel.

Judge SCHROEDER. Yes. Senator, as Judge Wallace noted in his testimony, the question of en banc review in our procedures we can change. We established the limited en banc; we can change it. I would be more than happy to talk with you or with anyone else. We can take it back to the court and discuss it and see whether it is advisable, whether it would make any meaningful difference to expand the size of the en banc. So we can do that.

On the whole issue of circuit configuration, I think that Senator Craig made a very good point and that is in line with what we have been saying. The issue here is what do you do with the fact that there are growing areas of the country where cases are going to continue to be filed at an increasingly fast rate. That includes the Eleventh Circuit and the Fifth Circuit and the Ninth Circuit.

It may well be that the time has come for there to be another independent look not at the whole system, not at the Ninth Circuit, but simply dealing with the issues of how to administer justice in those areas which are growing so fast that additional judges are going to have to be needed. I think that larger issue is what needs to be confronted.

Senator KYL. Judge O'Scannlain.

Judge O'SCANNLAIN. Senator, I think the thing to keep in mind with respect to this limited en banc option is that this is a creature of statute that permits two circuits to function with less than its full court. The only other circuit besides ours that qualifies is the Fifth Circuit and they have, since 1980, declined to function with a limited en banc court. We are the only court of the two that are eligible that has adopted the limited en banc option.

I think what you see from the testimony, in particular, of my colleague, Judge Tallman, and some of my comments is that there are a lot of people who wonder if the limited en banc process isn't broken, for a variety of reasons. First of all, the notion that 6 judges can bind 28 is in itself a very, very difficult concept to deal with.

But more importantly, there have been a number of instances now, and in particular the Payton case which Judge Tallman may wish to speak to, where more judges on our court voted one way than the six judges who had the last word. More than six voted the

other way, so it is a very, very difficult case to support at this point.

Now, it is true that we could sit as a 28-judge full court en banc. There were two calls; they both occurred since 1986, when I came on the court. One had to do with the physician-assisted suicide case, where the vote was eight to three in favor of finding a constitutional right for physician-assisted suicide. There was a call, but there was less than a majority. So the Supreme Court took it and reversed us.

Senator KYL. Excuse me. When you say there was a call, could you explain that for the record?

Judge O'SCANNLAIN. There was a call for a full court rehearing after the eight to three en banc decision, and the call was unsuccessful. In other words, maybe it took 15 votes at that point. Whatever a majority of the number of active judges at that time was, it did not materialize. So therefore it went on to the Supreme Court.

The other one was a six-to-five decision where the majority held that there was no Eighth Amendment violation when the State of Washington used as a form of execution in capital cases hanging. There was a call for that case to be reheard en banc as well because, first of all, it was a six-to-five case. I am sure a lot of people would think that in and of itself might justify a rehearing by the full court, and obviously it was a very significant constitutional issue. Well, there was a call made at that point for a full-court review and the full court did not do so. There was not a majority to do so. I think, as a matter of fact, that case never went to the Supreme Court. As I understand it, it ended at that stage.

So there is a real problem, and the only reason we have a limited en banc is because we are so large. That is really what we are dealing with here. Every other circuit will function with a full court en banc, and have done so all along. I think we have arrived at a point where there is a diminishing confidence in our limited en banc process.

Judge TALLMAN. Senator, my response would be if the limited en banc is such a good system, why hasn't anybody else emulated it? The Fifth Circuit certainly could if it wanted to, but has chosen not to do so. And making en banc panels larger is not a solution. Judge Tjoflat, I think, is prepared to tell you about his experiences with an en banc where they actually had some 25 or 26 judges, and at that point it begins to look less like a court and more like an argument in the House of Lords. The dynamics are very different when you get a group that big trying to decide a single legal issue.

Senator KYL. If I could just interrupt—and, Judge Wallace, excuse me—that is the situation that is going to exist in, let's say, a hypothetically California-only Ninth Circuit. You are going to have that many judges on the court today, and eventually you will have that many judges on some of the other courts.

So what does that say about the desirability of having all 25 judges, let's say, sit on a case?

Judge TALLMAN. Never having done it, I agree with Judge O'Scannlain. The few times it has been suggested on our court, it has been voted down, and my understanding is because of the concerns that people have of trying—I mean, imagine as a lawyer

standing in front of three tiers of judges in the courtroom to argue your case.

Senator KYL. Well, excuse me again for interrupting, but knowing the six that I was going to argue before, I might well relish that notion.

Judge TALLMAN. What you might not like would be the individual opinions that could be generated because, theoretically, every one of the judges could write separately if they wanted to. And trying to discern the legal rule out of that ruling would make a mockery of our attempts to do so, such as when the Supreme Court writes multiple plurality opinions.

Senator KYL. Well, I would suggest the dynamics itself would probably move toward a consolidation of opinions and views.

Could I just interrupt and ask one more question, too, in terms of your procedures? Twice, you said, since you have been on the court, Judge O'Scannlain, there has been a call for a full en banc review. Procedurally, how does that work and could that theoretically happen in any case, or how does that work?

Judge O'SCANNLAIN. Well, when I say call, that is the device that we have within the court. In other words, a judge will simply call for a vote on whether a given case be reheard. We have about 40 of those a year, on average, from 3-judge panels. I might, for example, see a decision in a particular three-judge panel and I have some concerns about whether that is an accurate statement of Ninth Circuit law. So I will send a message—we operate by e-mail—to my colleagues saying I would like to call that case.

Then that starts a process by which we have an internal exchange of memoranda. Some of these memoranda are even more carefully done than a lot of briefs that we see. A lot of effort goes into it. Ultimately, there will be an end to that period and there will be a vote and each judge will vote either yes or no on whether a case should be reheard en banc or not, and it takes a majority to do so.

Senator KYL. A majority of the full court?

Judge O'SCANNLAIN. A majority of the active, non-recused judges, yes, that is correct.

Senator KYL. And then that creates an en banc panel?

Judge O'SCANNLAIN. Well, no.

Senator KYL. That is the procedure for the full-court review?

Judge O'SCANNLAIN. Well, it is the same for either. In other words, the call simply asks for a vote. Whether it is with respect to a 3-judge case or after an 11-judge panel has issued an opinion, a call operates exactly the same way.

Senator KYL. So just to make sure I understand, have there been roughly 40 calls from an 11-judge en banc panel for a full-court review?

Judge O'SCANNLAIN. No, no, no. I hope anything I might have said would have been clear.

Senator KYL. Only twice since you have been on the court has that happened?

Judge O'SCANNLAIN. Only twice since I came on, and as I understand it, only twice ever, because this process only started in 1980 or so, or 1981, when that statute became effective.

Senator KYL. And Judge Schroeder is acknowledging that. So could I summarize it this way, then, that while your procedure admits of the possibility of a full-court review upon a majority vote of the full, qualified court, obviously it has not occurred and it would be very sparingly done?

Judge O'SCANNLAIN. Right. The 40 number refers to the average number of calls on three-judge decisions that we are at about now.

Judge SCHROEDER. I think that is the key statistics that Judge O'Scannlain is correct about, that out of 8,000 cases that are filed and some 4,000 that we actually decide, on average, there may be 30 to 40 requests for a vote to go en banc from the 3-judge panel decision.

Judge O'SCANNLAIN. And roughly more or less half of those are successful.

Judge SCHROEDER. Yes.

Senator KYL. Judge Tallman, before I call on you—and I still am going to get to you, Judge Wallace, and I know my red light is on, but I think this is an important point.

So am I correct, then, that out of the full caseload of the court in a year, there will be only be between 20 and 40 en banc hearings?

Judge TALLMAN. That is right. If you look at page 17, which is Appendix B of my written testimony, I have listed for you the total number of en banc calls.

Senator KYL. Thank you. I will review that carefully.

Judge TALLMAN. And when the call is made, taking 2003, there were 40 en banc votes, but only 13 passed and 27 failed.

Senator KYL. That is very helpful and I appreciate that.

I will just conclude with this, since I referred to Judge Wallace, back to my central question, your point being that while all the circuits are going to grow, we might as well figure out how to deal with that using a court that is already big, and my sort of posited response, yes, that is fine, but is it still perhaps too big relative to the size that we would like to see even though, of course, all of the courts are inevitably going to grow in size.

Judge WALLACE. Senator Kyl, thank you for the question. My point is that we ought to think further than just the Ninth Circuit; that is, I have been pleading for, and there has not yet been consideration of, a discussion about whether we are going the wrong way.

Why should the First Circuit have so few judges? We always talk about the Ninth Circuit having many, but why shouldn't consideration be given to combining circuits? It is not politically easy, I am sure, and would not be accepted well by judges of the courts of appeals. But that is not the issue. The issue isn't the creature comfort of the judges. It is what is best for our Republic.

To me, you will never get to the place where you decide what you need for the growth that is going to occur everywhere, more in the West than in the East—until you decide if you on the right track by dividing and balkanizing or whether you should look to larger circuits and begin thinking of combining smaller circuits. Then the issue really is before you. There is no question that growth is going to occur and we are not in a position to really accommodate that unless we look at the issue of fewer, larger circuits.

Senator KYL. Excuse me. I didn't mean to be impertinent. I have got to conduct a luncheon at 12:30 which I Chair, and therefore I am going to have to go. And I was just conferring with the Chairman about that problem, since I am not going to be able to hear the rest of the testimony. I apologize for being rude.

Judge WALLACE. That is all right.

As far as the full court en banc is concerned, the Fifth Circuit tried it and didn't like it. That doesn't mean that we couldn't hold a full-court en banc and be able to accommodate it. It depends on the personality of the judges who are involved. If Judge O'Scannlain or others are disappointed with our limited en banc, they can go to our court and ask for a change of our en banc rule. We can do away with the limited en banc tomorrow if a majority of the judges wish to do so.

What I am suggesting is there is no perfect way of accomodating growth in the future. But if we can be flexible in our approach and experiment in pilot programs, as we have in the Ninth, not kill the pilot program, but think in long range terms: what do you want at the end of the 21st century? I think this opens up the door to consider having fewer, larger circuits as the way of the future.

I might say, Senator Kyl, that we shouldn't limit the contribution small States make to our large circuit. We have many times when the view of a small–State judge, such as Idaho or Arizona, carries the day because it is a different perspective.

Senator KYL. I have no doubt that the court would be well served if it listened more closely to the views of those small–State judges. Nothing against my colleagues from California, of course.

Well, I was just going to ask one other question. I don't want to get into the procedure of the court, but I was kind of curious from your last comment whether you do this in secret ballot and whether there has ever been a vote of the judges in the circuit on the hypothetical question of splitting the circuit. Has that ever occurred?

Judge O'SCANNLAIN. Well, it has not occurred and I think there are a number of us in the court who feel that it would be a very desirable thing to happen at some point. It would be very, very useful, it seems to me.

Senator KYL. It would be interesting because contrary to those who sort of relegate the judges to a lesser role in the process of making this decision, frankly, while I am not willing to defer to the court, especially since undoubtedly there would be a divided opinion within the court, I think we have to really respect the experience that all of the judges on the court have in this matter.

You certainly know far better than we do about how you can best function. Now, that doesn't mean you have the last word, obviously, but frankly it would be very, very informative for us, I think, to get that kind of an expression of view.

Judge O'SCANNLAIN. We could either do it ourselves or perhaps through the Committee there might be a request that we have a secret ballot on precisely that issue, and I think it would be very interesting to see the results.

Judge WALLACE. The discussion just changed, I would point out, from a request to a secret ballot, and that has never been the view of our court that things are done in secret. We are a collegial court.

Judge SCHROEDER. We have never done that. We have never had a vote in secret. But, Senator, if I may just add that we are scheduled to discuss this issue of the circuit configuration at our next retreat which takes place in about ten days, and if we wish to have a further discussion at a court meeting and take a vote, we will.

Senator KYL. If a majority of the judges call for a secret ballot, you will do it, right?

Judge SCHROEDER. If they call for a secret ballot, we will do that, but we will vote on that openly.

Chairman SESSIONS. Thank you, Senator Kyl.

Well, it has been a very, very interesting and rewarding discussion, I think. People have put their opinions out. I guess I am inclined to be concerned that as the court grows, we are reaching just an intolerable level, unless you really do believe in a huge regional court.

As I recall the rule of 7, 7 percent growth means you double in 10 years. Isn't that right?

Judge TALLMAN. Yes.

Chairman SESSIONS. So at 13-percent growth, we are moving rapidly forward, it seems to me. I think a court this large becomes more like a legislative body and less like a court. You have less pressure to work with your colleagues and more of a willingness just to vote like you think that minute.

I am not aware of any State appellate court that has ever existed as large as the Ninth Circuit. In New York, they have grown from small to big and they have always kept a smaller supreme court and appellate court. Maybe they have intermediate court systems.

But I think about Alabama, Judge Wallace, on the question of how many circuits. I think most States have multiple circuits. We have 67 counties and I believe 45 or 55 circuits that feed to the supreme court or the intermediate courts for certain specialized cases. So I think that is the model America is used to. I appreciate your willingness to think outside the box. I am not there yet, but I believe we do better to stay with the system that brought us here which has given us the greatest legal system in the history of the world.

Thank you so much. We have got another panel.

Judge O'SCANNLAIN. Thank you, Mr. Chairman.

Judge SCHROEDER. Thank you, Mr. Chairman.

Chairman SESSIONS. Excellent testimony, and your written testimony was superior, also.

Judge TALLMAN. Thank you.

Judge SCHROEDER. Thank you.

Chairman SESSIONS. Judge Tjoflat and Judge Coughenour, thank you. I am sorry to keep you waiting so long. As you can see, the interest was high in this panel, and I guess the judges that are in the middle of the discussion have a lot to say and want to be heard on it.

Both of you have submitted superb written testimony. I am sorry we have lost some of our numbers. There are meetings that occur this time everyday by both of the Senate Leaders, Senator Daschle and Senator First, and that has caused us to lose some of our numbers.

I would like to hear from you, if you could allow your written testimony to be made part of the record, and just hear from you straight up how you see this issue and what we are going to do about it, if anything.

Judge Tjoflat, I know that you were a member of the old Fifth Circuit and were part of the change with Judge Wisdom, who also apparently voted to split the old Fifth into the Eleventh. I do remember that, and I don't think there is a single judge that would vote to merge them back. You served, also, as chief judge of that Eleventh Circuit Court of Appeals and had the administrative responsibility, as has Judge Schroeder.

STATEMENT OF HON. GERALD BARD TJOFLAT, JUDGE, U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, JACKSONVILLE, FLORIDA

Judge TJOFLAT. Thank you, Mr. Chairman. This is the second time the Committee has asked me to appear on the matter of what to do about the Ninth Circuit. The last hearing was, if I recollect, 1995, October, or 1996, which led to the creation of what became known as the White Commission.

I asked the general counsel of the Committee, why do you want me to appear at a hearing—that was back then—on what to do about the Ninth Circuit? And they said, well, you were in the old Fifth Circuit and you are what is left of the old Fifth Circuit who is still active.

Judge Godbold and I were elected by the old court as the spokesmen on the circuit split issue, the reason being that Chief Judge Brown was against the division of the circuit. So the court decided, well, we will have two other judges appear, one from Alabama and one from Florida, to testify before the House and the Senate. So I have been wrestling with this problem all this time.

Let me say at the beginning that I commend the Ninth Circuit for doing an incredible job in the face of an overwhelming caseload and problems that are beyond comprehension. I was chief judge of the Eleventh Circuit for 7 years and I was very active in the administration of the old Fifth, and we never saw anything comparable in terms of the onslaught of cases and personnel and the number of judges you have to deal with. So my hat is off to them. The finger is in the dike and they have done a damn good job—excuse me—of handling it.

Let me just share some experiences about what happened in the old Fifth Circuit after the Congress added 11 judges to the court. If you will recall, during the 1970's, judges weren't added to the federal courts until the Carter administration. In 1979, I guess it was, or early 1978, the quadrennial judgeship bill, which was long overdue, added 10 judges to the Ninth, which increased the court from 13 to 23, and 11 to the Fifth, which increased it from 15 to 26. At that time, we had more business in those six States than the Ninth, and that is the reason for that.

Leading up to the addition of the 11 judges, the Congress did that over our unanimous objection. I am talking about the unanimous objection of the Fifth Circuit Court of Appeals, and all the judges in the Fifth Circuit for that matter, the district judges as well.

Chairman SESSIONS. What did the judges object to?

Judge TJOFLAT. Objected to any more judges on the court of appeals.

I had gone on the Middle District of Florida court in 1970, and then went to the Fifth Circuit in 1975, and was familiar with the general attitude. The problem from the trial judge point of view was, what is the law of the circuit? We saw, as the Fifth Circuit grew from, say, 11 to 13 and 13 to 15, that the stability of the rule of law was impaired to some extent.

At any rate, when the quadrennial judgeship surveys that the Judicial Conference would have every 4 years—when they came to the Fifth Circuit, we said no more judges, and we had our heels dug in. And so came 1979 and the bill was introduced. As a matter of fact, we didn't even know it was coming. We knew a bill was coming to add judges, but not 11 to our court. A Senator from Arkansas introduced the bill, is my recollection.

But at any rate, we acquired ten new judges and we never got the eleventh until late in the fall of 1979. We acquired ten by the time September rolled around. Maybe we had 23. The policy on the Fifth was that we sat en banc in September, February and June every year, and we had a court meeting each of those times.

I can't overemphasize the importance of an en banc proceeding. It is absolutely essential to the health of the Nation that the rule of law be stable, predictable and reliable so that citizens can act in accordance therewith. When the law is this way today and maybe that way tomorrow, people lose their rights. They lose property rights, they lose their civil liberties. It is a bad scene, and I think my colleagues on the Ninth agree with that a hundred percent. Every judge does.

So we met in September 1979. I think we had 23 sitting around the table, the old 15 and 8 new ones, and we decided not to rehear any cases. The whole agenda was, what do we do with this mob? We said that in a joking sort of way. So the newer judges who had just been appointed in June, July, August and September said, well, we think this will work. Well, of course, they had no experience, but okay.

So the idea of what to do with the court was tabled for 1 year. So we met in February. Well, the en banc calendar in February had the September cases and the February cases. I don't recall how many, but by that time drugs were a big, huge problem and we had cases in the Fifth Circuit where the Coast Guard wanted to board ships on the high seas. Do you need a search warrant? Do you need reasonable suspicion? Can the Coast Guard do it? Will international law allow them to do it? Can you do it in the contiguous zone? Can you do it in territorial waters? What if the ship isn't flying a flag?

I am running out of time.

Chairman SESSIONS. Well, you are making a good story. That is a good history. Maybe you can wrap it up.

Judge TJOFLAT. I will wrap it up.

Chairman SESSIONS. This is not like the Eleventh Circuit, however, Judge. When the light came on, I knew I had to hush, especially when you were presiding.

Judge TJOFLAT. Well, I will try to wrap it up this way. The statute that gives the Ninth Circuit the right to have a mini en banc gave the old Fifth, not the new Fifth, the old Fifth, the same right. So after we sat in February, 1980—it is a painful proposition to have 26 judges trying to decide a case in conference, I tell you—we decided whether to have mini en bancs after the first experience. Maybe it was even after the second one, in June. This isn't working with this many people sitting around the table.

So the discussion went this way: Well, we will have a mini en banc of 11, but suppose 6 people out of 11 carry the day and we have got 20 people on the court who disagree. Are we going to re-en banc the case? If we do, what is the public perception? This is the dialogue.

Well, the public perception is, and to the legal profession, we will just keep re-en bancing cases until we get a majority view out of the mini en banc court. So that would make the mini en banc court a dry run, in effect. So we decided, well, if we do the mini en banc, we are going to have a blood oath that we will not re-en banc cases because we don't want to create that perception.

We studied that for a good while and decided against it, so we sat the full crowd. Sitting in an en banc court of that size, I tell you, is not only an emotionally draining exercise. It takes an enormous amount of work. And I will finish with this: There is a group dynamic. You have a room full of 26 people trying to reach principle, not compromise, principle, and some people are going to talk. The larger the group, they are silenced. You take somebody who won't talk, won't speak; they "pass" when it comes to them in an en banc conference of 26. You put that same individual on a three-judge panel and you can't keep them quiet.

I have sat on en banc courts from 7 to 18, then skipped all the way to 26. The reason for the lower numbers was because after we split the circuit, which was easy to do because the western States had 51 percent of the business and the eastern States 49, so we didn't have the California problem—but I sat on en banc courts in the Eleventh Circuit of 7, 8, 9, 10, 11 and 12.

We have more business in the Eleventh Circuit now than the Fifth Circuit had when we split. With the exception of one judge voting in the last 23 years, everybody has voted against adding one more judge to the court, for the very reason that we are concerned about the stability of the rule of law.

Chairman SESSIONS. I think that is a dramatic demonstration of your belief in tangible terms that collegiality and coherence of the circuit is endangered if you actually say you don't want more judges to help you do the growing caseload.

The Eleventh has the highest caseload per judge in the country, or close to that. Isn't that right?

Judge TJOFLAT. Something like that.

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

Chairman SESSIONS. Judge Coughenour.

STATEMENT OF HON. JOHN C. COUGHENOUR, CHIEF JUDGE, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SEATTLE, WASHINGTON

Judge COUGHENOUR. Thank you, Mr. Chairman. I welcome the opportunity to express my views, and I think it is appropriate that I be the last to speak because I think the value of the views of a country boy from the wilds of Kansas is probably appropriately positioned at the end.

Let me say, by the way, in case you are not aware of it, at the new building in Seattle we are sharing courtrooms. We are the first in the country to do that.

Chairman SESSIONS. I am impressed. Every magistrate does not have their own courtroom?

Judge COUGHENOUR. Every magistrate does not have their own courtroom. Every judge does not have their own courtroom.

Chairman SESSIONS. I am impressed.

Judge COUGHENOUR. We have two courtrooms for every three judges.

Chairman SESSIONS. That makes sense, and it takes some scheduling, but most of the time I am sure that works very well. Do you think that works well?

Judge COUGHENOUR. I think it is going to work just fine. Something that hasn't been said here today which I think bears scrutiny is that there is a phenomenon afoot in this country recognized by all the chief judges at the most recent national chief judges' conferences that we are trying fewer cases across the country than was true. And in Seattle and in a number of other districts, we are trying less than one-half the number of cases than we were just a few years ago. So these concerns about this constant growth may be premature.

In addition, I think it needs to be emphasized that the tremendous growth in the Ninth Circuit filings is driven by and large by immigration cases. As that glut works its way through the court, those numbers are going to be back down at a much more reasonable level.

On the subject of your question, let me state quite bluntly my views on this subject have changed. When I went on the court 23 years ago, I was put there largely by the efforts of Senator Slade Gorton, who was a close personal friend then and is still a close personal friend. I must say that I could not say the same thing about Ronald Reagan. I had never met the man, but Senator Gorton was the one who put me where I am.

Senator Gorton was out front on the issue of splitting the circuit, and largely out of loyalty to him I deferred to his judgment on the question. When Senator Gorton retired from the Senate, my objectivity on the issue was enhanced. And after a couple of decades where the rubber meets the road, as opposed to some of my colleagues here, I have to tell you that I don't see these problems from down below where I am.

I don't have any difficulty following the law of the Ninth Circuit. When I get to work each morning, I make my coffee. I don't have a secretary, by the way, to save money. I make my coffee and then I go sit down at my computer and I look at the most recent summary of Ninth Circuit decisions, and it takes me about 15 minutes

each morning. We have a very effective way, by technology, of alerting all of our judges in the circuit immediately what the Ninth Circuit is doing and we can keep abreast of it very easily. It is not a problem at all.

The problem that is perceived by many that these decisions are being made down in California that affect us up in the Northwest really is a problem of perception and a lack of knowledge of what the facts are.

For example, probably the most controversial decision that the people of the Northwest had difficulty accepting was the so-called spotted owl decision, a ruling by a dear friend of mine who is now gone, Bill Dwyer, from Seattle. We have another very controversial decision in the Northwest right now regarding the use of pesticides and herbicides adjacent to salmon-bearing streams. You are looking at the judge who has to be careful where his name is spoken out loud in the Northwest right now because of that decision. I am not from California. That is a northwesterner making a decision about northwestern law.

The perception that we have all these problems in the Northwest because we have these decisions coming out of the Ninth Circuit that is dominated by California—there is a siren song that attracts one to that conclusion, but upon examination it fails.

The same is true for the attitude that large must be bad. Again, there is a siren song that attracts one to that conclusion, but it just doesn't bear scrutiny. For those of us on the firing line applying the law everyday, who have perhaps more responsibility than anyone else in this room to keep track of what the law is in the Ninth Circuit, it is not a problem. I do it everyday. I don't have any difficulty keeping up with the Ninth. In fact, I welcome the number of Ninth Circuit decisions we have because very often when I am struggling with a problem, I can find a Ninth Circuit case right on point and it makes my job a lot easier.

So I can give Judge Tjoflat my one minutes and 18 seconds, if he wishes it.

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

Chairman SESSIONS. Judge Coughenour, statistically speaking, however, with the number of judges as they are configured and as they are likely to be configured in the future, the odds are pretty high that a salmon case in Washington is going to be decided by California judges. Isn't that right?

Judge COUGHENOUR. Yes, and I think the odds are very high that I will be affirmed.

Judge TJOFLAT. That is because he is such an able judge.

Chairman SESSIONS. Well, I have got to tell you I am not a speed reader, but people used to read the opinions, and now we are reading summaries and I am not sure a summary can really handle an opinion. You know, you can't do everything, but if your circuit is not too large and the cases are not too many, if you read that, it is a thorough education and it keeps you up.

I remember when I was a prosecutor, I tried to read the Federal criminal cases in the circuit and the Supreme Court. I just got down to that, which was hard enough for me. Yes, a lot of times

you just skim the head notes and that kind of thing, and you just have to.

Judge Tjoflat, would you comment on Harry T. Edwards, a D.C. Circuit Judge's comments that I quoted earlier? "In the end, collegiality mitigates against judges' ideological preferences and enables us to find common ground and reach better decisions. In other words, the more collegial the court, the more likely it is that the cases that come before it will be determined on their legal merits."

Do you think there is a sense in which judges in a smaller circuit feel more of a responsibility to come together and speak coherently than in a 28-judge circuit?

Judge TJOFLAT. I think all judges would like to have a good intellectual exchange and relationship with their colleagues. In the old Fifth Circuit days before we split, we figured out how long it would take for everybody on the court to sit with everybody else, and what has already been expressed was our situation.

I don't think there is any question at all that when you are sitting on panels with the same judge three or four times a year and you are handling emergency matters administratively—stays of execution in death penalty cases, for example, or stays of deportation or stays of district court decisions of great moment, stays in class actions, all that sort of thing—the ability to mind-read your colleague is extremely important.

You don't even call for a law clerk or somebody. You know who is on the panel with you and you know exactly how that individual thinks and you know what they are interested in or what may concern them, and so you get on a quick conference call or use the e-mail or just a fax. If we merged the new Fifth and the Eleventh together, it would take a good deal of time to get to that point, if we could at all.

Judge COUGHENOUR. Senator, could I make a comment about that?

Chairman SESSIONS. Yes, please.

Judge COUGHENOUR. When I joined my old law firm, I was number 38. By the time I left the firm, it had almost 200 lawyers and there was a point that it passed through where collegiality started becoming an issue. But it wasn't at 38 or 28; it was at more like 100 to 150 lawyers where collegiality became an issue.

I have always understood that the most collegial institution in the world is the U.S. Senate, and there are 100 members of the United States Senate.

Chairman SESSIONS. You have been ill-informed.

[Laughter.]

Chairman SESSIONS. And I won't even make a comment on the Judiciary Committee.

[Laughter.]

Chairman SESSIONS. Well, you can work together. I know the old Fifth had a series of tough civil rights cases in the early days, and many times you were able to get virtually unanimous support there that sent a signal. On the Richard Nixon case and other cases, courts have gotten together and they have sat down in a room and they have said we need to figure out what we can agree on and render an opinion that we can all join in on.

Is that a factor, Judge Tjoflat?

Judge TJOFLAT. Well, in the old Fifth Circuit days, we had school desegregation cases in every village and town and city in the South, and there were unanimous decisions just like in *Brown* v. *Board of Education* in the Supreme Court, in 1954 and 1955, that carried forward into the 1970's.

Chairman SESSIONS. Judge Coughenour, a chief judge who has supported some form of restructuring, former Chief Judge William Browning, in Arizona, said this. He served on the White Commission and he said, "I think the people of the Ninth Circuit today are receiving a rationed form of justice," close quote, and that part of the reason the Ninth Circuit judges resist dividing the circuit is that lawyers naturally have, quote, "an institutional bias against change."

How would you respond to that?

Judge COUGHENOUR. Well, I think I would never disagree with my dear friend, Bill Browning. I think lawyers and judges tend to be very conservative when it comes to change. I must say that I have grown very fond of the Ninth Circuit and I am enormously proud of the way it has been administered by our chief judges and our current chief judge. I frankly believe that we have the best chief judge in the United States right now, and that we have every reason to be, if you will pardon the term, a little defensive when it comes to the scrutiny that is focused on us from time to time.

We are on the left coast and people do think a little differently out there, and as a consequence the rest of the country sometimes may have a little difficulty understanding the way we think. But there is a West Coast mentality and there is something to be said for a West Coast court that ties together these many diverse States and people. I frankly am very proud to be a member of that court and I will do what I can to try to help the Senate understand why we should remain the same.

Chairman SESSIONS. Well, thank you, Judge.

Do any of you have any further comments?

Let me just say that even judges whose judicial philosophy I don't share that I may describe as an activist judge—you have some extraordinarily capable judges on the court, intellectually superior, and they make great opinions, even if I would disagree with them.

I do think Senator Biden is basically correct, however, that a case tried in Idaho ought to have the same ruling that comes in Los Angeles or New York or Miami, for that matter. We have got one law, one Constitution, one set of statutes, and fundamentally they have to be in sync. I can imagine it is more difficult to control panels when you have them all over the place, and just mathematically the odds that you get a weird panel with two of the three maybe having a more extreme view of the law than would otherwise be the case is a factor.

Of course, most panels don't get overruled. Most circuit cases are affirmed. Fifty-plus million people are bound by the decisions of the Ninth Circuit, and if you are looking for left coast law instead of Supreme Court law, then they are stuck because the Supreme Court can't review them all.

But, anyway, you both have made good cases. We are going to study this hard. My commitment to you is that if we do move forward with something, my goal will be to create courts that make sense that are not driven by ideology, because I think there is no way people could affect ideology anyway, really, in the way this court exists and the way it will be divided. So let's just do it on merit.

If there is nothing further, we will adjourn the hearing. I will note that we will keep the record open for two weeks for any further questions or information that the members might like to provide.

If there is nothing else, we are adjourned.

[Whereupon, at 1:07 p.m., the Subcommittee was adjourned.]

[Question and answer and submissions for the record follow.]

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

QUESTIONS AND ANSWERS

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

May 14, 2004

Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

Dear Senator Feinstein:

I write in response to your request of April 8, 2004, for cost estimates for the implementation of S. 2278, H.R. 2723, and S. 562 – legislation that proposes dividing the Ninth Circuit into either two or three circuits. Enclosed is a summary table detailing the one-time start-up and recurring costs for each of the three bills. While each bill would impose significant costs, S. 2278 would require the greatest new expenditures due to the need to construct a new courthouse.

The judiciary is not in a position to absorb any of the additional costs associated with this proposed legislation. Chief Judge Schroeder has shared with me her letter of April 19, 2004, to you explaining in some detail how the financial distress caused by inadequate appropriations is affecting the operation of courts in the Ninth Circuit. I assure you that the forced staff furloughs, staff reductions, and cutbacks in court operations and public service she describes are occurring in all federal courts and not only within the Ninth Circuit. As the judge points out, future funding shortfalls, such as the hard freeze in discretionary spending proposed by the Administration for FY 2005, would cripple the federal judiciary for years to come. Therefore, in the event one of these bills is enacted, the judiciary would require the additional appropriated funds estimated in this letter.

The cost estimates were developed by Administrative Office staff with input from the Circuit Executive for the Ninth Circuit and the General Services Administration. The estimates have been approved by Chief Judge Mary Schroeder of the Ninth Circuit. The estimates are based upon assumptions and staffing models agreed upon by the

Administrative Office and the Circuit Executive's Office for the Ninth Circuit and are stated in current costs. Should the underlying assumptions prove not to be exact, the costs would need to be revised accordingly.

It should be noted that a substantial portion of the costs of each of these proposals is related to the creation of new judgeships, based on the numbers and duty station locations specified by each bill. In turn, the associated increases in court support staff levels reflect the proposed new judgeships and were calculated using our budget formulation standards. If the number of new judgeships changes or if court support staff projections were based on the lower funding levels currently imposed throughout the judiciary, the associated costs would need to be adjusted accordingly. I also note that the Judicial Conference of the United States included seven new judgeships for the Ninth Circuit (five permanent and two temporary) in its most recent judgeship recommendations submission to Congress.

If enacted, each of these bills would result in extensive space alterations to current court facilities and the acquisition of additional leased space. We expect that any decrease in current Ninth Circuit court personnel levels would be addressed through earlyouts, buyouts and involuntary separations (RIFs), or relocation payments if staff volunteer to relocate to the new Twelfth or the new Twelfth and Thirteenth Circuits' headquarters offices.

Following is a summary of the analysis of the costs associated with each bill:

- **S. 2278, "Ninth Circuit Judgeship and Reorganization Act of 2004"**
  This legislation proposes dividing the Ninth Circuit into three circuits and adding seven new circuit judgeships to what would be the "new" Ninth Circuit. Establishing new Twelfth and Thirteenth Circuits would likely require one-time start-up funding ranging from $16.7 million to $18.9 million for space alterations, information technology and telecommunications infrastructure, furniture and furnishings, and law books. In addition, a new courthouse would have to be built in either Phoenix or Las Vegas to house the proposed Twelfth Circuit. The cost of a new courthouse in Las Vegas is estimated to be $114.7 million. The cost of a new courthouse in Phoenix is estimated to be $84.4 million. Therefore, the total start-up costs would, depending on the site of the new courthouse, be either $131.3 million or $101.1 million.

  The judiciary would also require an additional $21.7 million annually in recurring personnel and operating expenses. This legislation would likely not necessitate the construction of a new courthouse in the proposed Thirteenth Circuit, but would require renovation of an existing courthouse.

- **H.R. 2723, "Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003"**
  This bill proposes dividing the Ninth Circuit into two circuits and adding seven new circuit judgeships in total for the "new" Ninth Circuit and a new Twelfth Circuit. Establishing a new Twelfth Circuit would require one-time start-up funding ranging from $11.6 million to $13.9 million for space alterations, information technology and telecommunications infrastructure, furniture and furnishings, and law books. Also, $13.8 million annually in recurring personnel and operating expenses would be required. This legislation would likely not necessitate the construction of a new courthouse in the proposed Twelfth Circuit, but would require renovation of existing courthouses.

- **S. 562, "Ninth Circuit Court of Appeals Reorganization Act of 2003"**
  This bill proposes dividing the Ninth Circuit into two circuits and adding ten new circuit judgeships in total for the "new" Ninth Circuit and a new Twelfth Circuit. Establishing a new Twelfth Circuit would likely require one-time start-up funding ranging from $14.1 million to $16.1 million for space alterations, information technology and telecommunications infrastructure, furniture and furnishings, and law books. Also, $16.6 million annually in recurring personnel and operating expenses would be required. This legislation would likely not necessitate the construction of a new courthouse in the proposed Twelfth Circuit, but would require renovation of existing courthouses.

If you have any questions or need further information please feel free to contact [redacted], Assistant Director for Legislative Affairs, at 202-[redacted]-1700.

Sincerely,

Leonidas Ralph Mecham
Director

Enclosure

cc: Honorable Orrin Hatch, Chair, Senate Judiciary Committee
Honorable Patrick Leahy, Ranking Democrat, Senate Judiciary Committee
Honorable Jeff Sessions, Chair, Subcommittee on Administrative Oversight and the Courts
Honorable Charles E. Schumer, Ranking Democrat, Subcommittee on Administrative Oversight and the Courts
Honorable Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit
Greg Walters, Circuit Executive, U.S. Court of Appeals for the Ninth Circuit

ATTACHMENT

COST ESTIMATE SUMMARIES FOR NINTH CIRCUIT SPLIT LEGISLATION (S. 2278, H.R. 2723, S. 562)

Note: Cost estimates include the creation of new judgeships, based on the numbers and duty station locations specified by each bill, and court support staff levels were calculated using current budget formulation standards.

S. 2278 COST SUMMARY Adds Twelfth and Thirteenth Circuits +7 Circuit Judgeships	ANNUAL RECURRING COSTS	START-UP COSTS
Judges and Chambers Staff Compensation	$ 4,244,083	$ -
Court Support Staff Compensation	$ 6,981,789	$ 3,197,500
Operating Expenses	$ 1,432,378	$ 2,305,182
Information Technology and Telecommunications	$ 253,204	$ 5,220,885
Space and Facilities[1,2]	$ 8,363,197	$ 120,442,629
Court Security (Courtroom and Chambers)	$ 475,258	$ 173,677
TOTAL ADDITIONAL COSTS	**$ 21,749,908**	**$ 131,339,874**

[1] H.R. 2278 would necessitate the construction of a new courthouse in either Las Vegas or Phoenix. The start-up costs in this line assumes the new courthouse will be located in Las Vegas at an estimated cost of $114.7 million. If the courthouse is instead built in Phoenix, the construction costs are estimated at $84.4 million.

H.R. 2723 COST SUMMARY Adds Twelfth Circuit +7 Circuit Judgeships	ANNUAL RECURRING COSTS	START-UP COSTS
Judges and Chambers Staff Compensation	$ 4,244,083	$ -
Court Support Staff Compensation	$ 3,785,467	$ 1,692,500
Operating Expenses	$ 1,176,007	$ [illegible]
Information Technology and Telecommunications	$ 127,952	$ 2,972,274
Space and Facilities[2]	$ 4,032,119	$ 5,161,129
Court Security (Courtroom and Chambers)	$ 475,258	$ 173,677
TOTAL ADDITIONAL COSTS	**$ 13,841,782**	**$ 11,640,837**

S. 562 COST SUMMARY Adds Twelfth Circuit +10 Circuit Judgeships	ANNUAL RECURRING COSTS	START-UP COSTS
Judges and Chambers Staff Compensation	$ 6,062,976	$ -
Court Support Staff Compensation	$ 3,086,902	$ 2,832,500
Operating Expenses	$ 1,442,652	$ 2,079,829
Information Technology and Telecommunications	$ 127,952	$ 3,674,028
Space and Facilities[3]	$ 5,154,584	$ 5,245,000
Court Security (Courtroom and Chambers)	$ 678,940	$ 248,110
TOTAL ADDITIONAL COSTS	**$ 16,554,006**	**$ 14,079,466**

[2] The General Services Administration has provided two different cost estimates for the necessary renovations of the Nakamura courthouse as required by the bills. The cost estimates for the start-up costs on these lines reflect the lowest estimate.

SUBMISSIONS FOR THE RECORD

CALIFORNIA ACADEMY OF APPELLATE LAWYERS

February 24, 2004

Senator Dianne Feinstein
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Feinstein:

The California Academy of Appellate Lawyers, an organization of approximately 100 seasoned California attorneys practicing in state and federal appellate courts, vigorously opposes efforts in the present Congress to divide the Ninth Judicial Circuit.

There are two currently active bills to accomplish a division – S.B. 562, which would keep only California and Nevada in the Ninth Circuit and move all the other states and territories from the Ninth into a new Twelfth Circuit; and H.R. 2723, which would keep Arizona along with California and Nevada in the Ninth Circuit and create a new Twelfth Circuit for the remainder. The Academy makes no distinction among these bills, all of which are equally ill-advised – the differences between them are organizational (dealing with the inclusion or exclusion of Arizona in the proposed new Twelfth Circuit) and they should all be rejected.

Splitting the Ninth Circuit is a bad idea for many reasons, the most important of which is that the Ninth Circuit is doing very well as presently structured, except for being understaffed because of vacancies on the bench. By many statistical measures the Ninth is one of the more successful of the judicial circuits based upon absolute number of dispositions, ratio of dispositions to judges, and time from filing (or from submission) to disposition. It has a distinguished reputation for institutional adaptability and innovative response to changing circumstances. And it provides a unified body of law for the vital Pacific Rim economic area which would be impossible to duplicate under the proposed reorganization.

Proposals to split the Ninth Circuit have been put forward every year for more than a decade. Every year they are basically the same, and recycle the same tired arguments. Of these the most often repeated is that the Circuit is too big to operate effectively. This is quite untrue, as has been shown statistically year after year. Such difficulties of scale as there are would be

solved by filling the existing vacancies, and by adopting S.B. 920, the Federal Judgeship Act of 2003, which incorporates the Judicial Conference's requests for additional seats on all circuits.

In fact, the basic impulse behind all these bills is not improved judicial efficiency but an attempt by lawmakers (largely but not entirely from the Northwest) to change rulings on such issues as land use, Indian rights, the environment and constitutional law (currently, *e.g.*, the pledge of allegiance decision) with which they are dissatisfied on policy grounds. By substituting a new, more conservative and tightly regional circuit they hope to effect changes in the law which they have insufficient support to make through legislative channels. This is an improper and dangerous interference with the judiciary for political purposes and should be resisted as a matter of principle. Indeed the White Commission observed:

> "There is one principle that we regard as undebatable: It is wrong to realign circuits (or not to realign them) and to restructure courts (or to 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."

Creating a new circuit would impose a need to duplicate staff, programs and facilities, including building an enormously expensive new courthouse, in order to accommodate a new circuit with 18% of the caseload of the existing Ninth Circuit. Hopes of reducing this completely unnecessary new expense by *ad hoc* cooperation between the chief judges of the newly constituted circuits are, as Chief Judge Schroeder says, "illusory."

The large majority of judges of the Ninth Circuit Court of Appeals, and the bench and bar of the Ninth Circuit generally, as well as the California delegation to the House of Representatives, have opposed past attempts to split the circuit "justified" on grounds no more persuasive than those offered in support of the current bills. Indeed claims that its size makes the Ninth Circuit bench "non-collegial" have been denied by the judges themselves. These are sufficient reasons to believe that the Ninth Circuit is working well as it is, and a sufficient ground for not forcing this change on an unwilling circuit.

Accordingly, the California Academy of Appellate Lawyers urges all members of the Senate Judiciary Committee take a position against S.B. 562 and, indeed, against any proposal to "reorganize" the Ninth Judicial Circuit. The Academy and its members stand ready to assist in opposing these bills in any useful way.

Yours truly,

Jerome I. Braun
for President James Martin
California Academy of Appellate Lawyers

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CALIFORNIA ACADEMY OF APPELLATE LAWYERS

April 19, 2004

Via Facsimile 202-228-2258

Ms. Anjali Chaturvedi
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Ms. Chaturvedi:

This is a follow-on to our discussion this morning about supplementing the California Academy of Appellate Lawyers' letter of February 24, 2004 to Senator Feinstein stating the Academy's opposition to S. 2278.

The February 24th letter only spoke to H. 2723 and S. 562 but as we discussed this morning the Academy's reasons for opposing those bills apply *a fortiori* to S. 2278. As stated in the April 12, 2004 letter faxed to you:

"Although those letters [attached] were written with only those two bills in mind the arguments contained therein are equally applicable to S. 2278. Indeed, they are even more compelling in terms of a "cost-benefit" analysis regarding the additional cost and expense for establishing two new circuits. Specific data respecting an estimate of those costs will, I'm certain, be forthcoming from the Court itself before the record is closed."

Please call me if either I or the California Academy of Appellate Lawyers may be of further assistance.

Cordially,

Jerome I. Braun for James C. Martin
President of the California Academy
of Appellate Lawyers

JIB:sc

cc: Honorable Mary M. Schroeder
Honorable Margaret M. McKeown
Cathy A. Catterson
James C. Martin
Robin Meadow

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CPDA

California Public Defenders Association
3273 Ramos Circle
Sacramento, CA 95827
Phone: (916) 362-1686
Fax: (916) 362-3346
e-mail: cpda@cpda.org

A Statewide Association of Public Defenders and Criminal Defense Counsel

April 20, 2004

Via Facsimile (202) 228-2258
& U.S. Mail

Honorable Dianne Feinstein:
United States Senate
331 Hart Senate Building
Washington, D.C. 20510

RE: Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2004 (S.2278), S.562, H.R. 2723

Dear Senator Feinstein:

The California Public Defender's Association (CPDA), an organization comprised of more than 3,000 criminal defense attorneys, strongly opposes S.2278 et al: proposals to split the Ninth Circuit. CPDA is convinced that no truly authentic rational basis exists to support tearing asunder the Ninth Circuit.

Conversely, the entirely unnecessary and avoidable costs which such a gambit would entail constitute sufficient justification to reject each and all of the measures.

Dividing the Ninth Circuit would squander important advantages that inhere in the Circuit. The Ninth Circuit benefits from significant economies of scale. A divided circuit would be plagued by redundant functions and employees.

Diminishing the Ninth Circuit by half as proposed by S.562 and H.R. 2723 would impose otherwise avoidable general costs estimated at $100 million, plus $10 million per year in added administrative costs. Moreover, the three-way split proposed by S.2278 would further exacerbate such unnecessary administrative costs.

The Federal Government is struggling with unprecedented deficits. Hence our efforts ought to be focused on reducing our costs and preserving our existing advantages.

The Ninth Circuit has consistently operated at the vanguard of innovative technological and administrative development. Historically, the Ninth Circuit has well served its constituents for the past 110 years. Rending this institution will yield only a degradation of services and a significant increase in costs.

As judicial caseloads and workloads (two distinct concepts) increase across America, the Ninth Circuit continues to illuminate the proper path as it maintains an important uniform approach to the development of Federal Jurisprudence. Fragmenting such an extraordinarily well functioning major portion of the nation's judicial branch is a terrible idea.

Should you or your staff require any additional information, I would be pleased to respond

With High Regards,

MICHAEL P. JUDGE
Chairperson
CPDA Legislative Committee

MPJ: fn

cc: The Honorable Howard L. Berman
Ranking Member, Subcommittee on Courts, the Internet,
and Intellectual Property Committee on the Judiciary
United States House of Representatives

The Honorable Barbara Boxer, United States Senate

The Honorable John Conyers, Jr.
Ranking Democratic Members
Committee on the Judiciary
United States House of Representatives

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate

The Honorable Patrick J. Leahy
Ranking Democratic Member
Committee on the Judiciary
United States Senate

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives

The Honorable Lamar S. Smith
Chairman, Subcommittee on Courts and Internet,
and Intellectual Property Committee on the Judiciary
United States House of Representatives

United States District Court
District of Montana

CHAMBERS OF
RICHARD F. CEBULL
U.S. DISTRICT JUDGE
JAMES F. BATTIN FEDERAL BUILDING
316 N. 26TH ST., ROOM 5428
BILLINGS, MONTANA 59101

PHONE (406) 247-7766
FAX (406) 247-7023

April 13, 2004

Senator Jeff Sessions
Chairman, Subcommittee on
Administrative Oversight and the Courts
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Honorable Jeff Sessions:

I am a U.S. District Judge for the District of Montana sitting in Billings, Montana. I was appointed by President Bush on July 26, 2001.

I am in favor of splitting the Ninth Circuit Court of Appeals, and I agree with the testimony of Judge Tallman and Judge O'Scannlain delivered recently before your Subcommittee. I also agree that it should not be a question of "if" the Circuit will be split, but "how" such a split will be accomplished. Personally, I am of the opinion that a Twelfth Circuit be created to contain all states except California, Nevada and Arizona, which would remain in and comprise the Ninth Circuit.

Thank you for considering my position on this important issue.

Sincerely Yours,

Richard F. Cebull
U. S. District Judge

RFC/ea

Statement of
The Honorable Mike Crapo
United States Senator
Idaho

April 7, 2004

PRINTABLE VERSION

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS
"Improving the Administration of Justice: A Proposal to Split the Ninth Circuit Court"

Statement by Senator Mike Crapo, Idaho

MR. CRAPO: Mr. Chairman, thank you for this opportunity to address the Committee on this important issue. I would like to submit my remarks for the record.

The Ninth Circuit Court of Appeals, as it now stands, is problematic in a number of ways, and because of this, our justice system itself suffers. Those who have suffered true grievances and are working through the appeals process to have the fair review allowed by our laws, are detrimentally affected in a number of ways. The caseload of the Ninth Circuit Court, almost one-fifth of the entire federal appellate caseload, means significant delays for those awaiting action by the court. In fact, in 2002, the Ninth Circuit Court had more cases pending over one year than the rest of the entire federal appellate judiciary combined. These delays cause both financial and emotional hardship for litigants and their attorneys. In some instances, these delays contribute to environmental degradation as well.

The population served by the Ninth Circuit Court encompasses 54 and half million people, across southwestern states, western states, and the non-continental U.S. states and territories. California alone has more people than are served by any other circuit court. Thus, the Ninth Circuit Court three judge panel issues decisions that bind one fifth of all Americans.

Americans depend upon our federal courts to clearly and consistently define "rule of law" under the United States Constitution, and they depend upon the impartiality and fairness of interpretation that comes from a true majority decision. These are two matters of grave concern to me with regard to the current make-up and administrative procedure of the Ninth Circuit Court of Appeals.

Another issue of far greater concern is that of consistency in Constitutional interpretation and precedence. I have very real doubts about the ability of the Ninth Circuit Court to uphold coherence and consistency in its judgments. Even one of the judges admitted that the sheer volume of judgments issued by the

Court exacts a "toll on coherence and consistency, predictability and accountability." (Judge Pamela Rymer, 1999). This inconsistency leads to increased likelihood of lawsuits, increased litigation costs, and an impression of arbitrary justice.

Coherency and consistency problems with judgments issued by the Ninth Circuit Court is evident in the percentage of judgments that the Supreme Court has overturned, especially in the last twelve years. From 1992 to 2003, the lowest percentage of overturned appeals was 68 percent. The highest was a telling 95 percent. The average percentage of Ninth Circuit Court decisions overturned by the Supreme Court during this time was 73.5 percent as compared to an average of 61 percent by the all the other circuit courts of appeal combined.

The current size of the Ninth Circuit Court of Appeals adversely impacts collegiality among the judges. When there are 3,000 minimum possible combinations of panels, judges do not have the opportunity to, in the words of Judge Rymer, "get a true understanding of their colleagues' jurisprudence". The size has also necessitated a number of administrative procedures that are unprecedented in the other Courts of Appeals. Of particular concern is the "en banc procedure," in which when a three judge decision is selected for an en banc review by a majority of the Ninth Circuit judges, only eleven judges are appointed to the review panel. Obviously, this means that fewer than one-fourth of the entire court (six judges) can bind the entire circuit with a majority en banc opinion. This cannot guarantee a judgment rendered by the majority.

A majority of Supreme Court justices favor a split of the Ninth Circuit Court, and Judge Diarmuid F. O'Scannlain of the Ninth Circuit testified that when courts grow too large, it is necessary to divide them to make them more manageable. He noted that the Ninth Circuit has virtually the same boundaries as it did in 1855.

The new divisions outlined in Senator Ensign's bill, which splits ninth circuit into three administrative units, will address the glaring concerns brought to light in this hearing. The additional judgeships allotted to the Ninth Circuit Court in this legislation will address the still-excessive caseload which the new Ninth Circuit would bear. Additional judgeships for the new Ninth Circuit in the bill were recommended by the nonpartisan Judicial Conference of the United States. The addition of a 12th and 13th Circuit Courts of Appeal would allow the federal judiciary to handle the projected population growth and subsequent caseload increase over which they would hold jurisdiction.

The time to make substantive and necessary changes to the Ninth Circuit Court of Appeals and to add two more circuits is long overdue. Residents of the western states, Hawaii, Alaska, and Guam will all benefit from Senator Ensign's proposed legislation, and I fully support his efforts.

Subcommittee on Administrative Oversight and the Courts

Testimony of Chief Judge John C. Coughenour

Western District of Washington

Mr. Chairman, and members of the Subommittee. My name is John C. Coughenour and I am the Chief District Judge of the U.S. District Court for the Western District of Washington, one of the trial courts of the Ninth Circuit. I also am the current chair of the Ninth Circuit's Conference of Chief District Judges, which consists of the chief district judges of all of the district courts in the circuit. And, as the conference chair, I am a member of the Judicial Council of the Ninth Circuit, the circuit's chief governing body.

I come before you today to state my strong opposition to splitting the Ninth Circuit, whether through this particular bill or others previously proposed. I believe the Ninth Circuit is functioning exceedingly well and that splitting it will not improve and may actually deter from the efficient administration of our federal courts. Many of my fellow judges, particularly chief district judges who have administrative responsibilities, share this view. In fact, in my seven years as chief district judge, I have yet to have a conversation with a fellow chief district judge who spoke in favor of a split.

The Ninth Circuit is widely inclusive in its governance, resulting in a strong and cohesive

organization. I know of no other circuit in which district judges, along with magistrate judges, bankruptcy judges, clerks of court, and the chiefs of the pretrial and probation offices, have so much input in the governance of their circuit. Our current chief judge, Mary M. Schroeder, further promotes this approach by attending the biannual meetings of our chief district judges, chief bankruptcy judges and magistrate judges. She actively participates in these meetings and listens to what we have to say. She often suggests that we bring new policy recommendations to the circuit's judicial council for consideration of adoption by the whole circuit.

Chief Judge Schroeder has continued the Ninth Circuit's proud tradition of innovation in judicial administration. She has formed committees to address the myriad of problems facing the judiciary today, such as improving jury trials, controlling the costs of death penalty cases, questions of space and security, judicial wellness, and alternate dispute resolution, to name but a few. I was privileged to have chaired the Ninth Circuit Gender Bias Task Force some years ago, which undertook a comprehensive study of gender bias in the courts. In virtually all of the areas just mentioned, I take enormous pride in the fact that the Ninth Circuit has led the way for the federal judiciary.

It is important for you to understand that the Ninth Circuit is not just a theoretical abstraction or a series of administrative laws and rules, but a real entity. Even though we have more judges, more cases, the largest geographic area, and the most people, we have a collegiality that I don't believe exists anywhere else in the federal judiciary.

The committees and our circuit executive provide our judges with a regular flow of information

that assists us with adjudicating our cases and maintaining consistency in the application of law. This information, when combined with ever-advancing technology, permits us to use teleconferencing, videoconferencing, and email to have virtually instantaneous communication with our colleagues whether they are in Tacoma, Washington or Guam. Technology will be increasingly critical to the courts as our caseloads grow larger. Federal courts have limited jurisdiction, but it continues to expand with each year.

We keep pace with our growing caseload in part by shifting judicial resources. Judges in districts that have relatively light caseloads can assist in other districts, such as the border courts, which are experiencing a flood of illegal drug and immigration cases. This practice has been critical over the past few years because of the lack of an omnibus judgeship bill.

I also believe that it is wrong to consider dividing a circuit because you do not like some of the decisions. Federal judges are required to make decisions based on the law, not the reigning attitudes of people who live in the northwest, southwest, or any other particular geographic area. Quite frankly, I have made a number of rulings that I did not like because the law required me to do so.

My last observation is that splitting the circuit appears to be very expensive at a time when the federal government and the federal courts can least afford it. All of the district courts of the Ninth Circuit are currently reducing staff and some are curtailing services as a result of budget cutbacks. To spend millions to create new and unnecessary administrative entities seems unwarranted and unwise. In the Western District of Washington, we are already severely

impacted by the current budget situation and are struggling to avoid laying off existing staff.

Let me close by emphasizing what I previously said, from the perspective of this chief district judge, and I believe that of the vast majority of district, magistrate, and bankruptcy judges in the Ninth Circuit, this is a circuit that functions well. It isn't broken. It does not need to be fixed and it certainly should not be split. Our chief, our judicial council, and our committees are constantly seeking ways to improve the services we provide to the public. We are effective given our limited resources, and are constantly striving to improve.

Thank you.

United States Bankruptcy Court
District of Arizona
P.O. Box 34151
Phoenix, Arizona 85067

Sarah Sharer Curley
Chief Judge

Telephone: (602) 640-5800 - Ext. 432

April 30, 2004

The Honorable Jeff Sessions
335 Russell Senate Office Building
Washington, D. C. 20510-0104

RE: Legislation to Split the Ninth Circuit

Dear Senator Sessions:

We understand that you are currently considering certain legislation which will split the Ninth Circuit. Whether Arizona is placed in a new circuit with Nevada or remains in a geographically decimated Ninth Circuit, all judges of this Court oppose any split of the Ninth Circuit. While many of us may have various individual reasons for opposing any split of the Ninth Circuit, we wish to bring one institutional reason to your attention.

The Ninth Circuit has been an innovator in many areas of judicial administration, the primary one of which, from our perspective, has been the Ninth Circuit Bankruptcy Appellate Panel ("BAP"). Although Congress authorized the creation of such appellate panels in each of the circuits in the 1978 Bankruptcy Reform Act, only in the Ninth Circuit has the BAP developed and flourished for more than twenty-five years. The BAP has been exceedingly effective in our Circuit and enjoys significant support not only from the Ninth Circuit bankruptcy judges, but also from the district court judges in this Circuit. In Arizona, the State Bar's support of the BAP is reflected by the percentage of cases which are heard by the BAP on a yearly basis rather than in the Arizona District Court. This success was recognized by Congress in the 1994 amendments to the Bankruptcy Reform Act which mandated that each circuit establish a BAP, unless the judicial council of the circuit specifically found a lack of sufficient judicial resources or a likelihood of undue cost or increased delay to parties.

The Ninth Circuit BAP has become an invaluable source of judicial precedent and a significant force in creating uniformity among the bankruptcy courts of this Circuit. Its judges are well respected, and its opinions are often cited. It has lessened substantially the workload on the district court judges from hearing bankruptcy appeals, which must be heard and determined on an expedited basis, a daunting task for district courts which are over burdened with a burgeoning criminal caseload.

We are very concerned that the splitting of the Circuit, in any manner, will destroy this valuable institution. No matter how Congress should physically reconfigure the Ninth Circuit, the BAP, as it now exists, would be severely impaired. From an administrative standpoint, any reconfiguration of the Circuit would leave one or more of the current or newly created circuits with insufficient judicial resources either to continue the remnants of the Ninth Circuit BAP or to create one or more new BAPs. The administrative problems are created under a variety of circumstances. For instance, because no member of a BAP panel is permitted to hear cases arising from that judge's district, it may diminish the pool of available judges to hear appellate matters, increasing the workload of those judges who serve on a BAP panel and still administer their trial calendars. Another administrative issue would be created if the circuit had an insufficient number of bankruptcy appeals to be able to create the three-judge panels to hear matters, thus forcing the matters to be heard solely by district court judges.

We see no benefit to any split of the Ninth Circuit which will ultimately shift the burden of bankruptcy appeals back to the ever increasingly overburdened district courts and foster less certainty and uniformity in bankruptcy law interpretation throughout the Circuit.

The bankruptcy courts have been at the center of many of the largest and most complicated commercial matters that have occurred over the last twenty to twenty-five years. These cases have had an enormous impact on the economy of this country. At the same time, the bankruptcy court is the federal court that is most likely to have a direct impact on the lives of many citizens attempting to solve their financial problems. Whether they are debtors, creditors, small or large businesses, they seek a fair, efficient, expedited resolution of their financial issues. Whether resolving such complex financial issues or important consumer problems, the Ninth Circuit BAP is critical to a functioning bankruptcy system. We believe that the likely destruction of the Ninth Circuit BAP is an extraordinarily high cost to pay for whatever may be perceived as the benefits of splitting the Circuit.

We thank you for the opportunity to present our thoughts on this important matter.

Very truly yours,

Hon. Sarah Sharer Curley
Chief U. S. Bankruptcy Judge

Hon. Redfield T. Baum
U. S. Bankruptcy Judge

Hon. Charles G. Case
U. S. Bankruptcy Judge

Hon. Randolph J. Haines
U. S. Bankruptcy Judge

Hon. Eileen J. Hollowell
U. S. Bankruptcy Judge

Hon. James M. Marlar
U. S. Bankruptcy Judge

Hon. George B. Nielsen, Jr.
U. S. Bankruptcy Judge

Statement of
The Honorable John Ensign
United States Senator
Nevada

April 7, 2004

PRINTABLE VERSION

STATEMENT OF SENATOR JOHN ENSIGN, NEVADA

Hearing before the United States Senate Committee on the Judiciary,
Subcommittee on Administrative Oversight and the Courts:
"Improving the Administration of Justice: A Proposal to Split the Ninth Circuit"

April 7, 2004

Good morning. The Ninth U.S. Circuit Court of Appeals, because of its enormous and growing caseload, has become unmanageable. A solution to this looming judicial crisis is long overdue. The court stretches from Mexico to Alaska, from Utah to Hawaii. This Circuit is home to nearly 20% of the population of the country. This Circuit recently had more cases pending for more than a year than all the other 10 circuits combined. And any examination of past and current population growth trends shows that the Ninth Circuit will only become more overloaded.

It is time to divide the Ninth Circuit. The citizens of nine states and two territories face inadequate access to justice, and this problem is only growing worse. Currently, the Ninth Circuit Court handles almost one-fifth of the entire federal appellate caseload, and the delays in providing adequate justice and providing redress for these cases is increasing.

Today I would like to focus solely on the issue of caseload. Earlier proposals to divide the Ninth Circuit have tended to focus on a division in two. Unfortunately, a division in two won't fully address the population trends of the Western states and will not resolve the stifling overload of cases the Ninth Circuit currently faces. Nevada, Arizona, and Idaho rank first, second and fifth respectively in the top five fastest growing states in the 2000 census. Additionally, California, Washington, Oregon, Alaska, and Montana rank in the top 20, all with double-digit growth.

In each of the last seven years, the Ninth Circuit has led the nation in the number of appeals filed, and that number continues to expand exponentially. Currently, the Court of Appeals has the highest number of cases pending for at least three months, six months, nine months, and a year. Given the population growth in

each of the states in the Ninth Circuit, this problem will likely only get worse.

These delays dramatically reduce the fundamental fairness in the administration of justice for one in every five Americans.

The problems of a circuit this large lead to conflicting interpretations and a lack of coherence in interpreting the law that affect not only the practitioners but also the citizens of these states. When the Ninth Circuit can hand down two decisions that address the same issue on the very same day—one that establishes a two part test and the other a three part test—the people of the Western States face a very serious problem in the administration of justice.

My proposal for division of the Ninth Circuit, S. 2278, addresses these concerns and provides for judicial expediency well into the future. By creating a new Twelfth and Thirteenth Circuit, we are able to grapple with the booming populations of the Sunbelt states and provide better administration to the people of the new Ninth Circuit.

The new Ninth Circuit Court would be allotted five additional permanent judges and two new temporary judges, all to be nominated in the next presidential term. My proposal also allows for each Chief Judge in the new Ninth, Twelfth, and Thirteenth Circuits to temporarily allocate resources between the circuits to ensure a smooth transition. Additionally, no split will happen until these judges are in place so that the citizens remaining in the Ninth Circuit have access to justice and the judges are in place to properly administrate the appeals process.

Additionally, my proposal ensures that all cases currently pending in the Ninth Circuit prior to the effectiveness date of the legislation will be resolved as if the split were not in effect, meaning all current litigants would be unaffected by any division.

In short, it is time to deal with the looming crisis that affects the citizens of the entire western portion of the United States. It is time to address the fact that the administration of justice for the citizens of the Ninth Circuit is becoming fundamentally unfair. And it is time to look to the future needs of our fastest growing states.

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Federal Bar Association
Office of the President

JOYCE E. KITCHENS
Kitchens/New, LLC
2973 Hardman Court
Atlanta, GA 30305
(706) 896-8300 • (706) 896-8355 (fax)
joyce@kitchensnew.com

April 20, 2004

The Honorable Jeff Sessions
Chairman
Senate Judiciary Committee
Subcommittee on Administrative
Oversight and the Courts
Washington, D.C. 20510

The Honorable Charles E. Schumer
Ranking Minority Member
Senate Judiciary Committee
Subcommittee on Administrative
Oversight and the Courts
Washington, D.C. 20510

Re: Hearing on "Improving the Administration of Justice: A Proposal to Split the Ninth Circuit"

Dear Senators Sessions and Schumer:

We provide the following comments in connection with your Subcommittee's April 7 hearing on three legislative proposals to split the United States Court of Appeals for the Ninth Circuit. Those three pieces of legislation are S. 562 (introduced by Senator Lisa Murkowski), S. 2278 (introduced by Senator John Ensign), and H.R. 2723 (introduced by Congressman Mike Simpson).

The Federal Bar Association maintains a longstanding interest in proposals to reorganize the Court of Appeals for the Ninth Circuit because it is the only national bar association that has as its primary focus the practice of federal law. Of the 16,000 attorneys in private and government practice across the nation who belong to the FBA, over 2,800 practice in the Ninth Circuit. With such a regional and national constituency, the FBA is both a beneficiary of direct experience with the structure and operation of the Ninth Circuit, as well as a stakeholder in the well-being of the entire federal court structure and the uniform administration of justice.

The Murkowski and Simpson bills are relatively similar in dividing the Ninth Circuit into a smaller, reconfigured Ninth Circuit and a new Twelfth Circuit. Under the Murkowski measure, the Ninth Circuit would include Arizona, California and Nevada. Under the Simpson proposal, the Ninth would embrace only California and Nevada. Under both

The FBA also believes that the well-being of the Ninth Circuit and the federal court system are best served by increased Congressional attention to two other concerns: the assurance of adequate judgeships; and the reversal of the trend to federalize crimes in areas traditionally reserved to the states. Both of these concerns relate directly to the capacity of courts to render justice fairly and swiftly. Indeed, we recommend that Congress, prior to the passage of any further federal criminal legislation, procedurally require of itself the generation of a "judicial impact statement" that projects the additional caseload and costs that such legislation may create.

Finally, we are indeed mindful to the fact that the caseload of the Ninth Circuit continues to expand, reflecting the demographic trends of the West, especially California. While no persuasive evidence exists today to suggest that the Court of Appeals for the Ninth Circuit is failing to appropriately administer justice, there may well come a time when there is demonstrable proof that the circuit is no longer operating effectively. At that point, it is likely that a far greater consensus among the bench, the bar and the public will coalesce to favor the division of the Ninth Circuit as a necessary remedy. We urge the Subcommittee to continue to engage in a dialogue with the bench and bar that readily discerns the existence of such a body of support, if that begins to occur.

An enormous number of challenges confront the federal judiciary. Their workload is increasing, while their resources are decreasing. Current and projected appropriations levels are creating a budget crisis. The pressing need for the maintenance of current court staffing levels, additional judgeships, courthouse renovations, improved court security systems and technology all represent important priorities. We ask for your continued help in finding legislative solutions to these serious concerns.

Thank you for your consideration of these views and support. We look forward to continuing to work with you and the Subcommittee in support of the Third Branch.

Sincerely yours,

Joyce E. Kitchens
National President

United States District Court
District of Montana

Chambers of
Sam E. Haddon
District Judge
Federal Courthouse
215 1st Avenue North, Room 200
Great Falls, Montana 59401

Mailing Address:
P. O. Box 1529
Great Falls, Montana 59403-1529
406-727-8877

April 8, 2004

The Honorable Jeff Sessions
United States Senate
Chairman, Subcommittee on Administrative
Oversight and the Courts
335 Russell Senate Office Building
Washington, D.C. 20510-0104

Re: S. 562 and S. 2278

Dear Chairman Sessions:

This letter is written as an expression of my continued support for division of the Ninth Circuit Court of Appeals and for creation of one or more new circuits.

The materials presented to your subcommittee and developed at the April 7, 2004, hearing provide thoughtful and well-reasoned explanations of the need for congressional action to bring the matter to resolution. Although both S. 562 and S. 2278 address the issues squarely, the realignment in S. 2278 is a particularly well-thought-out and workable proposal.

I urge the Senate to give the proposed legislation its most favorable consideration.

Sincerely,

Sam E. Haddon

SEH/lf
cc: The Honorable Orrin G. Hatch
The Honorable Conrad Burns
The Honorable Denny Rehberg

HSBA
Hawaii State Bar Association

April 21, 2004

Honorable Dianne Feinstein
Subcommittee on Terrorism, Technology &
Homeland Security
United States Committee on the Judiciary
815 Hart Senate Office Building
Washington, DC 20510-6288

Dear Senator Feinstein,

Thank you for soliciting our comments on the proposed split of the Ninth Circuit Court of Appeals and on the alternative proposals: HD2723, SB562 and SB2278. We have solicited comment from our federal practitioners and have found that the overwhelming majority of our judges and attorneys who have responded continue to oppose splitting the Ninth Circuit.

Based on the comments we have received and the discussions that have been held, 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 in accordance with any of the proposed bills will lead to increased polarization of divergent interests and the attrition of consistency in the federal court system.

It has been noted by our commentators that the Ninth Circuit has been continuously increasing its efficiency through various means, including the increased use of technology and the confirmation of new judges. This is not to say that expression of concerns about the operation of the Ninth Circuit are not valid. For example, it has been noted that there are markedly increasing caseloads and delays in the disposition of appeals. However, these concerns can be far better remedied by measures other than the proposed split of the Ninth Circuit. Vacant seats on the bench, which include the District Court of Hawaii, must be expeditiously filled, and timely and adequate funding must be provided to improve the access to justice by our citizens. Addressing these immediate concerns will result in minimum disruption to the circuit while ensuring maximum efficiency in the overall administration of justice.

In conclusion, the Hawaii State Bar Association strongly opposes a split in the Ninth Circuit Court of Appeals. We find that maintaining the current composition of the Ninth Circuit is much more in accord with promoting efficiency and fairness in the administration of justice, and we therefore respectfully and categorically oppose any of the three alternative proposals.

1132 Bishop Street, Suite 906 • Honolulu, HI 96813 • Phone: (808) 537-1868 • Fax: (808) 521-7936 • Http://HSBA.org

Very truly yours,

DALE W. LEE
President
Hawaii State Bar Association

Cc: Honorable Daniel K. Inouye, United States Senate
Honorable Daniel K. Akaka, United States Senate
Honorable Neil Abercrombie, United States House of Representative
Honorable Edward E. Case, United States House of Representative
Honorable Richard Clifton R. Clifton, Ninth Circuit Court of Appeals
Honorable David A. Ezra, United States District Court

United States Court of Appeals
Ninth Circuit

Chambers of
Andrew J. Kleinfeld
Circuit Judge

Courthouse Square
250 Cushman Street, Suite 3-A
Fairbanks, Alaska 99701

Telephone (907) 456-0564
Facsimile (907) 456-0284

May 10, 2004

The Honorable Jeff Sessions
Chairman, Subcommittee on Administrative
Oversight & the Courts
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Ninth Circuit Division

Dear Senator Sessions:

Would you please enter this letter into the record on the several bills to divide the Ninth Circuit.

I favor division of the Ninth Circuit. My reason is that it is too big, so any division would be an improvement. The problems with its size are that we cannot hold a true en banc and we cannot read other judges' decisions. In consequence, we cannot function as a court in the traditional sense because of our size. I attach a copy of a speech I gave supporting division of the Ninth Circuit at the Harvard Law School Federalist Society last week, which further explains my views.

Of the several plans under consideration, the Ensign Bill strikes me as the best. Of course, no bill can entirely solve the problem caused by California's unusually large size, but the several proposed bills can solve the problems of the other eight states in the circuit. The Ensign Bill does that especially well.

One of its advantages is that by dividing the circuit into three instead of two, you would avoid having to deal with this issue again for many years. The Thirteenth Circuit, of which I would be a part, would be comparable to the First Circuit in size, a court that has always worked especially well.

The Ensign Bill also has cost advantages. On an immediate level, the Thirteenth Circuit would already have a circuit headquarters building. I am quite familiar with the Nakamura Courthouse, having heard cases there a number of times, and I think it would be suitable for a circuit headquarters without great expense for modification. Though I am less familiar with the

Solomon Courthouse, I have been there, and it also looked adequate to me as a circuit headquarters.

Another important consideration regarding costs is travel. Circuit judges still ride circuit, as at the beginning of the Nineteenth Century. The difference is that instead of going by stagecoach, we go by airplane. Thus air routes rather than roads or train schedules determine the practicality of the circuit's configuration. Seattle is an especially convenient air hub. The government could save a considerable amount in the expense of travel for judges, law clerks, and circuit staff and the time wasted in travel, if the Thirteenth Circuit consisted of Oregon, Washington, and Alaska, and had its seat in Seattle. The government would also save a great deal of money on the travel for argument of federal defenders, federal prosecutors, and other government lawyers, if the circuit were so organized.

I have less familiarity with the possible locations and air routes in what would be the Twelfth Circuit under the Ensign Bill. I would guess, though, that administrative expense would also be less for that court.

An additional long-term saving on administrative expense comes from smaller size alone. It is quite difficult to administer a very large firm, whether it is a business firm, a court, or a government agency. The smaller it is, the easier the task is. I would think that many fewer middle managers would be needed for three small circuits than for one huge one.

All of these administrative concerns pale, however, before the much greater importance of providing sound law for the nation. That is best accomplished by a court in the traditional sense, where the judges on the court read each other's opinions and sit with each other frequently, and where the whole court reconsiders decisions en banc when necessary, with an en banc decision genuinely producing the majority view of the court. That cannot be accomplished on the present gargantuan Ninth Circuit. Adding judges, while solving some of the problems, exacerbates these two key problems.

Thank you for your efforts, so useful to the country, on this important task.

Sincerely yours,

Andrew J. Kleinfeld
Circuit Judge

Enclosure: Harvard Law School Federalist Society Speech
/bgf

Why the Ninth Circuit Should Be Divided

Speech to Harvard Federalist Society, May 4, 2004

Andrew J. Kleinfeld

Thank you, Ms. Mai.

Harvard Law School sure has changed since I was here. There are little changes, like the library expansion and classrooms in Pound. And big changes, like my favorite places that you probably haven't even heard of are gone, like Elsie's sandwich shop, and Cronin's bar, where I proposed to my wife over whalemeat after dragging her to my Ames argument. Fortunately, some important institutions are still here, like Leavitt and Pierce Tobacco Shop, the only place that would cash a check for me on a Saturday in the 60's - no ATM's then.

In figuring out what I should say to you today about the Ninth Circuit, one thought I had was that I should just lead us in the Pledge of Allegiance and leave it

at that. But I had another idea: I'll brag about how big my court is. Ninth Circuit judges often do that in speeches. We are really, really big – you might call us the mother of all appellate courts. Forty percent of the United States land mass, twenty percent of its population – that's 57 million people – are within our jurisdiction. We serve almost three times the average population of the other circuits.

But, you know, I really don't think our size is something to brag about. The Ninth Circuit's excessive size causes problems that ought to be and can easily be repaired. Our size causes errors, and gives us too much power. That we are triple the size of the average federal regional circuit is a rough measure of the excessiveness of our power. When we make a mistake, the impact is colossal. And, you know, occasionally we do make mistakes, as the Supreme Court points out from time to time.

Mistakes and size are related. Of course, every person and every institution has an error rate. Intelligent administration, for courts as for any other sort of firm, consists of recognizing institutional causes of error and curing them to the extent practicable. My thesis for this afternoon is that our excessive size, by itself, independent of the quality and conscientiousness of judges, contributes to our error

rate. Above a certain size, quality varies inversely with size, even though other things such as quality of individual judges are held equal. This cause of error can be easily cured, without great expense or difficulty, by dividing our circuit.

First, I'll explain what I mean when I say we're "big." We currently have 28 active seats on the court, 26 of which are occupied. The next biggest circuit, the Fifth, has 17. The esteemed First Circuit has 6 seats. We have more than twice the average number of judges on other circuits. And there is currently a bill in Congress that would add another seven judges to our court. We would be swallowing more judges than all the active judges in the First Circuit, yet for us it would be a small gulp.

Beyond the 28 active seats, we also have senior judges. They bring our total to 47 judges altogether. Senior judges generally don't retire. Their seats become open for appointment, but the senior judges, though entitled to quit working and to draw full pay for life, customarily keep coming to work, participating on panels, and deciding cases, sometimes carrying the same caseloads as judges in regular active service. Thus, when a judge takes senior status, it effectively adds a judge to the court rather than replacing one with another. The senior judge continues to

serve, and a new judge is added to take his active seat.

Not only do we have an extraordinary number of judges, we also have a high number of cases absolutely and per judge. Over 12,500 cases were filed in the Ninth Circuit in 2003. Commensurate with our population, that is almost triple the average for the regional circuits.

In 2002, we terminated 701 cases per active judge. Just from 1999 through 2003, our filings went up from 9,400 to over 12,500, a 30% increase. Our 2004 filings appear to be rising even more rapidly, in part because immigration cases are now being what the Executive Branch calls "streamlined" from Immigration Judges to us. New immigration filings have gone from 350 new cases in 2001, to 525 in 2002, to almost 1,200 in 2003. Our 2004 intake of immigration cases through March suggests that our 2004 number will double the 2003 number, which itself was double the 2002 number.

If all this was just a problem of too many cases per judge, we could cure it by adding judges. That's how we got up to 28, and that's why the Judicial Conference of the United States recommended that we be expanded to to 35. More

judges helps with the problem of too many cases per judge. But it makes the other problems of excessive size worse, by increasing the excessiveness.

Montesquieu correctly argued that what we would now call coordination and agency problems made gentle and fair government difficult. He wrote that "A large empire supposes a despotic authority in the person that governs. It is necessary that the quickness of the prince's resolutions should supply the distance of the places they are sent to; that fear should prevent the carelessness of the remote governor or magistrate." As applied, this means it's hard to make law coherent over a large area because it's hard for people subject to and even for the judges and lawyers who are supposed to apply it, to know what the law is, let alone monitor compliance. Fortunately, despite Montesquieu's suggestion, we reject despotism and fear as means of assuring coherence in Ninth Circuit law. Unfortunately, though, we have the same problems of information and coherence that Montesquieu identified in large empires.

As the size of a circuit increases, the difficulty of interpreting the law coherently and consistently increases. Though larger size means fewer terminations per judge, it destroys what the great scholar of the common law, Karl

Llewellyn, called "the reckonable result." He meant focusing not only on what was held, but also on what was bothering and what was helping the court. That increases the reader's forecasting power, as contrasted with "forecasting based merely on a search for the prevailing doctrine."

When I was in practice, like most lawyers I could predict with great accuracy what the Alaska Supreme Court would do, even where there was no case in point. I read its decisions as they came down, and got to know the thinking process of each of the five justices. All of us lawyers could judge pretty well how they would decide our cases if they got them. Of course, there were occasional surprises, but not very many, to me or to other lawyers. Our clients benefitted from advice based on this high degree of reckonability. Most compliance with the law is out of court, as people conform their conduct to it, and reach settlements based on shared predictions by knowledgeable counsel of how the disputes would be resolved were they fully litigated. Where a court is reckonable, clients learn from their lawyers what the law is and how their cases are likely to come out if litigated, and avoid the expense and misery of litigation. My guess is that in any state that has serious and scholarly lawyers on its highest appellate court, and where that court decides all its cases en banc, the lawyers are about as able to

predict outcomes as we were in Alaska.

A court that is not reckonable is of far less use to the general public, the lawyers who represent the members of the public, and the trial judges who must adjudicate their cases. There is no expense caused by the law that is so great as the expense to the public of not knowing what the law is. That expense is much greater than all the salaries, courthouses, air fares, and other government budget expenses, as large as those have become. If people cannot, with the assistance of good lawyers, say what the law is, the resultant unpredictability prevents transactions and generates lawsuits. Courts should settle disputes, not create them.

Even though I am an active judge on the Ninth Circuit Court of Appeals, I can't predict our law as well as I could predict the law in Alaska when I was not on the court that pronounced it. That is ridiculous.

Excessive size is what makes my court unreckonable. Last September, we reheard en banc the California recall case. The lawyer for the ACLU wound up his intense and serious argument with a request that the "Ninth Circus" reverse the district court decision. He was pretty upset by his slip of the tongue, but we

thought it was pretty funny. Well, we have no elephants, and we do serious work in a serious way. But like a three-ring circus, we have a huge number of participants doing a lot of different things in different places simultaneously. That makes our court fun to watch, but hard to keep track of, even for the judges on it.

There are two specific ways our size operates to have this effect. We're too big to read each other's decisions, and we're too big to sit en banc as a full court to correct errors.

In 2003, we issued about 835 published decisions and orders. A couple of years ago, I tried to bring a year's worth of published disposition onto the dais with me for a speech, but they were too heavy, the box and bags broke, and they fell around my feet and ankles like a heavy snow. This time I'm sparing my back and have left them in chambers. Faced with our own 701 terminations per year, it sure is tempting to figure that we have confidence in our colleagues and just let the slipsheets go. After all, to make the 701 terminations per year, we have to read 25,000 or so pages of briefs, record excerpts, and the relevant cited cases. Just how much time do you imagine any one of us has to monitor the dispositions by all of our colleagues for consistency with circuit and Supreme Court law?

And that doesn't even count our so-called unpublished decisions. Actually they're all published even though we call them "unpublished," and in 2003 there were 4,460 of them. That's 84% of our terminations. You can be quite sure that most of us do not read other judges' unpublished dispositions, and I do not recall ever rehearing any of them en banc. Do you think we're right every time on them? The Supreme Court has occasionally reversed an unpublished disposition, so plainly we're not. We just can't have an effective error correction mechanism for this 84% of our caseload. It's too big for us all to read them.

If there are more judges on the court to deal with increased caseloads, this problem of not reading our own court's decisions gets worse, not better, because each new judge writes an additional pile of opinions that everyone else is supposed to read. If we don't read our own court's decisions, then we can't avoid errors, inconsistency, and incoherence by knowing the sense of our court's decisions as a whole and policing aberrational decisions through our en banc process or internal informal processes.

Let me explain what I mean about our inability to correct errors through our en banc process. Traditionally, federal appeals are heard by panels of three judges,

and reheard en banc where importance, inconsistency, and possible error require the attention of the full court. The phrase "en banc" traditionally means all the judges on the court. But this doesn't work in our circuit – you just can't have effective give and take at oral argument or in deliberation by 28 judges at a time, so we rehear cases en banc in panels of 11 judges. To the best of my knowledge, we are the only appellate court in the English common law tradition that calls something less than all the active judges on the court "en banc."

A random draw of 11 judges means that a majority of the en banc panel is 6 judges. We have a lot of 6-5 en banc decisions. It is ridiculous that a majority of the court, for purposes of rehearing en banc, is actually less than a quarter of the active court. Getting a case reheard en banc, where the en banc is less than half the court, is a crapshoot, a bet on the draw. Judges who hold a minority view on the court can easily be the majority on the en banc, even though the whole purpose of en banc rehearing is to bring an errant panel into accord with the court's majority view.

The problem is well illustrated, ironically, by what I regard as one of our greatest successes, the California recall case. In this case of great public

importance, we managed through intense effort to rehear the case quickly and then publish a unanimous en banc decision that entirely put the issue to rest without disrupting the election. It was a triumph for our court.

But consider, for a moment, that the unanimous decision of the court rehearing the case en banc was contrary to the unanimous decision of the three-judge panel that first heard the case. By chance, the three judges on the original panel were not drawn for the rehearing en banc. Our names are drawn for en banc panels from a box, like names for a jury. It is always a gamble who gets drawn for an en banc, and always a gamble whether the en banc reflects what would be the view of the entire court. Thus, by luck of the draw, it was obviously possible that we could have had an 8-3 decision, had the members of the original panel been drawn, or even a split or unanimous decision going the other way. That pops the balloons at the celebration of our unanimous resolution of the California recall election controversy.

There are more subtle effects of size as well, which can be thought of in terms of collegiality. The word is imprecise in its usage, and it is worth

distinguishing its meanings. A lot of times we say collegiality when we mean civility, or amicability, among the judges. I don't think size reduces collegiality in that sense. One of our judges was quoted in a recent book on the federal appellate courts as saying, "we get along better because we don't see each other as much." What most contributes to civil and amicable relationships among judges on federal appellate courts is that, except in the very rare instances of resignation or elevation to the United States Supreme Court, we all serve together on the same court for life. Joining a federal appellate court really is "til death do us part." That gives us a big incentive to get along with one another, and we usually do.

A different and very important meaning of collegiality in terms of the public interest, is its more traditional one, derived from the doctrine of the Catholic Church's College of Cardinals. In this sense, collegiality means speaking with shared authority rather than as individuals. It is critical that a court speaks this way. Yet we cannot so speak when there are so many of us. The primary reasons are the simple and straightforward judicial administrative reasons that I mentioned: we can't read each other's opinions, and we can't effectively conduct a full court rehearing en banc to deal with opinions that do not speak with the shared authority of the full court.

There are other reasons too. For example, if judges overlap a great deal on different panels, they can effectively inform each other of decisions not yet read, and they are highly aware of each other's modes of thought. But as our size grows, we overlap less and sit with each other less. You can draw more than 3000 combinations of three from 28 active judges, far more from 47 regular sitting judges plus visiting judges sitting by designation. Referring to the Ninth Circuit as "a" court becomes more and more a matter of form rather than substance the bigger we get. It's more in the nature of a database from which judges are drawn. Two active judges can go years without sitting with each other, so our thinking rubs off on each other less.

My experience is typical, because we are all assigned randomly to panels throughout the circuit (thus I sit many times a year in California, and rarely sit in Alaska where I practiced, served as a district judge, and have my chambers). In 2003, I sat on seven regular week-long calendars and on two one-week motions and screening calendars for easier cases. In those nine sittings, I sat with 19 different judges. This included 14 of my colleagues on the Ninth Circuit, and, sitting by designation, three district judges, a Seventh Circuit judge, and a judge from the Court of International Trade. This leaves 33 Ninth Circuit judges with

whom I did not sit at all last year, on a regular calendar or screening calendar. Some of these judges I have not sat with for years. In fact, there is one judge on my court whom I have never sat with in my 12 ½ years on the court. Far from being able to assure that my opinions are unlikely to deviate substantially from his, I haven't much idea at all of what his thoughts are. He introduced himself to me again when I last saw him at a court function, doubting that I recognized him.

Also, as our size grows, the variance of views grows. If you have a small court with one outlying viewpoint, then that viewpoint is moderated by the others on the court. But if you have a very big court, there will be more judges with outlying viewpoints, and a higher number of panels on which they'll sit together. Professor Paul Carrington wrote that "while there is a limit to the number of different viewpoints possible in a given case, nevertheless, the larger the number of panel variations possible, the more likely it is that an aberrational view can command an occasional majority." That is to say, if your court is bigger, you're more likely to get three outliers on a panel. On a small court like the First Circuit, by definition there can't be three outliers, they'd be half the court.

Because of our inadequate abilities to read each other's opinions and rehear

them in true en bancs, the formal corrective processes don't work to address the outliers' decisions. Because we don't sit with each other much, and consequently don't talk with each other much, the normal informal corrective processes that go on in all social groups don't work very well either. We don't know what other panels are doing in unpublished dispositions, and don't have time to figure out what they are doing, in much detail, even in their published opinions. So outlying opinions, which would normally be revised before publication, become binding precedent.

One argument that opponents of a split make is that we shouldn't Balkanize federal law, because the west coast needs uniformity for commercial purposes, and federal law is inherently national in scope. Well, the east coast seems to be able to maintain commercial vigor despite having five federal circuits running down the Atlantic coast, or six if you count the D.C. Circuit. And a lot of federal law isn't national in scope at all. In Alaska, we get cases under complex but local federal legislation such as the Alaska National Interest Lands Conservation Act and the Alaska Native Claims Settlement Act. In the other states, there are numerous local pieces of tremendously complex federal legislation generating our cases, such as the Bonneville Power Administration, the Navajo-Hopi Settlement, and the

California Central Valley Water Authority. Because of our size, a judge on the Ninth Circuit sits in Alaska, for example, only about once in seven to ten years, and cannot gain adequate expertise in the law to be applied. Every year, judges are surprised to discover that with one exception for some Indians not originally from Alaska, we don't have Indian reservations in Alaska, and that gold mining is a genuinely important industry there. And of course, we get diversity cases involving questions of state law. Few of us are able to gain much familiarity with the state laws of the nine states in our circuit, with the exception of California, as we could if there were fewer states.

Another argument that opponents of a split often make is that the proponents are trying to punish the court for decisions they don't like. Well, I don't think the court ought to be split because its decisions are too this or too that. There wouldn't be any point. A liberal president could find plenty of liberal judges in conservative states, and a conservative president could find plenty of conservative judges in liberal states. The truth is, there are also political reasons behind some people's opposition to a split. A lot of people like our mistakes, and want them to continue to control the law for a fifth of the country's population. After all, the Supreme Court can't fix them all. Political preferences aren't a good reasons for splitting

the circuit or for keeping it together. Judicial administration reasons are the ones that matter, and they argue for dividing it.

I haven't said how the Ninth Circuit should be divided. I don't think it matters nearly as much as that the division be accomplished. We just need smaller units. The how is a congressional decision. And there are currently three bills pending in Congress.

In the House, Representative Michael Simpson of Idaho has introduced a bill to divide the circuit in two, with a new Twelfth Circuit to consist of Alaska, Washington, Oregon, Idaho, Montana, Hawaii, and the Pacific Trust Territories. This would leave California, Arizona, and Nevada in the Ninth. This bill has already progressed through hearings in a House Judiciary subcommittee.

Earlier this month, a subcommittee of the Senate Judiciary Committee also held a hearing on proposals to divide the circuit. In the Senate, two bills have been introduced. Senator Lisa Murkowski of Alaska introduced a bill to create a new Twelfth Circuit that would consist of Alaska, Washington, Oregon, Idaho,

Montana, Arizona, Hawaii, and the Pacific Trust Territories. The new Ninth would consist of California and Nevada.

More recently, Senator Ensign of Nevada introduced a bill to divide the Ninth Circuit into three circuits: A remaining Ninth made up of California, Hawaii, and the Pacific Trust Territories; a Twelfth of Montana, Idaho, Nevada, and Arizona; and a Thirteenth of Alaska, Washington, and Oregon.

Though I don't much like big government expenditures, my view is that the costs of a split would not be excessive, for two reasons. First, it is easier to administer a small system than a large one. We have a huge staff, hundreds of people in our offices in San Francisco, Seattle, and Pasadena. Tremendous talent and staffing is necessary for so large an entity. Second, we have vacant or about-to-be vacant federal courthouses in Seattle and Portland, which would be entirely adequate for circuit headquarters. So cost should not be prohibitive.

I am especially attracted to the Ensign bill because it creates a Thirteenth Circuit that could attain the same excellence as the comparably-sized First Circuit here. But any of the bills would improve the federal appellate judiciary. One

judge on my court mentioned recently that our caseload was like a gorilla and eight mice, because California so predominated, so we wouldn't accomplish anything if we divided because California would still be so huge. My thought was, maybe we can't shrink the gorilla, but we certainly can free the eight mice!

The United States Court of Appeals for the Ninth Circuit is a great court, of extremely conscientious and able judges. We should multiply its virtues by dividing it.

U.S. SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

HEARING ON "IMPROVING THE ADMINISTRATION OF JUSTICE: A PROPOSAL TO SPLIT THE NINTH CIRCUIT"

APRIL 7, 2004

STATEMENT OF SENATOR KYL:

I would first like to introduce Chief Judge Schroeder, and thank her for making herself available to testify at this hearing. Judge Schroeder received her law degree from the University of Chicago law school. After serving as a trial attorney in the U.S. Justice Department's Civil Division, and spending several years in private practice in Phoenix, Judge Schroeder was appointed to the Arizona Court of Appeals in 1975. In 1979, she was elevated by President Carter to the U.S. Court of Appeals for the Ninth Circuit. She has served as Chief Judge of the circuit since 2000. Chief Judge Schroeder brings a unique and valuable perspective to the topic of this hearing.

The subject of this hearing – whether to subdivide the Ninth Circuit – is one that I have been immersed in for many years. Prior to serving in Congress, I spent nearly two decades in private practice in Phoenix, Arizona. I represented clients before every level of the state and federal courts, and have litigated many times before the Court of Appeals for the Ninth Circuit.

As a U.S. Senator from Arizona, I supported and submitted written comments to the "White Commission" on Structural Alternatives for the Federal Courts of Appeals in 1998. Commenting on the Commission's draft report, I urged commissioners to consider and evaluate multiple proposals for reconfiguring the Ninth Circuit. The proposals that I suggested to the Commission included making California into a separate division of the Ninth Circuit or into a separate circuit; creating four divisions, with Central California alone as its own division, in order to more evenly distribute the caseload; and even adding Arizona to the Tenth Circuit.

Each of these proposals presents its own set of issues for consideration – as do the various circuit-splitting bills introduced in this Congress. Ultimately, the path Congress chooses to follow will depend on which criteria we deem to be most important in configuring a circuit: is the top priority to evenly balance the caseload? To preserve geographic contiguity? To avoid subdividing a State? To maintain circuit compactness?

As this process moves forward, I hope that all of the participants will keep in mind one criterion above all others: that is to ask, how does any of the proposed configurations of the Ninth Circuit (including the status quo) affect the litigants who will have cases before the court? How does it affect their access to a stable, reliable body of law by which they can arrange their affairs? And when disputes arise, how does the circuit's structure affect their ability to have a

case decided quickly and efficiently? I think that by devoting our good-faith energies to this matter, and deciding which criteria are most important while always holding the interests of the court's "customers" above all others, Congress should be able to come to an agreement on how the U.S. Court of Appeals for the Ninth Circuit should be configured in the future.

I look forward to hearing the views of the distinguished witnesses before us today.

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement Of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Hearing Before The Subcommittee On Administrative Oversight And The Courts
On "A Proposal To Split The Ninth Circuit"
April 7, 2004

Today's hearing is the latest in what has become a series of hearings on matters of limited urgency and importance, but of great political significance to some members of the Republican Party. Instead of focusing this Committee's efforts on oversight of the Department of Justice and FBI and exploring ways to improve our nation's anti-terrorism's efforts, we have held a number of hearings on rewriting the Constitution to limit the first Amendment and stigmatize certain Americans. Today, we are asked to consider playing politics with judicial geography.

I have long regarded political attempts to alter the makeup and structure of our federal judiciary with some skepticism. I do not support politicizing the bench with ideological appointments and I do not support politicizing the bench with geographical alterations to suit the current political winds.

Now before the Senate are two different proposals to split the Ninth Circuit. Yet another proposal with still different parameters is being considered by the House Judiciary Committee. Strikingly, the most recent proposal does not stop at splitting the Ninth Circuit in two. This novel legislation calls for the Ninth Circuit to be split into three separate circuit courts of appeal.

Proponents of the split have long criticized the Ninth Circuit for its size and caseload. They might be interested to note that last year the average length of turnaround for cases before the Ninth Circuit was a month less than the average case lasted in 2002. Further, the Ninth Circuit's average turnaround time has improved 16 percent relative to the national average since 1997.

While I can understand why some might want to have a federal circuit court of appeal that was dominated by individuals from their State, I look forward to receiving testimony justifying not one, but two additional circuit courts. Some of the proponents of these bills have argued that smaller, rural States are disadvantaged by being lumped into a circuit that contains a State the size of California with a substantial urban population base. But surely, they would not argue that Vermont and New Hampshire should be granted their emancipation from the larger, more urban States in the Second and First Circuits. Our federal bench should not be manipulated simply to make each circuit homogeneous.

senator_leahy@leahy.senate.gov
http://leahy.senate.gov/

As others have noted in greater detail, there are a variety of policy reasons that the proposals to split the Ninth Circuit are troubling. At the forefront of my concerns is the cost of this proposal. This Committee should be especially concerned about the allocation of our limited federal resources. I have fought hard to provide our federal judiciary with adequate funds and have been the lead sponsor on legislation to provide necessary cost-of-living adjustments and a significant pay raise to the men and women who serve on the federal bench. In these times of tight budgets both at the federal level and for the Courts in particular, to create an additional one or two federal circuits and to provide for the additional infrastructure and associated staffing arrangements to accommodate them is problematic. I expect that several of our distinguished witnesses will comment on the budgetary impact of this legislative proposal. I look forward to receiving their testimony and thank them for traveling so far to be with us today.

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GARY LOCKE
Governor

STATE OF WASHINGTON
OFFICE OF THE GOVERNOR
P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 753-6780 • www.governor.wa.gov

April 21, 2004

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, D.C. 20510

Dear Senator Sessions:

I would ask that you include the enclosed testimony from Washington Governor Gary Locke in the record of the April 7, 2004 hearing before your Subcommittee, regarding proposals to restructure the U.S. Ninth Circuit Court of Appeals. Governor Locke provided the enclosed testimony to the White Commission on Structural Alternatives for the Federal Courts of Appeals in 1998. The Governor's views and concerns regarding a division of the Ninth Circuit have not changed since.

Thank you,

Jennifer Joly
General Counsel

TESTIMONY OF WASHINGTON GOVERNOR GARY LOCKE
COMMISSION ON STRUCTURAL ALTERNATIVES
FOR THE FEDERAL COURTS OF APPEALS
(Wednesday, May 27, 1998)

Mr. Justice White, and other distinguished members of the Commission, thank you for this opportunity to appear before you on the structure and administration of the Federal Courts of Appeals.

First and foremost, I do not believe that this is an issue that should be dealt with in political terms. Nationally, the courts should be structured and operated in a way that results in timely, efficient and uniform justice. Short-term political issues should not be given weight. Our Washington State Attorney General, Christine Gregoire is in agreement with me on these points.

An important question being addressed by the Commission is whether the 9th Circuit should be divided, so I will focus my testimony on that question.

Washington State has a strong interest in maintaining the current, unified structure of today's 9th Circuit.

Our state is part of a geographical, economic, political, and historical fabric that is woven from throughout the Western and Pacific states and territories. Looking back, it is evident to me that we have benefited from sharing the same court. Looking forward, to the future, I am even more convinced that a single body of precedent makes sense, and that splitting our circuit would be a move in the wrong direction.

Washington is tied to other states and territories in the 9th Circuit in many ways.

- Washington, Oregon, and California share a contiguous coastline, and therefore share, and sometimes compete or conflict, on issues relating to coastal fish and wildlife, commercial ports, and maritime law.

- These three states plus Alaska, Hawaii, and the territories share the Pacific Ocean, and thus many of the same concerns.

- Washington, Oregon, Idaho, and Montana share the Columbia-Snake River basin, the backbone of the Northwest, with its salmon, hydroelectric dams, barges, and water for irrigation and recreation. Our electric system, including the federal Bonneville Power Administration, is part of an electric power grid that quite literally binds the entire West together.

- Washington, Idaho, Montana and Alaska share borders with Canada. Along with California, which borders Mexico, we all share concerns about immigration law and commerce along our international borders.

My point is: If we were to split the 9th Circuit, we could cut the cake in many ways. But why cut the cake? Given the ties among the states, the 9th Circuit is a case where the whole is greater than the sum of its parts could ever be.

Arguments that the 9th Circuit does not function well are not compelling. I am convinced by the ample rebuttal to those arguments – made by people intimately familiar with the courts – that the administrative problems can be remedied without dividing the circuit.

I am here to testify about concerns on a different level. Washington and the Northwest are closely tied to California and the other western states.

Washington is home to some major corporations whose products, I'm willing to bet, we have all used and enjoyed recently.

- How many here have flown on a Boeing airplane in the last month?
- Sipped a Starbucks latte?
- Shopped for clothes at Nordstrom store?
- Stayed in a house or hotel built with Weyerhaeuser lumber (-- though you might not have recognized it)?
- Used Microsoft software?

We are proud of these businesses but we recognize that they are part of a national and world economy. As you know, if California were a country, it would be the 9th largest country in the world, as measured by gross national product.

Those who see California as a liability have too narrow a field of vision. California is an integral part of the western and Pacific states and an important economic partner – all the more reasons for uniformity in the case law between Washington and California.

It would not benefit Washington to see California become part of another circuit, with the conflicting case opinions and forum shopping separate circuits would produce. I am thinking of cases relating to immigration law, labor law, the Endangered Species Act, the Bonneville Power Administration, maritime law, and tribal treaty law. The western states are not severable – they are tied together by geographic, natural resource, economic, and legal issues distinctive to the west.

It is a virtue, not a vice, that the 9th Circuit is able to bring consistency and coherence in all these areas of law, as they apply to all of the states and territories in the circuit. If the circuit were divided, there would be unnecessary friction, forum-shopping, competitive advantages and disadvantages among states in different circuits. There would be conflicts in the laws that apply to fish that know no boundaries, commerce that is traded up and down the coast, and people who work, play, and emigrate throughout the West and Pacific.

It is a virtue, not a vice, that the 9th Circuit judicial panels are drawn from a large and geographically diverse pool of judges, ensuring a broad, not parochial, approach to how federal law is applied within the region.

I think these virtues will become even more evident in the future, especially as the U.S. Supreme Court finds it increasingly difficult to review and resolve all of the conflicting cases from different circuits.

The 21st century will tie all of us closer in many ways: Technology will increase our communication; multiple demands for limited natural resources will force us to allocate them wisely; commerce will become seamless across international borders.

We should be guided not by short-term political concerns, but by a long-term look at the future. In that regard, we are well-served by the unified, integrated, well-run 9th circuit that we have.

Thank you, and thank you for coming the Washington state, to listen to our views.

PROMOTING JUSTICE
THROUGH SERVICE TO OUR
COMMUNITY

Los Angeles County Bar Association

STREET ADDRESS:
261 S Figueroa St S/ite 300
Los Angeles CA 90012-2503

MAILING ADDRESS:
P O Box 55020
Los Angeles CA 90055-2020

TELEPHONE: 213.627.2727
FACSIMILE: 213.896.6600
WEB SITE: www.lacba.org

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WRITER'S DIRECT LINE:

April 15, 2004

VIA FACSIMILE – (202) 228-2258

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

Re: Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2004 (S. 2278) - OPPOSE

Dear Senator Feinstein:

The Los Angeles County Bar Association strongly opposes S. 2278, the latest in a series of proposals to split the Ninth Circuit. We also oppose two other pending proposals to split the circuit, S. 562 and H.R.2723. There is no legitimate reason to split the Ninth Circuit, and certainly no reason to incur the very substantial costs that such a split 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 24,000 members, 60 sections and committees, 25 affiliated bar associations, over 100 staff members, and thousands of active volunteers. Our fundamental mission is to meet the professional needs of Los Angeles lawyers and to improve the administration of justice. It is in this last capacity that we send this letter.

As both Chief Judge Mary M. Schroeder and Senior Judge Clifford Wallace testified on April 7, 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 in two, as proposed by S. 562 and H.R. 2723, would cost an estimated $100 million, plus $10 million per year in added administrative costs. The three-way split proposed by S. 2278 would further increase administrative costs. At a time when our federal government is facing significant deficits, our efforts should be directed at lowing 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 pointed out in his testimony last week, 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. If it remains undivided, will serve as a model of effective administration of a large appellate court for the rest of the country.

S. 2278 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. 2278, as well as any other proposals to split the Ninth Circuit.

Sincerely,

Robin Meadow
President

Brian S. Curry
Chair, Federal Courts Coordinating Committee

cc: The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
VIA FACSIMILE (202) 224-6331

The Honorable Patrick J. Leahy
Ranking Democratic Member
Committee on the Judiciary
United States Senate
VIA FACSIMILE (202) 224-9516

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
VIA FACSIMILE (202) 225-3190

The Honorable John Conyers, Jr.
Ranking Democratic Member
Committee on the Judiciary
United States House of Representatives
VIA 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
VIA 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
VIA FACSIMILE (202) 225-3196

The Honorable Barbara Boxer
United States Senate
VIA FACSIMILE (415) 956-6701

HAROLD MALKIN, Esq.
IDX TOWER
925 FOURTH AVENUE, SUITE 2500
SEATTLE, WASHINGTON 98104
(206) 516-3875

April 28, 2004

The Honorable Jeff Sessions
Chairman, Subcommittee on Administrative Oversight and the Courts
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Sessions:

My name is Harold Malkin. I am a partner in private practice at a litigation firm in Seattle, Washington and I write in support of the concept embodied in the legislative proposals currently under consideration to split the Ninth Circuit. The views expressed herein are my own. As I explain below, my support for these proposals is in no way motivated by any disagreement or disapproval of any one or several decisions of the Ninth Circuit. Indeed, I believe strongly that such a motivation is an inappropriate basis upon which to support splitting the Ninth Circuit.

Simply stated, the Ninth Circuit is too big effectively and efficiently to function as a single judicial circuit. Prior to watching the recent hearings conducted by your subcommittee on this issue on C-SPAN, I cannot say I had ever heard cogent presentations debating the merits of a split. However, having listened carefully and, I believe, objectively to the testimony of those in favor and those opposed to splitting the Circuit, I was struck by the fact that the overwhelmingly clear weight of the evidence supports a split.

Of the Ninth Circuit Judges who testified in opposition to a split, my firm sense was that nostalgia and inertia are the principle rationales offered for maintaining the *status quo*. It is no justification of the present situation to argue that the Ninth Circuit currently "is working." The Circuit should not merely work, it should work well. It should be a place where judges sit regularly on panels with all of the other Circuit Judges, where the entire court can sit together en banc, where decisions are handed down in a relatively timely fashion and, most importantly, where there is a sense among the consumers of justice -- the bar, litigants and the public -- that the Circuit is not dysfunctional.

In contrast to the testimony of those who oppose splitting the Ninth Circuit, the testimony of those in favor struck me as well-reasoned, fact-based and motivated not by politics but by sincere, empirical concerns. There are sitting judges on the Court who feel strongly and have stated publicly that they do not feel the court is working well. Judges who have been on the Court for four years still have not sat on three-judge panels with all of their Ninth Circuit colleagues. Judges on the Court do not feel sufficiently invested in decisions of the Circuit to participate actively in arguing for and against hearing cases en banc. While it is true that not all Ninth Circuit jurists hold these views, the fact that such a fundamental disagreement exists between the Circuit Judges on such a substantive issue is, in and of itself, a distraction from the work of the court and an undeniable indication that change is worth considering. No one can seriously argue the proposition that it is inconceivable that Congress would today *create* a circuit the size of the current Ninth Circuit.

Admittedly, our country faces challenging times. Postponement of judicial reform can easily be justified based upon more pressing national priorities. However, when all is said and done the fact that Ninth Circuit decisions govern nearly one-fifth the nation's population and that the population of the Ninth Circuit is 25 million more than the next most populous circuit remains unchanged. Adding judicial officers and administrative staff to what is already too large a circuit may help temporarily to ameliorate certain issues but, in the longer term, will only compound the basic problem of a circuit grown larger than anyone could reasonably have imagined or intended.

Our institutions of government need to remain connected and responsive to the constituencies they serve. The federal judiciary is no exception. Statements and testimony to your Subcommittee established that many of those served by the Ninth Circuit believe that this important sense of "connection" no longer exists. The *status quo* typically benefits entrenched interests. Powerful interests are, in turn, often aligned in support of leaving things unchanged. In this instance, however, reform needs to be embraced. The Ninth Circuit is the anomaly; the other, smaller, more cohesive and collegial circuits the rule. As a nation, we have ample, favorable experience with these more "conventional" circuits. Their success is not an accident and, in my view, should be emulated rather than rejected as a model for the future Ninth Circuit, whatever its ultimate configuration.

I appreciate the opportunity to offer the Subcommittee my views, which, I believe, are shared by many practitioners in Seattle and throughout the Ninth Circuit.

Sincerely,

HAROLD MALKIN

HAM ed202202

LISA MURKOWSKI
ALASKA
MAJORITY DEPUTY WHIP

COMMITTEES:
ENERGY AND NATURAL RESOURCES
CHAIRMAN, SUBCOMMITTEE ON WATER AND POWER
ENVIRONMENT AND PUBLIC WORKS
VETERANS' AFFAIRS
INDIAN AFFAIRS

United States Senate
WASHINGTON, DC 20510-0203
(202) 224-6665
(202) 224-5301 FAX

510 L STREET, SUITE 650
ANCHORAGE, AK 99501-1956
(907) 271-3735

101 12TH AVENUE, BOX 7
FAIRBANKS, AK 99701-6278
(907) 456-0233

P.O. BOX 21647
JUNEAU, AK 99802-1647
(907) 586-7400

130 TRADING BAY ROAD, SUITE 350
KENAI, AK 99611-7716
(907) 283-5808

540 WATER STREET, SUITE 101
KETCHIKAN, AK 99901-6378
(907) 225-6880

851 EAST WESTPOINT DRIVE, SUITE 307
WASILLA, AK 99654-7142
(907) 376-7665

STATEMENT OF SENATOR LISA MURKOWSKI
JUDICIARY SUBCOMMITTEE ON
ADMINISTRATIVE OVERSIGHT AND THE COURTS
April 7, 2004

Mr. Chairman, Senator Feinstein, members of the Committee, thank you for holding a hearing on the important matter of the United States Court of Appeals for the 9th Circuit. The 9th Circuit has a direct and dramatic impact on my State of Alaska. For 20 years we have examined the need to make changes and actively considered how it should be restructured. The Court's administration, the physical size of the Circuit, the length of time that the Court takes to resolve cases and the huge and diverse case load for judges create considerable problems in dispensing justice.

Last year, in response to these problems, I introduced S. 562, the "Ninth Circuit Court of Appeals Reorganization Act of 2003," cosponsored by Senators Stevens, Burns, Craig, Crapo, Inhofe and Smith. S. 562 would split the 9th Circuit by leaving Nevada and California in the 9th Circuit and create the 12th Circuit containing Alaska, Arizona, Hawaii, Idaho, Montana, Oregon, Washington, along with the territories of Guam and the Northern Mariana Islands.

The bill provides that the present 9th Circuit would cease to exist for administrative purposes on July 1, 2005. To allow the prudent administration of the court system, the 9th Circuit and the newly created 12th Circuit could meet in each others' jurisdiction for 10 years after the enactment of the bill. S. 562 also provides that judges in the 9th Circuit may elect in which circuit they wish to practice. Each circuit judge who is in regular active service and each judge who is a senior judge of the former 9th Circuit on the day before the effective date of this Act may elect to be assigned to the new 9th Circuit or to the 12th Circuit and shall notify the Director of the Administrative Office of the United States Courts of such election.

I know that today's hearing is not called to specifically address the substance of the variety of cases for which the 9th Circuit could be criticized. But I would be remiss if I did not share with you another very recent decision by the 9th Circuit that helps demonstrate how the physical size of the 9th Circuit, the huge case load and the manner in which the 3 judge panels and the 11 judge en banc panels operate, contribute to decisions that are not consistent or always well founded in the law.

In December 2003, the Circuit Court sitting *en banc* overturned a lower court's decision in the case of *The Wilderness Society v. U.S. Fish and Wildlife Service.* In 1998, plaintiff sought to enjoin the U.S. Fish and Wildlife Service permit allowing the operation of the State of Alaska's 30-year old salmon enhancement project in Tustumena

Lake located on the Kenai Peninsula of Alaska. But on December 20, 2003, the 9th Circuit sitting en banc remanded the case back to the lower court and ordered the project enjoined.

Alaska's Attorney General has sought to intervene on behalf of the State of Alaska because the Alaska National Interest Lands Conservation Act has long been interpreted to permit this type of fishery enhancement work in wilderness areas. The Alaska Attorney General believes the decision has the potential to prohibit recreational activities, commercial guiding and eco-tourism in these areas where they have been permitted for decades.

The Chief Judge of the 9th Circuit is scheduled to testify at this hearing today. I will certainly not ask any questions about this case of her or other judges here from the 9th Circuit who may in the future consider this case. I respect the Doctrine of the Separation of Powers and as a Senator do not seek to take issue with the Circuit on this case in this forum. But I am troubled how the intent of Congress related to the permitted activities in wilderness areas in Alaska can be overlooked.

Some of the problems of the circuit can be traced to issues related to its geographic size, the case load, the lack of geographic diversity in its sitting judges and many other issues unique to the 9th Circuit.

In 2003, the 9th Circuit had 11,277 cases pending before it – a 17% increase over the previous year of 9,625 cases. In comparison, in 2003, the 2nd Circuit had the next highest caseload with 6,767 cases pending, or over 4,500 fewer cases than the 9th. Next in line is the 5th Circuit with 4,444 cases in 2003.

The 9th Circuit takes an average of 5.8 months between the Notice of Appeal and the filing of the last brief. But from Notice of Appeal to final disposition it averages 14 months. Now in comparison, the 5th Circuit averages 5.6 months between the Notice of Appeal to the filing of the last brief. But from the filing of the Notice of Appeal to a final decision in the 5th Circuit, the average time is 9.4 months – nearly five months faster.

So, it takes five months longer in the 9th Circuit with close to 7,000 more cases pending. With such a large case load and the length of time involved, the reality is that the 9th Circuit will only fall farther and farther behind its sister Circuits.

Part of the problem with the 9th Circuit is its sheer size. The three-judge panels cannot circulate opinions to all of their colleagues for corrections or review. This breeds conflict of decisions between three judge panels all in the same circuit. There are 27 judges. There is no telling how some issues will be decided. In the 9th Circuit, the court cannot really sit *en banc*. Instead 11 judges are picked to review a decision of a 3 judge panel. Once again, the process insures that a decision of the whole court is in reality the luck of the draw.

I am committed to the belief that the people and institutions that comprise the 9th Circuit support splitting the circuit and creating a new circuit. On March 21, 2003, Greg Mitchell in *The Recorder* wrote that the 9th Circuit Court should be split not as a means to punish it for bad decisions, but that "[i]t should be split for the ho-hum reason that it is just too big to operate as intended and needs to become bigger still to carry what has become the heaviest caseload in the country." According to Mitchell, the Judicial Conference said it would seek 11 new circuit judgments from Congress, with seven to be for the Ninth Circuit. If that happens there would be over 35 active judges in that circuit with another 20 on senior status.

An editorial in the *Oregonian* newspaper dated July 25, 2002, encourages the splitting of the 9th circuit, not because of the Court's decisions, but because, "the hard facts make the case." The paper pointed out that the 9th Circuit comprises nine states and two territories that contain a population of over 56 million people. The next largest populated circuit is the 6th Circuit with a population of 32 million. The 9th Circuit has twice the population of the average appeals court.

The *Oregonian* cited Judge Diarmuid O'Scannlain who sits on the 9th Circuit. He said his support of the split "is solely based on judicial administration grounds—not premised on reaction to unpopular decisions of Supreme Court batting averages." I look forward to hearing from him today.

Finally, allow me to put in the record along with the other two editorials to which I referred, an article that appeared in the Forum section of the Anchorage Daily News on June 8, 1997. The writer in my home state said then that we needed the judges and that the circuit should be split to meet the growing demands placed on it.

Seven years ago the United States Congress was considering legislation to split the 9th Circuit Court of Appeals. The split did not occur then but the legislative effort resulted in a commission being convened to consider and make recommendations on the issue. The White Commission in the 1990's did not recommend the split but suggested administrative changes that subsequently seem unworkable and do not address the problems we discuss today.

So we are here today to consider S. 562 and S. 2278. I am pleased to see another proposal put forward to address the problems. S. 2278 introduced by Senator Ensign and cosponsored by Senator Craig. The bill would create two new circuits. One circuit would keep California, Hawaii and the two territories in the 9th Circuit. The new 12th Circuit would include Arizona, Nevada, Montana and Idaho. The State of Alaska would join the states of Oregon and Washington to create the 13th Circuit. The proposal is very intriguing and I am anxious to hear more about it. The several administrative changes suggested in Senators Ensign and Craig's bill are also very attractive. I am pleased to see progress on either of these proposals. I again want to thank Senator Ensign for leadership in this area and I especially want to thank you Mr. Chairman for holding this hearing.

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The Recorder

March 21, 2003 Friday

SECTION: NEWS; Vol. 3; No. 21-2003; Pg. NoByline

LENGTH: 686 words

HEADLINE: It's time to **split** the circuit

BYLINE: Greg Mitchell

BODY:

With the rumble of war in Iraq and the hum of helicopters over San Francisco, it's a little hard to concentrate on something as mundane as the need to **split** up the overstretched and understaffed **Ninth Circuit** U.S. Court of Appeals.

And mundane it surely is. Which may explain why, as pressing as the courts' needs have become, they only surface on the political agenda in the context of this or that decision that offended this or that senator. Or all of them, as the Pledge of Allegiance ruling did.

The circuit shouldn't be **split** to punish it for producing opinions some find offensive, or to prevent it from doing so again. It should be **split** for the ho-hum reason that it is just too big to operate as intended and needs to become bigger still to carry what has become the heaviest caseload in the country.

The Judicial Conference said this week it would seek 11 new circuit judgeships from Congress, with seven intended for the Ninth Circuit.

If that happened, the circuit would seat 35 active judges; another 20 or so are on senior status.

That's not a court. It's a convention.

All those voices lead the court to wildly inconsistent decisions, since it takes just two judges to set the law of the circuit in any one case. And the court's limited en banc procedure - a random draw of 11 judges - can't be expected to keep up.

Of course, calls to **split** the **Ninth Circuit** are nothing new. For years, senators from the northwest wanted their constituents freed from what they saw as rulings from afar favoring environment over industry.

In the 1990s, the White Commission - headed by former Supreme Court Justice Byron White - was convened to study court structure and the wisdom of a **split**. Anti-circuit **splitters** took great comfort from its conclusion, in a 1998 report, that a **split** wasn't warranted.

But since 1998, filings from the circuit's nine Western states and far-flung U.S. territories have grown 29 percent. Filings from California alone have grown 35 percent.

The Recorder March 21, 2003, Friday

Judges say the workload has become crushing. It has doubled since the last time Congress gave the Ninth Circuit a new judgeship, in 1984. So there's no question new judges are needed.

But before Congress sets about creating those new judgeships, it should carve the circuit in two. A separate circuit for California, Nevada and Arizona might be best, but there are a few sound options. What there aren't are sound objections.

It's understandable that Chief Judge Mary Schroeder would continue to carry the torch for an intact circuit. And when the Pledge of Allegiance ruling led to renewed calls for a **split** during the summer, Schroeder was right to defend the circuit's integrity from political attack.

However, the other arguments she made in her testimony to Congress, relying as they do on the White Commission's report, simply aren't persuasive. For example, the report noted that dividing the circuit would "deprive the West and the Pacific seaboard of a means of maintaining uniform federal law in that area. "

But as Judge Diarmuid O'Scannlain, a **split** proponent, notes, "there are five circuits for the Atlantic and Gulf States. I don't think freighters are colliding more frequently off Cape Cod than they are off the Marin headlands." Nor, he added in a Q and A with appellate blogger Howard Bashman, has the development of the South's law been hampered by the fact that its territory falls into three separate circuits.

It may be true, as Schroeder argued, that a new circuit would cost upwards of $100 million for new facilities and related infrastructure. And no doubt the creation of a new circuit would bring logistical, and even legal, headaches.

These aren't insurmountable obstacles. Instead, they are the kind of boring work-a-day problems that our elected officials sometimes put off in favor of scoring cheap political points.

So Schroeder has a choice. She can accept that a **split** is inevitable and then work with Congress on a plan acceptable to the court.

Or she can wait until the **Ninth Circuit** outlaws apple pie, and let Congress act on its own.

- Greg Mitchell

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LOAD-DATE: March 21, 2003

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The Columbian (Vancouver, WA.)

August 03, 1997 Sunday

SECTION: B section; Pg. 9

LENGTH: 780 words

HEADLINE: FAIRNESS DEMANDS SPLIT OF NINTH CIRCUIT APPEALS COURT

BYLINE: ANN DONNELLY ; for The Columbian

BODY:

Should residents of the Pacific Northwest and Alaska be disadvantaged in the federal courts compared to those seeking justice in other regions?

The U.S. Senate recently debated the long-recommended **split** of the federal Court of Appeals for the **Ninth Circuit**, culminating in a landmark vote in our region's favor. Yet without help from the House, it appears reform is still at least several years away.

On July 24, U.S. senators from the Pacific Northwest, Arizona and Alaska united and won an important debate when the Senate decided that the gigantic, cumbersome and oft-reversed **Ninth Circuit** should be **split** and a new circuit created.

The senatorial discourse reflected important interregional tensions. It positioned most senators from Oregon, Washington, Arizona, Idaho, Montana and Alaska, who favored the **split**, against California's senators and their allies from various states. Supporting the Californians were Sens. Patty Murray, D-Wash, and Ron Wyden, D-Ore., environmental groups and bar associations in many states, all of whom favor the status quo.

The debate brought the contentious issue to the full Senate for the first time. The occasion highlighted the growing power of the senators from Alaska, Frank Murkowski and Ted Stevens (who chair the Energy and Appropriations committees, respectively) and of Sen. Slade Gorton, R-Wash.

Gorton, who as Washington's state attorney general argued 14 cases before the U.S. Supreme Court, has championed **splitting** the **Ninth Circuit** since the early 1980s.

After the July 24 vote, Gorton was jubilant at having brought the issue to the floor and gathered such substantial support from his colleagues, who voted with him 55 to 45. An eloquent ally in the debate was collegial freshman Sen. Gordon Smith, R-Ore., with whom Gorton clearly shares a closer rapport than with previous Oregon senators.

Though demonstrating great progress, the Senate vote hardly guarantees success. The House, with its huge California delegation, opposes the **split**.

Gorton's interest in improving our access to the federal appeals court is

The Columbian (Vancouver, WA.) August 03, 1997, Sunday

well founded. Many citizens increasingly view courts, especially the Ninth Circuit, as remote and too powerful. And indeed the Ninth Circuit decides mega-issues, including cases that mold our salmon, water and timber policies. Except for the relatively few cases accepted by the Supreme Court, its decisions are final. We have no alternative to living with their impacts on our businesses and daily lives.

It stands to reason that the closer the court is to us geographically, the more directly it reflects us. A more intimate court will render decisions we can more easily live with.

'Unmanageable monstrosity'

So Northwesterners have reason to support the proposed new Twelfth Circuit. Leaving giant California and Nevada in the Ninth Circuit, the new circuit would comprise Washington, Oregon, Alaska, Arizona, Montana, Idaho and Hawaii.

The urgency of reform is glaringly evident. Former U.S. Supreme Court Chief Justice Warren Burger called the Ninth Circuit an "unmanageable administrative monstrosity." The monster exceeds all the other circuits in both geographic size and fast-growing population.

Twenty percent of all Americans live in the Ninth Circuit, which encompasses a land mass the size of Western Europe. Its caseload is by far the largest, while the 28 judgeships it contains are twice the maximum number recommended by the U.S. Judicial Conference.

Evidently suffering a loss of effectiveness, the Ninth Circuit has shown increasing reversal rates every year since 1992. During the last Supreme Court session, the Court reversed, often by unanimous vote, an astounding 27 of the 28 cases it heard from the Ninth Circuit.

One of the circuit's current judges, Andrew Kleinfeld, admits that "we have become a laughing stock. It's not because we have bad judges; it's because the circuit is too large and has too many cases."

Opponents of creating a new circuit do not try to deny the addition is needed. The facts are too clear. Instead, they contend another study commission must be funded.

But taxpayers have funded enough study commissions. A 1973 congressional commission concluded the **Ninth Circuit** should be **divided**, and the situation has only worsened since then. Congressional hearings on the subject were held in 1974, 1975, 1983, 1989, 1990 and 1996. On three occasions, Senate committees have reported out bills **splitting** the circuit.

Now the full Senate has rendered a resounding decision. It is up to our House delegation --including the successor to Rep. Linda Smith --to argue the case as persuasively as Gorton has.

LOAD-DATE: August 03, 1997

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Anchorage Daily News (Alaska)

June 8, 1997, Sunday, FINAL EDITION

SECTION: FORUM, Pg. 2G

LENGTH: 834 words

HEADLINE: OPINION

BODY:

Split the court?

Yes -- but very carefully

Too big, too far away, too unaware -- that's what the Alaska congressional delegation and Gov. Tony Knowles say about the **9th** U.S. **Circuit** Court of Appeals. The 28-member court, headquartered in San Francisco, hears federal cases from Alaska and eight other western states. Alaska's top officials think the California-dominated court fails to understand the 49th state -- and they would like to see Alaska's cases heard in a new appeals court, confined to Alaska, Idaho, Montana, Oregon and Washington.

The politicians' dissatisfaction looks suspiciously like venue shopping. Find a judge closer to home and get a more palatable decision.

Lawmakers may very well be right about that, but not necessarily. Alaska and Washington are as apt to fight over what they have in common -- salmon for example -- as to agree. Moreover, President Clinton and his successors could very well find judges in the northwest who share the same bent as the so-called ''California judges.'' More rain and lower temperatures do not make lawyers more conservative.

Nevertheless, the proposal to **split** the court has merit and should be addressed by Congress. The **9th Circuit** is a rapidly growing monster.

As Sen. Frank Murkowski has noted, the court ''serves a population of more than 45 million people, well over a third more than the next-largest **Circuit**. Last year alone, the **9th Circuit** had an astounding 7,146 new filings. By 2010, the Census Bureau estimates that the **9th Circuit's** population will be more than 63 million -- a 43 percent increase in just 13 years. ...''

According to 1995 figures, cases in the **9th Circuit** take longer to get a hearing than cases anywhere else. Furthermore, its operating costs surpass the costs of all other **circuits** combined. The **9th Circuit** is too big to provide timely, responsive justice.

It's unlikely a new **circuit** will come to life soon. Many lawyers and judges oppose the change. So do California's two senators. But Congress is exploring legislation that would create a 10-member bipartisan study commission to offer recommendations about splitting the court. In time, such a commission likely would heed rational appeals for a 12th **Circuit**.

Anchorage Daily News (Alaska) June 8, 1997, Sunday,

If a 12th Circuit is created before 2001, however, it will face an immediate headache. President Bill Clinton and the Senate have been gridlocked over the appointment of new federal judges. Republican leaders have let it be known that the president's selections should be in ''the mainstream'' -- and they have insisted on defining the mainstream. The president has said he won't be bound by the lawmakers' criteria -- and he has all but stopped sending up the names of new judges.

Such partisanship must stop. The country needs new judges to meet the federal courts' duties. And the west needs a new federal appeals court.

Timothy McVeigh

The legal system responded well

The very government that Timothy McVeigh sought to topple by domestic terrorism protected his rights as a citizen on trial for murder and conspiracy. As the trial process showed, law-abiding Americans can take pride and comfort in their judiciary system. It is a cornerstone bombs cannot undo.

Until Tuesday, when the jury announced its guilty verdicts, the legal system treated Mr. McVeigh as an innocent man in the 1995 Oklahoma City truck bombing. Now he is a former soldier turned convicted killer, his own life in the balance.

If jurors reach a unanimous decision on his fate, there is no turning back. Even Judge Richard Matsch, whose succinct and no-nonsense conduct elevated the judiciary in the eyes of many, cannot overrule them. If jurors cannot agree, then Judge Matsch can sentence Mr. McVeigh to life in prison.

Imagine the difficulty of the jurors' task as outlined by the judge: "To be the conscience of the community" and to make a reasoned decision "free from the influence of passion, prejudice or any other arbitrary factor."

Unlike even the most avid trial followers, jurors have not been able to walk away from emotional testimony that has left hardened observers in tears. They must sit and listen and try, as best they can, to keep their emotions in check.

For his part, Timothy McVeigh has sat stone-faced most of the time, even when a mother who lost her 18-month-old in the bombing said, "It's painful to be a mother and not have anyone to mother." Even when a doctor who had to cut off a trapped woman's leg to save her described the ordeal. Even when horror after horror was shared, Mr. McVeigh appeared unmoved.

In contrast, bombing survivor Bennie Evans, now stationed at Anchorage's Fort Richardson, says of Timothy McVeigh, ''Life is so valuable, even his.'' Here is a man who has every reason to hate, and he chooses compassion instead. Bennie Evans is living proof that the American spirit was scathed but not extinguished by the darkness and death that blanketed the Alfred P. Murrah Federal Building on April 19, 1995.

LOAD-DATE: June 11, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WM. FREMMING NIELSEN
Senior Judge

Post Office Box 2208
Spokane, Washington 99210-2208
Telephone 509.353.3163
Facsimile 509.353.2166

April 19, 2004

Senator Jeff Sessions, Chairman
Subcommittee on Administrative
Oversight and the Courts
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Sessions:

I join in support of splitting the Ninth Circuit. These are a few of my personal views, not necessarily the views of the Judges of the United States District Court for the Eastern District of Washington.

The Ninth Circuit consists of 28 active judges, plus 21 senior judges. The circuit regularly solicits the help of district judges from within the circuit as well as visiting circuit judges. This results in an infinite number of three-judge panels which creates a lack of continuity and direction within the circuit. Judges who make up the panels are frequently strangers and the many panels seem to have difficulty keeping abreast of the rest of the circuit. This supports the conclusion that the circuit is without heart and lacks collegiality, an important aspect of the judicial process. The resulting lack of predictability in the appellate process is an ongoing issue. I often hear the comment that the outcome of any appeal "just depends on the make up of the panel."

Many of us from the outlying districts feel a sense of frustration which is a natural result of the unwieldy size of the circuit. Much of the Ninth Circuit is made up of smaller districts along with the huge state of California. The result is that California controls and overwhelms the rest of the circuit. This frustration is often felt by litigants concerned about having their cases decided by a court so far removed.

The steady growth in caseload, which will require the circuit to continue to grow, suggests that existing problems are only going to become more apparent. If the concept of manageable regional circuits is to be maintained, a split of the Ninth Circuit is at

sometime inevitable. The decision to split the circuit, and how to split it, will never be any easier.

I heard the testimony of Judges Diarmuid O'Scannlain and Richard Tallman and concur with their analysis and recommendations.

Very truly yours,

Wm. Fremming Nielsen
Senior U.S. District Judge

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

Hearing on:
"Improving the Administration of Justice: A Proposal to Split the Ninth Circuit"
Wednesday, April 7, 2004, 10:00 a.m.
Dirksen Senate Office Building Room 226
Washington, D.C.

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

Good morning, Chairman Sessions and Members of the Subcommittee. My name is Diarmuid F. O'Scannlain, Judge of the United States Court of Appeals for the Ninth Circuit with chambers in Portland, Oregon. I am honored to be invited to participate in this hearing on "Improving the Administration of Justice: A Proposal to Split the Ninth Circuit." Indeed, the urgency of restructuring the largest judicial circuit in the country is evident in the number of Ninth Circuit reorganization bills pending in this session of Congress. As you know, Senator Murkowski introduced her Ninth Circuit reorganization bill, S. 562, last year. On the House side, Congressman Mike Simpson of Idaho sponsored H.R. 2723, a similar bill, and six months ago the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property held a hearing on that bill, where, at Chairman Sensenbrenner's invitation, I also appeared as a witness. And within the last few days, Senator Ensign has introduced S. 2278 which offers even a third approach.

Each of these bills takes a different tack in effecting the reorganization of the Ninth Circuit. But each of them 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. Because I remain steadfast in my belief that Congress inevitably will restructure the Ninth Circuit, and because S. 562, H.R. 2723, and S. 2278 all would well accomplish that goal, my comments effectively support any of these proposals.

Eight of my colleagues–Judges Sneed (California), Beezer (Washington), Hall (California), Trott (Idaho), Fernandez (California), T.G. Nelson (Idaho), Kleinfeld (Alaska), and Tallman (Washington)–publicly support a restructuring of the Ninth Circuit.[1] I believe that an increasing number of District Judges within the circuit also support a restructuring; a number of them have filed statements to that effect in the Report on the House Hearing.[2] And you may recall that my colleague Judge Rymer (California) served on the White Commission,[3] and is on record that our Court of Appeals is too large to function effectively.

I

I have served as a federal appellate judge for more than a decade and a half on what has long been the largest court of appeals in the federal system (now 47 judges, soon to be 50).[4] I have also written and spoken repeatedly on issues of judicial administration.[5] Therefore, I feel

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[1] Of course, I do not speak for the Court of which I am a member.

[2] See Appendix to the 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).

[3] See Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (1998) [hereinafter "White Commission Report"].

[4] 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.

[5] See 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

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

I appear before you as a judge of one of the most scrutinized institutions in this country. In many contexts, that attention is negative, resulting in criticism and controversy. Some view these episodes as fortunate events, sparking renewed interest in how the Ninth Circuit conducts its business.[6] But any restructuring proposal 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 proportions. Nine states, thirteen thousand annual case filings, forty-seven judges, and fifty-seven million people are too much for any non-discretionary appeals court to handle satisfactorily. The sheer magnitude of our court and its responsibilities negatively affect 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. Restructuring will work again. For these reasons alone, I urge serious consideration of S. 562, H.R. 2723, and S. 2278.

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

I changed my views in the early '90s while completing an LL.M. in Judicial Process at the University of Virginia. The more I considered the issue from the judicial administration

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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).

[6] See, e.g., 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.

perspective, the more I rethought my concerns. The objective need for a split became obvious. One could no longer ignore the compelling reasons to restructure the court, whether or not one agreed with anyone else's reasons for doing so.

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

II

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

At a certain point, larger circuits became unwieldy because of their size. Lawmakers recognized that adding new judges served only as a temporary anodyne rather than a permanent cure. Instead, Congress wisely restructured larger circuits. The District of Columbia Circuit can trace its origin as a separate circuit to a few years after the enactment of the Evarts Act.[7] Part of the Eighth Circuit became the Tenth Circuit in 1929, while portions of the Fifth begat the Eleventh in 1981. The next year saw the creation of the Federal Circuit.[8] And, in due course, I have absolutely no doubt that a Twelfth—and even, perhaps, a Thirteenth—Circuit will be created out of the Ninth.

Congress formed each new circuit, at least in part, to respond to the very real problems posed by overburdened predecessor courts. That same rationale applies with special force to the Ninth Circuit, as many experts acknowledge. Indeed, the White Commission of 1998,[9] and the Hruska Commission of 1973[10] before it, both concluded that the Court of Appeals for the Ninth Circuit is too big. Regardless of which party controlled Congress when the commissions were authorized, each concluded that the Ninth Circuit needs restructuring because of its unsustainable size.

A

From a purely numerical perspective, the sheer enormousness of my court is undeniable, whether one measures it by number of judges, by caseload, by population, or by geographic area. Our official allocation is 28 active judges—more than the total number of judges, active and senior combined, on any other circuit. Currently, 26 of those active judgeships are filled, and we have an additional 21 senior judges, who are in no sense "retired," with each generally hearing a

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

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

[9] See White Commission Report.

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

substantial number of cases ranging from 100 percent to 25 percent of a regular active judge's load. My colleague, Judge A. Wallace Tashima, has announced that he will take senior status in June, adding another active vacancy and another senior judge to our roster. There are forty-seven judges on our court today. And when the two existing and one imminent vacancies are filled, our court will have 50.[11]

I should pause to put that figure in perspective. At close to fifty judges, the Ninth Circuit is approaching twice the number of total judges of the next largest circuit (the Sixth with 26), and already has more than four and a half times that of the smallest (the First with 10). Indeed, there are more judges currently on the Ninth Circuit than there were in the entire federal judiciary at the birth of the circuit courts of appeals. And every time a judge takes senior status, we grow ever larger. Meanwhile, compared to our 47 judges, the average size of all other circuits today remains at around 20 judges.

Even with the lumbering number of judges on our Circuit, we can hardly keep up with the immense breadth and scope of our Circuit's caseload. In the 2003 court year, 12,632 appeals were filed—over double the average of other circuits, and over 4,000 more cases than the next busiest court, the Fifth. In fact, our total appeals exceed the next largest circuit's by more than the entire annual dockets of the First, Third, Seventh, Eighth, Tenth, and D.C. Circuits. Unfortunately, such disparity has only increased, for in 2003, the Ninth Circuit had the second fastest growth rate in appeals of all the regional circuits.[12] Along with this double-digit percentage growth in overall filings,[13] we have also seen a huge upswing in immigration appeals. Recently, the Board of Immigration Appeals streamlined its review procedures—often abandoning three judge panels in favor of one judge summary dispositions—in an effort to clear its backlog. Because we review BIA appeals directly from the Board, we suffer the immediate effects of this policy change. For court year 2003, we received around eighty immigration

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[11] See Appendix. All the numerical data used in this testimony can be found in the appendix, unless otherwise noted, so from here on out I do not footnote this data. For most of my numerical data, I use caseload statistics provided by the Administrative Office of the United States Courts in a report entitled Judicial Business of the United States Courts: 2003 Annual Report of the Director. For the Ninth Circuit, however, I use our internally generated caseload statistics. Unless otherwise noted, all caseload statistics reflect appeals filed in fiscal year 2003, from October 1, 2002 to September 30, 2003, and, I use population statistics compiled by the United States Census Bureau for the year 2003.

[12] See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2003 Annual Report of the Director.

[13] Only six other circuits reported any increase in their appeals between 2002 and 2003, and only two others saw double digit gains. The Ninth Circuit saw a 12.7% jump over the same time period. See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2003 Annual Report of the Director. Even the rate at which our appeals are increasing is itself accelerating, as our appeals climbed only 10.4% in the 2002 court year. See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director.

appeals each and every week.[14] Indeed, immigration appeals now make up about a third of the Ninth Circuit's docket.[15]

By population, too, does our circuit dwarf all others. The Ninth Circuit's nine states and two territories range from the Rocky Mountains and the Great Plains to the Sea of Japan and the Rainforests of Kauai, from the Mexican Border and the Sonoran Desert to the Bering Strait and the Arctic Ocean. This vast expanse houses more than 57 million people—almost exactly one fifth of the entire population of the United States. Indeed, there are 25 million more people in the Ninth Circuit than in the next most populous circuit, the Sixth. As a result, our population exceeds the next largest circuit's by more than the total number of people in each of the First (encompassing Boston), Second (encompassing New York), Third (encompassing Philadelphia and Pittsburgh), Seventh (encompassing Chicago and Indianapolis), Eighth (encompassing St. Louis, Kansas City, and Minneapolis/St. Paul), Tenth (encompassing Denver and Salt Lake City), and D.C. Circuits (encompassing, of course, Washington, D.C.). And as with the number of appeals filed, the Ninth Circuit's population is growing at an exceptional rate. Of the 10 fastest-growing cities of over 100,000 residents, all but one—the tenth fastest growing—are located in the Ninth Circuit.[16] Similarly, three of the five fastest-growing cities of over 1,000,000 residents—including Phoenix, AZ, the city with the most growth—are also found within the borders of the Ninth Circuit.[17]

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

B

Numbers alone cannot tell the whole story. From the standpoint of a firsthand observer, I have concluded that our court's size negatively affects the ability of us judges to do our jobs. For

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[14] See Ninth Circuit AIMS Database, Fiscal Year 2003, October 1, 2002 to September 30, 2003. Our system categorizes one class of appeals as "administrative appeals," of which we had 4,361 in fiscal year 2003. The overwhelming majority of these agency filings are immigration appeals.

[15] See id.

[16] This data covers the period from the 2000 census through the year 2002 (the Census Bureau has not yet released figures through 2003 for this particular information). See United States Census Bureau 2000 to 2002 city estimates, http://eire.census.gov/popest/data/cities/tables/SUB-EST2002-03.php. The ten fastest growing cities of over 100,000 residents during that time period are: (1) Gilbert, AZ; (2) North Las Vegas, NV; (3) Henderson, NV; (4) Chandler, AZ; (5) Peoria, AZ; (6) Irvine, CA; (7) Rancho Cucamonga, CA; (8) Chula Vista, CA; (9) Fontana, CA; (10) Joliet, IL.

[17] See id. The five fastest growing cities of over 1,000,000 people between 2000 and 2002 are: (1) Phoenix, AZ; (2) San Antonio, TX; (3) San Diego, CA; (4) Houston, TX; (5) Los Angeles, CA.

example, I participated in eight, week-long sittings last year on regular panels. The composition of those panels often changes during a given week. Thus, presuming I sit with no visiting judges and no district judges—a mighty presumption in the Ninth Circuit, where we often enlist such extra-circuit help to deal with the overwhelming workload—I may sit with around twenty of my colleagues on three-judge panels over the course of a year. That is less than half of the total number of judges on my court. Because the frequency with which any pair of judges hears cases together is quite low, it becomes difficult to establish effective working relationships in developing the law.

Consistency of law in the appellate context requires an environment in which a reasonably small body of judges has the opportunity to sit and to conference together frequently. Such interaction enhances understanding of one another's reasoning and decreases the possibility of misinformation and misunderstandings. Unlike a legislature, a 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 12,600 plus appeals, each judge is faced with the Sisyphean task of keeping up with all his or her colleagues' opinions—not to mention all the opinions issued by the Supreme Court along with the relevant public and academic commentary.

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

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

of a court that issued 836 published dispositions in 2003 alone.[18]

Moreover, all other courts of appeals in this country convene en banc panels consisting of all active judges. Yet the Ninth Circuit uses limited en banc panels comprised of 11 of the 28 authorized judgeships. This limited en banc system appears to work less well than other circuits' en banc systems. Because each en banc panel contains fewer than half of the circuit's judges and consists of a different set of judges, en banc decisions do not incorporate the views of all judges and thus may not be as effective in settling conflicts or promoting consistency.

A good example of this limitation was last year's California Recall case.[19] Our unusual alacrity in this extraordinary situation clearly deserves commendation—although we must be careful not to overemphasize our efforts,[20] for as recent research demonstrates, even elephants can run when they find it necessary.[21] But what the circumstances surrounding the case unquestionably demonstrate are the problems inherent in our use of 11-judge en banc panels. As you may remember, a district court initially denied a motion to put a stop to the recall not long before election day. Soon after, however, the original three-judge panel unanimously reversed, ruling that the election campaign to recall Governor Gray Davis had to cease. On rehearing en banc, an 11-judge, randomly selected panel affirmed the district court—also unanimously—and again allowed the election to go forward. Interestingly, none of the original three judges who voted to halt the election wound up on the 11-judge panel. One can reasonably question whether the 11-judge panel was truly representative of the court, for we do not know how the remaining 14 judges would have decided the case. In fact, there are enough active judges so that an entirely separate 11-judge panel could have been formed without even a single member of either the original three-judge or the actual en banc panel. As it stands, our circuit is only a few active judgeships away from being able to form three separate en banc panels simultaneously.[22]

Limited en banc panels pose another troubling defect: unrepresentative results. Judge Tallman eloquently decried this problem in a recent dissent to a six-to-five en banc decision, which I quote:

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[18] This is not to mention the almost 4,500 non-precedential, unpublished dispositions we circulate each year. See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2003 Annual Report of the Director.

[19] S.W. Voter Registration Educ. Project v. Shelley, 344 F.3d 882 (9th Cir. 2003), rev'd, 344 F.3d 914 (9th Cir. 2003) (en banc).

[20] See, e.g., Statement of Alex Kozinski, 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).

[21] John R. Hutchinson et al., Biomechanics: Are Fast-Moving Elephants Really Running?, 422 Nature 493 (2003); see also Rossella Lorenzi, Elephants Do Run, Say Researchers, Discovery News, Apr. 7, 2003, at http://dsc.discovery.com/news/briefs/20030407/elephant.html.

[22] Indeed, if as few as five new judgeships were added to our Circuit without a corresponding split, we would be able to form three simultaneous 11-judge en banc panels, only decreasing the legitimacy of an already troubled en banc process.

> Today, six judges of this court announce that the legal conclusion reached by seven of their colleagues (plus five Justices of the California Supreme Court) is not only wrong, but objectively unreasonable in light of clearly established federal law. According to the six judges in the majority, those twelve judges were so off-the-mark in their analyses of United States Supreme Court precedent that their shared legal conclusion ... must be deemed objectively unreasonable.[23]

I do not suggest that our use of limited en banc panels is unwarranted under our current circumstances. Given our size, it would be an enormous drain on our resources to do it any other way—for the time being, it is a necessary triage effort. I only mean to point out the sacrifices we must make to deal with the strains that we labor under—strains due entirely to our distended bulk.

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 14 months—a third again longer than the average for the rest of the Courts of Appeals.[24] Most disturbingly, 138 appeals wallowed under submission for twelve months or more last year in the Ninth Circuit.[25] We are by far the worst circuit in this regard, with over 50% more stale cases than all the other circuits combined.[26] Indeed, no other circuit had as many as 20 such cases, meaning that our record on this front is over seven times worse than the next slowest circuit.[27] Whatever point in the process to which this delay may be attributed, the striking length of time our circuit takes to dispose of cases is alarming. No litigant should have to wait that long to receive due justice. But at the same time, judges need time to deliberate and to ensure that they are making the correct decision. This backlog increases the pressure on us to dispose of cases quickly for the sake of the litigants, which, in turn, can only inflate the chance of error and inconsistency. I believe our unreasonable size is directly responsible for this serious problem.

Also, because of the circuit's geographical reach, judges must travel on a regular basis from faraway places to attend court meetings and hearings. For example, in order to hear cases, my colleagues must fly many times a year from cities including Honolulu, Hawaii, Fairbanks, Alaska, and Billings, Montana to distant cities including Seattle, Washington and Pasadena, California. In addition, all judges must travel on a quarterly basis to attend court meetings and en banc panels generally held in San Francisco. A certain amount of travel is unavoidable,

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[23] Payton v. Woodford, 346 F.3d 1204, 1219 (9th Cir. 2003) (en banc).

[24] Thankfully, we are not the worst circuit in this regard, but we are a close second. See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2003 Annual Report of the Director.

[25] See id.

[26] See id.

[27] See id.

especially in any circuit that might contain our non-contiguous states of Alaska and Hawaii, and our Pacific island territories. But why should any one circuit encompass close to 40% of the total geographic area of this country when the remaining 60% is shared by eleven other regional circuits?[28] Traveling across this much land mass not only wastes time, it costs a considerable amount of money.

D

I am not alone in my conclusions. Several Supreme Court Justices have commented that the risk of intra-circuit conflicts is heightened in a court that publishes as many opinions as the Ninth.[29] 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,[30] and as consistency of law falters, predictability erodes as well. The Commission pointed out that a disproportionately large number of lawyers indicated that the difficulty of discerning circuit law due to conflicting precedents was a "large" or "grave" problem in the Ninth Circuit. Predictability is clearly difficult enough with 28 active judgeships. But this figure mightily understates the problem, for it fails to consider both senior judges (most of whom continue to carry heavy workloads), and the large number of visiting district and out-of-circuit judges who are not even counted as part of our 47-judge roster. Notably, the White Commission also concluded that federal appellate courts cannot function effectively with as many judges as the Ninth Circuit has. It also concluded that our limited en banc process has not worked effectively.

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

III

The question then becomes how to split the circuit: nine states and two territories offer a wealth of possibilities. As I mentioned, there are three current House and Senate proposals, each of which restructures our circuit in a different way. The special virtue of most of the recent restructuring efforts is that they address substantially all of the arguments against previous

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

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

[30] 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.

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. Indeed, each recent reorganization plan also 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 by each proposal would remain bound by pre-split Ninth Circuit precedent, helping to minimize confusion in interpreting the law.

Despite such similarities, each of the recent proposals offers separate restructuring plans, in turn presenting distinct sets of pros and cons. I firmly believe that the Ninth Circuit must be divided, but the particulars appropriately remain in Congress's hands. Rather than advocating one particular approach, then, I simply examine each of the recent proposals in turn.

A

S. 2278, introduced by Senator Ensign last week, creates a new Twelfth Circuit comprised of the Mountain states of Idaho, Montana, Nevada, and Arizona, and a new Thirteenth Circuit comprised of the Northwestern states of Alaska, Oregon, and Washington. The "new" Ninth Circuit would contain California, Hawaii, and the Pacific island territories of Guam and the Northern Marianas.

S. 2278 includes some very important and much-needed innovations that will dramatically reduce administrative costs in the reconfigured circuits by liberally allowing the sharing of judicial resources. These gains, pioneered by H.R. 2723 and further discussed below,[31] may be particularly helpful given the fact that our circuit's recent productivity increases have been unable to keep pace with the explosion in the number of appeals we receive each year,[32] a discrepancy demonstrating that our internal administrative reforms alone simply are not working as well as we all had hoped.

Senator Ensign's bill adds five new judgeships and two temporary ones, all but one located in the reconfigured Ninth Circuit. Total active judges would increase for at least the next ten years to 35, with 21 allocated to the new Ninth Circuit, 8 to the Twelfth, and 6 to the Thirteenth. 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."[33] 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.[34]

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[31] See infra Part III B.

[32] See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2003 Annual Report of the Director.

[33] 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).

[34] 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,

I also commend S. 2278 for placing six of its seven 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. S. 2278 answers this first by ensuring that no restructuring occurs until new judges have been appointed to help equalize the share of appellate work. Second, under some past proposals, the new Ninth Circuit would have been left with a very large caseload, while losing an improportionately large number of judges to the new circuits. In contrast, S. 2278's provisions result in only a marginal caseload disparity. The Twelfth and Thirteenth Circuits would take just under a third of the caseload and, factoring in the additional judgeships, 40% of the judges. The new Ninth would get a little more than two thirds of the caseload and 60% of the judges. Given the relatively small numbers of judges involved, it is hard to get much closer than that. And, of course, I have no doubt that most—if not all—of the new Twelfth and Thirteenth Circuit judges gladly would volunteer on new Ninth Circuit panels to help ease any growing pains. I myself would be assigned to the Thirteenth Circuit but would be more than happy to help out the new Ninth and Twelfth on a regular basis as needed.

Moreover, the new Ninth Circuit's workload, measured by number of appeals per authorized judge, would be less than 30% higher than the current average among the circuits. Indeed, the new Ninth Circuit would have fewer cases filed, per authorized judge, than the Second, Fifth, and Eleventh Circuits. Best of all, the per-judge caseload would markedly drop from the large number that each authorized Ninth Circuit judge currently processes.

On the other hand, S. 2278's Twelfth and Thirteenth Circuits may be subject to a "critical mass" attack, wherein skeptics might suggest that they would be too small to stand on their own.[35] Although the areas are among the fastest growing in the nation, these two new circuits would begin as some of our smaller circuits. Still, S. 2278's Twelfth Circuit would process more litigation than the First and D.C. Circuits, and would be close to the Tenth. And by appeals filed per authorized judgeship, the Twelfth Circuit, as created by S. 2278, would exceed the Third, Tenth, and D.C. Circuits, and would not be far behind the First, Sixth, and Eighth Circuits.

S. 2278's Thirteenth Circuit would be even smaller, though, for its total population and appeals would exceed only the D.C. Circuit. However, measuring appeals per authorized judge, it would surpass the Tenth and D.C. Circuits, and would be on par with the Third. Ultimately, then, the suggestion that either the proposed Thirteenth or Twelfth Circuit would be "too small" might not hold much water, and may impugn each one of the already hardworking circuits with which they would be comparable.

Of course, because these two circuits would start on the small side, 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. What is more important, however, is that S. 2278's new Ninth would be significantly

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Eighth, and Tenth Circuits. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089. Interestingly, the Ninth Circuit declined to request new judgeships notwithstanding its statistical eligibility for a number of new judges at the time.

[35] See, e.g., Statement of Sidney R. Thomas, 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).

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. 2278 offers a unique solution by separating the Ninth Circuit into three. And while this will lead to smaller courts at the outset, the exponential growth out West may well counsel such a proactive approach.

B

Congressman Simpson introduced H.R. 2723 in the House of Representatives on July 14, 2003. It employs the traditional dual-split approach, creating one additional circuit, the Twelfth, comprised of the Northwestern states and the Pacific Islands (Washington, Oregon, Idaho, Montana, Alaska, Hawaii, Guam, and the Northern Mariana Islands). The "new" Ninth Circuit would retain California, Nevada, and Arizona. Like S. 2278, H.R. 2723 adds five new judgeships and two temporary ones, all located in the reconfigured Ninth Circuit. Total active judges would increase for at least the next ten years to 35, with 26 allocated to the Ninth Circuit and 9 to the Twelfth. As noted, additional judgeships are sorely needed, which H.R. 2723 should be applauded for recognizing.

Congressman Simpson's proposal also introduced innovative administrative provisions codifying the ability to share resources, including the assignment of district and circuit judges, among the new circuits. To allow the sharing of resources—not only among but between circuits—will serve as an unqualified boon to efforts at managing heavy caseloads. Indeed, these important provisions essentially grant an unprecedented double benefit. Nearly all of the important administrative innovations we have instituted as triage over the last few years may be shared between the new circuits, while at the same time, each circuit receives all the benefits of reorganization into new circuits. So as each circuit develops intimate familiarity with a greatly decreased number of lower court rules and methodologies, we should see the immediate productivity gains inherent in a more cohesive geographical unit.

While H.R. 2723's approach does result in a caseload disparity, it is marginal. The Twelfth Circuit would take just under 20% of the caseload and, factoring in the additional judgeships, about 25% of the judges. And while H.R. 2723's division ensures that the Twelfth Circuit would begin as one of our smaller circuits, it would not be unreasonably so, as it would process more litigation than the First and D.C. Circuits, and would be within a few hundred appeals of the Tenth. And by appeals filed per authorized judge, H.R. 2723's Twelfth Circuit would exceed the Tenth and D.C. Circuits, and would be roughly comparable to each of the First, Third, Sixth, and Eighth Circuits.

More than the other recent reorganization proposals, H.R. 2723 would keep the new Ninth as a large circuit, well exceeding all other circuits in terms of population, overall caseload, and number of judges (just two less than the current Ninth). However, H.R. 2723's new Ninth Circuit would have, on average, the exact same caseload per judgeship as a new Ninth would under S. 2278, resulting in a marked decrease from what we now process. So while Congressman Simpson's new Ninth Circuit soon might be subject to many of the same criticisms I have identified above, breaking the current Ninth Circuit into smaller decisionmaking units of any size is undoubtedly preferable to the status quo.

H.R. 2723's additional judgeships and administrative provisions truly stand out, and any future circuit reorganization bill would do well to adopt them. Indeed, I am delighted to see that

S. 2278 has adopted H.R. 2723's laudatory administrative proposals whole cloth.

C

Senator Murkowsi introduced the first restructuring alternative of this session, S. 562, on March 6, 2003. Like H.R. 2723, it employs a dual-circuit approach, dividing the current Ninth Circuit into a "new" Ninth with California and Nevada, and a Twelfth Circuit that would include Alaska, Arizona, Guam, Hawaii, Idaho, Montana, the Northern Marianas, Oregon, and Washington.

The special virtue of S. 562 is that it presents a reconfiguration that has previously been adopted and passed by the Senate.[36] Unfortunately, however, S. 562 currently does not provide for any new judges, leaving it open to powerful criticism regarding the caseload disparity it creates. For while the Twelfth Circuit's workload significantly would drop compared to the current Ninth Circuit, the new Ninth's would increase appreciably on a per judge basis. This is a genuine weakness: Why reorganize the Ninth Circuit in such a way that one of the resulting subdivisions would be even more overburdened than before?

Still, S. 562 easily could be amended to add the five permanent and two temporary judges provided by S. 2278 and H.R. 2723. Were that to happen, S. 562 would offer a most viable alternative reorganization plan. Instead of a marked increase in its workload, the "new" Ninth Circuit would see a significant drop in the number of appeals filed per judge. And while it would remain the largest circuit overall, it would not be unreasonably so, processing only about 5% more appeals than the Fifth Circuit, and hosting a population within 5 or so million of the Sixth.

Moreover, S. 562's Twelfth would stand as a credible circuit under any metric. It would house more people than the First, Eighth, Tenth, and D.C. Circuits, and less than 10% fewer than the Third. And it would process roughly the same number of appeals as the Third and Seventh Circuits, and more than the First, Eighth, Tenth, and D.C. Circuits. And its appeals-per-judge caseload would be only about 8% less than the current all-circuit average. Indeed, of the three recent proposals, S. 562, if amended to include the seven new judges, yields the most balanced division from a numerical perspective.

Like the other proposals, however, S. 562 is not beyond reproach. For one thing, the layout is somewhat strange, as the Twelfth Circuit "hopscotches" over the new Ninth in order to include Arizona. This result is not entirely cohesive geographically, and may sacrifice some productivity gains that a more tightly knit configuration might yield. Yet there is nothing inherently objectionable about a non-contiguous aggregation—indeed, our own country clearly abandoned such a premise in 1959, when we accepted Alaska and Hawaii into the Union. Because the Ninth Circuit already includes these states, and because the First and Third Circuits include Puerto Rico and the Virgin Islands respectively, three current circuits are already as non-contiguous as S. 562's Twelfth Circuit would be. And now that judges ride circuit by commercial jet rather than stagecoach or train, availability of air routes rather than contiguity should determine the practicality of one layout or another. So while S. 562's particular alignment may be a basis for some criticism, it certainly presents a reasonable approach that brings its own set of benefits to the table.

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[36] See Ninth Circuit Court of Appeals Reorganization Act of 1997, S. 1022, 105th Cong. § 305.

As currently written, S. 562 probably does not present an attractive solution to the problems facing my circuit. Nevertheless, with the addition of new judgeships (and, perhaps, the valuable administrative provisions discussed above[37]), Senator Murkowski's bill offers an elegant approach that cannot be overlooked.

D

There is an additional objection, involving S. 562 and S. 2278, that warrants special attention. Under each of these proposals, the new Ninth Circuit would encompass only two states, running contrary to the proposition that a circuit should contain at least three. Of course, it is true that no current circuit contains fewer than three states,[38] but the fact that this is the status quo does not mean that a circuit could be viable with fewer. This may be especially true if one of those states is California.

Which brings us to the pervasive question of what to do with California, which currently accounts for over two thirds of our court's current caseload. Indeed, California by itself already houses more people than any other circuit in the country, and alone accounts for more appeals than any other circuit save the Fifth—which processed only 2% more last year. California also hosts four separate judicial districts, 14 circuit judges, and well over 50 federal district judges.[39] Each of these factors alone, much less in combination, might make a California-only circuit viable.

The 1973 Hruska Commission proposed an interesting alternative to a single-state circuit which solves the California question by splitting that state between a Northwestern circuit based in San Francisco, and a Southwestern Circuit based in Los Angeles.[40] Although this is my personal preference, it appears that any division of California into two circuits is off the table since it is my understanding that Senator Feinstein has expressed disapproval of any restructuring which would put her state in two separate circuits. In any event, given the enormous size of California, inter-circuit parity suggests that the optimal—if not ideal—choice may be one of these two options, and either split California or allow it to be a circuit of its own. From a practical standpoint, either a California-only circuit, or at least allowing California to be paired with only one other state, may make the most sense. Regardless, the simple fact that California is so large should not prevent efforts to reorganize the nine states and two territories that currently form our unreasonably large circuit. Even if the California problem were insoluble, restructuring will still substantially benefit the rest of the circuit, which in itself is a positive value. California's immense size is a difficult, but navigable issue that must carefully be considered in any effort to reconfigure the Ninth Circuit.

IV

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[37] See supra Part III A; Part III B.

[38] Except, of course, for the District of Columbia Circuit, which comprises only one judicial district.

[39] See Federal Judicial Center, Judges of the Districts of California, at http://www.fjc.gov/newweb/jnetweb.nsf/hisc.

[40] See Hruska Commission Report, supra note 7, at 2.

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

For example, one suggestion is that the Ninth Circuit should stay together to provide a consistent law for the West generally, and the Pacific Coast specifically. This is a red herring, as is the "need" to preserve a single 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. Each of the various restructuring provisions quite sensibly make use of these natural settings in effecting their restructuring.

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

I concede that there are judges on the Ninth Circuit Court of Appeals who believe the disadvantages of splitting the circuit outweigh the advantages. But as a member of that court, I must take issue with the innuendo that they represent an overwhelming majority. Some judges are neither for nor against restructuring: they decline to express any view, feeling the matter is entirely a legislative issue. And a great number of judges on our court do indeed favor some kind of restructuring, many strongly so. Perhaps our Chief Judge will make a good-faith effort to determine the breadth and scope of our judges' views on the issue, especially in light of the sincere new approaches made by both the House and the Senate. So far, she has neglected to do so, although I understand that the issue will come up at our informal retreat later this month.

Our circuit judges are not the only ones who may support a restructuring. Each of the five Supreme Court Justices who commented on the Ninth Circuit in letters to the White Commission "were of the opinion that it is time for a change."[41] 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."[42] An increasing number of district judges have expressed support for restructuring, as well, with many practitioners concurring. Still, some bar members do not seem to care who gets appointed to this large circuit—by the luck of the draw they can get a friendly panel, or if not, a randomly selected en banc panel can give them a second shot. In any event, I truly believe that support for a split is not so thin as many objectors suggest.

Finally, I would like specifically to respond to one of Chief Judge Schroeder's recent public statements on the issue of restructuring our circuit. In her most recent "State of the Circuit" speech,[43] our Chief made the astonishing assertion that "split proposals must realistically be viewed as a threat to judicial independence." This is directly contrary to over a century of Congressional legislation of circuit structure—all of which is concededly within the legislature's purview—and cannot be true. Bills such as S. 562, H.R. 2723, and S. 2278, with many provisions directly responding to the concerns the Chief Judge has previously articulated, demonstrate the good-faith efforts made by the House and Senate reasonably to restructure the judicial goliath of the Ninth Circuit. Calling for a circuit split based on particular decisions is counterproductive and unacceptable. But so is attacking the integrity of our elected representatives when they make honest and fair proposals to divide our circuit.

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.[44] As loyal as I am to my own court, I cannot oppose the logical and inevitable evolution of the Ninth

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

[42] Id.

[43] Mary M. Schroeder, State of the Circuit Speech at the 2003 Ninth Circuit Judicial Conference, Kauai, Hawaii (June 23, 2003).

[44] 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).

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. 28 judges is too many already, and more judges will only make it more difficult to render clear and consistent decisions. The time has come when such cosmetic changes can no longer suffice and a significant restructuring is necessary.

Whatever mechanism you choose, ultimately Congress will restructure the Ninth Circuit. This task has been delayed far too long, and each day the problems get worse. I do not mean to imply that our circuit as a whole is beyond the breaking point. I want to emphasize that our Chief Judge and our Clerk of the Court are doing a marvelous job of administering this circuit. Instead, my focus is on where we go from here. If the Ninth Circuit Court of Appeals has not yet collapsed, it is certainly poised at the edge of a precipice. Only a restructuring can bring us back. And proposals such as S. 562, H.R. 2723, and S. 2278, with their commendable efforts at answering all major objections to past proposals, provides just the lifeline we need.

V

Unfortunately, the Ninth Circuit's problems will not go away; rather, they will only 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 any reasonable restructuring proposal that might come before you.

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

United States Court of Appeals
THE PIONEER COURTHOUSE
PORTLAND, OREGON 97204-1396

Chambers of
DIARMUID F. O'SCANNLAIN
United States Circuit Judge

(503) 326-2187

May 7, 2004

The Honorable Jeff Sessions
Chairman, Subcommittee on Administrative Oversight and the Courts
335 Russell Senate Office Building
Washington, D.C. 20510

Re: Ninth Circuit Split – Cost Estimates

Dear Chairman Sessions:

We have been given the courtesy of reviewing the response to Senator Feinstein's recent request for cost estimates of the pending Ninth Circuit restructuring bills prepared by L. Ralph Mecham, Director of the Administrative Office of the United States Courts. While we applaud the dedication and efficiency of the Administrative Office in preparing these rough estimates on relatively short notice, such intense time pressure can give rise to some unwarranted assumptions underlying the calculations.

Of course, we are the first to concede that we have neither the expertise nor the appropriate staff to analyze specific cost figures in detail with any degree of confidence. We have no doubt that the AO acted in good faith and with due sincerity in performing this difficult task. Nevertheless, without a better understanding of the AO's assumptions, our limited review suggests that the estimates, though generally fair, may overemphasize many of the costs associated with these restructuring bills.

There are several possible misconceptions arising from the AO schedules that should be noted:

- Failure to Identify Savings and Offsets from a Restructuring: It is unclear whether the diminished expense of a reorganized circuit resulting from loss of

employees with long federal tenures, reduction in caseload, reduction in travel costs, reduction in office and storage space, etc. have been factored into the analysis. For example, the AO generously budgeted several million dollars worth of brand new furniture, computers, and office equipment under each of the proposals. Much of this equipment will be redundant, of course, as the vast majority of equipment usage in one location will be offset by a corresponding decrease in another. At least with respect to these new supplies, it appears that the AO did not consider any such offsets; at worst, the well-functioning equipment in the old location could presumably be sold or reused elsewhere within the judiciary, at some significant overall savings.

- Merging of Split Costs with New Judgeship Appropriations: The Ninth Circuit had already requested seven new circuit judgeships before any of these bills were proposed, so it is unfair to assess them as start-up and recurring costs associated with any new circuits. Indeed, all three estimates include cost figures for the creation of new judgeships, so none of them accurately reflects the underlying expense of restructuring the Ninth Circuit. The "cost of reorganizing the Ninth Circuit" and the "cost of reorganizing the Ninth Circuit *while adding several new judges*" are entirely different matters, and the two should not be confused. The AO's estimates are wholly premised on the addition of these new judges, and the great majority of the assumed space and equipment requirements are therefore unrelated to the actual cost of reorganizing the Ninth Circuit. In short, the AO's estimates should not be mistaken for an estimate of the underlying cost to divide the Ninth Circuit.

- S.562 Estimate: Although the AO budgets for them, S. 562's provisions do not provide for the creation of new judgeships, as contrasted to S. 2278 and H.R. 2723 which do. The overall start-up and recurring costs for that bill likely should be reduced by at least 20% (or more).

- Unusual, and Perhaps Unwarranted Assumptions: The AO's schedules also include some estimated costs that may not necessarily accrue under any of the bills. First, the AO's schedules assume that any and all new circuits would require a permanently staffed Bankruptcy Appellate Panel clerk's office. However, very few circuits in the country permanently employ such staff, so

it is unlikely that a new Twelfth or Thirteenth would require such a recurring expenditure. Additionally, the schedules contain some cost estimates that may not bear out in practice. For example, the report estimates a unit cost of $5,000 for each "Support Staff IT Desktop Computer." It seems doubtful that a desktop computer would cost so much, particularly when, as the AO estimates, hundreds would be purchased at once.

- AO Correctly Concludes No New Courthouse Needed for H.R. 2723 or S. 562: Chief Judge Schroeder, in a letter to the House Subcommittee on Courts, the Internet and Intellectual Property dated October 28, 2003 regarding H.R. 2723, asserted that the "Nakamura US Courthouse is too small to serve as a new circuit headquarters," and estimated $100 million for a new Seattle courthouse. The AO's report properly debunks that myth, acknowledging that the Nakamura Courthouse is well-suited to the task if a new Twelfth or Thirteenth Circuit were to be located in Seattle. However, the AO did suggest that an entirely new building would have to be built in Las Vegas or Phoenix to house a Twelfth Circuit under S. 2278, an assumption that may not be warranted. There are recently completed major courthouses in both cities, and either of these two existing buildings might serve as a circuit headquarters—perhaps even in tandem. Additionally, the Sandra Day O'Connor Courthouse replaced an older federal courthouse in Phoenix as did the Lloyd D. George Courthouse in Las Vegas. Each might have available space, and even the rental of a modest amount of private office space in either of those cities might be appropriate. Thus, further research might obviate entirely the need for a $84–$115 million dollar courthouse under S. 2278.

- Seattle Courthouse Calculation: It also appears that the AO's estimates include the cost of renting the entire Nakamura Courthouse as a circuit headquarters. However, even if there is no restructuring, the Ninth Circuit has already committed to occupying close to 75% of the Nakamura Courthouse upon its renovation, and to assume the associated costs. Thus, perhaps as much as three quarters of the AO's estimated recurring rent costs should be excluded as part of the price of enacting any of these bills.

For these and many other reasons, the AO's cost estimates may not provide concrete, reliable figures, either for the costs associated with the pending reorganization bills, or, in particular, for the baseline expense associated with a reorganization of the Ninth Circuit. Until we can compare apples to apples, and until we have a better understanding of the long-term benefits of smaller circuits, fiscal and otherwise, one must remain somewhat skeptical and recognize the limitations of the Administrative Office's response to Senator Feinstein's inquiry.

We appreciate the opportunity to comment on this issue, and ask that you include this letter as part of the permanent record.

Sincerely,

Diarmuid F. O'Scannlain
United States Circuit Judge
for the Ninth Circuit

Richard C. Tallman
United States Circuit Judge
for the Ninth Circuit

cc: Senator Dianne Feinstein
L. Ralph Mecham
Chief Judge Schroeder

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

ELIZABETH L. PERRIS
BANKRUPTCY JUDGE

1001 S.W. FIFTH AVENUE, # 700
PORTLAND, OREGON 97204
(503) 326 - 4173

RAEMA MANNING, JUDICIAL ASSISTANT
DIANE K. BRIDGE, LAW CLERK
TONIA J. McCOMBS, LAW CLERK

VIA FACSIMILE

May 10, 2004

The Honorable Senator Jeff Sessions
United States Senate
335 Russell Senate Office Building
Washington, D.C. 20510-0104

Re: S. 2278

Dear Senator Sessions:

On behalf of the judges of the Bankruptcy Appellate Panel of the Ninth Circuit, enclosed please find a statement opposing division of the circuit. We appreciate the fact that the Subcommittee left the record open to allow for submission of additional comments.

Very truly yours,

ELIZABETH L. PERRIS
Bankruptcy Judge

ELP:rjm
Enclosure
cc: Chief Judge Mary M. Schroeder (via facsimile)
Gregory B. Walters (via facsimile)

Statement Opposing Division of the Ninth Circuit

Submitted by the Judges of the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals

The judges of the Bankruptcy Appellate Panel for the Ninth Circuit respectfully oppose division of the Ninth Circuit Court of Appeals. Such division would result in the loss of a circuit that is a unique, innovative judicial entity that is able to foster efficient use of judicial resources while maximizing coherence in the interpretation of the law in the Ninth Circuit.

The focus of our comments is on the impact that dividing the circuit would have on the administration of bankruptcy cases and appeals.[1] Bankruptcy touches more American lives than any other federal law, except the Federal Tax Code. Of the 1,611,268 bankruptcies filed nationally in the 12 months ending March 31, 2004, 284,093 cases were filed in the bankruptcy courts of the Ninth Circuit.

When the Bankruptcy Code was enacted in 1978, it contained authority for the circuit courts to create bankruptcy appellate panels (BAP) as an alternative forum to the district courts for reviewing bankruptcy decisions. The Ninth Circuit created a BAP for the circuit almost immediately. The Ninth Circuit is the

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[1] Others have ably explained the impact that dividing the circuit will have on the court's appellate work and other aspects of judicial administration. We limit our comments to the impact on bankruptcy case administration, which is our area of expertise.

only circuit that has continuously had a BAP since 1979. As discussed in more detail below, the Ninth Circuit BAP is an example of how the Ninth Circuit is innovative and leverages its resources to provide better public service.

Effective Use Of Judicial Resources

Seven bankruptcy judges are authorized for appointment to the BAP. Beginning January 2003, the number actually appointed dropped to six to reflect reduced case loads and to preserve resources. BAP judges serve in an appellate role in addition to their trial court responsibilities. The work of the BAP is augmented by trial judges who sit pro tem. All are volunteers who receive no additional compensation for BAP duty. Regularly appointed BAP judges do receive the assistance of an additional law clerk.

Because BAP judges cannot hear cases from their own districts, the judges travel throughout the circuit to hear appeals. The fact that the Ninth Circuit is large, with varying economic conditions in different parts of the circuit at any given time, has meant that there have always been an adequate number of capable bankruptcy judges willing to volunteer to assume the additional 25% - 30% workload that comes with being a BAP judge.

Since its inception, more than 14,060 appeals have been resolved by the BAP, of which 4,500 appeals have been decided on the merits.

Advantages Of Size Offered By A Large Circuit

In bankruptcy, the same legal issues will often arise in thousands of cases. Only a handful of the parties involved will go to the time and expense of appealing an adverse ruling. A prompt, persuasively reasoned determination of those issues by a circuit-wide court provides predictability of probable legal outcome across the circuit. Decisions by the BAP give guidance to trial courts and save unnecessary litigation costs.

The current structure of the Ninth Circuit offers advantages over smaller circuits. As the number of cases increases, the chance that a particular issue will be brought to an appellate court more quickly also increases. Issues can be decided once, not two or three times, as would be the result if the circuit were to be divided and each new circuit had to address the same issues. Although BAP decisions are not considered binding precedent, our understanding is that the bar considers them highly effective tools for assuring predictability of outcomes, if not for anticipating circuit court adoption of legal principles developed by the BAP.

Having A BAP Conserves District Court Resources

The BAP is authorized to hear appeals from all 13 districts of the Ninth Circuit. (Guam and the Northern Mariana Islands are excluded, as they do not have bankruptcy judges separate from the district judges.) Appeals are heard by three-judge panels with the consent of the parties. Historically the BAP has handled

approximately 60% of the appeals, while the various district courts have handled approximately 40% of the appeals.

The BAP handles appeals that otherwise would have resulted in additional case loads for the district courts. For example, over the past ten years, the BAP has resolved an average of 680 appeals annually. The shift of work from district courts to the BAP enables the Article III district judges to spend more time on criminal and other cases that only they can adjudicate.

If the circuit were to be divided, it is unknown whether the case load of each of the new circuits would warrant the establishment of a BAP and, even if it did, whether the smaller BAPs could justify the administrative expense and necessary staffing inherent in any court.[2]

Having A BAP Conserves Circuit Resources

Bankruptcy decisions are subject to a two-tiered system of appellate review. The first stop is the BAP or the district court, where about 75% of the number of appeals initially filed are fully resolved. The remaining 25% seek second-level review at the court of appeals. Appeals that go through the BAP are less likely to seek second-level review, 20% from the BAP compared with 30% from the district courts, in part due to the

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[2] We do note that, under 28 U.S.C. § 158(b)(4), it is possible that a BAP could serve the bankruptcy courts of more than one circuit, but there has never been a joint BAP. The complexity of establishing a cross-circuit institution may create practical impediments to doing so.

expertise of the bankruptcy bench in understanding bankruptcy issues, and in part due to the persuasive value of the BAP decisions. These efficiencies would likely be lost if the circuit were to be divided.

Conclusion

In closing, the judges of the Bankruptcy Appellate Panel for the Ninth Circuit strongly oppose division of our circuit, because we believe that opportunities to make efficient use of the substantial resources of our large circuit will be lost by fragmentation, as will the consistency in the law that comes from having a large circuit rather than two or more smaller circuits.

We greatly appreciate the opportunity to submit a statement regarding division of the circuit

Submitted on May 5, 2004

Elizabeth L. Perris, Chief Judge	Dennis Montali
Philip H. Brandt	James M. Marlar
Christopher M. Klein	Erithe Smith

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

John M. Roll
United States District Judge

Evo A. DeConcini United States Courthouse
405 West Congress Street, Suite 5190
Tucson, Arizona 85701-5053

Telephone: (520) 205-4520
Fax: (520) 205-4529

October 9, 2003

Honorable F. James Sensenbrenner, Jr.
Chairman, House Committee on the Judiciary
U.S. House of Representatives
2449 Rayburn HOB
Washington, D.C. 20515-5905

Re: H.R. 2723 (Ninth Circuit Court of Appeals
Judgeship and Reorganization Act of 2003)

Dear Chairman Sensenbrenner:

I write in enthusiastic support of legislation to bring the Ninth Circuit into alignment with the size of other circuits of the United States Courts of Appeals. My enthusiasm for reorganization of the Ninth Circuit is tempered only by the shape that the realignment may assume. I write only on my own behalf. I do urge that the committee consider alternatives to placing the Districts of Arizona and Nevada with California. While the devil is obviously in the details, the need for reorganization is abundantly clear.

My comments are not directed toward the execution of administrative responsibilities in the Ninth Circuit; those duties are performed remarkably well by an outstanding Circuit Executive's Office. Rather, my comments are offered in the spirit of improving the administration of justice.

Introduction

Currently, at 28 authorized judgeships, the Ninth Circuit has 11 more authorized judgeships than the next largest circuit, and is twice as large as most. H.R. 2733 would divide the Ninth Circuit into two circuits. The new Ninth Circuit would include California, Arizona, and Nevada, and would consist of at least 24 authorized judgeships, while a new Twelfth Circuit would include the rest of the current Ninth Circuit, and would consist of 9 authorized judgeships.

This proposed Act would merely shift the problems of the current Ninth Circuit to the three states that would compose the new Ninth Circuit. I respectfully recommend a geographical division that would produce a more even-handed distribution of judges and caseload between the two new circuits.

A. Need for Sub-Division

1. Disproportionate Dimensions of the Ninth Circuit

Although the Ninth Circuit is but one of 13 circuit courts, it consists of nine states (including California, the most populous state in the country), the U.S. Territory of Guam, and the Commonwealth of the Northern Mariana Islands.

Since Congress established the Ninth Circuit Court of Appeals in 1891, enormous population shifts have occurred. Its population (51,453,880 people), physical size (1,347,498 square miles), number of states (9), and number of judges (28), far outrank any other circuit. The next largest circuit (the Eleventh Circuit) has 17 authorized circuit judges. In 1980, the Fifth Circuit was divided into two circuits, the Fifth and Eleventh Circuits. Today, those two circuits combined have 29 authorized judgeships. No compelling reason exists for one circuit to be far larger than any other circuit and twice as large as most.

2. Modified En Banc Hearings – Votes Required for En Banc Review

In 1978, Congress authorized the largest circuit courts to conduct en banc hearings with panels consisting of fewer than all active judges. Only the Ninth Circuit has utilized this statutory option, using 11 circuit judges to serve on en banc hearings. It is necessary to do

so in the Ninth Circuit because it would be virtually impossible for 28 judges to meaningfully convene en banc. This means that when the most important issues are decided in the Ninth Circuit, far less than a majority of the active judges participate.

By statute, a majority of a circuit's active circuit judges must vote for rehearing en banc before such a hearing may take place. Because the Ninth Circuit has 28 authorized judgeships, 15 votes are required in order to obtain en banc review. Only three other circuits even have 15 or more circuit judges. In *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003) (the Pledge of Allegiance litigation), nine judges voted for rehearing en banc, yet because of the requirement that a majority of active judges vote for rehearing en banc, nine votes were insufficient.

3. Enormous Number of Panel Combinations – Inconsistent Decisions

Except for the rare en banc hearing, all circuit court decisions are rendered by three-judge panels. Ninth Circuit Judge Diarmuid O'Scannlain has estimated that as a result of having nearly 50 active and senior judges serving on the Ninth circuit, there are approximately 19,600 different three-judge panel combinations. This does not even take into consideration the significant number of visiting judges who sit with the Ninth Circuit. In 1973, the Hruska Commission recognized frustration among practitioners resulting from "apparently inconsistent decisions by different panels of the large court. . . ." At that time, the Ninth Circuit only had 13 authorized circuit judgeships. With the addition of 15 active circuit judgeships since 1973, it is difficult to believe that the situation has improved.

B. Configuration of Sub-Division – The Details

For many reasons, including those discussed above, the Ninth Circuit should be sub-divided into two circuits. However, I respectfully suggest that the Districts of Arizona and Nevada not be joined with California to form one of the two circuits.

The impact of the specific alignment proposed in H.R. 2723 would be instant creation of a new mega-circuit having almost as many judges as the current Ninth Circuit. It would result in the Ninth Circuit being subdivided into a new Ninth Circuit (California, Arizona, and Nevada) with at least 24 judges and a new Twelfth Circuit with only 9 judgeships.

It would seem that the goal of eliminating the many problems posed by an oversized circuit could be achieved by subdividing the current Ninth Circuit into two circuits of comparable caseload. Assuming that division of California is not realistic, one division that would achieve this goal would be the joining of California with the Territory of Guam and the Commonwealth of the Northern Mariana Islands.

Conclusion

Although the Ninth Circuit is clearly in need of reorganization, any such reorganization should result in two new circuits of comparable size and caseload.

Thank you for the opportunity to comment upon this most important undertaking.

Sincerely,

John M. Roll

JMR:mb

cc: Representative Jeff Flake
Representative Mike Simpson

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

John M. Roll
United States District Judge

Evo A. DeConcini United States Courthouse
405 West Congress Street, Suite 5190
Tucson, Arizona 85701-5053

Telephone: (520) 205-4520
Fax: (520) 205-4529

November 4, 2003

Honorable Jeff Sessions
Chairman, Senate Committee on the Judiciary
U.S. Senate
335 Russell SOB
Washington, DC 20510-0104

Re: Reorganization of Ninth Circuit Court of Appeals

Dear Chairman Sessions:

I write in enthusiastic support of legislation to bring the Ninth Circuit into conformity with the size of other circuits of the United States Courts of Appeals. I write only on my own behalf. I respectfully and earnestly urge that legislation be enacted that reorganizes the existing Ninth Circuit Court of Appeals into three manageable circuits. Arizona would fit very comfortably with Idaho, Montana, and Nevada in a new circuit. This circuit, as well as a Northwest circuit, would have more than adequate caseload and ample room for growth.

My comments are not directed toward the execution of administrative responsibilities in the Ninth Circuit; those duties are performed remarkably well by an outstanding Circuit Executive's Office.

My comments are offered in the spirit of improving the administration of justice. For all of the reasons described below, the administration of justice would be well-served by the first meaningful adjustment to unfettered growth since 1891.

Physical dimensions of existing circuit

Although the Ninth Circuit is but one of 13 circuit courts, it consists of nine states (including California, the most populous state in the country), the U.S. Territory of Guam, and the Commonwealth of the Northern Mariana Islands.

As Ninth Circuit Judge Diarmuid O'Scannlain has eloquently described it, "[t]he Ninth Circuit...range[s] from the Rocky Mountains and the Great Plains to the Sea of Japan and the Rainforests of Kuai, from the Mexican Border and the Sonoran Desert to the Bering Strait and the Arctic Circle." Written Testimony of Diarmuid F. O'Scannlain, at 5, Hearing on H.R. 2723, October 21, 2003 ("O'Scannlain Testimony").

The Ninth Circuit occupies 1,347,498 square miles, more than one-third of the land mass of the United States. With a population of over 56 million people, more than one-fifth of the United States currently resides within the boundaries of the Ninth Circuit.

Number of circuit judges

The Ninth Circuit has 28 authorized judgeships. The next largest circuit, the Eleventh Circuit, has 17 authorized judges. In 1980, the Fifth circuit was divided into two circuits, the Fifth and Eleventh Circuits. Today, those two circuits combined have a total of 29 authorized judgeships.

Since the 1930s, every decade up to the present has seen serious proposals to split the Ninth Circuit. In 1973, the Commission on Revision of the Federal Court Appellate System chaired by Senator Roman Hruska ("Hruska Commission") recommended that the Ninth Circuit be divided, and as recently as 1998, the Commission on Structural Alternatives for the Federal Courts of Appeals ("White Commission") concluded that something had to be done regarding the Ninth Circuit, although something less than a split was proposed.

Five years ago, the White Commission stated:

> In our opinion, apparently shared by more than two-thirds of all federal appellate judges, the maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between eleven and seventeen.

(White Commission, at 29.)

Ninth Circuit Judge Diarmuid O'Scannlain has estimated that as a result of having nearly 50 active and senior judges serve on the Ninth circuit, there are approximately 19,600 different three judge panel combinations.

In 1973, the Hruska Commisson recognized frustration among practitioners resulting from "apparently inconsistent decisions by different panels of the large court..." In 1973, the Ninth Circuit had 13 authorized circuit judgeships. Fifteen active circuit judgeships have been added since then.

Prof. Arthur D. Hellman, University of Pittsburgh School of Law, recently offered congressional testimony concerning reorganization of the Ninth Circuit. At best, Prof. Hellman offered guarded support, under certain circumstances, for reorganization. However, in his prepared written statement, he did describe a study he carried out in July 2003, involving seven Ninth Circuit judges. Those seven judges, as of 2003, had served on the Ninth Circuit for periods ranging from 2 years 11 months to 4 years 5 months. He found that all seven had yet to serve on a three-judge regular argument panel with all of the other active Ninth Circuit judges. Statement of Arthur D. Hellman, at 10, Hearing on H.R. 2723, October 21, 2003 ("Hellman Statement.")

Caseload

Judge O'Scannlain has pointed out that with 11,271 appeals handled in the 2002 court year, the Ninth Circuit's caseload was more than double the average of other circuits and almost 2,500 more than the Fifth Circuit, the next busiest circuit in the country. The caseload is higher in 2003. (O'Scannlain Testimony, at 4.)

Prof. Hellman, in his written statement to Congress, included a chart indicating "that for the last decade and a half, the Ninth Circuit Court of Appeals has consistently ranked at or near the bottom among federal appellate courts in the median time interval from filing the notice of appeal to final disposition." (Hellman Statement, at 15.)

Prof. Hellman also discussed the Ninth Circuit's adamant opposition to the Judicial Conference's proposal regarding citation of unpublished opinions, which opposition may be a product of the circuit's volume of appeals and number of judges.

Limited en banc participation

One disturbing feature of the current size of the Ninth Circuit is the complete impracticality of the entire Ninth Circuit sitting en banc. The White Commission noted that only the Ninth Circuit utilizes the abbreviated en banc procedure authorized by Congress in 1978. (White Commission, at 21.) Under this procedure, only 11 of the Ninth Circuit's authorized 28 circuit judges sit "en banc." With the exception of the chief judge (who is always a participant), any panel member may or may not be randomly selected to serve as one of the 11 "en banc" judges.

The White Commission also stated that "[s]upporters of the [Ninth Circuit] as currently structured say that its en banc process is efficient and effective. They note that very few en banc decisions are closely divided, so it is unlikely a full-court en banc would produce different results." (White Commission, at 35.)

However, since the White Commission's report in 1998, many en banc decisions have involved at least four full or partial dissents. *See e.g.*, *Payton v. Woodford*, No. 00-99000 (9th Cir. 2003) (en banc); *United States v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003) (en banc); *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003) (en banc); *United States v. Severino*, 316 F.3d 939 (9th Cir. 2003) (en banc); *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002) (en banc); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc); *Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002) (en banc); *Paulson v. City of San Diego*, 294 F.3d 1124 (9th Cir. 2002) (en banc); *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc); *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc); *Washington*

Legal Foundation v. Legal Foundation of Washington, 271 F.3d 835 (9th Cir. 2001) (en banc); *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001) (en banc);*Catholic Social Services, Inc. v. I.N.S.*, 232 F.3d 1139 (9th Cir. 2000) (en banc); *United States v. Hayes*, 231 F.3d 663 (9th Cir. 2000) (en banc).

Furthermore, in every other circuit, the votes of nine judges would constitute a majority in an en banc hearing; in the Ninth Circuit, the votes of nine judges are an insufficient number to even obtain an en banc hearing. For example, in *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003), *petition for cert. filed*, 71 U.S.L.W. 3708 (U.S. Apr. 30, 2003) (No. 02-1574), the pledge of allegiance case, at least 9 judges voted to have the panel's 2-1 decision reheard en banc. Because 13 of the current 24 active judges did not vote for rehearing en banc, the 2-1 panel decision remains the law of the circuit. Of course, even had 13 judges voted for rehearing en banc, only 11 of the circuit's 24 judges, would have participated. When the Ninth Circuit is at full strength with 28 active circuit judges, 15 votes will be required just to obtain en banc review. Only three of the thirteen circuits in the United States have 15 or more circuit judges. *Newdow* is a particularly troublesome example because that decision is viewed by a large segment of the population of the United States as one of the most important decisions rendered by the Ninth Circuit.

In addition to *Newdow*, at least one other prominent case involved denial of a petition for rehearing en banc despite significant votes for en banc review. *See e.g., Silveira v. Lockyer*, 312 F.3d 1052 (2002), *reh. en banc denied* 328 F.3d 567 (9th Cir. 2003) (7 circuit judges dissenting from denial of rehearing en banc).

Yet another problem with the limited en banc procedure surfaced recently. In *S.W. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003), *rev'd en banc*, 344 F.3d 914 (9th Cir. 2003), the California gubernatorial recall case, a three-judge panel unanimously enjoined the State of California from proceeding with a scheduled recall election. A unanimous eleven judge en banc panel reversed the unanimous three-judge panel. No member of the three-judge panel was drawn to participate in the limited en banc hearing.

Conclusion

The manifold problems discussed above will only be exacerbated by the stopgap measure of simply adding new judges to the existing Ninth Circuit. Reorganization of the Ninth Circuit into three circuits would serve to bring the existing Ninth Circuit into line with the size of the other federal circuits, and would allow for growth in the circuit consisting of Arizona, Idaho, Montana, and Nevada, as well as the circuit containing the Northwestern states.

"Only the barest nostalgia suggests that the Ninth Circuit should keep essentially the same boundaries for over a century." (O'Scannlain Testimony, at 11.)

Sincerely,

John M. Roll

JMR:mb

cc: Senator Jon Kyl

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

John M. Roll
United States District Judge

Evo A. DeConcini United States Courthouse
405 West Congress Street, Suite 5190
Tucson, Arizona 85701-5053

Telephone: (520) 205-4520
Fax: (520) 205-4529

April 5, 2004

Honorable Jeff Sessions
Chairman, Senate Committee on the Judiciary
U.S. Senate
335 Russell SOB
Washington, DC 20510-0104

Re: Reorganization of Ninth Circuit Court of Appeals

Dear Chairman Sessions:

I write in enthusiastic support of legislation to bring the Ninth Circuit into conformity with the size of other circuits of the United States Courts of Appeals. I write only on my own behalf. Having said that, however, I know of no district judge from the Ninth Circuit authorized to speak on behalf of all Ninth Circuit district judges on this topic, nor am I aware of any survey of district judges concerning a possible circuit split. I do urge Congress to consider overseeing an anonymous survey of all circuit and district judges in the Ninth Circuit. I believe that the results would indicate significant support for a split of the Ninth Circuit.

I respectfully and earnestly urge that legislation be enacted that reorganizes the existing Ninth Circuit Court of Appeals into three manageable circuits. Arizona would fit very comfortably with Idaho, Montana, and Nevada in a new circuit. This circuit, as well as a Northwest circuit, would have more than adequate caseload and ample room for growth.

My comments are not directed toward the execution of administrative responsibilities in the Ninth Circuit; those duties are performed remarkably well by an outstanding Circuit Executive's Office.

My comments are offered in the spirit of improving the administration of justice. For all of the reasons described below, the administration of justice would be well-served by the first meaningful adjustment to unfettered growth since 1891.

Physical dimensions of existing circuit

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Last fall, Judge O'Scannlain pointed out that with 11,271 appeals handled in the 2002 court year, the Ninth Circuit's caseload was more than double the average of other circuits and almost 2,500 more than the Fifth Circuit, the next busiest circuit in the country. The caseload is higher in 2003. (O'Scannlain Testimony, at 4.) As of September 30, 2003, 11,277 cases were pending in the Ninth Circuit, more than one quarter of the 44,600 cases pending n all circuit courts.

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In addition to *Newdow*, other cases have involved denial of petitions for rehearing en banc despite significant votes for en banc review. *See e.g.,Belmontes v. Woodford,* 350 F.3d 861 (9th Cir. 2003), *reh. en banc denied* 359 F.3d 1079 (2004)(8 circuit judges dissenting from denial of rehearing en banc); *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *reh. en banc denied* 328 F.3d 567 (2003) (7 circuit judges dissenting from denial of rehearing en banc).

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Summary

The following are some of the reasons it is clearly time for the historic Ninth Circuit to be divided.

- The Ninth Circuit has 28 active circuit judges. The next largest circuit has 17, and the average size of the other 11 geographical circuit courts is 12 circuit judges.

- The Ninth Circuit has 48 circuit judges, when senior circuit judges are counted.

- Even with 48 circuit judges, the Ninth Circuit routinely invites district judges from within the Ninth Circuit, circuit and district judges from other circuits, and even Court of International Trade judges to participate in three-judge panels.

- So many possible combinations of three-judge panels exist that it is not uncommon for active judges on the Ninth Circuit to sit for more than three years without having sat on a panel with all of the other active circuit judges. This has been described as a strong contributor to a breakdown in collegiality.

- Considering only the number of combinations arising from the 48 Ninth Circuit judges, Judge O'Scannlain has calculated that there are 19,600 possible three-judge panel combinations.

- The Ninth Circuit now hears 25% of all federal circuit appeals. As of September 30, 2003, 11,277 cases were pending in the Ninth Circuit, more than one-quarter of the 44,600 cases pending in all circuit courts.

- Once appeal is filed, the Ninth Circuit takes at least 5 months longer than the national 10 month average to decide cases.

- The Ninth Circuit now issues so many opinions that some members of the Ninth Circuit have complained that they do not have the time to read all of the Ninth Circuit's opinions.

- One-third of the Supreme Court's caseload consists of reviewing Ninth Circuit decisions.

- When the Supreme Court heard appeals from the Ninth Circuit between 1990-96, 73% of the Ninth Circuit's decisions were reversed, compared to a national average of 46%.

- During the 1997-98 term, the Supreme Court reversed 27 of 28 Ninth Circuit cases reviewed.

- Between 1998-2002, the Supreme Court reversed the Ninth Circuit in 103 cases, 26 unanimously, and affirmed the Ninth Circuit in 13 cases.

Conclusion

In deciding what, if any, action should be taken regarding the Ninth Circuit, the Senate has three options: (1) divide the Ninth Circuit, with new judges being added; (2) retain the current configuration of the Ninth Circuit but add seven new judges thereby increasing the number of judges to 35, about three times the average size of the other circuit courts; or (3) retain the current configuration but add no new judges, despite a steady increase in an enormous caseload. Certainly, the first option appears most appropriate and the proposed legislation under consideration clearly meets this objective.

Thank you for your consideration of these comments.

Sincerely,

John M. Roll
District Court Judge

JMR:kh

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

John M. Roll
United States District Judge

Evo A. DeConcini United States Courthouse
405 West Congress Street, Suite 5190
Tucson, Arizona 85701-5053

Telephone: (520) 205-4520
Fax: (520) 205-4529

April 29, 2004

Honorable Jeff Sessions
Chairman, Senate Committee on the Judiciary
U.S. Senate
335 Russell SOB
Washington, DC 20510-0104

Re: Proposal to reorganize the Ninth Circuit Court of Appeals

Dear Chairman Sessions:

Former Chief Judge of the District of Arizona William D. Browning, former Chief Judge of the District of Arizona Robert C. Broomfield, and District Judge John M. Roll write in order to communicate the following information to you concerning the current proposal to reorganize the Ninth Circuit Court of Appeals.

Former Chief Judge William D. Browning served as a member of the White Commission. It is Judge Browning's position that if the choice is either adding additional judgeships to the existing Ninth Circuit or dividing the Ninth Circuit, he favors dividing the Ninth Circuit Court of Appeals.

Former Chief Judge Robert C. Broomfield testified before the White Commission in opposition to division of the Ninth Circuit. Judge Broomfield now favors dividing the Ninth Circuit Court of Appeals.

District Judge John M. Roll is in line to become the next chief judge of the District of Arizona. Judge Roll supports Senator Ensign's proposal to divide the Ninth Circuit Court of Appeals.

Sincerely,

William D. Browning
Senior District Judge

Robert C. Broomfield
Senior District Judge

John M. Roll
District Judge

JMR:kh

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

John M. Roll
United States District Judge

Evo A. DeConcini United States Courthous
405 West Congress Street, Suite 51
Tucson, Arizona 85701-505

Telephone: (520) 205-452
Fax: (620) 205-452

May 21, 2004

Honorable Jeff Sessions
Chairman, Senate Committee on the Judiciary
U.S. Senate
335 Russell SOB
Washington, D.C. 20510-0104

Re: Cost Estimates for Twelfth Circuit Headquarters

Dear Mr. Chairman:

My reasons for writing to you are twofold.

I write in enthusiastic support of Senate Bill 2278, which provides for a three-way split of the existing Ninth Circuit and places Arizona in a new Twelfth Circuit with Nevada, Idaho, and Montana.

I also write because I have read Administrative Office Director Ralph Mecham's letter to Senator Diane Feinstein, dated May 14, 2004, and strenuously disagree with the conclusion that should a new Twelfth Circuit headquarters be located in Phoenix, it would be necessary to erect an $84 million circuit courthouse.

Cost estimates

Initially, one may question whether cost alone should be an overriding factor in deciding whether to divide a circuit which is so large it dwarfs virtually every other circuit. This is particularly true in light of the fact that the Ninth Circuit caseload is so heavy that seven additional judgeships are proposed in Senate Bill 2278. Although the caseload justifies additional judgeships, without a circuit split, the addition of seven new circuit judges would enlarge the existing Ninth Circuit to 35 active circuit judges. The next largest circuit would be half that size and the average of all other circuits would be about one-third the size of the Ninth Circuit.

However, realizing that cost is a consideration, I do not believe that a new circuit courthouse would be required if Phoenix is selected as the headquarters for the new Twelfth Circuit.

Although my primary responsibilities involve service in the Evo DeConcini Federal Courthouse in Tucson, I am also quite familiar with both of the federal courthouses in Phoenix, those being the Sandra Day O'Connor Federal Courthouse and the 230 North First Avenue Federal Courthouse.

I believe that inquiry into available space for the Twelfth Circuit headquarters in Phoenix would disclose that enough space could be made available in the Sandra Day O'Connor Federal Courthouse and/or 230 North First Avenue Federal Courthouse to accommodate the entire circuit operation. I would welcome the opportunity to provide further information regarding this conclusion.

The Need for Subdivision of the Ninth Circuit

No one could seriously argue that when the boundaries of the Ninth Circuit were formed over 100 years ago, it was contemplated that those boundaries would remain unchanged in perpetuity, regardless of population growth.

Today, the Ninth Circuit encompasses nine states, a territory and a commonwealth, 20% of the nation's population and nearly 40% of the nation's land mass, and accounts for 25% of the nation's federal appellate caseload and about one-third of the appeals reviewed by the Supreme Court.

The Ninth Circuit has so many judges that I have yet to personally even meet a large number of them, and I have served on the district court for nearly 13 years.

The Ninth Circuit has so many active circuit judges that it alone of the 12 geographical circuits utilizes the congressionally-authorized abbreviated en banc procedure. This practice results in a minority of active Ninth Circuit judges participating in each en banc hearing and as few as six active Ninth Circuit judges actually rendering en banc opinions.

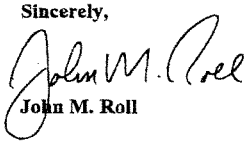
In previous correspondence to your committee, I have outlined many other insurmountable problems endemic to any circuit the size of the Ninth Circuit.

Honorable Jeff Sessions
Page Three
May 21, 2004

Conclusion

Senate Bill 2278 provides for an outstanding subdivision of the Ninth Circuit. The new Twelfth Circuit would serve well the citizens of Arizona, Nevada, Idaho and Montana and the country as a whole. I respectfully urge passage of this extremely important piece of legislation. Thank you.

Sincerely,



John M. Roll

JMR:kh

cc: Honorable Jon Kyl
Mr. Leonidas Ralph Mecham

SCCBA: The Bar Association of Silicon Valley™

SANTA CLARA COUNTY BAR ASSOCIATION

Hon. Dianne Feinstein
United States Senate
Washington, DC 20510-0504

By FAX and EMAIL ONLY

RE: Splitting The 9th Circuit

Dear Senator Feinstein:

Thank you for the opportunity to provide you with the position of the Santa Clara County Bar Association regarding pending legislation before Congress that would serve to split the United States Court of Appeals for the Ninth Circuit. The specific bills are S. 2278; S. 562, and H.R. 2723.

The Santa Clara County Bar Association is strongly opposed to the splitting of the Ninth Circuit. Such an action would produce particularly difficult problems in the administration of justice for the State of California. Since California cases in the Ninth Circuit represent almost 60% of the Circuit's caseload, the workload and administration of a new circuit that includes all of California could cause greater delays than we currently experience. And, of course, splitting California between two new circuits would be a severe problem for Californians and attorneys representing them, in that many situations where the circuit decisions would be in conflict.

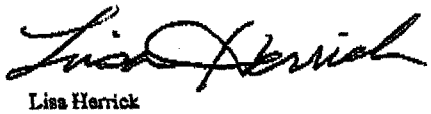
In addition, adding another circuit would only create greater difficult with precedents and only add another opportunity for conflicting decisions between circuits. As such, the U.S. Supreme Court would be called on to resolve those conflicts, which would either create longer delays in the administration of justice or result in more conflicting decisions among the circuits, since the Supreme Court cannot, does not and probably would not resolve all the conflicting decisions.

Finally, the proposal to split the Ninth Circuit is not driven by interests to improve the administration of justice. If that is the motivation, the efforts should be directed to filling the vacant positions on the Court and adding justices to the bench. The real problem with the Ninth Circuit is its caseload. Splitting the circuit will not resolve that problem. Political interests in diluting the decisions of the Ninth Circuit and creating what some characterize as a more conservative bench is not the appropriate reason to split the

Circuit. In fact, doing so for those reasons really strikes at the heart of the independence of the judiciary and its role as an independent, third branch of government.

If we can provide additional information, please do not hesitate to contact us.

Best regards,
SANTA CLARA COUNTY BAR ASSOCIATION



Lisa Herrick
President

STATEMENT OF CHIEF JUDGE MARY M. SCHROEDER

TO THE SENATE JUDICIARY SUBCOMMITTEE ON COURTS

April 7, 2004
Re: S. 2278

Good morning. My name is Mary M. Schroeder, and I am the Chief Judge of the United States Court of Appeals for the Ninth Circuit. I am the chief executive officer of both the court of appeals and the Ninth Circuit Judicial Council, which governs the court of appeals, the district courts and the bankruptcy courts. My home chambers are in Phoenix, Arizona. I welcome the opportunity to appear before you even on very short notice.

Appearing with me today in opposition to the proposals to divide the circuit are two other judges with administrative experience. Senior Judge J. Clifford Wallace of San Diego, one of my distinguished predecessors as chief, and the Chief District Judge for the Western District of Washington, Jack Coughenour of Seattle. Judge Coughenour is currently the Chair of our Conference of Chief District Judges. Also present to provide us information is our superb Clerk of Court, Cathy Catterson.

I believe it is important at the outset that all of us understand at least three important points.

The first goes to cost. When we discuss any of the proposals before you, we are not just talking about splitting up the judges of the existing Court of Appeals into separate courts of

appeals. We are actually talking about dividing the entire and well integrated administrative structure of the Ninth Circuit to create two or even three separate and largely duplicative administrative structures. This is costly and, I submit, wasteful. This is especially true when we face a budget crisis requiring us to lay off employees performing critical functions such as the supervision of probationers and preparation of sentencing reports.

The second point goes to geography. The Ninth Circuit includes California. Although there are nine states in the Ninth Circuit, more than two-thirds of the workload of the court of appeals is from California. There is no way to divide the circuit into multiple circuits of roughly proportionate size without dividing California. None of the proposals before you would do that, so like Goldilocks, we find that one is too big and another too small.

The third point goes to history. Over the course of the extremely colorful history of the west, certain ties have developed that should be respected in circuit alignment in order to provide for continuity and stability. Arizona, for example, may at one time have seen itself as a rocky mountain state, but the truth today is its economic and cultural ties are overwhelmingly closer to California than to Colorado or Wyoming. Another example is California and Nevada. Their bond is so great that they have joined in a compact to protect Lake Tahoe. Idaho and eastern Washington have essentially treated their district judges as interchangeable for years. The division proposed in S. 2278 would sever all these ties by dividing Arizona from California, California from Nevada and Idaho from Washington.

As chief, I am very proud of the manner in which we have been able to administer a rapidly growing caseload with innovative procedures possible only in a court with large judicial resources. Some examples:

- Our system of identifying issues and grouping cases is unique among the circuits and allows for efficient resolution of hundreds of cases at a time, once the central issue is decided by a panel.
- The staff attorneys' office, and in particular the Pro Se Unit, efficiently processes approximately one-third of our cases each year for cases in which jurisdictional problems dictate the result or in which the decision is compelled by existing case law.
- The Bankruptcy Appellate Panel has successfully resolved a large number of bankruptcy appeals which would otherwise be decided by Circuit Judges.
- The mediation program, also unique in its breadth, resolves more than 800 appellate cases a year.
- Technology has dramatically changed court operations over the last few decades, particularly since the time when the Fifth Circuit split. Automated case management and issue tracking systems; computer aided legal research, electronic mail, videoconferencing, etc. have all permitted the court to function as if the judges were all in the same building.

Most important, the existence of a large circuit, with all circuit, district and bankruptcy judges bound by the same circuit law, gives us the flexibility to deal with the large concentrations of population and enormous empty spaces of the west. A large circuit has served our citizens well by allowing us to move judges from one part of the circuit to another depending on where the needs are, as recently, for example, in the border districts of California and in the widely scattered population centers of Idaho.

I recognize that the latest proposal contains a number of provisions intended to ameliorate the harm that would result from division. Most notably it would immediately add circuit judgeships for California, and postpone actual division until after that most uncertain point in time that the new judges are confirmed. This makes long range planning very difficult.

This proposal also envisions judges from the new Twelfth and the Thirteenth Circuits sitting with the Ninth Circuit on request. This would restore a bit of the lost flexibility, but not much. Judges would have to keep track of the law of multiple circuits to make it work. More important, chief circuit judges are not anxious to see their active judges doing the work of other courts and not their own.

The Commission chaired by former Justice Byron White studied the issues a few years ago. It recommended against dividing the Ninth Circuit, praised its administration and cautioned against restructuring courts on the basis of particular decisions by particular judges. Judicial independence is a constitutional protection for all our citizens.

Circuit restructuring is in fact rare. It has happened only twice. The last was nearly a quarter of a century ago when the Fifth Circuit divided into the Fifth and Eleventh upon the unanimous vote of the active circuit judges. Division should take place only after there is demonstrated proof that a circuit is not operating effectively, and when there is a consensus among the bench, the bar and the public it serves that division is the appropriate remedy. That burden has not been met here.

The latest proposal, S. 2278, was introduced five days ago when I was hearing cases in Pasadena, and it took a day to travel here from the west coast. I have thus had only limited time to study it. If you have any questions I am unable to answer today, or if you would like a written follow up on any matter that arises during this hearing, I would be happy to provide it.

I am pleased to be here today with my colleague Diarmuid O'Scannlain, with whom I have appeared before, and with my colleague Richard Tallman, whose views appear to reflect those of our mutual mentor and esteemed colleague, the late great Eugene Wright of Seattle. (Judge Wallace and I never got him to see the light either.) We have had discussions within our court about this subject from time to time for several decades, but the great majority of our judges have consistently opposed division. I am advised that the chief bankruptcy judges oppose division as well. The Chair of our conference of Chief District Judges, Judge Coughenour of Seattle, is here, and will share his trial court perspective with you.

Thank you for the privilege of appearing before you.

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

U.S. COURTHOUSE, SUITE 610
401 W. WASHINGTON ST., SPC 54
PHOENIX, AZ 85003-2156
(602) 322-7320
FAX: (602) 322-7329

April 19, 2004

Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC 20510-0504

Dear Senator Feinstein:

During the recent subcommittee hearing on possibly dividing the Ninth Circuit, several speakers cautioned against increasing administrative costs at a time when the federal courts can least afford it. I believe this point deserves further explanation. The federal courts are currently experiencing severe financial duress due to a decline in federal funding over the last several years. The situation has necessitated reducing the overall non judicial court workforce by nearly 500 positions and requiring our employees to take some 17,560 forced furlough days. These employees include the people who docket the filings, send out critical notices of court proceedings and supervise probationers. In light of this very serious belt-tightening, this hardly seems the time to duplicate, much less triplicate, administrative regional headquarters staffing and incur expensive building construction and renovation costs.

Federal courts in California have been particularly hard hit by budget cutbacks. The Central District of California, which has courthouses in downtown Los Angeles, Santa Ana and Riverside, has cut its workforce by 20 percent. Many court programs and services have been negatively affected and the clerk has reduced public window service by two hours per day at all three divisions. Staff reductions also have occurred in the Northern District of California, which has courthouses in San Francisco, San Jose and Oakland. The Eastern District of California reduced the work week of some staff. Even the border-stressed Southern District of California in San Diego was not excluded from the cutbacks. The San Diego probation office reduced staffing 13 positions below that authorized by workload increases, yet still needed to lay off an additional ten employees. Ominously, the probation office is reducing the frequency of offender drug testing and is redirecting $150,000 in drug and mental health services just to meet payroll.

Reductions in public service hours have been implemented by our courts in Alaska and Hawaii. Other judicial districts in the Ninth Circuit have coped through use of furlough days, staff reductions and reduced staff work schedules. The Court of Appeals has left a number of positions unfilled despite a growing caseload driven by a recent influx of immigration appeals. Overall, the courts within the Ninth Circuit have lost 112 positions. Over 600 of our employees were furloughed for a total of 2,190 days.

Next year's fiscal situation will also be grim. The Administrative Office of the U.S. Courts estimates a potential loss of an additional 2,000 - 5,000 probation officer and court staff positions should current budget predictions hold. We face the very real possibility of suspending civil jury trials and halting indigent defense counsel payments by summer of 2005.

In his April 14th letter to Senator Gordon Smith, Chief Judge Ancer Haggerty of the District of Oregon describes the federal court's upcoming fiscal prospects as a potential "Constitutional crisis to the Rule of Law in America." He predicts a reduction in access to court services and the creation of a public safety crisis in Oregon should Congress not fund the Federal Courts at a 6.1% rate or higher in fiscal year 2005. I enclose a copy of Chief Judge Haggerty's letter for your review.

In light of our already constrained financial resources, incurring administrative and construction expenses redundant of existing court services would further burden our ability, particularly here in the West, to administer the business of the federal courts. May I ask that my letter be included as part of my public testimony.

Sincerely,

Mary M Schroeder

Mary M. Schroeder
Chief Judge

Enclosure

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

U.S. COURTHOUSE, SUITE 610
401 W. WASHINGTON ST., SPC 54
PHOENIX, AZ 85003-2156
(602) 322-7320
FAX: (602) 322-7329

May 5, 2004

Honorable Jeff Sessions
Senate Judiciary Committee
United States Senate
Washington D.C. 20510

Honorable Dianne Feinstein
Senate Judiciary Committee
United States Senate
Washington D.C. 20510

Dear Senators Sessions and Feinstein:

I write to supplement the record of the April 7, 2004 hearing before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts on proposals to split the Ninth Circuit.

Following the hearing, our court held a retreat and had a full discussion on the issue of whether or not a split of the Ninth Circuit would improve the administration of justice within the circuit. It is our court's practice not to conduct votes at these retreats. Rather, I circulated a mail ballot the following week and asked each member of our court to indicate whether they: (1) oppose a division of the Ninth Circuit; or (2) favor a division of the Ninth Circuit; or (3) abstain from voting.

The Court currently has a total of 47 judges serving on the court, 26 active judges and 21 senior judges, plus two vacancies. The vote concluded on April 30, 2004. Of the 47 judges, 30 judges voted in opposition to circuit division, nine voted in favor of circuit division and eight judges abstained from voting. Of the 26 active judges, only four active judges favor division, fifteen active judges oppose division, and six active judges abstained from voting. Of the 21 senior judges, fifteen senior judges oppose circuit division, five senior judges favor division, and two senior judges abstained.

The issue before your subcommittee is how best to administer justice in the region covered by the Ninth Circuit and whether any of the proposed bills achieves that purpose. I submit they do not. Dividing a circuit should not take place to make the lives of judges or lawyers easier or cozier, or to reduce travel

burdens. It should only take place when there is demonstrated proof that a circuit is not operating effectively, and there is a consensus among the bench and bar and the public it serves that division is the appropriate remedy.

The overwhelming vote of the judges of our circuit court of appeals, 30 to 9, against division of the circuit is a strong indication that the best way to serve the nine western states is to continue operating as a unified circuit - without any division. Over the years, the great majority of the bench and bar in the Ninth Circuit have supported this view, and that support continues to the present day.

Thank you.

Sincerely,

Mary M. Schroeder
Chief Judge

c: Senator Orrin Hatch, Chair, Senate Judiciary Committee
Senator Patrick Leahy, Ranking Member, Senate Judiciary Committee

OPENING STATEMENT OF JEFF SESSIONS, CHAIRMAN

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

APRIL 7, 2004

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

At the outset, I suppose the first question one would ask is one I should answer, as the Chairman of this Subcommittee and a senator long interested in judicial administration: "Why are we discussing a division of the Ninth Circuit now?"

To answer that question, we need to appreciate the basic purposes of a federal court of appeals. In our federal judicial system, an appellate court has two basic functions. First, it must review lower court and agency decisions. In this regard, it acts effectively as the court of last resort, since the Supreme Court reviews very few court of appeals decisions each year. Second, to borrow from Chief Justice Marshall's famous opinion in *Marbury v. Madison*, it must say clearly and consistently "what the law is" for that circuit.[1] Uncertainty in the law frustrates litigants, encourages wasteful lawsuits, and undermines the rule of law.

How well does the Ninth Circuit today fulfill those two basic functions? We start with some undisputed facts. The Ninth Circuit is the largest circuit in our system, by far. It covers almost 40% of the land mass of the United States, stretches from the Arctic Circle to the border of Mexico, and rules almost one-fifth of the population of the country. It now has 28 authorized circuit judgeships — 11 more than the next circuit, as this chart shows, and almost 17 more than the average circuit. It also has 21 senior judges. It is therefore not much of

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[1] 5 U.S. 137, 177, 1 Cranch 137 (1803).

an exaggeration to say that the Ninth Circuit panel assigned to a particular case is truly a luck-of-the-draw panel.

In addition, the Judicial Conference of the United States has recommended that Congress create seven additional judgeships for the Ninth Circuit. If we did so, the court would have 35 active judges, making it even more oversized. Nobody would claim that our Supreme Court could function with 35 Justices. Why should we feel any different about a Ninth Circuit with 35 active judges and 21 senior judges, given that the court of appeals is the court of last resort in the vast majority of cases? Counting senior judges, the Ninth Circuit would be twice the size of any other circuit!

Moreover, as this chart illustrates, the caseload of this large circuit has exploded in recent years. In 1997, about 8,700 appeals were filed in the Ninth Circuit.[2] In 2003, there were almost 13,000[3] – a 48.1% increase, or over 4,000 more appeals, in just six years.

This huge increase in caseload appears to have impaired the administration of justice in the court of appeals. The Ninth Circuit's efficiency in deciding appeals — that is, the time the court takes between the filing of a notice of appeal and the final disposition of a case – consistently has lagged far behind other circuits.

In 2003, for instance, the Ninth Circuit had 418 cases pending for three months or more – 25 shy of the next five circuits *combined*.[4] The next highest circuit had 98 such cases. The next chart shows that 138 cases were pending in the Ninth Circuit for over a year. This was more than *every* other circuit in the federal system *combined*, with the next

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[2] 8,692 appeals were filed in the Ninth Circuit in 1997. Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 1997 Annual Report of the Director*, Table B at 76.

[3] 12,872 appeals were filed in the Ninth Circuit in 2003. Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 2003 Annual Report of the Director*, Table B at 70.

[4] *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 2003 Annual Report of the Director*, Table S-5 at 38.

highest circuit at a mere 19 cases.[5] This delay cannot be explained by a lack of judgeships; although the caseload is high, several other circuits have higher caseloads per judge. Thus, it appears that the first function of a court of appeals – reviewing decisions from below – may not be performed as well as it could be.

If population growth is any indication, the problem is quite likely going to get worse. As you can see from this chart, the population of the states within the Ninth Circuit grew faster than that of any other circuit between 1990 and 2000. That population is projected to grow even more substantially between 1995 and 2025, as this next chart demonstrates. With the higher caseload those millions of new residents will bring, the administrative challenges can only grow.

How about the second function? Are Ninth Circuit judges able to speak with clarity and consistency on what the law of the circuit is? This too appears doubtful. Because the circuit has so many judges, it is difficult to preserve the collegiality that is so important to judicial decision-making, as D.C. Circuit Judge Harry T. Edwards eloquently has argued:

> "In the end, collegiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions. In other words, the more collegial the court, the more likely it is that the cases that come before it will be determined on their legal merits."[6]

Additionally, the Ninth Circuit employs a limited en banc procedure under which it is not the full court of appeals, but a random draw of 10 judges, plus the chief judge, that reviews three-judge panel decisions. This can result – and has resulted – in a mere six judges making the law for the entire circuit (even when more than six judges

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5 *Id.*

6 Harry T. Edwards, "The Effects of Collegiality on Judicial Decision Making," 151 U. Pa. L. Rev. 1639, 1689 (2003).

on the court as a whole have taken an opposite position on the record). In all other circuits, en banc means en banc – the full court.

Finally, with so many cases decided each year, it is hard for any one judge to read the decisions of his or her peers. And it is virtually impossible for lawyers who practice in the circuit to stay abreast of the law. Judge Edward Becker, a distinguished judge on the Third Circuit, has explained that:

> "[W]hen a circuit gets so large that an individual judge cannot truly know the law of his or her circuit . . . , the circuit is too large and must be split. . . . I cannot imagine a judge in a circuit as large as the Ninth, with its staggering volume of opinions,being able to do what we in the Third Circuit do."[7]

These factors – loss of collegiality, the limited en banc, and an inability to monitor new law – undermine the goal of maintaining a coherent law of the circuit.

Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, and Kennedy publicly have agreed on the need for structural reform, and no other Justice has disagreed.[8] These jurists voiced their concern six years ago. Today, the Ninth Circuit issues almost 50% more decisions than it did at that time. It is difficult to argue that Ninth Circuit judges and lawyers reviewing the flood of opinions find the law any more coherent. So is this a circumstance in which the Congress should exercise its constitutional power to "ordain and establish" new

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[7] Letter from Hon. Edward R. Becker to the Hon. Byron R. White, Gilbert S. Merrit, Pamela Ann Rymer, and William O. Browning, and N. Lee Cooper, Esq., Members of the Commission on Structural Alternatives for the Federal Courts of Appeals ("White Commission") (Jan. 26, 1998).

[8] *See, e.g.*, Letter from Hon. John Paul Stevens to White Commission (Aug. 24, 1998); Letter from Hon. Sandra Day O'Connor to White Commission (June 23, 1998); Letter from Hon. Antonin Scalia to White Commission (Aug. 21, 1998); Letter from Hon. Anthony M. Kennedy to White Commission (Aug. 17, 1998).

inferior courts?

Two of my colleagues are here to help us answer that question. Senator Lisa Murkowski of Alaska has been a leader in addressing reorganization of the Ninth Circuit, and has introduced a bill, S. 562, to restructure the circuit. I am sure that her comments, based on her experience as a senator from the Northwest and as a lawyer who practiced within the Ninth Circuit, will give us a useful context for understanding the issue.

I also would like to commend my colleague, Senator Dianne Feinstein, for her interest in Ninth Circuit reorganization. Senator Feinstein has long advocated that the Congress look at objective measures in determining whether to split the circuit, and has wisely insisted that a split serve administrative, not political, purposes. In fact, the very title of this hearing borrows from a speech she gave on the Senate floor several years ago in which she stated, "That is the fundamental question: Would a split improve the administration of justice, and, if so, what should that split be?"[9] Senator Feinstein asks the precise question I intend to focus on during this hearing. I look forward to the insights from our distinguished group of witnesses.

We will hear from two panels of witnesses today. On the first, we will discuss whether a split of the Ninth Circuit is warranted. We also will address the merits of various legislative proposals to effect such a split, including Senator Ensign's bill, S. 2278; Senator Murkowski's bill, S. 562; and Congressman Mike Simpson's bill, H.R. 2723. The witnesses on this panel, starting from my left, are Judge Diarmuid O'Scannlain, appointed to the Ninth Circuit by President Reagan in 1986; Chief Judge Mary Schroeder, appointed to the Ninth Circuit by President Carter in 1979; Judge Richard Tallman, appointed to the Ninth Circuit by President Clinton in 2000; and Judge J. Clifford Wallace, appointed to the Ninth Circuit by President Nixon in 1972.

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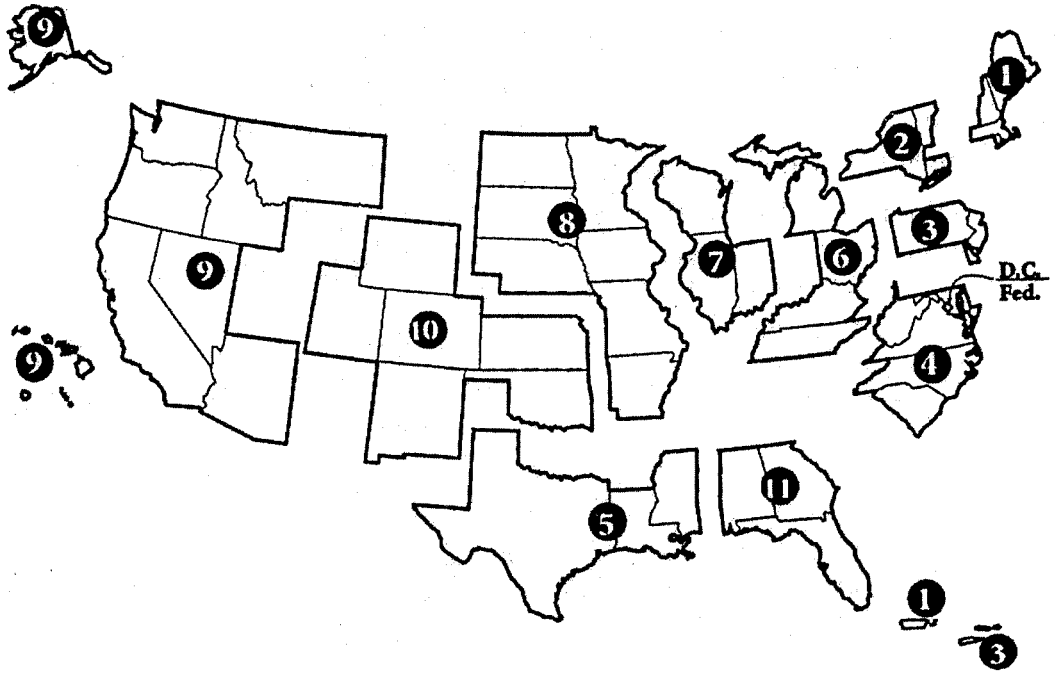
[9] *Cong. Rec.* at S8042 (July 24, 1997).

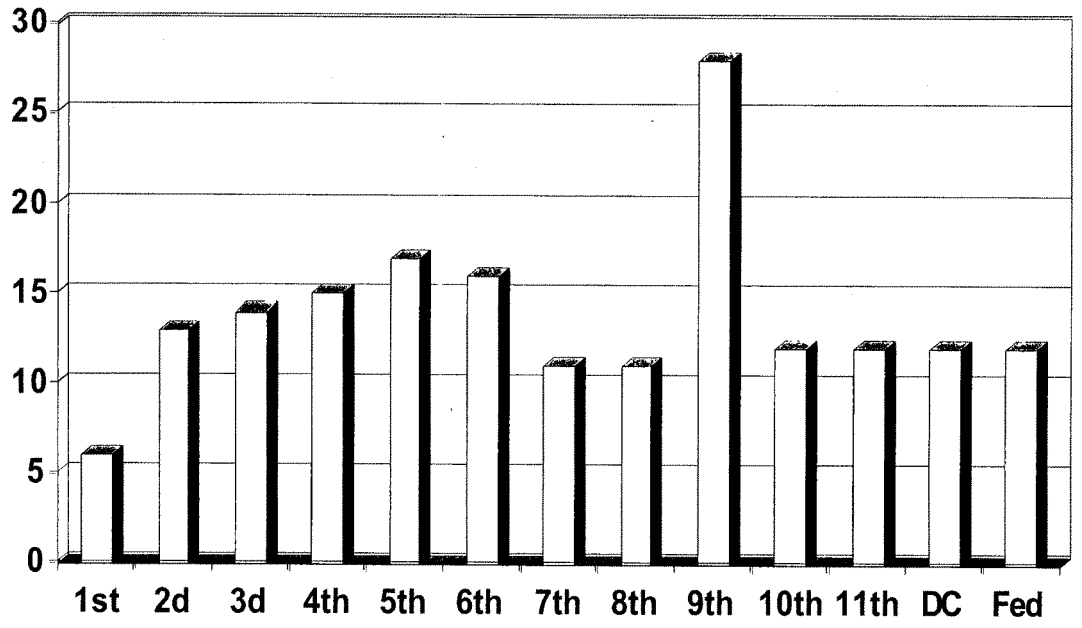
On the second panel, we will focus on the administrative aspects of a split, with reference to the most recent restructuring of a federal judicial circuit. In 1981, Florida, Georgia, and my home state of Alabama were carved out of the Fifth Circuit to become the Eleventh Circuit. This reorganization was initiated in large part because of the size of the circuit, and has proven to be a tremendous success in terms of judicial administration. Two witnesses will share their wisdom on this panel. The first witness will be Judge Gerald Bard Tjoflat, who was appointed to what was then the Fifth Circuit by President Ford in 1975, and who has served on the Eleventh Circuit since 1981. The second witness will be Chief Judge John Coughenour, appointed to the Western District of Washington by President Reagan in 1981.

With that, I turn to my colleague, Senator Feinstein, for her opening statement.

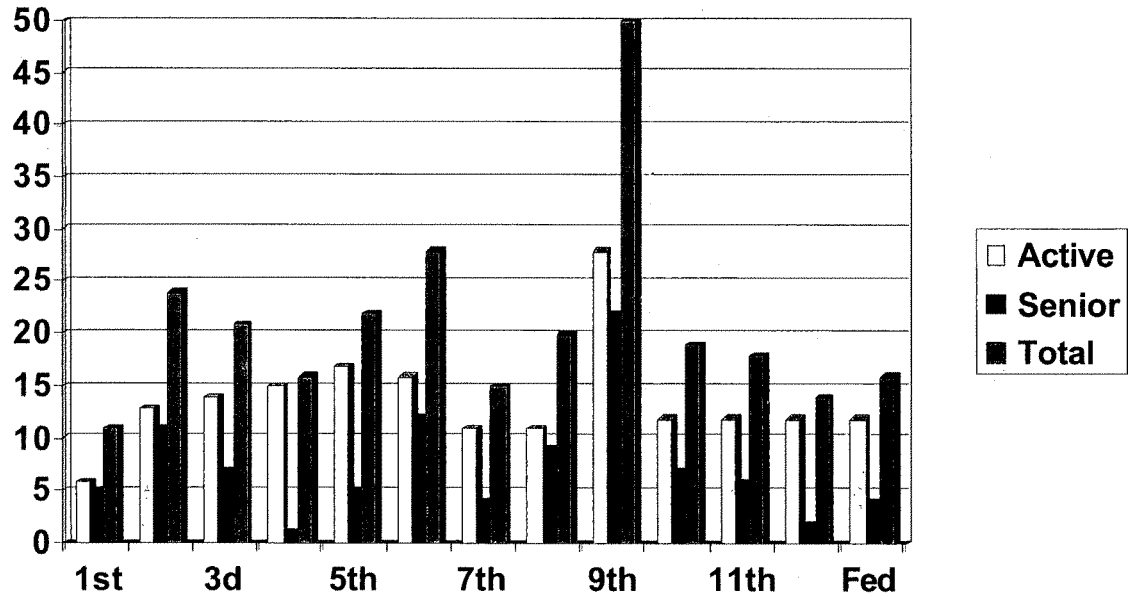
FEDERAL JUDICIAL CIRCUITS



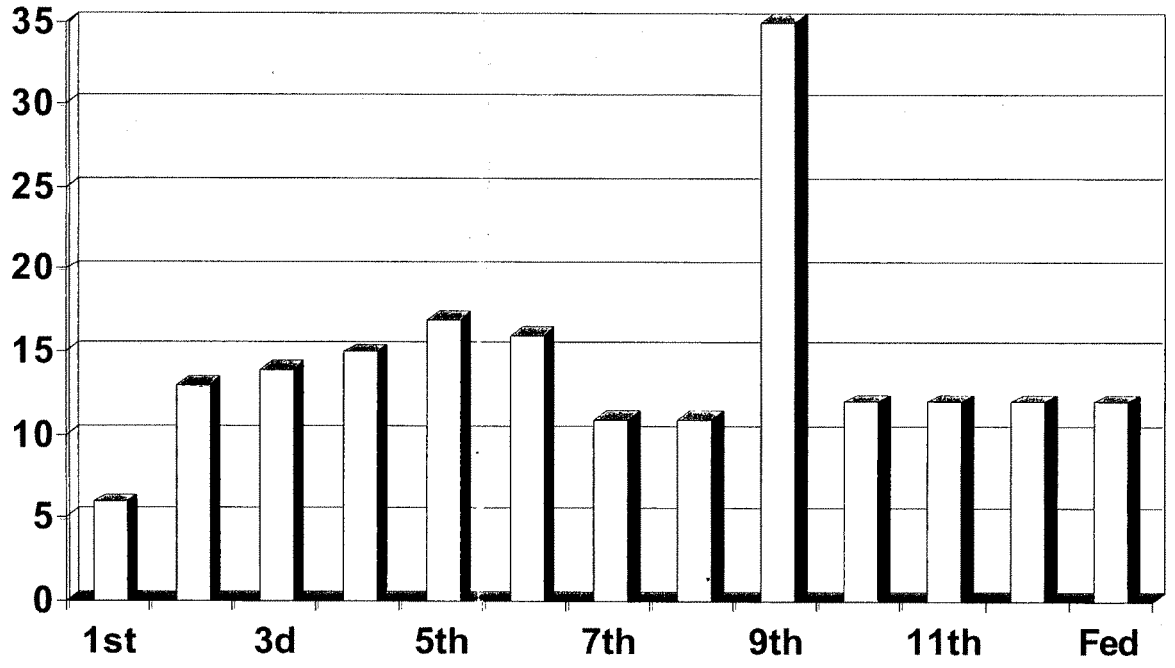
CURRENT AUTHORIZED JUDGESHIPS, BY CIRCUIT



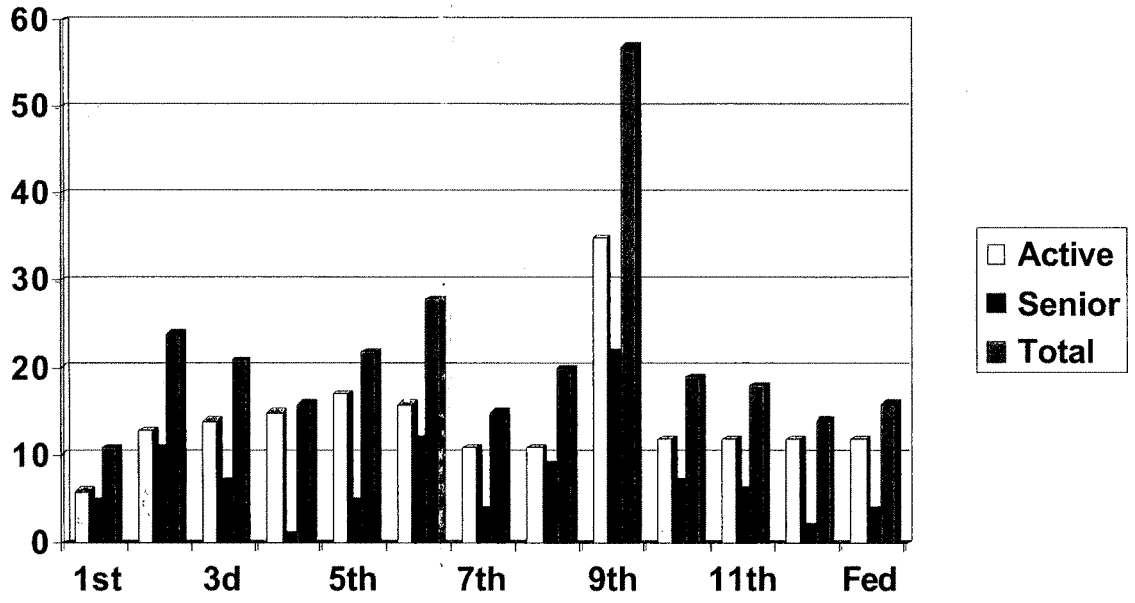
ACTIVE, SENIOR, AND TOTAL U.S. CIRCUIT JUDGES, BY CIRCUIT



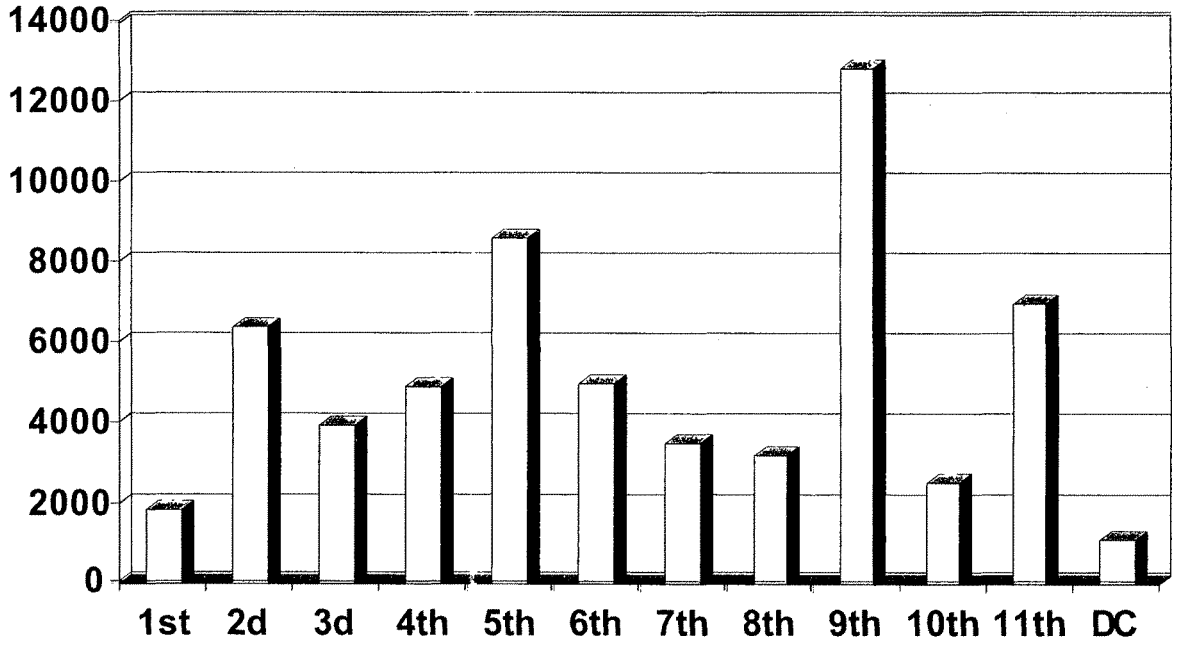
AUTHORIZED JUDGESHIPS, BY CIRCUIT, WITH SEVEN NEW 9TH CIRCUIT JUDGES



ACTIVE, SENIOR, AND TOTAL U.S. CIRCUIT JUDGES, BY CIRCUIT, WITH SEVEN NEW 9TH CIRCUIT JUDGES



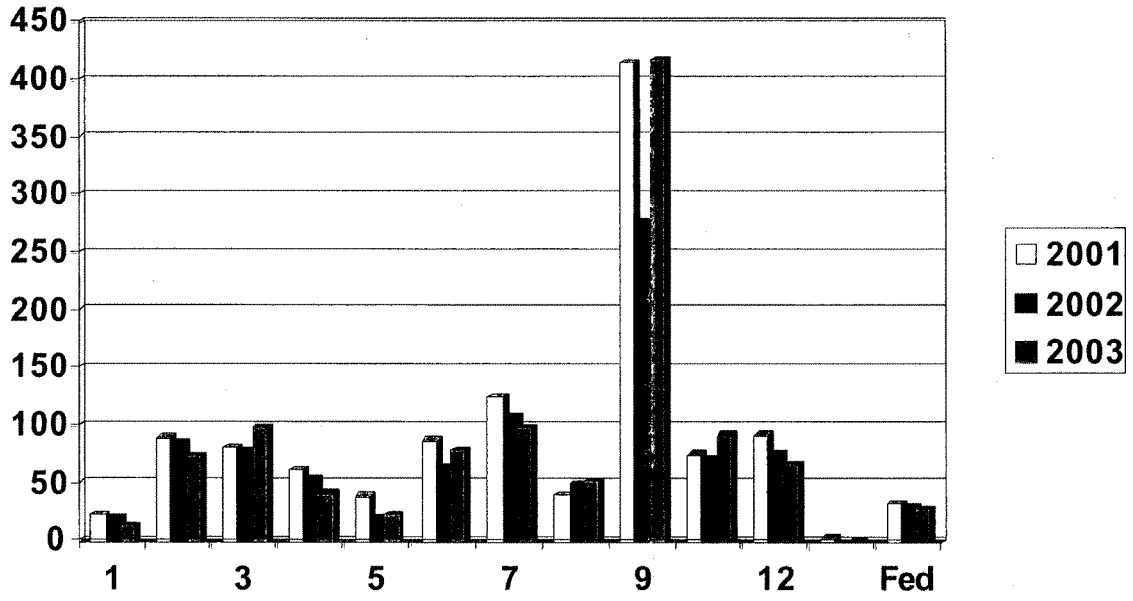
FILINGS BY CIRCUIT, 2003



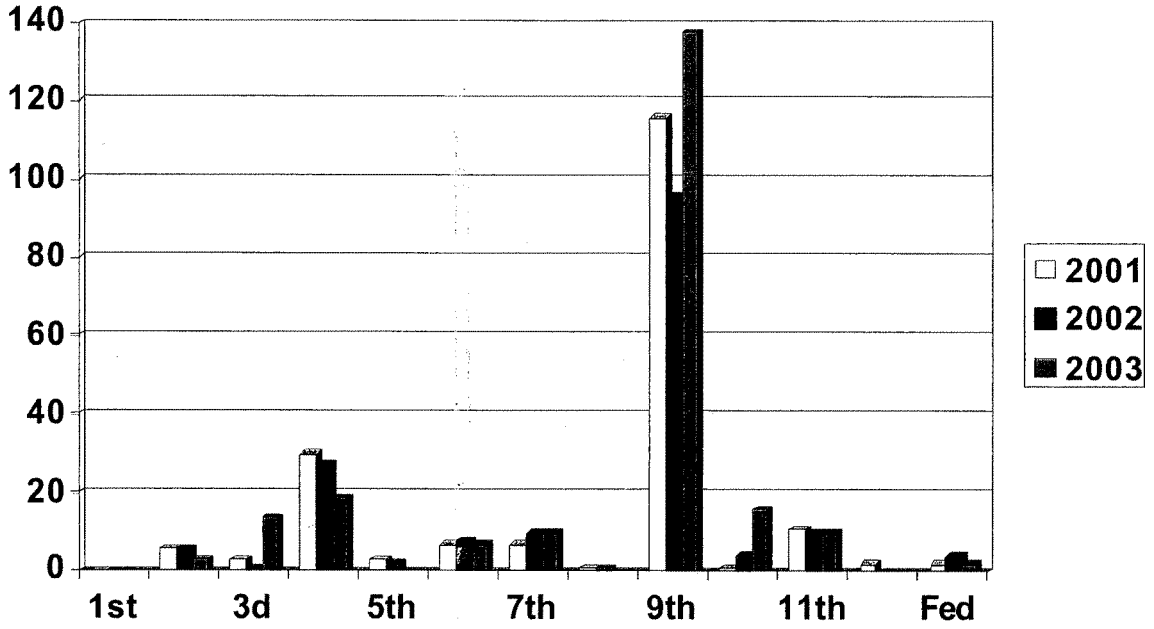
FILED APPEALS IN THE NINTH CIRCUIT BETWEEN 1997 AND 2003

	FILED APPEALS	RANK	PERCENT INCREASE	RANK
1997	8692	1ST	N/A	N/A
1998	9070	1ST	4.3%	4TH
1999	9383	1ST	3.5%	5TH
2000	9147	1ST	(2.5%)	10TH
2001	10342	1ST	13.1%	T - 2ND
2002	11421	1ST	9.4%	1ST
2003	12872	1ST	12.7%	2ND

CASES PENDING THREE MONTHS OR MORE, BY CIRCUIT (2001-2003)



CASES PENDING ONE YEAR OR LONGER, BY CIRCUIT (2001-2003)



THE POPULATION WITHIN THE NINTH CIRCUIT WILL GROW FASTER THAN THAT OF ANY OTHER CIRCUIT BETWEEN 1995 AND 2025

- CALIFORNIA: **FASTEST** GROWTH RATE IN NATION
- HAWAII: **3RD FASTEST** GROWTH RATE IN NATION
- ARIZONA: **4TH FASTEST** GROWTH RATE IN NATION
- NEVADA: **5TH FASTEST** GROWTH RATE IN NATION
- IDAHO: **6TH FASTEST** GROWTH RATE IN NATION
- ALASKA: **8TH FASTEST** GROWTH RATE IN NATION
- WASHINGTON: **12TH FASTEST** GROWTH RATE IN NATION
- OREGON: **13TH FASTEST** GROWTH RATE IN NATION
- MONTANA: **17TH FASTEST** GROWTH RATE IN NATION

THE POPULATION WITHIN THE NINTH CIRCUIT GREW FASTER THAN THAT OF ANY OTHER CIRCUIT BETWEEN 1990 AND 2000

- NEVADA: **FASTEST** GROWTH RATE IN NATION (66.3%)
- ARIZONA: **2ND FASTEST** GROWTH RATE IN NATION (40.0%)
- IDAHO: **5TH FASTEST** GROWTH RATE IN NATION (28.5%)
- WASHINGTON: **10TH FASTEST** GROWTH RATE IN NATION (21.1%)
- OREGON: **11TH FASTEST** GROWTH RATE IN NATION (20.4%)
- ALASKA: **17TH FASTEST** GROWTH RATE IN NATION (14.0%)
- CALIFORNIA: **19TH FASTEST** GROWTH RATE IN NATION (13.6%)

---------- **NATIONAL AVERAGE: 13.1%** ----------

- MONTANA: **20TH FASTEST** GROWTH RATE IN NATION (12.9%)
- HAWAII: **29TH FASTEST** GROWTH RATE IN NATION (9.3%)

OVERALL CASELOAD INCREASE IN THE NINTH CIRCUIT, 1997-2003

INCREASE IN FILED APPEALS, 1997-2003	4180 (48.1%)
INCREASE IN PRO SE APPEALS, 1997-2003	1575 (37.7% OF INCREASE IN CASELOAD)
INCREASE IN COUNSELED APPEALS, 1997-2003	**2605 (62.3% OF INCREASE IN CASELOAD)**

GROWTH IN COUNSELED APPEALS DROVE GROWTH IN NINTH CIRCUIT APPELLATE CASELOAD BETWEEN 1997 AND 2003

	Overall Filed Appeals (Increase from Previous Year)	**Pro Se Appeals** (Increase from Previous Year)	**Counseled Appeals** (Increase from Previous Year)	**Percentage of Caseload Change Due to Increase in Counseled Appeals**
1997	8692	3424	5268	N/A
1998	9070 (+378)	3707 (+283)	5363 (+95)	25.1%
1999	9383 (+313)	3714 (+7)	5669 (+306)	97.8%
2000	9147 (-236)	3607 (-107)	5540 (-129)	54.7%
2001	10342 (+1195)	4160 (+553)	6182 (+642)	53.7%
2002	11421 (+1079)	4836 (+676)	6585 (+403)	37.3%
2003	12872 (+1451)	4999 (+163)	7873 (+1288)	88.8%

STATE BAR of ARIZONA
www.azbar.org

SENT VIA FAX AND U.S. MAIL

April 19, 2004

Senator Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

RE: State Bar of Arizona Position on Bills Regarding Ninth Circuit

Dear Senator Feinstein:

Thank you for your letter of April 8, 2004, requesting the position of the State Bar of Arizona regarding S.2278, S.562 and H.R. 2723. The Arizona Board of Governors considered your letter at its regular meeting on April 16, 2004, and voted to affirm its previous position, that we oppose any split of the Ninth Circuit. I have enclosed a copy of the letter dated October 17, 2003, which describes our previous and continuing position.

We have convened a study committee of the State Bar to review issues related to such pending legislation. Should there be other bills or issues arising in the future on this topic, we would be happy to consider them through the auspices of this committee.

Very truly yours,

Pamela A. Treadwell-Rubin
President

PAT-R/nb

Enclosure: Copy of Letter Dated October 17, 2003

cc: Members of the Board of Governors
Teresa J. Schmid, Executive Director

111 West Monroe Suite 1800 Phoenix, AZ 85003-1742 Phone 602.252.4804 Facsimile 602.271.4930

LITIGATION SECTION
THE STATE BAR OF CALIFORNIA

April 20, 2004

VIA U.S. MAIL & U.S. MAIL

The Honorable Dianne Feinstein
United States Senate
331 Hart Senate Office Building
Washington, DC 20510

Re: Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2004 (S. 2273) – OPPOSE

Dear Senator Feinstein:

The Executive Committee of the Litigation Section of the State Bar of California on behalf of the Litigation Section opposes S. 2278, the latest in a series of proposals to split the Ninth Circuit. We also oppose two other pending proposals to split the circuit, S. 562 and H.R.2723. 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 about 9,000 members and is one of the largest of the State Bar of California Sections. 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.

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 in two, as proposed by S. 562 and H.R. 2723, would cost an estimated $100 million, plus $10 million per year in added administrative costs. The three-way split proposed by S. 2278 would further increase 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, 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 week, 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.

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 S. 2278, as well as any other proposals to split the Ninth Circuit.

Very truly yours,

Charles V. Berwanger

Charles V. Berwanger

CVB:bg
cc: The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
VIA FACSIMILE (202) 224-6331

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
VIA FACSIMILE (202) 225-3190

The Honorable Lamar S. Smith
Chairman, Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary
United States House of Representatives
VIA FACSIMILE (202) 225-8628

The Honorable Barbara Boxer
United States Senate
VIA FACSIMILE (415) 956-6701

The Honorable Patrick J. Leahy
Ranking Democratic Member
Committee on the Judiciary
United States Senate
VIA FACSIMILE (202) 224-9516

The Honorable John Conyers, Jr.
Ranking Democratic Member
Committee on the Judiciary
United States House of Representatives
VIA FACSIMILE (202) 225-0072

The Honorable Howard L. Berman
Ranking Member, Subcommittee on Courts, the Internet, and Intellectual Property
Committee on the Judiciary
United States House of Representatives
VIA FACSIMILE (202) 225-3196

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

"Improving the Administration of Justice: A Proposal to Split the Ninth Circuit"
Dirksen Senate Office Building, Room 226
Washington, D.C. 20510

Wednesday, April 7, 2004

Written Testimony of
RICHARD C. TALLMAN
United States Circuit Judge
United States Court of Appeals for the Ninth Circuit
Park Place Building, 21st Floor
1200 Sixth Avenue
Seattle, Washington 98101-3123
(206) 553-6300

Good morning, Mr. Chairman and Members of the Subcommittee:

My name is Richard C. Tallman, and I am a United States Circuit Judge on the United States Court of Appeals for the Ninth Judicial Circuit with chambers in Seattle, Washington. I was appointed by President William J. Clinton in May 2000. I am honored to appear before you to discuss the reorganization of the Ninth Circuit, and I again join my colleague, Judge Diarmuid O'Scannlain, and the other circuit and district court judges throughout the Ninth Circuit who publicly favor splitting our court to better serve the citizens of the West.

The recently proposed bills present practical and welcome solutions to a problem that has been growing for many years. This issue was already under discussion twenty-five years ago when I became a member of the California and Washington bars. The Ninth Circuit was too big then and it has only become bigger. Today it is enormous by any method of measurement, and still growing. Size does affect the quality and efficiency of administering justice. Inevitable and continuing growth will not permit us to ignore this conundrum indefinitely.

1. The Need for Collegiality Among Circuit Judges

I am acutely aware of the way in which the sheer size of our court impedes the critical development of strong personal working relationships with my fellow judges. The genius of the appellate process is based upon the close collaboration of independent jurists who combine their judgment, experiences, and collective wisdom to decide the issues presented by an appeal. Only by sitting together regularly can members of a court come to know one another and work most

effectively in common pursuit of the right answer.[1] Our decisions constantly build on the existing foundations of our jurisprudence, shaping the development of the law in our circuit (with guidance from the Supreme Court).

I came on the bench nearly four years ago, in June 2000. Yet I have not sat on a regular three-judge oral argument panel with all of my other active and senior colleagues. I firmly believe that there is a need for cohesion among the members of an appellate court because we must work closely together if we are to deliver to the nation that elusive but vital work product we call justice.

I appreciate the fact that Congress has been considering various proposals for the configuration of a circuit split. I recognize that the ultimate configuration is a decision best left to the considered judgment of the legislative branch. Whatever you decide, a smaller court would improve our collegiality and enhance predictability, which I learned from practicing law is crucial to maintaining the respect for the rule of law among the people we serve. Smaller groups of judges working together more frequently will surely benefit the citizens of our region and the nation. This will allow people to plan their business and personal affairs in ways that comport with reasonable expectations of what the law allows or commands.[2]

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[1] *See* Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* 29 (1998) (available at http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf) [hereinafter "White Commission Report"].

[2] *See* White Commission Report at 30.

2. Caseload Concerns

In nearly four years on this job, I have seen the workload increase forty percent from some 9,000 to nearly 13,000 cases docketed annually.[3] Judicial resources in the West simply have not kept pace with this astounding increase in work. Our current active and senior judges have responded by working harder and harder each year, churning out increasing numbers of decisions but taking longer to do so. The Ninth Circuit is consistently among the slowest of the national courts of appeals in processing our workload.[4]

We also find ourselves relying heavily upon visiting district and senior circuit judges from throughout the country in order to staff the increasing number of oral argument panels.[5] We borrowed more than 100 visiting judges in 2002. I personally appreciate the enormous contribution these jurists make to the processing of our appeals. However, there is a price to be paid in the work product of judges who do not regularly sit with us and who understandably may

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[3] 2003 Appellate Judicial Caseload Profile Report for the Court of Appeals for the Ninth Circuit, available at http://www.uscourts.gov/cgi-bin/cmsa2003.pl.

[4] The Ninth Circuit's case processing time (counted from the time of filing a notice of appeal in district court to the final disposition of the case by the court of appeals) has been consistently higher than the national median. *See* Appendix A. Briefs sitting on the shelves of the Clerk's Office get stale if too much time passes before the appeal can be scheduled for argument. It is a constant struggle for each judge to make sure he or she is aware of the latest decisions announced in the interim, an awareness that is key to identifying and applying the most current precedents.

[5] *See* White Commission Report at 31 (noting that 43% of cases in 1998 had a visiting judge on the panel).

be less familiar with the voluminous jurisprudence of the country's largest court of appeals.

As we struggle to keep pace with the thousands of dispositions, including hundreds of published opinions,[6] and more than 1,000 petitions for rehearing filed by disappointed litigants urging us to rehear their case en banc or amend the panel's decision,[7] I find that there are simply not enough hours in the day for even the most conscientious and hardworking judge to remain current.[8] This is important because my fellow judges' decisions constitute the ever-growing jurisprudence declaring the law of the West. The petitions for rehearing are also significant in that they may alert members of the court who were not originally assigned to hear the appeal of the need to call for en banc review or to suggest an amendment of the original panel opinion.[9] It is also important to understand the practical limits of the United States Supreme Court, which does not have the capacity to issue writs of certiorari to correct every errant circuit court decision.

Circuit judges must not only keep pace with new developments in federal law, but also with the laws of the states in which we sit. It is virtually impossible for any one judge on the Ninth Circuit to gain familiarity with the relevant substantive law of nine states and two

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[6] *See* White Commission Report at 32.

[7] *See* Appendix B.

[8] *See* White Commission Report at 29 (noting that smaller judicial units improve the ability of individual judges to circulate and read one another's work prior to publication). Our court is too big to engage in pre-circulation of every published opinion before filing.

[9] *See* White Commission Report at 29 (stating that smaller judicial units may more readily make en banc calls, leading to more coherent and predictable law).

territories when sitting in diversity cases. Judges must be familiar with the geography, history, and culture of the lands and people affected by their rulings; for example, such familiarity is critical when we hear environmental and Native American law claims that arise in the Pacific Northwest.

The primary responsibility of each active circuit judge is to thoughtfully review and consider the appellate briefs and excerpts of record in the nearly 500 cases assigned to each of us annually. However, there is a limit to the available time and human endurance required to decide these cases in a timely and thorough manner. For judges who would be assigned to one of the smaller, newly-created Courts of Appeals following a split, and assuming that the caseload currently generated by the states of the Pacific Northwest remains constant, the appellate caseload per circuit judge would be greatly reduced. The changes proposed in these bills would provide each judge with more time available to study and prepare appellate decisions and would guarantee faster processing of cases on appeal, including more expeditious scheduling of oral argument hearings and quicker decisions on the merits.

3. Travel Costs

When I first came on the court and assumed my duty station in Seattle, I was surprised to learn that I would spend very little time actually hearing cases from the Pacific Northwest. I also was surprised at how much time I spend traveling between Seattle and California, where I hear the majority of my cases. This year I will spend only seven days hearing oral argument in cases

arising out of the Northwest. The remaining time is assigned primarily to hearing appeals from California, Arizona, and Nevada. While I enjoy deciding cases from all over the Western United States and the Pacific Territories, it seems wasteful of both my limited time and the taxpayers' money that I am required to spend countless hours in airports and on airplanes—time that could be devoted to more efficiently processing the work in chambers. A full 80% of the Ninth Circuit's cases arise from the State of California and the Southwestern states of the circuit. As a result, Pacific Northwest judges are continually borrowed to make up for the shortage of appellate judges in California.

4. Additional Judgeships and Administrative Costs

California needs more judges, and I am pleased to see that Senate Bill 2278 and House Bill 2723 address this need by adding new judgeships. I would certainly be willing to visit wherever needed during the transition period while new judges are nominated and considered for appointment. I volunteered to sit as a district judge in Montana in 2001 and 2002 when that state was down to one active district judge for the entire state, and I will sit in the District of Idaho this year. I continue to volunteer in other districts when able because I think it is important for appellate judges to occasionally sit on the district court in order to appreciate the difficulty of presiding over trials. I also am pleased to see that these bills encourage sharing of administrative staff, facilities, and judicial conferences in order to reduce duplicative and unnecessary expenditures.

Seattle is home to the ten-story William K. Nakamura United States Courthouse, which the district court judges of the Western District of Washington will vacate in July 2004 when they move to a new facility. The Nakamura Courthouse has more than 100,000 square feet of useable space and it certainly is large enough to serve as a circuit headquarters. The GSA estimates that it will require around $50 million to retrofit the building to make it earthquake safe. The money to pay for this comes from rent that the GSA already collects from tenant courts and does not require new construction funds from Congress. Reconfiguring the Nakamura building to accommodate a new circuit headquarters would not require excessive additional work or financial expenditure beyond that now contemplated by the GSA and approved by Congress.

5. The Ninth Circuit's Limited En Banc Proceedings

The Ninth Circuit is unique among this country's circuit courts of appeals by virtue of its "limited" en banc proceedings.[10] An en banc panel is convened when necessary to maintain uniformity among a circuit's decisions, to resolve conflicts with U.S. Supreme Court precedent, or to address cases involving questions of exceptional importance.[11] In every other circuit, an en banc panel consists of *every* active member of the court. Unfortunately, the unmanageable size of the Ninth Circuit, which currently has 26 active circuit judges (out of 28 authorized

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[10] *See* Appendix D for the text of statutes and internal court rules that govern en banc proceedings.

[11] *See* FED. R. APP. P. 35 (recommending en banc hearings only when (1) it is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance).

judgeships), has compelled us to experiment with limited en banc panels of only 11 judges.[12]

To briefly summarize our procedures, any active or senior judge may make an en banc call regarding any three-judge panel's decision, or may recommend hearing a case en banc initially. We then have the opportunity to exchange memoranda, and the active judges vote on whether to grant en banc review. If a case is accepted for en banc review by a simple majority of active judges, an 11-judge panel is drawn at random to hear the case.

Our limited en banc proceedings create more problems than they solve. Because the Chief Judge presides over every en banc panel, only ten 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*,[13] and two recent death penalty cases, *Payton v. Woodford*[14] and *Cooper v. Woodford*.[15]

Most strikingly, a mere six 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

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[12] *See* Sec. 6 of PL 95-486, 92 Stat. 1633 (1978), reproduced in Appendix D.

[13] 344 F.3d 914 (9th Cir. 2003) (en banc).

[14] 346 F.3d 1204 (9th Cir. 2003) (en banc).

[15] 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).

views. It is indisputable that 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. A recent example of this is *Payton v. Woodford*, where a slight majority of six judges on a limited en banc panel granted habeas corpus relief to a death row inmate.[16] It also is theoretically possible that an 11-judge panel could contain none of the minimum of 14 judges who voted to accept the case for en banc review in the first place.

A further disadvantage of this system is that it discourages judges from making en banc calls—which, again, plays 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 11-judge panel.

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[16] 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 to review 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 judges to review 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 to review the case, 7 would have affirmed and 6 would have reversed; however, the limited en banc panel reversed 6-5). In each 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.

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.

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.[17] 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.[18]

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 *three* 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

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[17] *See* Appendix B.

[18] *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).

whole. It is unacceptable that a mere six judges on a limited en banc panel could direct the development of our circuit's law without the input of the 29 who did not happen to be randomly chosen.

Nor is authorizing larger en banc panels the right solution. As the White Commission report observed, at a certain point a panel simply becomes too large for its members to work effectively together.[19] Because litigants are given only 30 minutes per side to present oral arguments to an en banc panel, even now it may be impossible for each judge to effectively pose the questions he or she may have about the case. Oral argument in the California recall election case proved that point beyond cavil. More judges per panel would also decrease the likelihood of panels rendering unanimous decisions that speak with one voice about important matters.

Finally, I would like you to consider what would have happened if the 1981 split of the Fifth Circuit or the 1929 split of the Eighth Circuit had never occurred. As of December 31, 2003, there were 3,270 appeals pending in the Eleventh Circuit and 4,328 appeals pending in the Fifth Circuit. Adding these figures together, there would have been 7,598 pending appeals before the old Fifth Circuit, or nearly 17% of all appeals pending in the U.S. Courts of Appeals. Based on similar figures, the Eighth and Tenth Circuits (if still together) would comprise about 8% of the total federal appeals pending in 2003.[20]

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

[20] *See* Appendix C.

Now compare this figure with the 11,587 (roughly 25%) appeals pending in the Ninth Circuit at the end of 2003. Even if the Fifth and Eleventh Circuits were still together, they would have only about two-thirds the number of appeals now pending in the Ninth Circuit. The Eighth and Tenth combined would be merely one-third of the size of the Ninth Circuit in terms of current workload.[21] Clearly, we are well past the point where we should be asking whether the Ninth Circuit should be split. Instead, we ought to be asking how it should be accomplished.

Conclusion

Circuits have been split in the past to address the problems inherent in unmanageably large courts. We must split the Ninth Circuit in order to attain the optimal size, efficiency, and organizational structure to permit our judges to excel at their duties in a collegial fashion, to promote shared development of judicial precedent in our respective regions, and for the benefit of all who live in the American West.

The ultimate measure of a court's power is its ability to command the respect of the people it serves, including the litigants who must comply with its decisions. The present size of

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[21] Just as impressive are the number of appeals filed in 2003. The Ninth Circuit received 12,694, compared to 8,547 in the Fifth, 6,970 in the Eleventh, 3,110 in the Eighth, and 2,509 in the Tenth Circuit. While the combined Fifth and Eleventh Circuit 2003 filings totaled 15,517, the Ninth Circuit alone still received nearly 13,000 new cases. This figure dwarfs the combined Eighth and Tenth Circuit filings of 5,619 appeals. *See* Appendix C. However you look at the numbers, the massive size of the Ninth Circuit mandates a split, along with an infusion of additional judges to the new Ninth Circuit to help tackle the load as part of its cases are reallocated to the newly created circuit or circuits.

the Ninth Circuit leads to the public perception that this court is incapable of reflecting the views of the huge population it serves over the vast expanse of land it covers. This perception threatens the very heart of the respect necessary for the rule of law and cannot be ignored indefinitely as the caseload continues to grow and the number of judges multiplies.

I thank the Committee for the opportunity to testify and I look forward to your questions.

APPENDIX A

Median Case Processing Time (in months)
from Filing in Lower Court to Final Disposition in Appellate Court

Year	Ninth Circuit	National Median	Difference
2003	30.4	25.9	4.5
2002	30.5	25.9	4.6
2001	30.7	26.6	4.1
2000	30.3	27.0	3.3
1999	29.9	27.1	2.8
1998	29.3	22.0	7.3
1997	29.0	26.0	3.0

Source: Administrative Office of the United States Courts
(AO Table B-4)

APPENDIX B

Ninth Circuit En Banc Ballots

Year	Petitions Filed	En Banc Ballots Sent	Grants of Rehearing En Banc Following a Vote	Denials of Rehearing En Banc Following a Vote
2003	972	40	13	27
2002	1039	35*	17	17
2001	797	42	19	23
2000	1006	48**	23	23
1999	1061	40	21	19
1998	1456	45	16	29
1997	1398	39	19	20
1996	1038	25	12	13

Source: Court of Appeals for the Ninth Circuit, Office of the Clerk

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* Voting was suspended in one case to enable the panel to consider a petition for rehearing. The panel then amended the opinion and the en banc call was withdrawn.

** Voting in two cases was suspended after the panels elected to consider amendments to their opinions.

APPENDIX C

Number of Appeals Filed and Pending in the Eighth, Tenth, Fifth, and Eleventh Circuits compared to the Ninth Circuit

Circuit	Appeals Filed in 2003	Percent of National Total (60,581)***	Appeals Pending as of Dec. 31, 2003	Percent of National Total (45,597)
8	3,110	5.13%	1,810	3.96%
10	2,509	4.15%	1,956	4.29%
5	8,547	14.12%	4,328	9.50%
11	6,970	11.50%	3,270	7.17%
8 and 10 combined	**5,619**	**9.28%**	**3,766**	**8.25%**
5 and 11 combined	**15,517**	**25.62%**	**7,598**	**16.67%**
9	**12,694**	**20.95%**	**11,587**	**25.41%**

Source: Administrative Office of the United States Courts
(AO Table B, summarizing the twelve-month period ending on December 31, 2003)

*** This national total does not include data for the United States Court of Appeals for the Federal Circuit.

APPENDIX D

Legislation and Rules Regarding the Ninth Circuit's Limited En Banc Procedures

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28 U.S.C. § 46(c) (authorizing en banc panels)

Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

PL 95-486, 92 Stat. 1633 (October 20, 1976) (authorizing limited en banc panels)

Sec. 6. Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.

Federal Rule of Appellate Procedure 35 (En Banc Determination)

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

[subsections (b)(2) and (3) and subsections (c) - (f) omitted]

Ninth Circuit Rule 35-3 (addendum to Federal Rule of Appellate Procedure 35)

The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, an 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside.

The drawing of the en banc court will be performed by the Clerk or a deputy clerk of the Court in the presence of at least one judge and shall take place on the first working day following the date of the order taking the case or group of related cases en banc.

If a judge whose name is drawn for a particular en banc is disqualified, recused, or knows that he or she will be unable to sit at the time and place designated for the en banc case or cases, the judge will immediately notify the Chief Judge who will direct the Clerk to draw a replacement judge by lot.

Notwithstanding the provision herein for random drawing of names by lot, if a judge is not drawn on any of the three successive en banc courts, that judge's name shall be placed automatically on the next en banc court.

In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc.

BRADLEY R. TAMM
ATTORNEY AT LAW, A LAW CORPORATION
828 FORT STREET MALL, UNIVERSITY CENTER SUITE 330
HONOLULU, HAWAII 96813-4321
(808) 524-4949, FAX (808) 524-4844
TOLL FREE: 888-999-2149

IRS CAF: 9006-13467R
E-MAIL: btamm@hawaii.rr.com

PRINCIPAL: BRADLEY R. TAMM, ADMITTED: HAWAII & CALIFORNIA
OF COUNSEL TO: GREG T. DUNN

April 17, 2004

Senator Dianne Feinstein
331 Hart Senate Office Building
Washington DC 20510-0504

Re: Ninth Circuit Court of Appeals – proposed split

Dear Senator Feinstein

At the urging of the Hawaii State Bar Association, I am writing this letter to express my views on the proposed division of the Ninth Circuit Court. Essentially, I feel that the Ninth Circuit is too large, particularly in light of the *"en banc"* review issues which were discussed recently in the testimony before the Senate Committee. In summary: my vote is to split the Circuit, but I do not support any of the current proposals.

I am licensed in both Hawaii and California, and I have practiced before the Ninth Circuit Court (and bankruptcy appellate panel) on many occasions. Thus, I have concerns as a trial court practitioner and an appellate attorney.

The problem with HB2723 (Simpson), SB562 (Murkowski) and SB2278 (Ensign) is that Hawaii would be tied to the same court as California. California however has little in common with Hawaii. Examples include:

- California has rules of professional conduct which are unique to California, whereas Hawaii (and all the other states, except New York, follow the ABA Model Rules (in one form or another)).
- California is a community property state (Castilian law), where Hawaii follows the English law of marital relations.
- California law of real property does not include the Torrens system (Land Court), but Hawaii (and Washington) does.
- California employs "deed of trust" and Hawaii (Oregon and Washington) use "mortgages."
- California's codes are unique to California, whereas Hawaii has adopted the "uniform" or "model" codes of commercial, property, business and criminal laws.

These differences can be "discounted" by some in that the decisions of appellate courts apply the law of the state in which the case arises (with some exceptions). However, it does not take into consideration the fact that the appellate judges come from the ranks of us practicing lawyers. Judges who come from one system of laws can certainly read the laws of another system; but they lack the intimate familiarity with the quirks of that system to make rulings which are truly appropriate. Personally, having learned my craft in California, I came to Hawaii 7 years ago and I still find myself "thinking California" in real estate and family law matters; even though that "thinking" is inapplicable here.

Additionally, California is so large (4 Federal Districts, 200,000 lawyers, and a population of over 27,000,000) as to dwarf by representation the smaller states. Given its size and population, it would probably warrant its own Circuit, or at least a circuit joining California, Arizona & Nevada. Alternatively, California should be joined with the other community property states (i.e., Alaska, Arizona, Idaho, Nevada or Washington), but not Hawaii (or Guam and the NMI). A split which took into consideration the commonality of laws of the individual states would make better sense in developing consistency of rulings. Here in Hawaii, the courts look to the laws of Washington and Oregon more often than California.

Thank you for allowing me to express my opinion. I trust that Congress will continue to work to resolve this long standing problem and find a resolution which is appropriate.

Sincerely,

BRADLEY R. TAMM

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United States Court of Appeals
for the Ninth Circuit
P. O. Box 31478
Billings, Montana 59107-1478

Chambers of
SIDNEY R. THOMAS
United States Circuit Judge

TEL: (406) 657-5950
FAX: (406) 657-5949

May 1, 2004

Hon. Jeff Sessions
Hon. Diane Feinstein
Subcommittee on Administrative Oversight and the Courts
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Sessions and Senator Feinstein:

Thank you for the opportunity to submit additional information for the record pertaining to various proposals to divide the Ninth Circuit Court of Appeals into two or more circuits. I am an active Ninth Circuit Judge, with chambers in Billings, Montana. The views expressed in this letter are my own.

Division of the Ninth Circuit at this time would create increased delay and decreased access to justice. It would create unnecessary and expensive duplication of core functions, while substantially reducing vital services. The most effective means of administering justice in the federal courts in the states comprising the Ninth Circuit is a centralized administration, with significant community outreach and services through the use of technology.

To explain my reasoning fully, I would like first to address the real world administrative impact of any split, then address some of the underlying concerns expressed by those promoting a structural division of the circuit.

Budgetary and Administrative Impact

At the present time, as the Subcommittee members are undoubtedly aware, the federal courts are facing a budgetary crisis. Ralph Mecham, Executive Director of the Administrative Office of the United States Courts wrote a memorandum to all federal judges on April 22, 2004, observing that: "The entire

judicial branch of government faces the most serious funding challenge that I have seen during my 19 years as Director of the Administrative Office." At the present time, all federal courts – including the courts of the Ninth Circuit – are preparing contingency plans involving significant personnel layoffs and other cost-saving measures.

As the Subcommittee is also undoubtedly aware, the Judiciary budget is prepared and allocated based on formulas that are, in great measure, caseload driven. Thus, circuit division will not necessarily mean greater funding for the federal courts in the current Ninth Circuit; it will essentially take existing funding and divide it. However, each new circuit will be required to duplicate and fund essential core functions. There will be multiple Clerks of Court and Circuit Executives, along with other top administrative staff positions. In sum, circuit division will reorganize the current staff resources into a more administratively top-heavy organization, less able to deliver needed services. The only remedy would be to take money from other circuits. This remedy might be required on the basis of the revised formulas for new circuits, but it would have an unfair and disastrous effect on other circuits that are currently experiencing severe budget crises of their own.

I will discuss later the administrative savings of maintaining the present structure for the Court of Appeals, and the cost in inefficiency and delay that would occur by dividing the circuit. Aside from those issues that are unique to the Court of Appeals, there are other, significant cost savings that would be lost if the Ninth Circuit would be divided. For example, one of the most expensive aspects of the judiciary budget is the payment for defense of capital cases. We have been cognizant of this problem and have created a committee to review budgets for the prosecution of such cases. Chief Judge Stephen M. McNamee of the District of Arizona and Judge Barry T. Moskowitz of the Southern District of California have done remarkable work in analyzing capital case budgets. Their work has saved hundreds of thousands, if not millions, of dollars. These efforts would be significantly lost or reduced under a new division. There simply would not be enough of a critical mass of judges to serve these functions in a small circuit.

Likewise, the smaller circuits would have significantly fewer resources in space and facility planning, a division in the Ninth Circuit Executive's office which has also saved taxpayers significant sums of money and assisted in the

construction of courthouses that are more efficient and less costly. An excellent example of effective planning is the new district courthouse in Seattle, which utilizes courtrooms space in an innovative and efficient manner. The planners of the Circuit Executive's office have been invaluable to smaller states like Montana and Idaho, to assist in courthouse planning given those states' very unique needs.

In short, there are enormous costs – both direct and indirect – that would be created by circuit division. Administrative duplication and waste would be substantial. Circuit division would result in a significant decrease in the services that the Circuit now provides.

Most importantly, the effect of these costs and inefficiencies would be compounded by our current budget situation.

Caseload Growth in the Ninth Circuit

The major premise behind the argument for structural division of the Ninth Circuit is that population growth throughout the region will cause increased appellate caseloads, and that division is the only means of accommodating the uniform increase in appellate filings. This argument is based on a faulty premise. In fact, there is no correlation between population growth and federal appellate filings. Rather, increases in appellate work have been primarily based on discrete, specific circumstances that tend to be transitory.

For example, Alaska's population grew 8.5% between 1991 and 2002. However, the number of appeals filed in the Ninth Circuit from Alaska actually *decreased* during the same period by 88.7%. Similarly, Oregon's population increased 17% between 1991 and 2002; its federal appellate caseload *decreased* during the same period by 13%. Indeed, if one examines the states comprising the Northern division of the Ninth Circuit (Alaska, Washington, Oregon, Idaho, and Montana), the appellate caseload has been virtually flat for over a decade. From 1993 to 2002, while the aggregate population grew 17%, the total appellate caseload from the region *decreased* by 3.2%.

The lack of relationship between population growth and federal appellate caseload is also demonstrated by reference to the various current proposals. S. 562 would divide the Ninth Circuit into two new Circuits, a new Twelfth Circuit

comprised of Alaska, Washington, Oregon, Idaho, Montana, Hawaii, and Arizona, with California and Nevada comprising the Ninth Circuit. The area comprising the Twelfth Circuit under that scenario has experienced a population growth of 20.5% between 1991 and 2002. However, its federal appellate caseload has only increased 12.8% during that period. In contrast, during the same period, the states assigned to the Ninth Circuit under the bill experienced a population growth of 15%, but a caseload growth of 45.7%.

If we examine S. 2278, we see similar results. The area comprising the new Thirteenth Circuit under that proposal (Washington, Oregon, Alaska) experienced a 16.7% increase in population between 1991 and 2002; its federal appellate caseload *decreased* 7.8% over that period. In contrast, the states comprising the Ninth Circuit under S. 2278 (California & Hawaii) experienced a 13.2% population increase over the same period, but a 47.4% increase in federal appellate caseload.

Overall, the caseload growth has been relatively flat over the last decade in the areas that would comprise the two new circuits; the increase has been in California filings, at a pace that has outstripped population growth. In sum, creating new circuits as proposed cannot be justified based on purported growth of cases within the areas covered by the new circuits.

The simple fact is that federal appellate caseload is not related to population growth. Rather, it is more influenced by other factors that tend to be transitory. For example, the federal courts in the states bordering Mexico have experienced enormous caseload growth in recent years. However, last year appeals from the Southern District of California – one of the judicial districts most affected by the problem – decreased from the previous year. The current appellate caseload challenge in the Ninth Circuit is not based on geography or population, but rather the actions of a single administrative agency.

The fact that judicial caseload emergencies tend to be transitory and driven by unique problems is also demonstrated by examining caseload in the various judicial districts. In my home state of Montana, for example, we recently experienced a judicial emergency because only one of Montana's three judgeships had been filled. To avoid dismissal of criminal cases for lack of a speedy trial, district judges were flown in from throughout the Ninth Circuit to try cases.

Eventually, two more judges were confirmed and the crisis abated. This is a familiar story in our Circuit, and the judges of our Circuit have demonstrated a remarkable willingness to assist their colleagues during these critical times. That is a luxury of a larger Circuit – to be able to have the flexibility to reallocate judicial resources during times of need.

In short, if one examines the data carefully, one can quickly discern that there is no independent justification for creating new federal circuit courts in the Western United States based on population projections or the intuitive notion that caseloads are uniformly increasing throughout the region. Rather, the data indicates that caseload spikes have been driven by unique circumstances that tend to be short-lived. To address these problems, the best solution is a larger Circuit that has the flexibility to reallocate resources internally, rather than to erect structural barriers to the allocation of judicial resources.

Delay

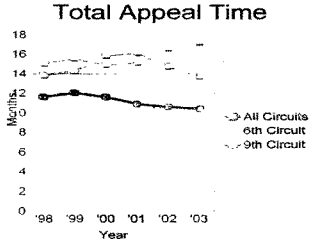
The second major faulty premise upon which the proponents of a circuit division rest their case is delay in case processing. Proponents of a split assume, without explaining, that any division of the Ninth Circuit will improve case processing time. The opposite is true. Circuit division will increase, not decrease delay.

First, let me address the question of delay within the Ninth Circuit. By use of case management techniques over the past several years, we have substantially reduced delay. In 2001, we faced a backlog of cases that developed from 1994-1998, during a period when the Court was operating with only eighteen of its twenty-eight judgeships filled. To address this, we adopted an aggressive case management plan. The plan was successful. At the end of 2001, the Administrative Office reported a median time from Notice of Appeal to disposition in the Ninth Circuit of 16.1 months. At the end of 2003, the median time was 13.7 months, a 14% decrease in two years. Our internal statistics showed an approximate 50% decrease in the time between the filing of the last brief and oral argument hearing during the same period. This statistic is important to us because it provides a good measure of how fast attorneys are able to get their case heard.

Our most current internal data indicates that, as a rough approximation, the time between filing briefing and oral argument in cases designated as important enough for oral argument is six months. (Other factors beyond our control influence the total time for all cases, such as the time it takes to obtain state court records in state prisoner habeas cases, which may be resolved at screening, rather than oral argument.) Because of the large influx of immigration cases, we do not expect the general median time for case processing to decline until the bulge of immigration cases has been resolved. However, long term trends in the filing of other cases have shown a decrease. For example, there has been a decrease in the filing of prisoner civil rights cases and a decrease in the number of state prisoner habeas petitions. Unless other events intervene, I would expect us to be able to resume our decrease in case processing time once the bulge of immigration cases have been resolved. The Ninth Circuit remains one of the fastest circuits in the nation in resolving cases after presentation to a panel of judges.

Moreover, the influx of immigration cases will probably not affect the case processing time for the states in the Northwest. There are very few administrative immigration cases filed there; thus, we should be able to maintain, and perhaps improve, our favorable oral argument disposition time in that region.

If delay were the primary justification for a circuit split, then there would be a much better case for dividing the Sixth Circuit than dividing the Ninth, as illustrated by this graph, which shows a continuing increase in delay in the Sixth Circuit, and a decrease in delay in the Ninth Circuit in the last five years.



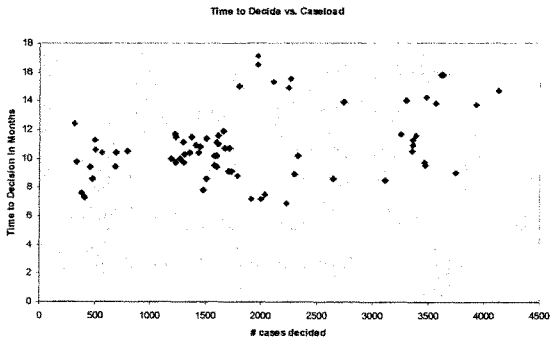
The simple fact is that case processing delay is not related to caseload, or size of circuit. The Commission on Structural Alternatives for the Federal Courts of Appeal, more popularly known as the "White Commission," studied the subject of delay thoroughly in 1998 and concluded that circuit size was not a critical factor in appellate delay. Specifically, the White Commission wrote:

> We have reviewed all of the available objective data routinely used in court administration to measure the

> performance and efficiency of the federal appellate courts, but we cannot say that the statistical criteria tip decisively in one direction or the other. While there are differences among the courts of appeals, differences in judicial vacancy rates, caseload mix, and operating procedures make it impossible to attribute them to any single factor such as size.

Commission on Structural Alternatives for the Federal Courts of Appeal, Final Report, p. 39 (1998).

In addition to a lack of relationship between circuit size and delay, there is no statistical relationship between total caseload and disposition time, as shown by this scattergraph, which illustrates the lack of relationship between decision time and caseload across all circuits.



Perhaps the real question is what the goal is in terms of case processing time, what structure best achieves it, and at what cost. For example, the difference between median case processing time for all circuits and the Ninth last year was 3.3 months. We were not the slowest circuit. If, by using management techniques, the Ninth Circuit could reduce total case processing time by 2.4 months in just two years, is there a compelling reason to cause serious disruption in the federal courts with the hope of reducing total case processing time by a few more months? Or is it better to continue to improve effectiveness and efficiency within the current structure?

If one examines the administrative structure of the Ninth Circuit and its efficiencies, I believe the only conclusion that can be drawn is that a circuit split will increase delay, rather than decrease it. A division of the circuit will cause the loss of a large number of administrative tools to reduce appellate caseload, and will place more cases and administrative tasks on judges.

The caseload mix of the federal judiciary, particularly in the Ninth Circuit, has changed over the years. Approximately 40% of total appeals in the Ninth Circuit are filed by *pro se* litigants. Last year, for example, there were 4,942 *pro se* appeals filed in the Ninth Circuit out of 12,694 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.

Further, well over half of the cases filed are the subject of procedural terminations. A procedural termination of a case may be occasioned by a number of factors, including: (1) dismissal for lack of jurisdiction, (2) resolution of the case through the efforts of the Circuit Mediator's office, (3) denial of a Certificate of Appealability, (4) dismissal for failure to prosecute. All of these terminations are accomplished through work of the central staff, not the work of individual judges and their law clerks. For example, over 1,000 appeals in the Ninth Circuit were resolved last year through action by the Circuit Mediator's office. The staff attorneys worked up and made presentations as to 1,829 Certificates of Appealability. Of those, 9% were granted; 91% were denied. In other words, well over 1,600 potential appeals were terminated at that stage, without the involvement of the chambers of individual judges. The Ninth Circuit case screening program is designed to quickly ascertain jurisdictional problems and to cull out cases in which the facts are uncomplicated and the result is dictated by Circuit precedent. The result of this is that approximately 1,800 appeals, or approximately one-third of total merits determinations cases were resolved outside of oral argument calendars.

To put this into total perspective, in an average year, approximately 50% of the filed cases are procedurally terminated through staff efforts before they reach a merits panel; of the remaining merits terminations, one-third were resolved by judicial screening panels deciding the cases based on staff presentations. Taking

this all together, the Circuit staff provided the primary assistance in the resolution of approximately 80% of appeals; the remaining 20% were resolved by judges and their chambers staff on oral argument calendars.

A division of the circuit will mean far fewer staff resources available to handle the non-oral argument calendar appeals, which account for 80% of the volume of circuit work. Splitting the circuit will not create budget increases; rather it will likely take existing resources and divide them. Moreover, core functions will be replicated, and additional management positions required. Thus, there will be far less staff available for case processing.

The current case mix in the Ninth Circuit is best addressed by retaining a strong, coordinated, central staff that can perform essential case triage and resolve the vast majority of appeals. Circuit division would reduce or eliminate many of these critical personnel resources available. The inevitable result will be inefficiency, waste of judicial time, loss of services, and increased delay.

However, there are additional reasons why circuit division will cause delay. In addition to the central staff, other institutional components of the Ninth Circuit have significantly reduced the number of appeals needed to be decided by appellate judges.

The Ninth Circuit Bankruptcy Appellate Panel, for example, resolved 675 appeals last year. The Ninth Circuit Appellate Commissioner has removed an enormous administrative load from the circuit judges by processing approximately 1,500 Criminal Justice Act vouchers last year, ruling on approximately 2,800 routine administrative motions last year, and conducting hearings and managing attorney discipline cases. These innovations would not be available to smaller circuits.

Further, in a circuit with a small number of circuit judges, any problems encountered by an individual judge would have far more ramifications than in a larger circuit. If a judge on a six or eight person 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, then it would have a significant impact on the functioning of that circuit.

Judges in small circuits would also have to assume a greater administrative load than in the current Ninth. In the present Ninth, judges rotate service on a series of important committees and administrative roles. These administrative tasks would be unnecessarily duplicated by Circuit division. Judges would do less judging, and more administering, if the Ninth Circuit were divided.

Circuit division does not eliminate caseload; it merely reallocates it. The cases still need to be decided. There is no evidence that demonstrates that the present caseload could be more effectively or efficiently managed by dividing the Ninth Circuit. In terms of efficient case processing, the best model at the present time is a strong, central administrative staff to examine cases for procedural and jurisdictional defects before the cases are referred to oral argument panels. If the ability to handle 80% of the Ninth Circuit's cases is impaired, and if circuit judges are forced to spend much more time with administrative matters, then the inevitable result will be increased delay to the litigants.

The best solution to resolving case processing delay is within the existing institution. Circuit division will not eliminate delay; it will create unnecessary delay.

En Banc Procedure

The Ninth Circuit's limited en banc procedure has been cited as a rationale for circuit division. However, a close examination will dispel the notion that circuit division is justified in order to guarantee a full court en banc hearing.

First, this involves an extraordinarily small number of cases. In 2003, there were 13,494 appeals filed in the Ninth Circuit. Twelve cases were heard en banc. In 2002, there were 12,157 appeals filed in the Ninth Circuit; 14 cases were reheard en banc. The suggestion has been made that the limited en banc procedure results in fewer cases reheard en banc. However, the Ninth Circuit hears more cases en banc than other circuits. For example, in 2003, every other circuit court of appeals except the Sixth Circuit heard fewer than 7 cases en banc.

The following chart illustrates the point:

Circuit	En Banc Cases
DC	1
First	3
Second	0
Third	4
Fourth	3
Fifth	6
Sixth	14
Seventh	3
Eighth	7
Ninth	15
Tenth	4
Eleventh	6

Over the 27,291 cases terminated in the federal circuit courts of appeal in 2003, only 66 involved en banc decisions. It is a very small number of cases, both nationally and within the Ninth Circuit.

Second, very few of the limited number of cases reheard en banc 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. No cases were decided by a one or two vote margin during 2003. The following chart provides the data:

NUMBER OF JUDGES VOTING IN MAJORITY IN LIMITED EN BANC OPINIONS 1996 - 2004

	Unanimous	10-1	9-2	8-3	7-4	6-5	Not yet decided
2004[1]	1	0	0	0	0	0	3
2003	6	1	0	1	0	0	4
2002[2]	8	0	0	1	4	3	0
2001[3]	4	0	0	3	5	5	0
2000	10	2	1	6	2	1	0
1999	10	3	4	1	1	1	0
1998	4	1	1	1	5	2	0
1997	2	2	0	4	3	5	0
1996	9	0	0	2	1	2	0

[1] Current through April 5, 2004.

[2] One case vacated without en banc opinion.

[3] Two cases from 2001 were taken off the en banc calendar.

Third, the worry that only six votes on the en banc court will bind the circuit neglects two significant facts: (1) well over 99% of the cases decided by the Ninth Circuit – and all the circuit courts for that matter – are decided by three judge panels, in which the votes of two judges bind the entire Circuit and (2) the Ninth Circuit allows for a full court en banc rehearing. As yet, there has not been an occasion in which a majority of the eligible judges has voted to rehear a case before the entire court.

Fourth, although eleven judges are ultimately drawn to serve on a Ninth Circuit en banc court, the determination whether to take a case en banc remains with the full court. By statute (28 U.S.C. § 46(c)), a vote in favor of en banc rehearing by a majority of non-recused active judges is required to take a case en banc. Moreover, any active or senior judge may call for en banc rehearing, and all may participate in the exchange of views – often extensive – that precedes the vote.

Fifth, the Court has taken concerns about the representative nature of the limited en banc panel seriously and studied the question. Prompted by issues raised during the White Commission hearings, the Ninth Circuit formed an Evaluation Committee to examine some of the issues raised more closely, including the limited en banc procedure. To answer the questions relating to en banc procedures, the Evaluation Committee consulted with a number of outside academic experts. One of the experts consulted was Professor D.H. Kaye of the College of Law, Arizona State University, a noted expert in the field of law and statistics, who conducted a statistical analysis of the size of the limited en banc court in relation to a full court of 28 judges. Professor Kaye calculated the probability that the outcome of the limited en banc court vote would be the same as that of a full court of 28. He posited a binary issue (judges would vote either to affirm or to reverse), and he considered the possible divisions among 28 judges. He found that expanding the en banc court would result in only a trivial gain in the degree by which an en banc court decision would represent the views of all judges of the court. The largest gain would occur when there were 28 active judges who divided 17 to 11 in their views as to whether the panel opinion was correct. Yet even in that situation, if the limited en banc court were expanded to 13, the gain in accuracy of "representativeness" would be only 3.5 cases per hundred, and only 7 cases per hundred if the limited en banc court were expanded to 15.

The Evaluation Committee also met with a number of other scholars to discuss this issue, including Professor Linda Cohen, Department of Economics, University of California, Irvine; Professor John Ferejohn, Hoover Institute, Stanford University; Professor Louis Kornhauser, New York University School of Law; Professor Matt McCubbins, Department of Political Science, University of California, San Diego; and Professor Roger Noll, Department of Economics, Stanford University, CA. These scholars consulted by the Committee confirmed the import of the calculations done by Professor Kaye in concluding that the current random draw is effective in providing a representative en banc court of 11 judges.

To supplement the analysis by Professor Kaye and the other consultants, the Evaluation Committee requested Professor Arthur Hellman of the University of Pittsburgh School of 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.

Sixth, none of the bills would totally eliminate the limited en banc court. Under any scenario, the circuit containing California would eventually have too many judges for a permanent full court en banc panel. For example, S. 2278 would place 21 judges in the reconstituted Ninth Circuit. So, to the extent that the procedure is view as problematic, none of the pending legislation addresses it fully.

Seventh, when all factors are considered, the limited en banc court is a valuable tool. Rehearing a case en banc uses up significant circuit resources. It is

a time and energy consuming process. My opinion is that the limited en banc system employed by the Ninth Circuit should be analyzed as to its legitimacy, representativeness, and deliberative quality. The limited en banc panel has rarely, if ever, reversed the decision of a prior en banc panel. Indeed, it is rarely requested to do so. There is no compelling evidence that the decisions of the limited en banc panel are not accepted as the binding decisions of the Court. Our internal studies, and all external studies, have concluded that the composition of the panel is sufficiently representative. Having too many judges can interfere with the deliberative process; limiting the panel number to eleven strikes an appropriate balance between the number required for legitimacy and representativeness and the number required for effective deliberations. It also strikes, in my opinion, the proper balance of resources needed to resolve en banc-worthy issues.

Finally, and perhaps most importantly, the question of size of the en banc panel is a matter within the administrative control of the Ninth Circuit. No legislation is required to either increase the size of the panel, or to mandate a full court en banc panel. That can be accomplished by vote of the judges of the circuit.

For all of these reasons, I do not believe that the nature of the limited en banc system employed by the Ninth Circuit justifies a circuit division.

Collegiality

Collegiality is often cited as a reason to create smaller circuits. In many cases, judges on smaller circuits have enjoyed a strong rapport. This doesn't mean, however, that judges on a larger circuit cannot achieve a similar rapport. Indeed, as most judges on our Court have testified repeatedly, we enjoy a very collegial atmosphere on our Court, despite differences of opinion. In some ways, a larger court is better able to absorb strong personality differences. When personal differences arise on a smaller court, a court may become rapidly dysfunctional. There are many examples of this. My point is not to argue that a larger circuit is more, or less, collegial than a smaller circuit; only to point out that a close working environment does not always produce collegiality.

Some proponents of a split have argued that the judges on our Court do not sit in panels as often as these observers believe they should. However, a careful look at other circuits should show that this is an exaggerated problem. For

example, the Eleventh Circuit, which was touted as an example to the Committee employs a large number of visiting judges. Indeed, 66% of the published opinions of the Eleventh Circuit involved a visiting judge on the panel. In contrast, only 33% of the published opinions of the Ninth Circuit involved a visiting judge. This is not to criticize the practice of the Eleventh Circuit, by any means. However, the point is that paring the size of a Circuit does not necessarily mean that judges will be sitting with each other more often. Indeed, as caseload increases, more visiting judges will be required, and the so-called collegiality created by frequency of sitting will be diminished.

On our Court, we have daily substantive interchanges of opinions and ideas through e-mail, some of them quite spirited. We sit often together on en banc panels. We have frequent contact. One excellent measure of collegiality is the degree to which judges resolve differences. Well over 90% of the cases are decided by unanimous vote. Further, there has been an increasing trend on our Court for off-panel judges who have concerns about panel opinions being able to work out differences with the panel without proceeding to a vote on whether to rehear the case en banc. During 2003, there were thirteen en banc calls or potential en banc calls that did not result in a ballot because the panel agreed to amend its opinion. This amounted to almost a quarter of the en banc calls. Given the frequency of communication and the internal indicia of collegiality, additional panel sittings would not materially improve our understanding of each other, at least in my opinion.

Nor would a circuit division necessarily produce a closer working environment. The geography of the Ninth Circuit, regardless of how it might be divided, precludes daily person-to-person contact. A single judge located in Hawaii, Alaska, or Montana is not going to have daily in person contact with other circuit judges, regardless of circuit configuration. In any circuit, for example, my chambers would not be located within driving distance of any other chambers. The daily in person interaction between judges will not change with a circuit split. The primary contact of the judges in any circuit division would remain as it is now, primarily by e-mail and telephone. Personal contact would be limited to court meetings and oral arguments. The illusion of increasing personal contact is not a reason to divide the Circuit.

Connection with Community

Coming from a less populated state, I feel strongly that a court must have a strong connection with the community it serves. Part of the premise for change is that smaller circuits would promote that. However, attorneys in states like Montana are unlikely to feel a significantly more intimate connection with a Circuit whose headquarters is in Seattle or Las Vegas or Phoenix, as opposed to a Circuit whose headquarters is in San Francisco. Likewise, no circuit division would place all circuit judges in an intimate environment; they would still maintain chambers hundreds or thousands of miles apart.

The best method of establishing and maintaining a sense of community is through the use of technology and through continued contact between the Circuit and community it serves. To that end, we have made enormous strides over the past several years. Ninth Circuit opinions are immediately posted on the Circuit's website, which contains an enormous amount of useful information. Digitized audio files of Ninth Circuit arguments are available on the website the day after argument. The Clerk's office has made briefs, orders, and audiofiles of cases in which the public has expressed an interest immediately available via the internet. Video argument will soon be available to litigants who cannot afford to travel in person for oral argument. Many of these advances were hastened as a result of conferences between the bench and bar of the states in the Ninth Circuit. Technology allows the Circuit to stay in close contact with the community it serves. However, technology is not always cheap. Because the Ninth Circuit has pooled resources, it can continue to improve the service it provides to litigants and the public. However, the resources for doing so would be seriously diminished in a small circuit.

Conclusion

For all of these reasons, I oppose a structural division of the Ninth Circuit. The best means of addressing the present challenges is within the existing structure. Division will be costly, inefficient, ineffective, and result in the significant impairment of the administration of justice in the Western United States. I thank the Subcommittee for its consideration of my views and those of my colleagues.

Sincerely,

Sidney R. Thomas
United States Circuit Judge

PREPARED STATEMENT OF

THE HONORABLE GERALD BARD TJOFLAT

CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

BEFORE

THE SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

"IMPROVING THE ADMINISTRATION OF JUSTICE:

A PROPOSAL TO SPLIT THE NINTH CIRCUIT"

WEDNESDAY

APRIL 7, 2004

Introduction

Mr. Chairman and members of the Committee, I am Gerald Bard Tjoflat of the United States Court of Appeals for the Eleventh Circuit. I am here today at your invitation to testify about a proposed split of the Ninth Circuit. I do not approach this issue with a political or personal agenda, but instead hope to offer an objective analysis of the disadvantages of a large court, based on my personal experience having served on the old Fifth Circuit when it had 26 active judges and 11 senior judges. Based on this experience–as well as my tenure on the much smaller Eleventh Circuit–it is my unequivocal belief that splitting the Ninth Circuit would be in the best interest of the our nation's great justice system.[1]

The Ninth Circuit is one of thirteen circuits in the federal appellate system, yet hears one out of every five federal appeals.[2] Its courts "sit in nine states and two territories ranging from the Rocky Mountains to the Sea of Japan and from the Mexican border to the Arctic Circle."[3] "[A]s a land mass, the 9th circuit is comparable to all of Western Europe."[4]

Since Congress first began giving serious consideration to splitting the Ninth Circuit over three decades ago, the problems facing the circuit have only grown worse. "In 1973, the ninth circuit was composed of 13 judges and received an annual caseload of approximately 2,300

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[1] For further elaboration on my position, I invite you to consider my previous testimony before this committee on the "Ninth Circuit Court of Appeals Reorganization Act" from September 13, 1995.

[2] *See also* Jennifer E. Spreng, *Proposed Ninth Circuit Split: The Icebox Cometh: A Former Law Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 893 (1998) ("The Ninth Circuit contains more states, covers more territory, boasts more judges, and dispenses justice to more people than any other circuit. If just one of its nine states were a separate circuit, that state would be the third largest circuit in the nation.").

[3] Diarmuid O'Scannlain, *A Ninth Circuit Split is Inevitable, But Not Imminent*, 56 Ohio St. L.J. 947, 947 (1995).

[4] Michael D. McKay & Robert G. Chadwell, *It is Time to Create a New 12th Circuit Court of Appeals for the Pacific Northwest*, 56 OR. ST. B. BULL. 9, 10 (1996).

filings. The Ninth Circuit has now mushroomed to 28 active circuit judges [and 22 senior judges[5]], and the caseload has grown upwards of 8,000 appellate filings each year."[6] The sheer size of the circuit—in terms of both population and judges—strongly counsels in favor of a split.

I. Previous Perspectives on Splitting the Ninth Circuit

Congress has carefully considered whether to split the Ninth Circuit for over thirty years. In 1972, Congress created the Commission on Revision of the Federal Appellate System (the "Hruska Commission"),[7] which recommended that the Fifth and Ninth Circuits each be broken up into two separate circuits. Although the former Fifth Circuit was split into the present-day Fifth Circuit and the Eleventh Circuit, the Ninth Circuit remains unchanged. "The original problems that provided the impetus for these suggestions, however, have persisted and given rise to more recent efforts to reorganize the Ninth Circuit to ensure consistent and high quality decisionmaking."[8]

Nearly a quarter of a century later, in 1997, Congress revisited the Ninth Circuit problem by creating the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by former Supreme Court Justice Byron White (the "White Commission").[9] Although the

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[5] *See United States Court of Appeals for the Ninth Circuit: The Judges of This Court in Order of Seniority*, *available at* http://www.ca9.uscourts.gov (last referenced Apr. 1, 2004).

[6] *Report of the Senate Comm. on the Judiciary on the Ninth Circuit Court of Appeals Reorganization Act*, S. Rep. No. 195, 104th Cong., 1st Sess., at 3 (Dec. 21, 1995) [hereinafter Senate Reorganization Report].

[7] *See* Commission on Revision of the Federal Court Appellate System, The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change (1973).

[8] Sanford Svetcov & Janelle Kellman, *The "No Split" Split of the Ninth Circuit—The End of the World as we Know It?*, 15 J. L & POLITICS 495 (1999).

[9] *See* Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (1998), *available at* http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf.

Commission did not formally recommend splitting the Ninth Circuit, it did suggest that the circuit be split into three essentially autonomous regional divisions. As the Ninth Circuit's Chief Judge pointed out, these recommendations essentially suggested the substantive equivalent of splitting the circuit. Under the White Commission's proposal, "The Ninth Circuit Court of Appeals would no longer function as one circuit court, amounting to a de facto split of the court of appeals."[10]

What is all the more remarkable is that four Justices of the United States Supreme Court—enough to grant certiorari on the issue—have declared that the time has come to split the Ninth Circuit.[11] Justice Kennedy, a former Ninth Circuit judge, best captured their sentiments in writing:

> [W]hat is striking is the relative absence of persuasive, specific justifications for retaining [the Ninth Circuit's] 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 . . . must meet a heavy burden of persuasion. In my

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[10] Chief Judge Procter Hug, Jr., *Potential Effects of the White Commission's Recommendations on Operations of the Ninth Circuit*, 34 U.C. Davis L. Rev. 325, 330 (2000).

[11] *See* Letter from Justice Antonin Scalia to Justice Byron White 2 (Sept. 9, 1998) (noting that the Ninth Circuit may be unmanageably oversized"), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/Scalia2.pdf (last referenced Apr. 1, 2004) [hereinafter September Scalia Letter]; Letter from Justice John Paul Stevens to Justice Byron White 1 (Aug. 24, 1998) ("[T]he arguments in favor of dividing the Circuit into either two or three smaller circuits overwhelmingly outweigh the single serious objection to such a charge [the inconvenience of splitting California between two or more circuits]."), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/stevens.pdf (last referenced Apr. 1, 2004) [hereinafter Stevens Letter]; Letter from Justice Anthony Kennedy to Justice Byron White 1 (Aug. 17, 1998), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/kennedy.pdf (last referenced Mar. 30, 2004) [hereinafter, Kennedy Letter] ("Based on my observations and perspective as a former judge of [the Ninth Circuit] and as a member of [the Supreme] Court, I submit the reasons for dividing the Ninth Judicial Circuit outweigh the reasons for retaining it as now constituted."); Letter from Justice Sandra Day O'Connor to Justice Byron White 1-2 (June 23, 1998) ("With respect to the Ninth Circuit in particular, in my view the circuit is simply too large. . . . [S]ome division or restructuring of the Ninth Circuit seems appropriate and desirable."), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/oconnor.pdf (last referenced Apr. 1, 2004) [hereinafter O'Connor Letter].

view this burden has not been met.[12]

The simple fact that a good number of Ninth Circuit judges, including its Chief Judge, oppose a split should not be given excessive weight in considering this issue. In the *Federalist Papers*, Madison recognized that there is a natural tendency for government officials "to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold."[13] The notion of ceding jurisdiction is never one that comes easy to a court—we judges are human beings with a natural tendency to sometimes overlook our own limitations—which makes it all the more necessary for an impartial outside observer such as the United States Congress to recognize that the time has come to split the Ninth Circuit. Moreover, as former Governor Racicot of Montana pointed out, "[T]o argue that judges and attorneys are comfortable with the status quo is a position that . . . falls deaf on the ears of those who have been awaiting a decision from the [c]ourt for many months or years."[14]

II. Population and Caseload

The Ninth Circuit, despite its admirable procedural innovations for dealing with a potentially crushing docket, faces a workload crisis. For example, in 2003, the Ninth Circuit had a staggering 12,872 case filings, up from 11,421 the year before—a 12.7% increase.[15] While these numbers are troubling enough, they become an especially distressing cause for concern

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[12] Kennedy Letter *supra* note 11, at 2.

[13] HAMILTON, ET AL., FEDERALIST PAPERS No. 1.

[14] *Hearing on the Ninth Circuit Split Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess., at 16 (Sept. 13, 1995) [hereinafter Circuit Split Hearing] (letter of Montana Governor Marc Racicot).

[15] ADMINISTRATIVE OFFICE OF THE COURTS, JUDICIAL BUSINESS OF THE UNITED STATES: 2003 ANNUAL REPORT OF THE DIRECTOR 70 tbl B (2003) [hereinafter JUDICIAL BUSINESS REPORT].

when we realize that, for several years, the Ninth Circuit has had more case filings than terminations. For example, in 2002, 11,421 cases were filed in the Ninth Circuit, but only 10,042 cases were terminated, leaving a backlog of approximately 1,400 unresolved cases.[16] The next year, in 2003, 12,872 cases were filed, but only 11,220 cases were terminated,[17] leaving a backlog of approximately 1,600 cases *in addition to* the existing 1,400-case backlog from the year before, for a total of over 3,000 unresolved piled-up cases. Given the ever-increasing torrent of cases flooding in, it is unlikely that the Ninth Circuit will ever be able to catch up. The most likely outcome is that the Ninth Circuit will systematically be forced to spend most of its time resolving cases filed and argued several years before, to the detriment of more current cases.

It has been argued that the Ninth Circuit processes cases faster than other circuits.[18] Such claims are not supported by the data:

> [T]he median time for resolution of an appeal in the Ninth Circuit is approximately fourteen months, the longest in the nation. Half of all appeals to the Ninth Circuit take more than two years. The majority of the time is consumed by court reporters and attorneys in record preparation and briefing; only 2.5 months of this time for orally-argued cases and .9 months for submitted cases are spent in judges' chambers. These statistics suggest that the circuit's problems of delay are directly related to the inordinate number of cases that the court's infrastructure must process.[19]

According to the most recent statistics from the Administrative Office of the Courts, the Ninth Circuit's case disposition time has only grown longer. While the nationwide average

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[16] *Id.*

[17] *Id.*

[18] *See id.* at 16 (statement of Sen. Joseph Biden).

[19] Eric J. Gibbin, *California Split: A Plan to Divide the Ninth Circuit*, 47 Duke L.J. 351, 373 (1997); *see also* McKay & Chadwell, *supra* note 4, at 9 ("The Ninth Circuit's own statistics show that in spite of its average caseload, it is unable to dispose of its cases in a timely manner.").

appeal disposition time, from filing a notice of appeal to final disposition in the circuit court, was 25.9 months, the Ninth Circuit took an average of 30.6 months—that's over 2 1/2 years per case.[20] Moreover, the Ninth Circuit was tied for being the second-slowest circuit in the nation (the slowest being the Sixth Circuit at 30.6 months per appeal).[21]

A comparative look at the data is even more illuminating. "The Fifth and Eleventh Circuits have a total of twenty-nine authorized judgeships. In recent years, the two circuits combined have disposed of 50 percent more cases than the twenty-eight judges of the Ninth Circuit have resolved."[22]

As the number of cases filed continues to increase, and the number of filings continues to dwarf the number of case terminations, case-decision times can only grow; time will serve only to exacerbate these problems.[23] The Ninth Circuit's population is dramatically increasing. According to the United States Census Bureau, the population of the states comprising the Ninth Circuit (even excluding Guam and the Northern Mariana Islands) is currently over 56.1 million people. By 2025, this figure is projected to rise to 75.7 million people.[24] Given its already-

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[20] JUDICIAL BUSINESS REPORT, *supra* note 15, at 91 tbl. B-4.

[21] *Id.*

[22] Gibbin, *supra* note 19, at 382.

[23] One commentator explains:

> [I]nstead of creating an ever-larger circuit with an increasingly monolithic infrastructure, Congress and the Ninth Circuit Judicial Conference should realize that the circuit is simply too large to handle a caseload that is growing with no end in sight. The solution lies in reducing, not increasing, the number of people served by the circuit. This can best be accomplished through judicial division.

Id. at 353.

[24] *See* United States Bureau of the Census, *Projections of the Total Population of States: 1995 to 2005*, *available at* http://www.census.gov/population/projections/state/stpjpop.txt (last referenced Apr. 1, 2004).

tremendous caseload, the Ninth Circuit cannot possibly hope to cope with the deluge of lawsuits such a dramatic demographic change will inevitably produce. The time to address this problem is now, before population pressures cause a true judicial emergency.

While the circuit has developed a number of procedural innovations to address its current docket, it is ill-equipped to handle the federal legal problems of 20 million additional people.[25] It has been persuasively argued, however, that if part of the concern over the Ninth Circuit is based on its caseload, "simply dividing the circuit in two without increasing the judicial resources . . . does nothing at all to address the problem."[26] While the gravamen of this objection is that, given a sufficiently high caseload, we eventually have to create new appellate judgeships, my fundamental point is that we are far better off adding judges to several smaller circuits than to add that same number of judges to a single already-large circuit. For the reasons discussed throughout this testimony, increasing the number of judges on a single court leads to a variety of inefficiencies and undesirable effects.

Moreover, as at least one commentator has pointed out, the workload on a court *does* increase based on the number of judges on that court. "Work whose volume depends on the size of the circuit arises from court administration and efforts to maintain the consistency of the circuit's law."[27] Each judge, for example, is expected to keep abreast of recent circuit cases. The more judges there are on a court, the more opinions are written and so the greater the number of

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[25] *See* Circuit Split Hearing, *supra* note 14, at 6 (statement of Sen. Howell Heflin) ("[I]f we look ahead 5, 6, 7, or 10 years from where we are, I think we are going to see that there are going to be many problems and, in fact, we may have to increase substantially the number of judges—and if we increase the judges, it means the structure has got to change . . . .").

[26] *See Id.* at 3 (statement of Sen. Joseph Biden).

[27] Spreng, *supra* note 2, at 895.

recent cases each judge must read, thereby taking up precious time.[28] If the Ninth Circuit were split into two or three separate circuits, each judge would have to read a much smaller number of recent cases. It is particularly important for a judge to review her colleagues' work in order to ensure that they are not straying too far from the weight of circuit precedent, to be able to call for an en banc poll when they do, and to gain a familiarity with general developments in circuit law for her own opinions.

Another situation in which the number of judges on a court can have a tremendous impact on the efficiency with which cases can be resolved is in *en banc* proceedings. The effort required to coordinate a majority, concurring, and dissenting opinions increases exponentially with the number of judges. While the Ninth Circuit has attempted to alleviate this problem through the use of limited en banc rehearings, I discuss later why this solution is not satisfactory.[29] Consequently, even if we hold the number of federal appellate judges constant, judicial workload will decrease if we split them between two or three circuits, rather than keeping the Ninth Circuit together as an amalgamated whole.

Even putting aside the issue of the judges' workload, a circuit split would make much more sense from an administrative point of view. A single jumbo circuit will require a much larger support apparatus than two reasonably sized circuits. As cases and judges continue to be

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[28] Ninth Circuit Judge Andrew Kleinfeld readily recognizes this problem, writing, "With so many judges on the Ninth Circuit and so many cases, there is no way a judge can read all (the) other judges' opinions . . . It's an impossibility." Senator Frank J. Murkowski, *From Arctic Circle to Mexico, Ninth Circuit Too Big to Do Justice*, 21 AK BAR RAG 3, 3 (1997) (quoting Judge Andrew Kleinfeld). Other commentators echo this point, explaining, "Some of the judges on the 9th Circuit are now no longer able to remain current with the law of the circuit as it develops. [Because of] the volume of . . . printed material, judges are obliged to rely upon law clerks, staff attorneys, librarians and the eternal hope that their opinions do not stray too far from the law of the circuit." McKay & Chadwell, *supra* note 4, at 9.

[29] *See infra* Part V.

added to the Ninth Circuit, we will need not only more support employees (staff attorneys, clerks, record handlers, etc.) to do actual work, but additional layers of bureaucrats and supervisors will also be necessary simply to coordinate and supervise the work of others, rather than actually help process any cases. Such additional oversight and employee-management mechanisms would not be necessary if the Ninth Circuit were split into two or more smaller circuits with less employees in each.

III. Collegiality

Perhaps one of the most important factors that determine the efficiency with which a court can operate as well as the quality of its ultimate product is the degree to which the judges on that court enjoy a high degree of collegiality with each other. As former Attorney General Griffin Bell points out, "[W]hen a court becomes too large, it tends to destroy the collegiality among its members . . . ."[30] As the Senate Judiciary Committee has already recognized, "The more judges that sit on a circuit, the less frequent a particular judge is likely to encounter any other judge on a three-judge panel. Breakdown in collegiality can lead to a diminished quality of decisionmaking."[31]

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[30] Letter from Former Attorney General Griffin Bell to Senator Jeff Sessions (June 6, 1997) (on file with author).

[31] Senate Reorganization Report, *supra* note 6, at 9. Judge O'Scannlain explains:

> [C]onsistency of law in the appellate context requires an environment in which a reasonably small body of judges has the opportunity to sit frequently together, thereby enhancing the understanding of one another's reasoning, decreasing the possibility of misinformation and misunderstandings, and increasing the tendency toward unanimous decisions. Collegiality results from close, regular, and frequent contact in joint decision-making. As the court and the caseload grow, maintaining the collegiality necessary for the court to do its job become increasingly difficult.

Diarmuid F. O'Scannlain, *Should the Ninth Circuit Be Saved?*, 15 J.L. & Politics 415, 418 (1999); *see also* Judge J. Harvie Wilkinson, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1173 (1994)

I explained the importance of collegiality in my *A.B.A. Journal* article entitled *More Judges, Less Justice*, "In a small town, folks have to get along with one another. In a big city, many people do not even know, much less understand, their neighbors. Similarly, judges in small circuits are able to interact with their colleagues in a much more expedient and efficient manner than judges on jumbo courts."[32] Because appellate judges sit in panels of three, it is critically important that a judge writing an opinion be able to "mind-read" his colleagues. The process of crafting opinions can be greatly expedited if a judge is aware of the perspectives of the other judges on the panel so that he can draft an opinion likely to be amenable to all of them. In a smaller circuit, where the judges know each other—and each other's judicial philosophy and predispositions—the process of drafting opinions likely to attract the votes of the other judges on the panel is greatly simplified.

In a larger circuit, in contrast, the odds are good that you will be sitting on a panel with two strangers (particularly once senior judges, visiting judges, and district judges sitting by designation are taken into account) whom you have never worked with before. "[B]ecause there are so many Ninth Circuit judges, it is conceivable that years could go by between the time when Judge A had last sat on a calendar or screening panel with Judge B. A number of senior and active judges may never have sat on a regular or screening panel with the junior judges appointed in the 1990s."[33]

("Collegiality may be the first casualty of expansion on the federal appellate courts. . . . Judges, however, have a deep conviction that a collegial court does a better job.").

[32] Judge Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J. 70, 70 (July 1993).

[33] Spreng, *supra* note 2, at 924.

Becoming acclimated with the personalities, views, and writing styles of an unending succession of strangers is much less efficient than working with a smaller group of colleagues who are better known to you. Additionally, as Judge Wilkinson has pointed out, collegiality leads to better group decision-making. "[A]t heart the appellate process is a deliberative process, and . . . one engages in more fruitful interchanges with colleagues whom one deals with day after day than with judges who are simply faces in the crowd. Collegiality personalizes the judicial process. It contributes to the dialogue and to the mutual accommodations that underlie sound judicial decisions."[34] Close interpersonal relationships facilitate the creation of higher-quality judicial opinions.[35] Those relationships also form the basis for interaction and continued functioning when a court faces the most emotional and divisive issues of the day.

Furthermore, the close ties that can be forged on a smaller court also allow you to build trust in your colleagues. For example, in a small circuit where the judges know each other well, if one judge declares that he reviewed the record in a particular case and feels that an error is (or is not) harmless under the circumstances, another judge might feel entirely justified in relying upon that assessment, rather than going through the immensely time-consuming task of

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[34] Wilkinson, *supra* note 31, at 1173-74.

[35] Ninth Circuit Judge David Thompson has suggested that the magnitude of the Ninth Circuit does not create any collegiality problems. He contends:

> The assumption that there is a correlation between court size and collegiality ignores the existence of the interaction among judges by telephone, e-mail, calendar lunch and dinner meetings, constant press of issues that relate to administration of the court and how we do our work, and the steady stream of communication on whether to take cases en banc. Our e-mail traffic covers such diverse topics as chamber space allocation, whether or not bench memoranda should be pooled, the successes of our children and grandchildren, and recommendations for legal reading.

Judge David R. Thompson, *The Ninth Circuit Court of Appeals Evaluation Committee*, 34 U.C. DAVIS L. REV. 365, 376 (2000). Speaking from personal experience, I can attest to the fact that mass e-mails and faxes on routine court business from faceless names hundreds of miles away simply cannot be compared to direct, in-person interactions, be it lunches, conferences, committees, or even informal receptions.

reviewing thousands of pages of trial transcript and dozens of boxes of pleadings and exhibits in order to come to the same conclusion himself. If two judges do not know each other and are unfamiliar with each others' judgment, work habits, or style, they are not likely to exhibit such reliance and would be prone to needlessly reproducing each others' efforts.

The benefits of a small court are perhaps most evident when dealing with emergency applications for relief, such as when a litigant seeks an emergency stay of a district court order. Although such applications are considered by a three judge panel, typically only one judge is able to have access to the full record at a time. Because the record tends to be voluminous, there is not always time for all three judges to fully review it in-depth. Additionally, because emergency motions can arise at literally any time, not all three judges are always in a position where they can immediately review it. In such cases, the rapport and trust that comes from working together in a small court often allows you to place great stock in the judgment and assessments of your colleagues, thereby allowing the court to handle such emergency matters expeditiously.

Conversely, when you work with another judge repeatedly, you also get to know her particular inclinations, and are able to identify arguments she may systematically overlook, and are aware of her interpretations of particular doctrines with which you might disagree. Thus, panel judges faced with an emergency petition are familiar with the types of errors their colleagues are most likely to make. This allows judges to prevent mistakes that might otherwise go unrecognized by allowing them to focus primarily on these potentially divisive issues.

My concerns with large courts are drawn from personal experience. Having served on both the old (pre-split) Fifth Circuit as well as the Eleventh Circuit, I can definitively attest to the fact that the entire judicial process—opinion writing, *en banc* discussions, emergency motions,

circuit administration, and internal court matters—runs much more smoothly on a smaller court. The Eleventh Circuit has steadfastly opposed efforts to increase the size of the court precisely to avoid the problems experienced by the Ninth Circuit.[36]

IV. Consistency and Clarity of Precedent

Another regrettable effect of the Ninth Circuit's size is that it leads to inconsistencies within, and uncertainty about, its caselaw. Each judge necessarily brings to the bench her own predispositions and judicial philosophy, and exerts (to a greater or lesser degree) her own "gravitational pull" on the law of the circuit. With twenty-eight judges, Ninth Circuit law is being pulled in twenty-eight somewhat different directions. This contributes to litigants' uncertainty over how matters not squarely addressed by precedent will be handled. It also creates what Justice Kennedy has termed an "unacceptably large risk of intra-circuit conflicts or, at the least, unnecessary ambiguities."[37] With so many panels and judges handling potentially similar issues, the potential for inconsistent dispositions dramatically skyrockets.[38] Kennedy explained, "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,

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[36] *See* Honorable Gerald Bard Tjoflat, *Prepared Statement Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary* 4 (June 9, 1997).

[37] Kennedy Letter, *supra* note 10, at 3.

[38] Spreng, *supra* note 2, at 906 ("In other words, the more judges, the more panel combinations; the more panel combinations, the greater likelihood that any two panels will produce irreconcilable interpretations of the law.").

one would expect the possibility of an intra-circuit conflict in the former to be far more than three times as great as in the latter."[39]

The sheer number of possible panel combinations on the Ninth Circuit is itself a good indication as to the uncertainty and dramatic potential for inconsistent rulings in a large circuit. Even putting aside senior judges and district or visiting judges sitting by designation, with 28 active judges, there are 19,656 possible three-judge panel combinations. This makes it practically impossible for the same three-judge panel to ever reconvene. For the past several years, the Ninth Circuit has been requesting an additional 10 active judges, for a total of 38; this would raise the number of possible panel combinations to 50,616. It is virtually impossible for a court to attempt to maintain any degree of coherence or predictability in its caselaw when it speaks with that many possible voices.

Moreover, while a "case on point" is the gold standard for attorneys, a circuit's law can also be quite confusing and overwhelming when there are simply too many cases on point. Having so many judges produce so many opinions that make similar points in slightly different ways undermines—rather than reaffirms—certainty, "creating incentives to litigate that do not exist in jurisdictions with small courts. . . . Individuals find it more difficult to conform their conduct to increasingly indeterminate circuit law and suffer higher litigation costs to vindicate the few remaining clear rights to which they may cling."[40] While the Ninth Circuit has taken

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[39] Kennedy Letter, *supra* note 10, at 3; *see also* Paul D. Carrington, *An Unknown Court: Appellate Caseload and the "Reckonability" of the Law of the Circuit*, *in* RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 206, 210 (Arthur Hellman ed., 1990).

[40] Judge Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J. 70, 70 (July 1993); *see also* Wilkinson, *supra* note 31, at 1175-76 (predicting "a loss in the coherence of circuit law if the size of circuit courts continue to expand. . . . As the number of judges rolls ever upward, the law of the circuit will become more nebulous and less distinct. . . . Litigation will become more a game of chance and less a process with predictable outcomes.").

several admirable steps in an attempt to remediate this distressing problem,[41] the best long-term solution is simply to split the circuit.

Interestingly, many opponents of a split have used different concerns about consistency as one of their major reasons for supporting the continued existence of a single jumbo circuit. It has been argued that "[h]aving 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."[42] Such arguments overlook the crucial point that Senator Slate Gorton made during the previous hearings on this issue—that the East Coast already has its major port cities in separate circuits, with no detrimental effects:

> I look at that map . . . and I see the port of Boston in the first circuit, the port of New York in the second circuit, the port of Philadelphia in the third circuit, and the port of Baltimore in the fourth circuit. Baltimore and Boston are closer than any of the cities described in the ninth circuit are to one another. I don't think we have a disaster in admiralty law and in foreign commerce because there are four circuits on the northern part of the Atlantic coast . . . .[43]

Thus, to the degree consistency in the law is an important value to us, it counsels in favor of splitting the Ninth Circuit.

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[41] Thompson, *supra* note 35, at 373 (explaining some of the steps that the Ninth Circuit has taken to identify opinions in which an intracircuit conflict is particularly likely, by attempting to identify opinions in which, among other things, "(1) the opinion expressly distinguishes one or more Ninth Circuit precedents; (2) the opinion expressly rejects out-of-circuit precedents; (3) the opinion includes a dissent . . . .").

[42] John B. Oakley & Procter Hug, *Comparative Analysis of Alternative Plans for the Divisional Organization of the Ninth Circuit*, 34 U.C. DAVIS L. REV. 483, 541 (2000).

[43] Circuit Split Hearing, *supra* note 13, at 12 (statement of Sen. Slate Gorton).

V. En Banc Review

One of the most obvious deficiencies with the size of the Ninth Circuit is that it essentially precludes *en banc* review. An *en banc* hearing is one in which all the judges of a circuit come together to speak definitively about a point of law for that circuit. This occurs primarily when multiple panels issue conflicting opinions, a longstanding precedent needs to be reconsidered in light of changed circumstances, or a present-day panel simply errs.

Because of the crucial role *en banc* hearings play in maintaining uniform, coherent circuit law, it is important that each judge of the circuit have a voice in the proceedings. The Ninth Circuit is the only circuit in the nation in which the majority of circuit judges are actually denied the opportunity to participate in most *en banc* hearings. Due to its size, the Ninth Circuit has been forced to resort to "limited" or "mini" *en banc* sessions, in which a panel of 11 judges speak for the circuit. Due to these "mini" *en bancs*, a minority of judges "definitively" determines the law for the Ninth Circuit. "Technically, a mini en banc decision may be reheard by all twenty-eight judges . . . but such a full hearing has not been granted since the mini en banc was authorized in 1978."[44]

The use of limited en banc panels has been roundly criticized. Justice O'Connor wrote, "Such panels, representing less than one-half of the authorized number of judges, 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."[45] She also observed that, in 1997, while the Ninth Circuit reviewed only 8 cases en banc, the Supreme Court granted oral arguments on 25 Ninth

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[44] Eric J. Gibbin, *California Split: A Plan to Divide the Ninth Circuit*, 47 Duke L.J. 351, 378 (1997).

[45] O'Connor Letter, *supra* note 10, at 2.

Circuit cases and summarily decided 20 additional ones. "These numbers suggest that the present system in CA9 is not meeting the goals of en banc review."[46] Moreover, the sheer number of judges on the Ninth Circuit means that such a large number of judicial opinions are produced that it is impossible for judges to grant *en banc* review to correct all important errors once they are found. The fact that the Ninth Circuit is too large to conduct one of the most basic functions of a federal appellate court—the *en banc* rehearing—is itself problematic enough to warrant a split.

VI. High Reversal Rate

In the words of U.S. Supreme Court Justice Antonin Scalia, "There is, in short, no doubt that the Ninth Circuit has a singularly (and, I had thought, notoriously) poor record on appeal."[47] It is a well-known fact that Ninth Circuit opinions have consistently fared poorly before the United States Supreme Court over the past decade. According to United States District Judge William Browning, the Ninth Circuit "is the most reversed circuit in the country . . . It is the circuit reversed unanimously by the U.S. Supreme Court the most; and it is the circuit, when reversed, which draws the fewest dissents in the U.S. Supreme Court."[48] An examination of the Ninth Circuit's reversal rate before the Supreme Court—especially compared to that of other circuits—demonstrates that there is a systematic problem which deserves congressional attention:

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[46] *Id.*

[47] Scalia Letter, *supra* note 10, at 2.

[48] *Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and the Ninth Circuit Reorganization Act: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 106th Cong., at 129 (1999) (statement of United States District Judge William Browning).

Sup. Ct. Term	9th Cir. cases in the Sup. Ct.[49]	9th Cir. cases reversed[50] by the Supreme Court	Sup. Ct. cases from other circuits	Cases from other circuits reversed	9th Cir. reversal rate	Reversal rate for other circuits
2002-03	23	18	30	21	78.2%	70.0%
2001-02	18	14	52	40	77.7%	76.9%
2000-01	17	13	49	29	76.4%	59.1%
1999-2000	10	9	52	29	90.0%	55.7%
1998-99	18	14	48	32	77.7%	66.6%
1997-98	17	14	63	34	82.4%	54.0%
1996-97[51]	21	20	unavailable	unavailable	95.2%	62.7%
1995-96	12	10	"	"	83.3%	56.9%
1994-95	17	12	"	"	70.6%	65.2%
1993-94	14	12	"	"	85.7%	42.5%
1992-93	22	15	"	"	68.2%	63.1%

[49] This is the number of cases from the Ninth Circuit in which the Supreme Court published a "full" opinion (that is, the Supreme Court did not summarily reverse or vacate the Ninth Circuit's ruling in a memorandum opinion without explanation).

[50] Throughout this chart, the term "reversal" includes the number of opinions that were either reversed or vacated by the Supreme Court by a full opinion.

[51] Data from the 1996-97 term and earlier is taken from Justice Scalia's letters to Justice Byron White, *see* Scalia Letter, *supra* note 10, at 1. The rest of the data in this chart was based on my own research statistical analysis, which relied heavily on the *Harvard Law Review*.

As the above data demonstrates, for over a decade, the Ninth Circuit has been reversed a far higher percentage of times than the other circuits in the federal judiciary. On average, 80.4% of Ninth Circuit cases argued before the Supreme Court each year get reversed. In comparison, only 61.15% of argued cases from other circuits get reversed. As Senator Frank Murkowski reminds us, "Let's not forget what all of those reversals were. They represent people—people who had their cases wrongly decided. They are people who had to incur great expense, face unnecessary delay, and risk adverse legal rulings in order to receive justice."[52]

What is particularly disturbing is that these results are not based on a small sample size of Ninth Circuit cases. In the 1996-97 term, for example, 21 cases from the Ninth Circuit were argued before the Supreme Court, and 20 of them resulted in reversals. A few years later, 9 out of the 10 Ninth Circuit cases argued before the Court were reversed. Because the Supreme Court is able to review only an extremely small percentage of the cases the Ninth Circuit hands down each year, this data casts doubt on the validity of the outcomes in many of the Ninth Circuit's other cases which evade further review.

According to Justice Scalia, this high reversal rate can be attributed at least in part to the circuit's unwieldy size. He argues that a significant function of en banc review is "to correct and deter panel opinions that are pretty clearly wrong," but in the Ninth Circuit "this error-reduction function is not being performed effectively . . . [because] the current size of the Circuit

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[52] Murkowski, *supra* note 28, at 10.

discourages" such hearings.[53] Justice O'Connor offered a similar assessment.[54] Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, after conducting an in-depth statistical analysis of the Ninth Circuit's high reversal rate, agreed that the circuit's large size has contributed to its inordinately high reversal rate. He wrote, "Reversals (especially summary reversals) by the Supreme Court and citations are used as proxies for quality of judicial output. The overall conclusion is that: (1) adding judgeships tends to reduce the quality of a court's output and (2) the Ninth Circuit's uniquely high rate of being summarily reversed by the Supreme Court; (a) is probably not a statistical fluke and (b) may not be a product of simply that circuit's large number of judges."[55]

As the Senate Judiciary Committee has previously recognized, reconfiguring a circuit because of its perceived ideology or due to disagreement with the merits of the decisions it renders is invalid and threatens both judicial independence and important separation of powers principles.[56] Nevertheless, endeavoring to ensure that an inferior court abides by the edicts of its hierarchical superiors and is not dramatically out of step with its coordinate courts in other parts of the country are legitimate aspects of the Senate's oversight function.

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[53] Letter from Justice Antonin Scalia to Justice Byron White 1 (Aug. 21, 1998), *quoted in* Hellman, *supra* note 39, at 433.

[54] Letter from Justice Sandra Day O'Connor to Justice Byron White 2 (June 23, 1998), *quoted in* Hellman, *supra* note 39, at 433.

[55] Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. Legal Stud. 711, 711 (2000).

[56] *See* Senate Reorganization Hearing, *supra* note 4, at 8 ("[T]he committee does not support alterting circuit boundaries in order to achieve a given ideological outcome on the merits in any case or to benefit any regional interest.").

VII. Increased Quality of Judging for Smaller States

The Ninth Circuit covers such a huge geographic region that judges can often find themselves confronting an issue from thousands of miles away concerning laws and a region that they know nothing about. Certain federal laws, for instance, are primarily important only in Alaska or other northwestern states. Diversity cases, in which federal circuit courts are called upon to interpret and apply state law, constitute a significant percentage of the circuit court docket; judges unfamiliar with the laws of far-off states are consequently at a severe disadvantage.[57] Judge Eugene Wright reminds us, "Judges whose background and experience lie in places a thousand miles from a given court are unlikely to have a full appreciation of regional aspects of an issue, even if they are aware of them."[58]

Justice Kennedy also raised the interesting point that the sheer size of the Ninth Circuit prevents it from having a close relationship to the citizens it supposedly serves. He wrote, "Our constitutional tradition has been one of broad community participation in the judicial selection process. . . . 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 affect community."[59] When citizens of

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[57] Murkowski, *supra* note 28, at 10 ("An effective appellate process demands mastery of state law and state issues relative to the land mass, population, and cultures that are unique to the region. . . . I would like to see Alaska-based appeals decided by judges with greater knowledge of Alaska."); *See also* Thompson, *supra* note 35, at 375 ("[W]e cannot deny that there is a perception that judges from particular regions bring to a panel a certain sensitivity to the concerns of people within that region.").

[58] McKay & Chadwell, *supra* note 4, at 9 (quoting Judge Eugene Wright).

[59] *Id.* at 4.

smaller states face a court that they perceive to be predominated by California, it loses legitimacy in their eyes and they approach it with a sense of detachment.

VIII. The California Split

The most persuasive proposals for splitting the Ninth Circuit include splitting the State of California between two circuits. Because such a large percentage of Ninth Circuit cases come from California, any circuit-split scheme that keeps California entirely within one circuit will invariably be problematic because the circuit containing California will be too large.

It is often argued that California cannot be split between two circuits because this could result in California law being interpreted in different ways in different parts of the state. Such objections are meritless for two reasons. First, California law already can be interpreted differently in different parts of the state—by state courts. Secondly, the law of the United States is frequently interpreted differently in different parts of the nation, yet this does not create an unworkable impediment to the effective functioning of government or the behavior of nationwide corporations. As Justice John Paul Stevens wrote, "[T]he importance of this concern pales in comparison with the disadvantages associated with a circuit that is so large that even the most conscientious judge probably cannot keep abreast of her own court's output."[60]

Moreover, if California were to be split between two circuits, intolerable circuit splits on California law could be resolved by the U.S. Supreme Court. Alternatively, controversial questions of state law could be certified to the California Supreme Court. Even in the absence of such a certification process, once the state supreme court definitively speaks to an issue, both

[60] Letter from Justice John Paul Stevens to Justice Byron White (Aug. 24, 1998), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/stevens.pdf (last referenced Mar. 30, 2004).

circuits would undoubtedly defer to that judgment. Consequently, there is little reason to fear that divergent interpretations of state-law would be a long term problem, and the potential short-term inconveniences are hardly debilitating.

IX. The Overwhelmingly Positive Experience of the Eleventh Circuit Split

Ultimately, my biggest reason for supporting a split of the Ninth Circuit lies with my own experience as a circuit judge. While the old Fifth Circuit had a long and proud tradition, it simply became too large to function effectively. I fear that the Ninth Circuit reached that point a long time ago. Having served as an active judge through a circuit split, I can personally attest to the fact that the resulting smaller circuits function much more smoothly, efficiently, and with a greater degree of collegiality and coherence in their caselaw. There is no reason to believe that a split of the Ninth Circuit would lead to different results.

Thank you very much for your kind attention.

I would be more than happy to answer any questions the Committee might have.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FRED VAN SICKLE
Chief Judge

Post Office Box 2209
Spokane, Washington 99210-2209
(509) 353-3224

April 15, 2004

Senator Jeff Sessions
Chairman, Subcommittee on
Administrative Oversight and the Courts
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Sessions:

I am writing to support the split of the Ninth Circuit. While I am the Chief Judge of the Eastern District of Washington, I speak only for myself.

I have the utmost respect for Chief Circuit Judge Schroeder, the judges of the Ninth Circuit and the Circuit Executive Greg Walters and his staff. They all are very hardworking and conscientious people.

However, the reality is that the Ninth Circuit is too large in terms of volume of cases, geography and the number of judges.

I have read the written statements presented before the recent hearing. Judges O'Scannlain and Tallman said it best. The large number of cases and large number of circuit judges result in so many three judge panel decisions it is nearly impossible to keep up with the law for the Circuit Judges and those of us at the trial level. I believe the lack of certainty concerning the law results in more appeals which further compounds the problem. Also the en banc process does not allow for sufficient participation to establish a real belief that "the court" has ruled and how it will rule in the future. Given the number of judges it is very difficult to get a sense of "the Court" determination in an area of law.

April 15, 2004

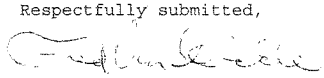
The geographical size of the Ninth Circuit also creates significant travel and communication problems that also compound the difficulties in dealing with the large number of cases and judges.

All the hard work, innovations and technological advances have not and will not change the situation.

How to split best is a real challenge. California generates a very substantial appellate case load by itself and is a fast-growing state. Yet I believe division of the circuit would be in the best interest of the people, the litigants and the lawyers. I urge support of division of the Ninth Circuit.

Thank you for the opportunity to address this issue.

Respectfully submitted,



Fred Van Sickle
Chief United States District Judge

TESTIMONY OF J. CLIFFORD WALLACE
Senior Judge and former Chief Judge
U.S. Court of Appeals for the Ninth Circuit
Before
The Subcommittee on Administrative Oversight
and the Court of the Senate Judiciary Committee

April 7, 2004

My name is J. Clifford Wallace. I have been a federal judge for 34 years, initially on the District Court, and as a member of the Ninth Circuit since 1972. I served as Chief Judge from February 1, 1991 to March 1, 1996. I speak for myself only.

This is not the first time I have testified in opposition to division of the Ninth Circuit, nor do I suppose it will be my last. My view is that the arguments in support of the current bills suffer from the same flaw as their predecessors: they fail to meet their burden of proof. As identified in the Long Range Plan for the Federal Courts:

> 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.

That simply has not been done. That should end this renewed division attempt. I have earlier identified my reasons in the attached law review article (56 Ohio St. Law Journal, 941-45 (1995)).

But for a few minutes today, I wish to discuss this issue on a national level. Indeed, the action requested here would change our approach to the federal appellate structure as we have known it. The issue, I suggest, is more than the Ninth Circuit and whether it should be divided, but what type of federal appellate system is best for our country in the 21st century.

My interest in the larger picture of judicial systems started in 1976 when, as a scholar at the Woodrow Wilson International Center for Scholars at the Smithsonian Institute, I began my study of judicial administration. As my attached personal data shows, I continued my interest nationally and internationally: serving on the Judicial Conference of the United States and many

of its committees, Ninth Circuit Conference and circuit committees, the Judicial Council, and working with foreign judiciaries now numbering over 50 worldwide. From this broader experience, I wish to make the point that for now and the foreseeable future, our country will be better served by fewer large circuits.

Those who champion division seem to express a preference for a small court culture. Chief Judge Emeritus Gerald Tjoflat of the Eleventh Circuit, in an article in the *ABA Journal*, likened his vision of a small and collegial court to "life in a small town," which he contrasts with "a big city, [where] many people do not even know, much less understand, their neighbors." This is indeed a romantic and appealing notion: a "small town" where everyone knows everyone intimately, and where the town is governed by consensus reached at occasional town meetings. Judge Tjoflat contrasts this vision with the faceless, impersonal, and bureaucratic "jumbo court," which he decries as less efficient and less predictable.

Some decline in collegiality usually accompanies growth in an organization, the amount depending on what priority participants give to maintaining it at the highest possible level. Life in a larger court is different; some aspects of the old relationship are lost as judges are added.

The ultimate test is not the comfort of judges, but what is best for the country. The federal courts do not exist for the benefit of judges. They exist, at taxpayer expense, solely to serve and to meet the needs of the public. Judges are, fundamentally, public servants. Judiciary policy must be dictated by concerns for the judiciary's mission, not by the personal preferences of its members.

Thus, I am not sure that the "life in a big city" versus "life in a small town" argument advances the debate very far. We would probably all like to return to the time of Learned Hand and enjoy the bygone days of a limited calendar with a great amount of available reflective time. But, as disputes in our society proliferate, sending case filing statistics skyward and creating grater demands than ever for judicial resources, I doubt this is a reasonable alternative.

The U.S. Court of Appeals for the Ninth Circuit, with 28 judgeships, is the largest in the United States. The fact is that large federal courts of appeals have many advantages and can better serve the public's needs. Large circuits like the Ninth can enhance stability, predictability, and efficiency in the law.

Stability and predictability

Critics maintain that the law in a large court is inherently unstable and unpredictable. It is true that the number of possible panel permutations in a court increases exponentially as the number of judges increases incrementally and that one cannot predict which panel will hear one's appeal. It does not follow, however, that the law in such a court will be unpredictable or unstable.

Of course, for lawyers and litigants, the best guide for predicting the outcome of any litigation is a case on point. When there is no case on point, they are left to shrug their shoulders and speculate as to how a court will rule. The more published decisions from which to work, the more guidance the lawyers—and the trial court judges—receive. Recognizing this principle, some smaller jurisdictions with small courts voluntarily opt to follow the law of the State of California—the largest judiciary in our country—for the very purpose of providing guidance and predictability to lawyers and litigants. Guam is a good example.

Attorneys who practice law in small jurisdictions, where there is little precedent, know how difficult it is to plan or to predict. It is the small court that leaves lawyers and litigants guessing. A larger court is capable of providing sufficient case law to provide truly useful precedent; it is precisely in such a court where one can find a case on point.

But will these added cases lead to conflict and inconsistency? 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. Hellman's empirical study found that the feared inconsistency in the decisions of a large court simply has not materialized. Professor Daniel J. Meador 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 contrary view, though popular, is unsupported by evidence, and is really nothing more than a seat-of-the-pants assumption.

Efficiencies

Certain inefficiencies are introduced as a court grows. It does not follow, however, that individual judge efficiency declines each time a new judge joins the court. This is borne out by comparative statistics among the circuits. Last year the Ninth Circuit was second best in judges

promptness as measured by median time from hearing to disposition and tied for first for submission to disposition. It is clear that although there is disparity in the relative efficiencies of the different courts, such differences cannot be attributed to the size of the courts.

Indeed, there are corresponding efficiencies that come with growth, although these are often overlooked in the current debate. An example is in solving the problem of panel conflicts. The Ninth Circuit uses an automatic issue coding system, which apprises the court as to what panels are working on what issues. This helps avoid intracircuit conflict and permits the panel to which the issue is first assigned to decide the case. This lessens the conflict possibilities.

Congress has not been oblivious to the need to work differently in a large court. Pursuant to the Omnibus Judgeship Act of 1978, federal appellate courts of 15 or more judgeships may, by local rule, divide into administrative units and conduct en banc hearings with less than the full court.

In the Ninth Circuit, a court of 11 judges is designated when an en banc hearing is required. The full court may overrule the en banc court, but we have never voted to do so. Why? Because the court is willing to rely on 11 of its judges for purposes of finality. Thus, unless judges believe they must have their hands on every en banc pencil, there is an alternative to full-court en bancs in a large court. Is it wrong? No, just different. It magnifies the efficiencies of a large court and eliminates what might be one of its inefficiencies. As stated in the 1990 Report of the Federal Courts Study Committee:

> The limited en banc appears to allow more efficient use of court of appeals resources and should be available to the other courts of appeals, even those that do not regularly have fifteen active judges. The growth in the number of circuit judges is likely to continue, increasing the potential for en banc courts of unwieldy size.

Thus, in addition to the challenges, growth has brought opportunities. Although growth carries with it certain inherent limitations, it simultaneously opens the door to new and exciting possibilities. The large court is a cumbersome animal indeed if one persists in operating as if it were a small court. Although adaption and innovation are often difficult for tradition-bound judges, judges should answer the call. The opportunities are there, and the world will not wait for us.

The alternative

If large circuits are rejected, division is inevitable. Many concerns could be addressed by further subdivision of the twelve general jurisdictional federal circuits. Certainly courts could be more collegial, with less need to sit en banc, if we had 20 mini-circuits of just nine judges each, and no large courts. But this would fragment the federal law much more than multiple panels within a large circuit. Under this alternative, continuing growth would mandate continuing division. How would the litigants cope with 30 circuits—with 40 circuits? Yet if you adopt the principle of division to keep circuit courts small, you must eventually confront the balkanization of federal law.

A network of smaller circuits would ensure that no circuit had a large volume of case law. Lawyers and litigants would routinely be forced to search the law of neighboring circuits for guidance—knowing full well that their circuit had no obligation to follow out-of-circuit law. Their choices would expand substantially, with increased intercircuit conflicts. At least in the large court, the parties know their panel is bound by the prior-panel rule.

Dividing larger circuits into smaller circuits will exacerbate the problem of the prior-panel rule because it is without binding force when the prior panel is from a neighboring circuit. Thus, the primary concerns about large courts—instability and unpredictability in the law—can only be worsened by dividing them into smaller circuits. In fact, this presents a compelling case for consolidating existing circuits to create fewer, larger federal appellate courts.

Therefore, it is no solution to stick with "small town" courts and just have a lot of them. Nor is it wise to accept the ostrich-like approach, insisting that a few small courts really can contain this swelling stream of litigation, and stubbornly cling to the smaller courts we have known. The judiciary should confront the challenges inherent in growth and deal with them productively.

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Of course, there are growing pains and a certain awkwardness as a court learns to function with larger numbers. These are challenges to confront, not challenges from which to retreat. Large courts are not wrong—just different. In the long run, fewer larger circuits may be the better structure for litigants.

I can remember the nostalgic days of the corner store with the pickle barrel. I might prefer to be a grocer in such an environment. But with the growth of society's demands, the supermarket has taken its place. We, too, need to keep an open mind in determining what model will best serve the long-term interests of the people we serve.

WITHERSPOON, KELLEY, DAVENPORT & TOOLE
A PROFESSIONAL SERVICE CORPORATION
ATTORNEYS & COUNSELORS

ROBERT L. MAGNUSON
NED M. BARNES
WILLIAM D. SYMMES**
ROBERT H. LAMP
K. THOMAS CONNOLLY
THOMAS D. COCHRAN
DUANE M. SWINTON
JOSEPH H. WESSMAN
JEFFREY L. SUPINGER*
DONALD J. LUKES+‡
LESLIE R. WEATHERHEAD*
MICHAEL D. CURRIN
BRIAN T. REKOFKE*
EDWARD J. ANSON++
R. MAX ETTER, JR.
STANLEY R. SCHULTZ
MICHAEL F. NIENSTEDT*
JOHN M. RILEY III
DENNIS M. DAVIS++
F.J. DULLANTY, JR.
DANIEL E. PINNEY
MARY R. GIANNINI*‡
TIMOTHY M. LAWLOR
CLAUDE F. BAILEY
WILLIAM M. SYMMES
ROBERT S. MAGNUSON
MARK A. ELLINGSEN*-
DAVID M. KNUTSON
JODY M. McCORMICK
SHELLEY N. SWANSON
JOEL P. HAZEL*
CHRISTOPHER G. VARALLO*
STANLEY M. SCHWARTZ
KELLER W. ALLEN*
KIMBERLY A. KAMEL

OF COUNSEL

WM. A. DAVENPORT
JOHN E. HEATH, JR.
ALLAN H. TOOLE
WILLIAM V. KELLEY
EARL K. KROGUE

*Also admitted in Idaho
+Also admitted in New York
**Also admitted in California
++Admitted in Idaho only
‡Also admitted in Oregon
-Also admitted in Montana

1100 U.S. BANK BUILDING
422 WEST RIVERSIDE
SPOKANE, WASHINGTON 99201-0302
Telephone: (509) 624-5265
Telecopier: (509) 458-2728

COEUR D'ALENE OFFICE
THE SPOKESMAN REVIEW BUILDING
608 NORTHWEST BOULEVARD, SUITE 401
COEUR D'ALENE, IDAHO 83814-2146
(208) 667-4080

April 21, 2004

Honorable Dianne Feinstein
United States Senate
SH-331 Hart Senate Office Bldg.
Washington, D.C. 20510-0504

Honorable Jeff Sessions
United States Senate
SR-335 Russell Senate Office Bldg.
Washington, D.C. 20510-0104

Re: H.R. 2723, S.562, S.2278: Proposals to Split the Ninth Circuit

Dear Senators:

The undersigned write to address the above referenced bills designed to split the Ninth Circuit. For the reasons outlined below, we oppose each of these bills and the notion that the Ninth Circuit needs to be split.

By way of background, the undersigned are the Chair, Chair-elect and Vice-Chair of the Ninth Circuit Lawyer Representative Coordinating Committee (LRCC), whose statutory mandate is to help improve the administration of justice in our circuit. Our combined experience with the Ninth Circuit is over 30 years. Chair-elect Mr. Saferstein has been president of the California State Bar and involved in various Ninth Circuit cases and activities, including Chair of the Ninth Circuit Judicial Conference in 1995. Mr. Rekofke, the current LRCC chair, has chaired the Ninth Circuit Task Force on Attorney Discipline and is currently a member of the Ninth Circuit Jury Improvement Committee. Vice-Chair Ms. Toledo has served on the Judicial Advisory Committee for the Eastern District of California. By virtue of many years of experience and multiple committees and interactions with attorneys and judges of the Ninth Circuit, we feel confident in our abilities to not only assess the need to split the Circuit but to report concerning the views of attorneys and judges regarding this issue.

First and foremost, splitting the Ninth Circuit should be considered only if there is compelling evidence that the interest of justice would be served by doing so. Based on our personal experience, our firms' experience and our interactions with our peers, we are unaware of any evidence that the Circuit is doing anything other than functioning well and utilizing its resources effectively.

Second, the various bills under consideration are similar to legislation introduced a number of years ago, which resulted in the White Commission study and recommendation. You may recall the White Commission concluded that splitting the Circuit would increase rather than solve alleged problems. Moreover, the White Commission set forth various recommendations to help improve the Ninth Circuit, many of which have been introduced over the years. Accordingly, the grounds for splitting the Ninth Circuit are less than they were five years ago.

Third, to our knowledge, the proposal to split the Ninth Circuit does not have the support of the majority of the bench or bar of the Ninth Circuit. Historically, such support has never materialized whenever the split issue has been entertained. We submit that the views of the judges of the Ninth Circuit, as well as the lawyers who practice in the Circuit should be afforded great deference. Given the suddenness of the introduction of Senator Ensign's bill on April 1st and the almost immediate hearings, the undersigned were precluded by time constraints to formally survey the LRCC and its constituents to provide a tally from the leadership of Ninth Circuit attorneys regarding the proposed split. When the Circuit split issue arose a number of years ago, however, it resulted in a resolution at the Ninth Circuit Judicial Conference in 1991. After hearing the pros and cons, the judges and lawyers of the Conference voted overwhelmingly against splitting the Circuit. As officers of the LRCC, and practitioners in the Ninth Circuit, we believe that the majority of lawyers do not support a split of our Circuit.

From our perspective, the bottom line is simple: the Circuit is not broken, therefore it does not need to be fixed.

Thank you for consideration of our views.

Very truly yours,

Brian T. Rekofke
Harvey Saferstein
Margaret Carew Toledo

WITHERSPOON, KELLEY, DAVENPORT & TOOLE
A PROFESSIONAL SERVICE CORPORATION
ATTORNEYS & COUNSELORS

1100 U.S. BANK BUILDING
422 WEST RIVERSIDE AVENUE
SPOKANE, WASHINGTON 99201-0300
Telephone: (509) 624-5265
Telecopier: (509) 458-2728

COEUR D'ALENE OFFICE
THE SPOKESMAN REVIEW BUILDING
608 NORTHWEST BOULEVARD, SUITE 401
COEUR D'ALENE, IDAHO 83814-2146
(208) 667-4000

April 21, 2004

Dianne Feinstein
United States Senate
SH-331 Hart Senate Office Bldg.
Washington, D.C. 20510-0504

Honorable Jeff Sessions
SR-335 Russell Senate Office Bldg.
Washington, D.C. 20510-0104

Re: H.R. 2723, S.562, S.2278: Proposals to Split the Ninth Circuit

Dear Senators:

I write to address the recent proposals to split the United States Court of Appeals for the Ninth Circuit into two separate Circuit Courts of Appeal. I respectfully oppose the proposals.

That you may evaluate my qualifications to comment on the topic, permit me to say that I am a member of the Bars of four states within the Ninth Circuit (Washington, Oregon, Idaho, and Hawaii), and I have also practiced in Guam, one of the territories within the Circuit. I have practiced in the federal courts of the Ninth Circuit for 23 years. I am a Fellow in the American College of Trial Lawyers. I have served for six years in the Ninth Circuit Judicial Conference, three of which I served on its Executive Committee, and I served as the Chair of the lawyer delegates to the Ninth Circuit. I currently serve on the Ninth Circuit Advisory Board, and will serve as its Chair in 2004-2005.

I respectfully say that the Ninth Circuit should not be split.

The pending proposals are similar to a bill introduced some five years ago. At that time, the Congress wisely elected to commission a blue-ribbon Commission to study whether splitting the Circuit was a sensible and responsible solution to problems that the Congress then perceived to exist. The Commission (chaired by the late Justice Byron White) concluded that it was not. Indeed, the Commission found that splitting the Circuit would magnify, rather than solve perceived problems. Instead, the White Commission recommended a number of

administrative changes that would improve the Circuit's performance. Many have been gradually introduced by the Circuit, to good effect.

I would respectfully suggest that the grounds for splitting the Circuit are no more substantial than they were five years ago -- they are less so.

The pending legislative proposals do not recite what specific problems they seek to solve. Assuming the perceived issues now are the same as they were five years ago, I would invite you to submit them to careful scrutiny. The main argument then for splitting the circuit was that the Court of Appeals was too slow to resolve cases. The criticism may or may not have merit (though the Ninth Circuit is roughly even with its peers in case resolution statistics, to this practicing lawyer and his clients *all* courts seem slow), but splitting the Circuit is no solution. Taking half the work and assigning it to half the judges (which, by the way, the current proposals would not accomplish, rather they would assign half the work to fewer than half the judges on one side) will not address the real issue, which is that there are not enough judges to do the work the court is assigned to do. Caseloads have grown exponentially in the past twenty years as Congress has created additional crimes, expanded the law-enforcement capabilities of federal agencies, and created new civil remedies enforceable in federal courts. There has not been a commensurate growth in judgeships, and the size of the Ninth Circuit Court of Appeals has actually contracted in recent years, owing to difficulties in filling vacancies. To speed up the courts, if that is necessary, what is required is the creation of more judgeships.

One hears by the water cooler (though this view has rightly not been publicly voiced by responsible leadership) that some, being disappointed by certain rulings of the Ninth Circuit Court of Appeals with which they disagree, would wish in retaliation to diminish the breadth of the geographic area in which its (sometimes unpopular) rulings apply by reducing the size of the Ninth Circuit. If (though I doubt it) these views have currency with any of the membership on your committee, I would offer two observations. The first is that the Ninth Circuit is not defined by the occasional celebrity attending a very few of its decisions, but by the sound moderation of the *hundreds* of decisions it renders every month. The second and more significant point is that as a matter of constitutional principle stretching back to the Founding of our nation, it is the highest duty of the courts to render unpopular rulings when the constitution and law demand it. To the extent that any legislation might be aimed, even in minor aspect, at diminishing the precious independence of our federal judges (by, for example, causing them to fear that their courts will be sanctioned by the legislature for having rendered unpopular decisions) it should be staunchly resisted. Especially in these parlous times, when fears of heightened dangers to our security have led us to grant extraordinary powers to those who police us, the urgent importance of the full independence of our judges to give daily effect to our constitutional guarantees of our freedom cannot be exaggerated.

Splitting the Ninth Circuit would also entail prohibitive costs.

Splitting the Ninth Circuit would hamper the highly desirable goal of uniform application of federal law among Western states which confront the same issues, including, for example, maritime law, water (and other natural resource) management and conservation law, federal lands management law, Pacific Rim trade questions, and so on.

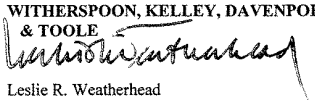
Forming and staffing a new circuit would be expensive. Creating a new Circuit would necessarily involve the creation of a duplicate administrative bureaucracy to run it. Tax dollars are scarce, and spending them on more clerks instead of more judges seems highly illogical to me.

The most recent historical precedent for splitting a circuit involved the breakup of the Fifth Circuit into the Fifth and Eleventh Circuits. I have reviewed the legislative history of the legislation providing for the realignment, to attempt to gain an understanding of why that step was taken. I learned that when the Fifth Circuit was split, there was virtually unanimous sentiment among the judges, the Circuit Bar, and the Bars of the affected states that dividing the Fifth Circuit was the correct thing to do. There is nothing like that uniformity of opinion in connection with any proposal to split the Ninth Circuit. The Circuit Bar has opposed the split. So have the state Bars of many affected states (including, historically, the Washington State Bar Association). A majority of the judges in the Circuit also oppose the idea. Where those with the most direct stake in the efficient functioning of the Ninth Circuit are on record doubting whether the proposed alteration is sound, the Congress ought to act only for the very strongest of reasons.

In sum, I am convinced that neither logic nor practical common sense lead to a conclusion that the Ninth Circuit should be split. I thank you for having considered my views, and for your continuing efforts on behalf of our country.

Very truly yours,

WITHERSPOON, KELLEY, DAVENPORT & TOOLE

By: 

Leslie R. Weatherhead

LRW: sh