NINTH CIRCUIT COURT OF APPEALS JUDGESHIP AND REORGANIZATION ACT OF 2003

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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NINTH CIRCUIT COURT OF APPEALS JUDGESHIP AND REORGANIZATION ACT OF 2003

TUESDAY, OCTOBER 21, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 2:10 p.m., in Room 2141, Rayburn House Office Building, Hon. Lamar Smith [Chairman of the Subcommittee] presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet, and Intellectual Property will come to order. We welcome our witnesses here. This is a hearing on the Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 0203. I am going to recognize myself for an opening statement, then other Members, then we will proceed with hearing from the witnesses today.

It has been said that the courts are the great levelers of the land; before them, all are equal. The rule of law is the cornerstone of American jurisprudence. For the most part, Americans have retained faith in our judiciary, because they believe it does apply the rule of law, from traffic court to the Supreme Court, when adjudicating legal disputes.

But a judiciary that fails to dispense justice in a timely, fair, and dispassionate manner compromises its own credibility. None of us here endorses such a fate for any of our Nation's courts at any level of review.

It is with this in mind that we will evaluate the merits of H.R. 2723, the Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003 which was introduced by our colleague, Representative Mike Simpson of Idaho.

More specifically, we need to explore whether the Ninth has become so big in geographic size, in work load, in number of active and senior judges, that it can no longer appropriately discharge its civic functions on behalf of the American people.

Consider this: The Ninth has 48 judges, a figure that is approaching twice the number of total judges of the next largest circuit. The Ninth represents 56 million people, or roughly one-fifth of our Nation's population. This is 25 million more people than the next largest circuit. The Ninth encompasses nearly 40 percent of the geographic area of the United States.

Some might argue so what if the Ninth is bigger and must handle more work for more people. Do these statistics by themselves

indicate that the Ninth cannot produce quality work in a reasonable amount of time?

Well, the Ninth Circuit also has the most number of appeals filed and the highest percentage increase in appeals filed, the most number of appeals still pending and the longest meeting time until disposition.

In this regard, I would like to direct everyone's attention to the charts positioned on the side of the dais to my right. The one labeled "Circuit Work Load and Productivity" illustrates the Ninth's dilemma because of the sheer number of cases it must handle annually.

The second chart denotes the three slowest circuits as measured by the time required to dispose of an appeal once filed. Over the 23-year period reviewed, the Ninth Circuit was rated one of the three slowest circuits 21 times. It was the slowest circuit in 10 of those years. If objectively rated, the Ninth Circuit would get the lowest grade based on these criteria. Counting the D.C. Circuit, the Ninth would rank 12th out of 12.

This rate raises the obvious question: Is justice being served, or, perhaps more precisely, can justice be better served?

There are other problems we should examine as well. Given the vast size of the Ninth, how does the added travel confronting the affected judges compromise their ability to work effectively? If the Ninth were split, would judges in the current configuration have greater opportunity to participate on argument panels with all of their colleagues? Will this result, and the increased likelihood of hearing more cases en banc, lead to greater predictability and certainty in the development of circuit case law?

We have a distinguished panel of witnesses to address these and other questions, and I look forward to their testimony today.

The gentleman from California, Mr. Berman, whose congressional district lies within the geographic boundaries of the Ninth Circuit, is recognized for his opening statement.

Mr. BERMAN. At least up till now.

Thank you, Mr. Chairman. It shall come as no surprise that I am opposed to the idea of splitting the Ninth Circuit, and thus am opposed to the legislation before us today, H.R. 2723. I have stated that opposition during hearings on similar legislation in each of the past several Congresses.

As then, I reject the political motives of some split advocates, find underwhelming the empirical case presented by others, and am concerned that a split will do more harm than good.

Some split advocates accuse the Ninth Circuit of being unduly activist in its decisions and believe a split would somehow curb this alleged tendency or at least inoculate the carved-out circuit from the decisions of the old Ninth Circuit.

I reject, quote, judicial activism, unquote, as a sound rationale for splitting the courts or for any other congressional action against the courts. If judicial activism were valid grounds for restructuring the courts, we would have to reconstitute the current U.S. Supreme Court, which has displayed its own judicial activism in crafting its doctrine of State sovereign immunity. Because judicial activism exists in the eye of the beholder, it cannot be a sound basis for restructuring courts.

Of course there are some, like Judge O'Scannlain, and several of his colleagues, who support a split for substantive reasons and not political or philosophical reasons, ideological reasons. I fully accept the substantive nature of their position and intend, as I have done in the past several Congresses, to hear them out.

Split proponents have the burden of proving the advisability of a split, and in my mind it is a heavy burden. They both must prove that the current Ninth Circuit does not efficiently and effectively serve the interests of justice and that a split would solve more problems than it would create. To date, the empirical evidence in support of a split has been lacking. In fact, for each reason offered as a justification to split the Ninth Circuit, there is an equally reasonable response that may justify an opposite conclusion.

I know our witnesses will get into many of these arguments and counterarguments, and I won't go through all of those arguments at this point. I will wait till questions and answers after the testimony.

But I do want to discuss a few issues that our witnesses apparently do not intend to address. Some split proponents tout the common misperception that the Supreme Court reverses the Ninth Circuit an inordinate amount of the time. Based on this misperception, they claim the Ninth Circuit is either out of touch with the rest of the country or issues an unusual number of bad decisions. The evidence does not support this assertion and, in fact, may lead to the opposite conclusion.

According to the Conservative Center for Individual Freedom, in the October through 2002 term, the Supreme Court reversed 18 out of 24, or 75 percent, of the Ninth Circuit decisions it took. That seems like a large percentage until you learn that the Supreme Court reversed 100 percent of the Fourth, Fifth, Eighth, and Tenth Circuit decisions it took.

Furthermore, the Supreme Court reversed 71 percent of Sixth Circuit decisions and 67 percent of Second, Seventh, and district court decisions. Thus the Supreme Court actually reversed the Ninth Circuit much less than four other circuits on a percentage basis, and about in the same percentage of cases as three other circuits and the district courts as a whole.

Some split proponents have in the past claimed that the efficacy of the Ninth Circuit compares unfavorably with other circuits as measured in decisions per judge. I guess that efficacy is supposed to mean efficiency. As I pointed out last year, I believe the opposite conclusion can be drawn. From October 2000 through September 2001, the Ninth Circuit handled about 207 appeals per circuit judge. The Fourth, Fifth, Seventh and Eighth Circuits and Eleventh Circuit handled more, with the Fifth Circuit handling almost twice as many appeals per judge.

However the Ninth Circuit judges are comparable to the Second, Third, and Sixth Circuits and significantly more than the First, Eighth, and Tenth Circuits. In other words, those numbers show that Ninth Circuit judges are in the middle of the packet with regard to the number of appeals they handle annually. This may not be the most efficient, but it is certainly not among the least.

While the opinions of Judge O'Scannlain and his 8 colleagues deserve our reasoned consideration, it is also important to note their

opinion is not broadly shared. Chief Judge Schroeder, Judge Kozinski, and an apparent majority of their Ninth Circuit colleagues oppose a split.

The bar, which is certainly an effective community with much practical experience in dealing with the Ninth Circuit, also opposes a split. In 1998 the ABA adopted a formal resolution in opposition to splitting the Ninth, and in written testimony submitted to this Subcommittee last year reiterated its staunch opposition to any division of the Ninth Circuit.

Once again, in conclusion I find the substantive arguments of both sides on this issue to be reasonable. Without clear evidence that the current situation is detrimental, and understanding that a dramatic restructuring could end up a costly failure, I do not believe it is appropriate or prudent for Congress to legislate a split of the Ninth Circuit. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Berman.

Mr. SMITH. Are there other Members who wish to make opening statements?

The gentlewoman from California, Ms. Waters, is recognized for an opening statement.

Ms. WATERS. Thank you very much, Mr. Chairman and Members. I move to strike the last word.

Mr. Chairman, I am strongly opposed to H.R. 2723. Nothing has occurred since the last time this Committee considered dividing the Ninth Circuit that convinces me that there is any justification for such a division. While I ascribe no partisan motive to the witnesses before us, I am also—I am concerned that at least some of the proponents of this bill are acting to try to address what they perceive as a liberal bias within the Ninth Circuit.

Clearly, in my view, objections to the substance of any decision of this court are no basis to justify proposals to divide the Ninth Circuit.

I believe that Judge Kozinski framed the issue before us correctly in his prepared testimony when he stated, and I quote, "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 consensus among the bench and the bar and public that it serves that division is the appropriate remedy," unquote.

I do not see any persuasive evidence to suggest that the Ninth Circuit is not operating effectively. The circuit court has developed procedures that allow for early identification of potential or perceived conflicts and procedures that ensure that issues common to a number of cases are monitored so that panels are alerted to all other pending cases in which the same issue is being raised.

The court also issues prepublication reports to advise members of the court 2 days in advance of the filing of every published opinion and identifies cases that may be affected by the publication of that new opinion.

There is nothing to suggest that cases are not being adequately examined for consistency and with precedent and legal soundness.

Similarly, the court's procedures for an en banc review appear to be functioning effectively. While it is true that 11 judges sit as an

en banc court, rather than the 28 authorized judges, every active Ninth Circuit judge participates in the decision whether to take a panel decision for en banc review.

Finally, I believe that proposals to divide the Ninth Circuit ignore the positive impact that technology is having on the court's ability to manage its docket and dispense justice effectively.

While I was not pleased with the court's reversal of the three-judge appellate court panel that had ordered a stay to the California recall election, no one can dispute that the appellate proceedings were handled efficiently and effectively.

The recall election case demonstrates that the Ninth Circuit's procedures are working well, and it confirms the wisdom of the adage, "If it ain't broke, don't fix it.".

Mr. Chairman, from construction costs of adding another circuit court headquarters, to the decreased opportunities to transfer judges in order to manage caseloads, I believe that dividing the Ninth Circuit would create far more problems than it would solve.

Simply put, the cure proposed by this bill is far worse than any alleged disease. I urge my colleagues to reject H.R. 2723 and yield back the balance of my time.

Mr. SMITH. Thank you, Ms. Waters.

Mr. SMITH. Before introducing our witnesses today, I would like to recognize the presence of the gentleman from Idaho, the individual who wrote the legislation on which we are having a hearing, and that is Congressman Mike Simpson. We appreciate his being here today and welcome him to sit in on the hearing as well.

Our first witness is the Honorable Mary M. Schroeder, the Chief Judge for the U.S. Court of Appeals for the Ninth Circuit. Prior to her service on the Federal bench, she also served as a judge for the Arizona Court of Appeals. Judge Schroeder earned her B.A. In 1962 from Swarthmore College and her J.D. in 1965 from the University of Chicago Law School.

Our next witness is the Honorable Diarmuid O'Scannlain, who is a circuit judge for the Ninth Circuit Court of Appeals. Judge O'Scannlain earned his B.A. Degree in 1957 from St. Johns University and his J.D. Degree in 1963 from Harvard Law School. He also earned the LLM degree in judicial process at the University of Virginia School of Law in 1992.

Our next witness is the Honorable Alex Kozinski, who also serves on the Ninth Circuit. Earlier in his career, Judge Kozinski was the Chief Judge of the U.S. Claims Court. Judge Kozinski received his undergraduate and law degree from UCLA, where he was a member of the Law Review.

The last witness is Arthur Hellman, who is a professor at the University of Pittsburgh School of Law. Professor Hellman is the Nation's leading academic authority on the Ninth Circuit. He received his B.A. Magna cum laude, Harvard 1963, and his J.D. 1966 from the Yale Law School.

Welcome to you all. We have written statements as well from the witnesses, and without objection, the entire witness statements will be made a part of the record. We do hope, however, that you will limit your oral testimony to 5 minutes.

Mr. SMITH. And we will proceed, and, Judge Schroeder, we will begin with you.

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

Judge SCHROEDER. Thank you very much, Mr. Chairman. I appreciate the opportunity to appear before you today. My name is Mary M. Schroeder. I am Chief Judge of the United States Court of Appeals for the Ninth Circuit, a position I have held since December of 2000. My chambers are in Phoenix, Arizona. With me today in opposition to this legislation is my colleague Alex Kozinski of Pasadena, and sitting collegially between us, expressing a different point of view, is Judge O'Scannlain.

Behind us, as always, is our very fine clerk of court, Cathy Catterson, who is with us from San Francisco.

I have nothing but positive things to report on the circuit's conduct of its business since I appeared before you approximately 15 months ago testifying in opposition to then-pending legislation. There was no reason to divide the circuit then, and there is none now.

We have four new judges, and we have reduced the time needed to hear and decide cases. There have only been two instances of circuit division in the history of our country. The first was in 1929 when the Eighth Circuit divided into the Eighth and the Tenth, and the second was in 1980 when the Fifth Circuit divided to create a new Eleventh Circuit.

That division had the full support of a substantial majority of the affected judges, and took place before the computer revolution which has transformed our country and the world, including our court systems. The majority of our judges on the Ninth Circuit do not favor any realignment.

This bill would divide the Ninth Circuit into two unbalanced circuits, one consisting of Arizona, California, and Nevada, which would have 82 percent of the caseload of the existing Ninth Circuit, and the other—leaving the remaining 18 percent to a circuit spanning the distance from the Arctic Circle to Guam. That is a lot of territory for nine judges.

H.R. 2723 also attempts to address major problems that were pointed out at last year's hearing, but it doesn't find solutions that will work. To deal with the real need for flexibility in the assignment of district judges, the bill would allow the transfer of district judges from one circuit to another but only upon the agreement of two Chief Judges, thus setting the stage for intercircuit administrative disputes. And this would require district and circuit judges to keep current in the law of two circuits rather than one.

To compensate for the paucity of judges in the circuit containing California, Arizona and Nevada, the bill adds judges; but if recent experience is any lesson, the additional judges will not be seen in significant numbers for a long time. Our average time for confirmation has been about 2-1/2 years.

Nor does the bill purport to do anything about the increase of costs resulting from the replication of existing staff resources, administrative personnel, and construction of buildings. The most important point is this: Our circuit works well. Our foresighted efforts to deal with the critical judicial administration issues facing us in the 21st century are receiving national recognition.

We have worked intensively on improving the relationships between the judiciary and the media, both electronic and print, so that the public is better informed about the operation of the courts. It is important for people to see how our justice system works, and our achievements were illustrated 3 weeks ago with the recall case. Whether you agree with it or not, it was telecast live to the Nation on a nationwide basis. So the Court of Appeals has in fact permitted cameras in the courtrooms for nearly 10 years.

In closing, I simply would like to emphasize that division of the circuit is not a partisan issue for our judges. We urge the Subcommittee to take no further action on 2723 and allow the circuit to continue to devote its efforts to what it should be doing, which is deciding those cases that come before it in a just and prompt manner through the conscientious application of the Constitution and laws of the United States. Thank you.

Mr. SMITH. Thank you, Judge Schroeder.

[The prepared statement of Judge Schroeder follows:]

PREPARED STATEMENT OF CHIEF JUDGE MARY M. SCHROEDER

I appreciate the opportunity to appear before you today. My name is Mary M. Schroeder and I am Chief Judge of the United States Court of Appeals for the Ninth Circuit, a position I have held since December 2000. I was appointed to the Ninth Circuit in 1979 by President Jimmy Carter. My chambers are in Phoenix, Arizona. Appearing with me today in opposition to the bill is my colleague Alex Kozinski of Pasadena, California, who was appointed to the Ninth Circuit in 1985 by President Ronald Reagan.

Since I last appeared before you, the Senate has confirmed four new judges to our Court, and we are now nearly up to full strength. It has been a very long time since we have had our full complement of judges; for quite a few years the Court was down by as many as one-third of its authorized, active judgeships. With the confirmation of these new judges and the continuing innovative means of managing our caseload, the Court has actually materially reduced the time needed to calendar and decide cases. As a result, I have nothing but positive things to report on the Circuit's conduct of its business since I appeared before you approximately fifteen months ago testifying in opposition to then pending legislation. There was no reason to divide the Circuit then and absolutely none now.

In the period since 1984, when the Court was last authorized new judgeships, there has been a tremendous growth in the Court's caseload. It has more than doubled. Due to the advances in technology, such as the automated docket, computer aided legal research, instantaneous electronic mail, videoconferencing, along with the economies of scale that can be achieved in a large circuit, we have increased our efficiency and our caseload has become more, and not less, manageable. Both the Fifth and Eleventh Circuits have experienced similar increases in caseload growth. No one is calling for further divisions of those circuits, and no one should.

There have only been two instances of circuit division the history of our country. The first was in 1929 when the Eighth Circuit divided into the Eighth and Tenth Circuits; and the second was in 1980 when the old Fifth Circuit divided to create a new Eleventh Circuit. That division had the full support of a substantial majority of the affected judges and took place before the computer revolution which has transformed our country and the world, including our court systems.

Last year, this subcommittee held a hearing on HR 1203, the Ninth Circuit Court of Appeals Reorganization Act of 2001. It was brought out during that hearing, that circuit division would do away with important advantages that flow from a large circuit. Division would eliminate the ability to transfer district judges from one district to another within the same Circuit to deal with fluctuating caseloads. Division would also reduce the number of circuit judges available to decide the cases from the burgeoning border districts, of Arizona and Southern California, and the increasingly populous District of Nevada.

I turn to the provisions of this bill, HR 2723. It would divide the Ninth Circuit into two unbalanced circuits. One, consisting of Arizona, California and Nevada, would have 82% of the caseload of the existing Ninth Circuit, leaving the remaining 18% to a circuit spanning the distance from the Arctic Circle to Guam. That's a lot of territory for 9 judges.

HR 2723 also attempts to address major problems that were pointed out at last year's hearing, but it does not find solutions that will work. To deal with the real need for flexibility in the assignment of district judges, the bill would allow the transfer of district judges from one circuit to another, but only upon agreement of two Chief Judges, thus setting the stage for intercircuit administrative disputes. More important this would require both district and circuit judges to keep current in the law of two circuits rather than one.

To compensate for the paucity of judges in the Circuit containing California, Arizona, and Nevada, this bill purports to add judges; but if recent experience is any lesson, the additional judges will not be seen in significant numbers to do any good for a very long time. The average length of time from vacancy to confirmation of Ninth Circuit judges over the past ten years has been two and half years. Quite a few took longer than that. For example, it took more than four years for Judge Richard Paez' confirmation to this Court; almost four years for Judge Marsha Berzon; three years for Judge Margaret McKeown; and currently Caroline Kuhl's nomination has been pending for more than two years. It was 19 years before we got an active judge in Hawaii after Judge Herbert Choy took senior status in 1984.

Nor does the bill purport to do anything about the increase of costs resulting from the replication of existing staff resources, existing administrative personnel, and the construction of buildings. Construction costs for a new circuit headquarters would be most dramatic. As noted at last year's hearing, there are courthouses in Seattle and Portland that are being renovated, yet neither of those buildings is being designed as a circuit headquarters. Indeed, substantial planning and design work is already underway in Seattle that would have to be undone, wasting precious taxpayer resources. Neither building has sufficient space to serve as a circuit headquarters. A third building, The Gus Solomon Courthouse in Portland, Oregon, requires substantial and costly seismic strengthening.

The most important point is this: our Circuit works well, and our foresighted efforts to deal with the critical judicial administration issues facing us in the 21st century are receiving national recognition. I will highlight one important project. Beginning more than five years ago, with my predecessor as Chief, Procter Hug of Nevada, the Circuit, through a key new committee, has worked intensively on improving the relationships of the judiciary and the media, both electronic and print, so that the public can be better informed about the operation of the federal courts and the difficult nature of the issues that they confront. It is important for people to see how our justice system works. Our achievements were illustrated three weeks ago when we permitted our En Banc proceedings in the California recall case to be telecast live on a nation wide basis. The lawyers were of superb quality, the issues of great public interest, and the judges well prepared. Much credit goes to Public Information Committee Chair, District Judge Alicemarie Stotler, of Santa Ana, California, and to District Judge Robert Lasnik of Seattle, Washington, who will succeed her.

The Ninth Circuit Court of Appeals has in fact permitted cameras in our appellate courtrooms for nearly ten years. This, we submit, is another illustration of how the Ninth Circuit is in the forefront of trying to make the public informed of the important role the federal courts play in today's society.

In closing, I would like to emphasize that division of the circuit is not a partisan issue for our judges. For nearly 50 years, our Chief Circuit Judges appointed by the Eisenhower administration through the Reagan Administration, including the judge who is set to succeed me, have all opposed division of the circuit. A large majority of our judges similarly have opposed and continue to oppose division as serving no useful purpose related to the administration of the federal courts of the west. We urge the subcommittee to take no further action on HR 2723, and allow the Ninth Circuit to continue to devote its efforts to what it should be doing: deciding those cases that come before it in a just and prompt manner, and though the conscientious application of the Constitution and the laws of the United States.

Thank you.

Mr. SMITH. Judge O'Scannlain.

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

Judge O'SCANNLAIN. Thank you, Chairman Smith and Members of the Subcommittee. My name is Diarmuid O'Scannlain, and I am a judge on the United States Court of Appeals for the Ninth Circuit, with chambers in Portland, Oregon.

Thank you for inviting me once again to discuss the future of my circuit. I am especially honored to be called upon to comment on this bill, because it is laudable for recognizing and directly responding to nearly every argument lodged against its predecessors. Congressman Simpson, its sponsor, has gone out of his way to solicit the views of our court, and it is evident that H.R. 2723 was drafted with uncommon sensitivity to the concerns of my colleagues.

I can report that I speak not only on my own behalf but on also the behalf of 8 of my colleagues, and you may also recall that another colleague, Judge Rymer of California, served on the White Commission and is on record that our Court of Appeals is too large to function effectively.

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 favors, sparking renewed interest in how the Ninth Circuit conducts its business.

I believe that all three judges here today, and Professor Hellman as well, would agree that a restructuring proposal like this bill should be analyzed solely on the grounds of effective judicial administration, grounds that remain unaffected by Supreme Court batting averages and public perception about particular decisions. Rather, restructuring the circuit is the best way to cure the administrative issues affecting my court, an institution that has already exceeded reasonably manageable proportions.

As you scan the appendix at the back of my prepared testimony, consider, for example, the exhibits numbered 10 through 13. Compared to all other circuits, we employ more than twice the average number of judges. We have more than twice the average population, and we handle more than twice the average number of appeals. The Ninth Circuit already equals two circuits in one.

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. Everyone recognizes these considerations, but not everyone agrees that a split is the ideal solution. In fact, on this point my own Chief and I will disagree, although each with the greatest respect for each other's views.

But I am convinced that the various arguments against the split are persuasive. Indeed, the special virtue of this bill is that it addresses substantially all of the arguments against H.R. 1203 advanced by Chief Judge Schroeder and Judge Sidney Thomas at last year's hearings. As the Chief pointed out last year, additional judgeships are sorely needed as there have been no additional judgeships added to our courts since 1984.

But this bill answers that protestation in spades. This bill properly places all seven of its new judges in the reconfigured Ninth Circuit. Last year's proposal left the Ninth Circuit with close to 80 percent of its caseload but only two-thirds of its judges. In contrast, H.R. 2723's efforts result in only a marginal caseload disparity.

The Twelfth Circuit would take about 20 percent of the caseload and about 25 percent of the judges, and of course I am confident that those of us assigned to the Twelfth Circuit would be more than happy to help out the new Ninth on a regular basis as need-

ed. And I for one accept Professor Hellman's suggestion to volunteer to sit with the new Ninth to help balance the load on a temporary basis.

Although this area is growing, I do concede that the Twelfth Circuit would begin as one of our smaller circuits, but at 2,200 total appeals filed, it already would process more litigation than the First and the D.C. Circuits and would be within a few hundred appeals of the Tenth.

By appeals fixed per authorized judgeship, the Twelfth Circuit would exceed the Tenth and D.C. Circuits and be less than 50 filings away from each of the First, Third, Sixth, and Eighth Circuits. Judge Thomas's suggestion that the Twelfth Circuit would be too small impugns each one of these already hardworking circuits.

Also Congressman Simpson's proposal explicitly continues and expands our practice of assigning circuit and district judges in times of need. These important provisions essentially provide an unprecedented double benefit. Nearly all the important administrative innovations the Ninth Circuit has instituted over the last few years may be shared between the two new circuits, and at the same time each circuit would receive all the benefits of reorganization into new circuits.

There is nothing unusual, unprecedented, or even unconstitutional about the restructuring of judicial circuits. Federal appellate courts have long evolved in response to natural population and docket changes. As geographic or legal areas grow even 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 be kept essentially the same for over a century. But our circuit is not a collectible or an antique, we are not untouchable. We are not something special or an exception to other circuits. 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 like all other circuits in our judicial system.

Indeed, I am mystified by the relentless refusal of past, present, and future Chief Judges to contemplate the inevitable. But I for one cannot oppose the logical evolution of the Ninth Circuit as we grow to gargantuan size.

Mr. Chairman, I thank you for making these short remarks. The complete presentation of my views on the legislation has been submitted, and I appreciate it being admitted into the record.

Mr. SMITH. And it has been. Thank you, Judge O'Scannlain.

[The prepared statement of Judge O'Scannlain follows:]

PREPARED STATEMENT OF JUDGE DIARMUID F. O'SCANNLAIN

Good afternoon, Chairman Smith and Members of the Subcommittee. My name is Diarmuid O'Scannlain, Judge of the United States Court of Appeals for the Ninth Circuit with chambers in Portland, Oregon. Thank you for inviting me, once again, to discuss the future of the Ninth Circuit. You sought my views in the 2002 hearings on H.R. 1203. I am especially honored to be called upon to comment on H.R. 2723, a bill that offers an even better solution to the problems inherent in the size of so large and overburdened a circuit as ours. In particular, H.R. 2723 is laudable for recognizing and directly responding to nearly every argument lodged against its predecessors. Congressman Simpson, its sponsor, has gone out of his way to solicit the views of our Court and it is evident that H.R. 2723 was drafted with uncommon sensitivity to the concerns of judges on my Court.

I can report that I speak not only on my own behalf, but also eight of my colleagues–Judges Sneed (California), Beezer (Washington), Hall (California), Trott (Idaho), Fernandez (California), T.G. Nelson (Idaho), Kleinfeld (Alaska), and Tallman (Washington)–who publicly support the restructuring of the Ninth Circuit.[1]

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 48 judges, soon to be 50).[2] I have also written and spoken repeatedly on issues of judicial administration.[3] Therefore, I feel well qualified to share my perspectives on our mutual challenge to address the judiciary's 800-pound gorilla: The United

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[1] Of course, I do not speak for the Court of which I am a member.

[2] 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.

[3] 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 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).

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 favors, sparking renewed interest in how the Ninth Circuit conducts its business.[4] But a restructuring proposal like H.R. 2723 should be analyzed solely on grounds of effective judicial administration; grounds that remain unaffected by Supreme Court batting averages and public perception of particular decisions. However one views our jurisprudence, my support of a fundamental restructuring of the Ninth Circuit, I want to emphasize, has never been premised on the outcome of given cases.

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, twelve thousand annual case filings, forty-eight judges, and fifty-six million people are too much for any non-discretionary appeals court to handle satisfactorily. The sheer magnitude of our court and its responsibilities negatively affects all aspects of our business, including our celerity, our consistency, our clarity, and even our collegiality. Simply put, the Ninth Circuit is too big. It is time now to take the prudent, well-established course and restructure this circuit. Restructuring large circuits is the natural evolution of judicial organization. Restructuring has worked in the past. Restructuring will work again. For these reasons alone, I urge serious consideration of H.R. 2723.

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 much of the '80s, largely because of the widespread perception that dissatisfaction with some of our environmental law decisions animated the calls for reform.

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

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[4] 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.

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 twelve. 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. Courts grew to six, ten, even seventeen judges.

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.[5] 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. And, in due course, I have absolutely no doubt that a new Twelfth Circuit will be created out of the Ninth, hopefully through legislation such as H.R. 2723.

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

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[5] 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.

[6] See Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (1998) [hereinafter "White Commission Report"].

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

And the sheer enormousness of my court is undeniable, whether you measure it by number of judges, by caseload, or by population. Our official allocation is 28 active judges—equal to or more than the total number of judges, active and senior combined, on any other circuit. Currently, 27 of those judgeships are filled, and we have an additional 21 senior judges. In other words, there are forty-eight judges on our court today. And when the one existing and one imminent vacancies are filled, our court will have 50.[8]

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 28), and already has more than four and a half times that of the smallest (the First with 11).[9] 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 48 judges, the average size of all other circuits today remains at less than 19 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 2002 court year, we handled 11,271 appeals—over double the average of other circuits, and almost twenty-five hundred more cases than the next busiest court (the Fifth).[10] Unfortunately, these numbers will only increase, and indeed have: as of three weeks ago, the end of the 2003 court year, that volume climbed to 12,632 filings.[11] Along with a double-digit growth in overall appeals,[12] we have

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[8] See Exhibit 3. Senior judges are in no sense "retired." Almost all of our senior judges carry a substantial load ranging from 100 percent to 25 percent of a regular active judge's load.

[9] See Exhibit 7; Exhibit 15.

[10] See Exhibit 9; Exhibit 13; Exhibit 16. There may be slight variations in terms of the summary statistics reported here and those reported elsewhere because of differences in sources. For the Ninth Circuit, I use our internally generated caseload reports from the AIMS database. For all other circuits, 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: 2002 Annual Report of the Director. Unless otherwise noted, all caseload statistics reflect appeals filed in fiscal year 2002, from October 1, 2001 to September 30, 2002. For all circuits, I use population statistics compiled by the United States Census Bureau for year 2002.

[11] See Ninth Circuit AIMS Database, Fiscal Year 2003, October 1, 2002 to September 30, 2003.

[12] Only three other circuits reported an increase in their appeals between 2001 and 2002, and none higher than 7.8% (the Second). The Ninth Circuit, on the other hand, saw a 10.4% jump over the same time period. See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director. The jump for the

seen a marked 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 dismissals—in an effort to clear its backlog. Because we hear BIA appeals directly from the Board, we suffer the immediate effects of this policy change. For court year 2003, we received around eighty immigration appeals each and every week.[13] Indeed, immigration appeals now make up about a third of the Ninth Circuit's docket.[14]

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 Circle. This vast expanse houses more than 56 million people—about one fifth of the entire population of the United States. That is 25 million more people than the next largest circuit (the Sixth).[15] Twenty-five million is an astounding number—more than the aggregate population of the ten largest cities in America combined.[16]

No matter what metric one uses, the Ninth Circuit dwarfs all else. Compared to the other circuits, we employ twice the average number of judges, we handle twice the average number of appeals, and we have twice the average population.[17] The Ninth Circuit already equals two circuits in one.

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 example, I participated last year in eight, week-long sittings a year on regular panels. The composition of those panels often changes during a given week. Thus, I may sit with around twenty of my colleagues on three-judge panels

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2003 court year was even greater: 12.1%. See Ninth Circuit AIMS Database, Fiscal Year 2003, October 1, 2002 to September 30, 2003.

[13] See Ninth Circuit AIMS Database, Fiscal Year 2003, October 1, 2002 to September 30, 2003. Our database categorizes one class of appeals as "agency" appeals, of which we had 4,253 in fiscal year 2003. The overwhelming majority of these agency filings are immigration appeals.

[14] See id.

[15] See Exhibit 8; Exhibit 11; Exhibit 16.

[16] See U.S. Census Bureau, Cities Ranked by Estimated 2002 Population, http://eire.census.gov/popest/data/cities/tables/SUB-EST2002-01.php. The ten largest cities, in order, are New York, Los Angeles, Chicago, Houston, Philadelphia, Phoenix, San Diego, Dallas, San Antonio, and Detroit.

[17] See Exhibit 15; Exhibit 16.

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 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 enormous size 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. This is the practice of most, if not all, other circuits. 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 now 12,000 plus appeals,[18] 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 and the relevant public and academic commentary. Without question, we are losing the ability to keep track of our own precedents. 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 too difficult for judges of the current Ninth Circuit adequately to do themselves.

Many point to the en banc process as a solution to some of these problems, but it is simply 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

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[18] See Ninth Circuit AIMS Database, Fiscal Year 2003, October 1, 2002 to September 30, 2003.

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 718 published opinions in 2002 alone.[19] 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 eleven of the twenty-eight 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 is the recent California Recall case.[20] There, the original three-judge panel unanimously reversed a district court's denial of a preliminary injunction to stop the recall election. On rehearing en banc, an 11-judge, randomly selected panel affirmed the district court—also unanimously—to order the election to go forward. None of the original three judges wound up on the 11-judge panel. Most unusually, there are enough active judges on our court such that an entirely separate 11-judge panel could have been formed without a single member of either the original three-judge or actual en banc panel. Indeed, our circuit is only a few active judgeships away from being able to form three separate en banc panels simultaneously.[21] I do not suggest that our use of limited en banc panels is unwarranted; given our size, it would be an enormous drain on our resources to do it any other way. I only mean to point out the strains that we labor under—strains due entirely to our distended bulk.

The Ninth Circuit's enormous size not only hinders judicial decisionmaking, it also creates problems for our litigants. In my court, the median time from when a party activates an appeal to when it receives resolution is over 15 months—more than 67% longer than the average time for the rest of the Courts of Appeals.[22]

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[19] This is not to mention the over 4,000 non-precedential memorandum dispositions we circulate each year. See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director.

[20] S.W. Voter Registration Educ. Project v. Shelley, 2003 WL 22176200 (9th Cir. 2003), rev'd, 2003 WL 22175955 (9th Cir. 2003) (en banc).

[21] Indeed, if the seven new judgeships contemplated by H.R. 2723 were added to our Circuit without a corresponding split, we would easily be able to form three simultaneous 11-judge en banc panels. This can only decrease the legitimacy of our already troubled en banc process.

[22] 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:

More disturbingly, an unacceptable number of appeals wallow under submission for a year or more. Our record on this front is almost four times worse than the next slowest circuit (the Fourth).[23] Judges need time to deliberate and to ensure that they are making the correct decision, but this backlog increases the pressure on us to dispose of cases quickly. This, in turn, can only inflate the chance of error and inconsistency.

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 Phoenix, Arizona and Pasadena, California. In addition, all judges must travel on a quarterly basis to attend court meetings – and en banc panels – generally held in San Francisco. A certain amount of travel is unavoidable, especially in any circuit that might contain our non-contiguous states of Alaska and Hawaii, not to mention our island territories. But why should any one circuit encompass close to 40% of the total geographic area of this country?[24] Traveling across this much land mass not only wastes time, it costs a considerable amount of money.

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.[25] Furthermore, after careful analysis, the White Commission concluded that circuit courts with too many judges lack the ability to render clear, consistent, and timely decisions.[26] 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

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2002 Annual Report of the Director.

[23] See id.

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

[25] See White Commission Report at 38.

[26] 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.

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 understates the problem. It fails to consider both senior judges (most of whom work prodigiously), and the large numbers of visiting district and out-of-circuit judges who are not even counted as part of our 48-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 effect a split, and to carve out a new Twelfth Circuit.

III

Everyone recognizes these problems, but not everyone agrees that a split is the ideal solution. In fact, on this point, my own Chief Judge and I appear to disagree, although each with the greatest of respect for each other's views. However, I remain unconvinced by the various arguments against a split. Indeed, the special virtue of H.R. 2723 is that it addresses substantially all of the arguments against H.R. 1203 advanced by Chief Judge Schroeder and Judge Sidney Thomas at last year's hearings.

As an initial matter, the restructuring provided by H.R. 2723 corrects many of the problems currently facing my court. It creates smaller decisionmaking units, which in turn fosters collegiality among judges, greater decisional consistency, increased accountability, and responsiveness to regional concerns. And as it moves forward, the new Twelfth Circuit should still be bound by pre-split precedent, helping to minimize confusion in interpreting the law.

Like last year's bill, H.R. 2723 creates a new Twelfth Circuit comprised of the Northwestern states and the Pacific Islands (Washington, Oregon, Idaho, Montana, Alaska, Hawaii, Guam, and the Northern Mariana Islands).[27] The "new" Ninth Circuit would retain California, Nevada, and Arizona.[28] Unlike H.R. 1203, however, H.R. 2723 includes some very important and much-needed elements. First, it adds five new judgeships and two temporary ones—all located in the

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[27] See Exhibit 2.
[28] Id.

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.[29] Second, it dramatically reduces administrative costs in the reconfigured circuits by liberally allowing the sharing of judicial resources.

The increase in judgeships for the new Ninth Circuit is particularly notable. Last year, Chief Judge Schroeder's primary objection to H.R. 1203 was that it did "not address the growing need for additional judgeships."[30] As Chief Judge Schroeder pointed out, these additional judgeships are sorely needed, as there have been no additional judgeships added to the Circuit since 1984. Yet H.R. 2723's seven additional judgeships answers this protestation in spades.

I also commend H.R. 2723 for placing all seven of its new judges in the reconfigured Ninth Circuit. Judge Sidney Thomas criticized last year's proposal because it did not result in a proportional caseload distribution. The additional judges in California, Arizona, and Nevada help equalize their share of appellate work. Under last year's proposal, the new Ninth Circuit would have been left with close to 80% of its caseload, while losing almost a third of its judges to the Twelfth Circuit. This year, in contrast, H.R. 2723's provisions result in only a marginal caseload disparity. The Twelfth Circuit would take almost 20% of the caseload and, factoring in the additional judgeships, about 25% 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 Circuit judges would gladly volunteer on new Ninth Circuit panels to help ease any growing pains. I myself would be assigned to the Twelfth Circuit but would be more than happy to help out the new Ninth on a regular basis as needed.

Moreover, the new Ninth Circuit would have, on average, 349 appeals filed per authorized judgeship.[31] That yields a workload barely 7% higher than the average of all other circuits, at 325.[32] Indeed, the new Ninth Circuit would have fewer per-authorized-judge cases filed than the Second, Fifth, and Eleventh Circuits, and not many more than the Seventh.[33]

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[29] See Exhibit 4; Exhibit 5.
[30] 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).
[31] See Exhibit 5; Exhibit 18.
[32] See id.
[33] See id.

These figures help demonstrate the fallacy of Judge Thomas's "critical mass" argument. Last year, he asserted that the proposed Twelfth Circuit was too small to stand on its own.[34] Although the area is growing, the Twelfth Circuit would begin as one of our smaller circuits. But the idea that it could not form a legitimate circuit is plainly untrue. At 2,186 total appeals filed, the Twelfth Circuit already would process more litigation than the First and D.C. Circuits, and would be within a few hundred appeals of the Tenth.[35] By appeals filed per authorized judgeship, the Twelfth Circuit, at 243, exceeds the Tenth and D.C. Circuits, and is less than fifty away from each of the First, Third, Sixth, and Eighth Circuits.[36] The suggestion that the Twelfth Circuit would be too small impugns each one of these already hardworking circuits.

Finally, H.R. 2723 answers both Chief Judge Schroeder's and Judge Thomas's concerns about administrative efficiency. Congressman Simpson's proposal explicitly allows each new circuit to continue our practice of assigning circuit and district judges throughout the area served by the old Ninth Circuit in times of need. I have no doubt that the Chief Judges of the new Ninth and Twelfth Circuits willingly would approve sharing their resources. I applaud H.R. 2723 for codifying and even expanding such a beneficial system. To allow the sharing of resources—not only among but between circuits—will serve as an unqualified boon to our efforts in managing heavy caseloads. Indeed, these important provisions of H.R. 2723 essentially provide an unprecedented double benefit. Nearly all of the important administrative innovations we have instituted over the last few years may be shared between the two circuits. At the same time, each circuit receives all the benefits of reorganization into new circuits. For example, 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. These gains may help counter the Ninth Circuit's recent productivity decrease in the number of appeals it terminates per year,[37] a decrease demonstrating that our administrative reforms

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[34] See 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).

[35] See Exhibit 16; Exhibit 18.

[36] See id.

[37] See Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director.

alone simply are not working. Rather, we need precisely the kind of pioneering solution H.R. 2723 provides.

Some of Chief Judge Schroeder's and Judge Thomas's objections survive H.R. 2723. 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. 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. This is absurd, as is the "need" to preserve a single law for the Pacific Coast. 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 for the reason that our borders were fixed inviolate in 1891. Indeed, the most naturally coherent geographic division would separate the Northwest and Southwest, each with its own climates and cultures. This is precisely the division H.R. 2723 effects.

Nor should cost alone be a reason to maintain the status quo. I respectfully disagree with my Chief's conclusion that the Twelfth Circuit would require a new courthouse and administrative headquarters with wild estimates in the hundreds of millions of dollars. There are far simpler—and far cheaper—solutions. The Gus Solomon Courthouse in Portland has remained unoccupied since the construction of the Mark Hatfield Courthouse for the District of Oregon. Likewise, the Nakamura Courthouse in Seattle will soon empty when the Western District of Washington moves to its newly constructed building. Either of these physical plants would be appropriate for the Twelfth Circuit's administrative headquarters. Neither would require new building costs, aside from relatively modest design and remodeling expenses.

I concede that there are judges on the Ninth Circuit 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 decline to express any view, feeling the matter is entirely a legislative issue. Yet a great number of judges on our court

favor some kind of restructuring, many strongly so. Perhaps you might suggest that our Chief Judge poll our Court in light of the sincere new approach made by the sponsors of H.R. 2723. So far, she has refused to do so. But our 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."[38] 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."[39] Many district court judges and practitioners concur as well. Some bar members, on the other hand, 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.

IV

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,[40] 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, and cannot be true. Bills such as H.R. 2723, with its panoply of provisions that directly respond to the concerns the Chief Judge articulated last year, demonstrate the good-faith efforts made by Congress reasonably to restructure the judicial monstrosity of the Ninth Circuit. Calling for a circuit split based on particular decisions is counterproductive and unacceptable. But so is attacking the integrity of Congress when it makes honest and fair proposals to divide our circuit.

There is nothing unusual, unprecedented, or even unconstitutional about the restructuring of judicial circuits. Federal appellate courts have long evolved in response to 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

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[38] White Commission Report at 38.

[39] Id.

[40] Mary M. Schroeder, State of the Circuit Speech at the 2003 Ninth Circuit Judicial Conference, Kauai, Hawaii (June 23, 2003).

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, or an exception to all other circuits. 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.[41] As loyal as I am to my own court, I cannot oppose the logical evolution of the Ninth Circuit as we grow to impossible size.

After denying these concerns, our past official court position straddles the fence by arguing that we can alleviate problems by making changes at the margin. Chief Judge Schroeder and her predecessors have done a truly admirable job with the limited tools they have, 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 it severely hampers our law-declaring role. More judges make it more difficult to render clear and consistent decisions. The time has come when such cosmetic changes can no longer suffice and when a significant restructuring is necessary.

All this is not to say that H.R. 2723 could not be improved. The new Ninth Circuit would still have a disproportionate share of the country's population and case filings. This raises the pervasive question of what to do with California, which currently accounts for about two thirds of our Court's current caseload.[42] Some suggest that California should be its own freestanding circuit. Others would divide California in half as parts of new Southwest and Northwest Circuits.[43] Either way, H.R. 2723 may offer only a short-term reprieve. For, with 26 active judges, the new Ninth Circuit would soon face many of the same issues I have

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[41] 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).

[42] See Exhibit 14; Exhibit 18.

[43] Incidentally, this was the recommendation of the Hruska Commission in 1973. See supra note 7, at 2.

emphasized today. But, for the present, the "new" Ninth would be adequately provided for, and the Twelfth would be immeasurably better served.

Whatever you choose to do, ultimately Congress must 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 the 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 fallen, it is certainly at the edge of a precipice. Only a restructuring can bring us back. H.R. 2723, with its commendable efforts at answering all major objections to past proposals, provides just the life rope we need.

V

Unfortunately, the Ninth Circuit's problems will not go away. 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 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 H.R. 2723.

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

APPENDIX

The Current Regional Circuits:
The largest by far is the Ninth with about a fifth of the total population and close to 40% of the total land mass of the United States

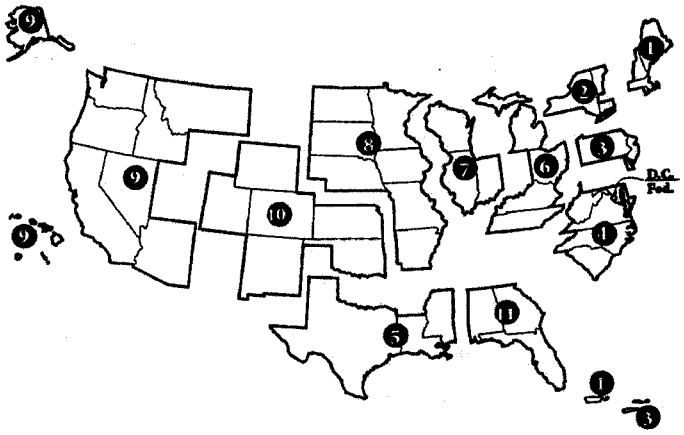


Exhibit 2

The Circuits After the Restructuring Proposed by H.R. 2723

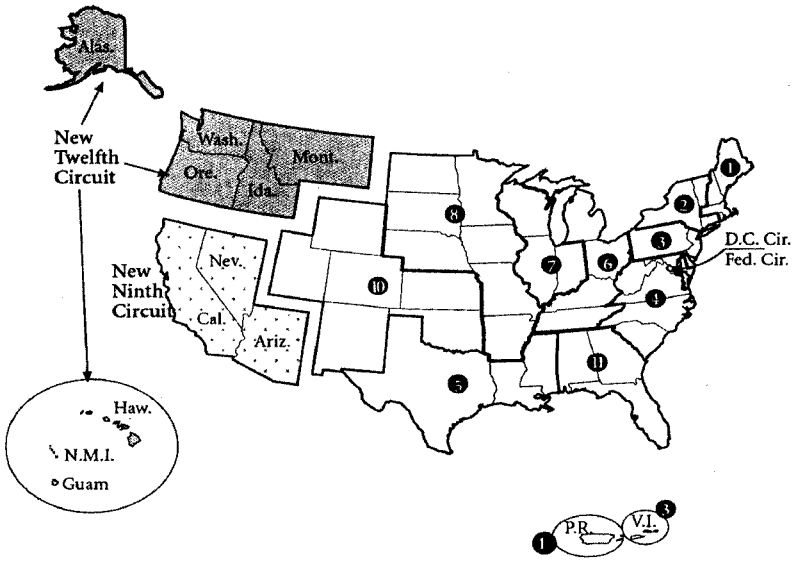


Exhibit 3

All Ninth Circuit Judges by Seniority

(as of October 21, 2003)

Judge	Appointed by	State	City	Status (Active/Senior)
1. Browning	Kennedy	California	San Francisco	Senior
2. Choy	Nixon	Hawaii	Honolulu	Senior
3. Goodwin	Nixon	California	Pasadena	Senior
4. Wallace	Nixon	California	San Diego	Senior

6. Hug	Carter	Nevada	Reno	Senior
7. Skopil	Carter	Oregon	Portland	Senior
8. Schroeder (Chief)	Carter	Arizona	Phoenix	ACTIVE
9. Fletcher, B.	Carter	Washington	Seattle	Senior
10. Farris	Carter	Washington	Seattle	Senior
11. Pregerson	Carter	California	Woodland Hills	ACTIVE
12. Alarcon	Carter	California	Los Angeles	Senior
13. Ferguson	Carter	California	Santa Ana	Senior
14. Nelson, D.	Carter	California	Pasadena	Senior
15. Canby	Carter	Arizona	Phoenix	Senior
16. Boochever	Carter	California	Pasadena	Senior
17. Reinhardt	Carter	California	Los Angeles	ACTIVE
18. Beezer	Reagan	Washington	Seattle	Senior
19. Hall	Reagan	California	Pasadena	Senior
20. Brunetti	Reagan	Nevada	Reno	Senior
21. Kozinski	Reagan	California	Pasadena	ACTIVE
22. Noonan	Reagan	California	San Francisco	Senior
23. Thompson	Reagan	California	San Diego	Senior
24. O'Scannlain	Reagan	Oregon	Portland	ACTIVE
25. Leavy	Reagan	Oregon	Portland	Senior
26. Trott	Reagan	Idaho	Boise	ACTIVE
27. Fernandez	G.H.W. Bush	California	Pasadena	Senior
28. Rymer	G.H.W. Bush	California	Pasadena	ACTIVE
29. Nelson, T.	G.H.W. Bush	Idaho	Boise	ACTIVE
30. Kleinfeld	G.H.W. Bush	Alaska	Fairbanks	ACTIVE
31. Hawkins	Clinton	Arizona	Phoenix	ACTIVE
32. Tashima	Clinton	California	Pasadena	ACTIVE
33. Thomas	Clinton	Montana	Billings	ACTIVE
34. Silverman	Clinton	Arizona	Phoenix	ACTIVE
35. Graber	Clinton	Oregon	Portland	ACTIVE
36. McKeown	Clinton	California	San Diego	ACTIVE
37. Wardlaw	Clinton	California	Pasadena	ACTIVE
38. Fletcher, W.	Clinton	California	San Francisco	ACTIVE
39. Fisher	Clinton	California	Pasadena	ACTIVE
40. Gould	Clinton	Washington	Seattle	ACTIVE
41. Paez	Clinton	California	Pasadena	ACTIVE
42. Berzon	Clinton	California	San Francisco	ACTIVE
43. Tallman	Clinton	Washington	Seattle	ACTIVE
44. Rawlinson	Clinton	Nevada	Las Vegas	ACTIVE
45. Clifton	G.W. Bush	Hawaii	Honolulu	ACTIVE
46. Bybee	G.W. Bush	Nevada	Las Vegas	ACTIVE
47. Callahan	G.W. Bush	California	Sacramento	ACTIVE
48. Bea	G.W. Bush	California	San Francisco	ACTIVE
49. [Kuhl]	G.W. Bush	California	Pasadena	Nominee
50. [Myers]	G.W. Bush	Idaho	Boise	Nominee*

SUMMARY:	**Authorized Judgeships**	**28**
	ACTIVE Judges	**27**
	Senior Judges	**+ 21**
	Sitting Judges	**48**
	Nominees pending	**1**
	Nominees awaiting vacancy	**+ 1**
	Total, including nominees	**50**

* Mr. Myers will succeed Judge Nelson as ACTIVE upon confirmation on or after November 14, 2003.

Judges for the "New" Ninth Circuit After Split

(as of October 21, 2003)

Judge	Appointed by	State	City	Status (Active/Senior)
1. Browning	Kennedy	California	San Francisco	Senior
2. Goodwin	Nixon	California	Pasadena	Senior
3. Wallace	Nixon	California	San Diego	Senior
4. Sneed	Nixon	California	San Francisco	Senior
5. Hug	Carter	Nevada	Reno	Senior
6. Schroeder	Carter	Arizona	Phoenix	ACTIVE
7. Pregerson	Carter	California	Woodland Hills	ACTIVE
8. Alarcon	Carter	California	Los Angeles	Senior
9. Ferguson	Carter	California	Santa Ana	Senior
10. Nelson, D.	Carter	California	Pasadena	Senior
11. Canby	Carter	Arizona	Phoenix	Senior
12. Boochever	Carter	California	Pasadena	Senior
13. Reinhardt	Carter	California	Los Angeles	ACTIVE
14. Hall	Reagan	California	Pasadena	Senior
15. Brunetti	Reagan	Nevada	Reno	Senior
16. Kozinski	Reagan	California	Pasadena	ACTIVE
17. Noonan	Reagan	California	San Francisco	Senior
18. Thompson	Reagan	California	San Diego	Senior
19. Fernandez	Bush	California	Pasadena	Senior
20. Rymer	Bush	California	Pasadena	ACTIVE
21. Hawkins	Clinton	Arizona	Phoenix	ACTIVE
22. Tashima	Clinton	California	Pasadena	ACTIVE
23. Silverman	Clinton	Arizona	Phoenix	ACTIVE
24. McKeown	Clinton	California	San Diego	ACTIVE
25. Wardlaw	Clinton	California	Pasadena	ACTIVE
26. Fletcher, W.	Clinton	California	San Francisco	ACTIVE
27. Fisher	Clinton	California	Pasadena	ACTIVE
28. Paez	Clinton	California	Pasadena	ACTIVE
29. Berzon	Clinton	California	San Francisco	ACTIVE
30. Rawlinson	Clinton	Nevada	Las Vegas	ACTIVE
31. Bybee	Bush	Nevada	Las Vegas	ACTIVE
32. Callahan	Bush	California	Sacramento	ACTIVE
33. Bea	Bush	California	San Francisco	ACTIVE
34. [Kuhl]	Bush	California	Pasadena	Nominee
35. [New vacancy]		--	--	Vacancy
36. [New vacancy]		--	--	Vacancy
37. [Temp. vacancy]*		--	--	Vacancy
38. [Temp. vacancy]*		--	--	Vacancy
39. [Future vacancy]**		--	--	Vacancy
40. [Future vacancy]**		--	--	Vacancy
41. [Future vacancy]**		--	--	Vacancy

SUMMARY:		
	Authorized Judgeships	**19**
	ACTIVE Judges	**18**
	Senior Judges	**+15**
	Sitting Judges	**33**
	Nominees pending	**1**
	Nominees awaiting vacancy	**0**
	New Judgeships	**+7**
	Total	**41**

* Temporary judgeship not to be filled after 10 years
** New judgeship created on January 21, 2005

Judges for the New Twelfth Circuit After Split

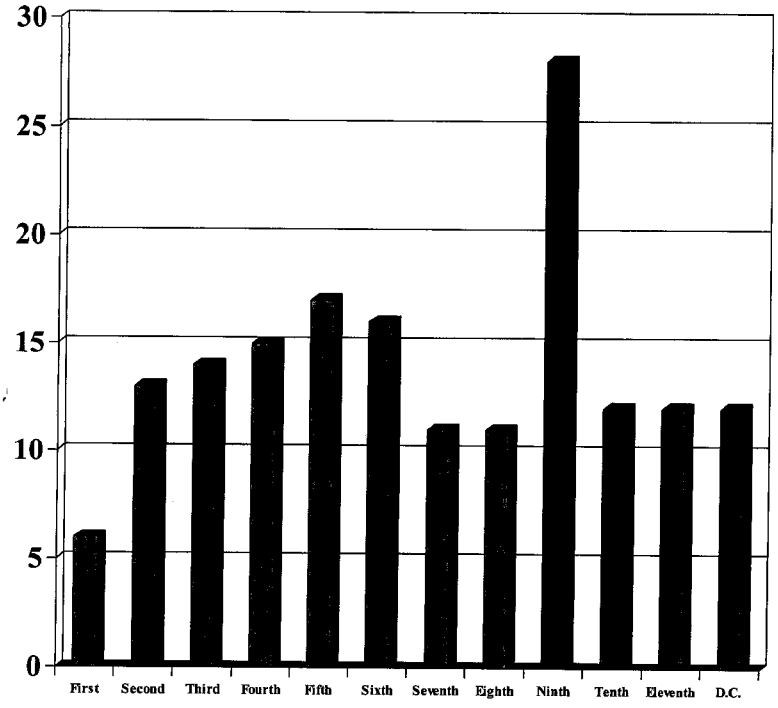
(as of October 21, 2003)

Judge	Appointed by	State	City	Status (Active/Senior)
1. Choy	Nixon	Hawaii	Honolulu	Senior
2. Skopil	Carter	Oregon	Portland	Senior
3. Fletcher, B.	Carter	Washington	Seattle	Senior
4. Farris	Carter	Washington	Seattle	Senior
5. Beezer	Reagan	Washington	Seattle	Senior
6. O'Scannlain	Reagan	Oregon	Portland	ACTIVE
7. Leavy	Reagan	Oregon	Portland	Senior
8. Trott	Reagan	Idaho	Boise	ACTIVE
9. Nelson, T.	Bush	Idaho	Boise	ACTIVE
10. Kleinfeld	Bush	Alaska	Fairbanks	ACTIVE
11. Thomas	Clinton	Montana	Billings	ACTIVE
12. Graber	Clinton	Oregon	Portland	ACTIVE
13. Gould	Clinton	Washington	Seattle	ACTIVE
14. Tallman	Clinton	Washington	Seattle	ACTIVE
15. Clifton	Bush	Hawaii	Honolulu	ACTIVE
16. [Myers]	Bush	Idaho	Boise	Nominee*

SUMMARY:		
	Authorized Judgeships	**9**
	ACTIVE Judges	**9**
	Senior Judges	**+6**
	Sitting Judges	**15**
	Nominees pending	**0**
	Nominees awaiting vacancy	**1**
	New Judgeships	**+0**
	Total	**16**

* Mr. Myers will succeed Judge Nelson as ACTIVE upon confirmation on or after November 14, 2003.

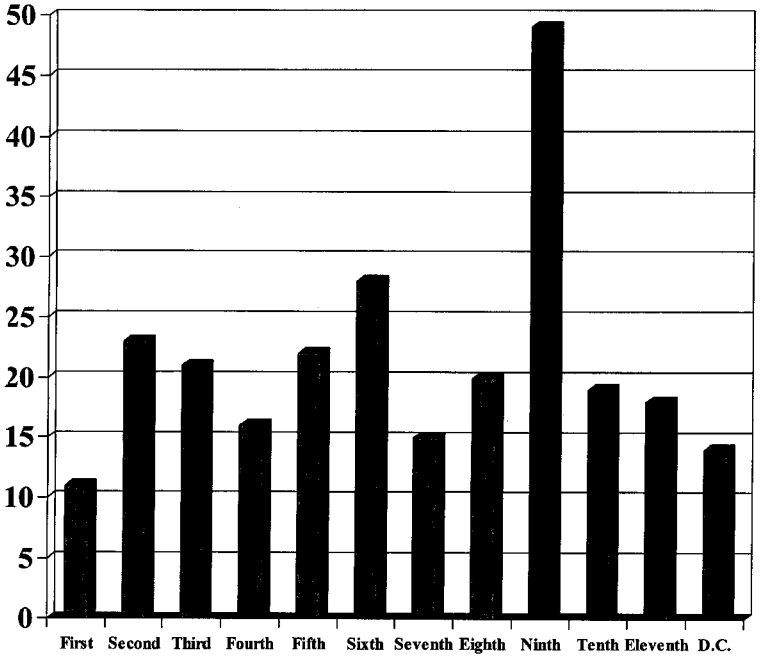
Authorized Judgeships per Circuit



SOURCE: 28 U.S.C. § 44 (2003)

Exhibit 7

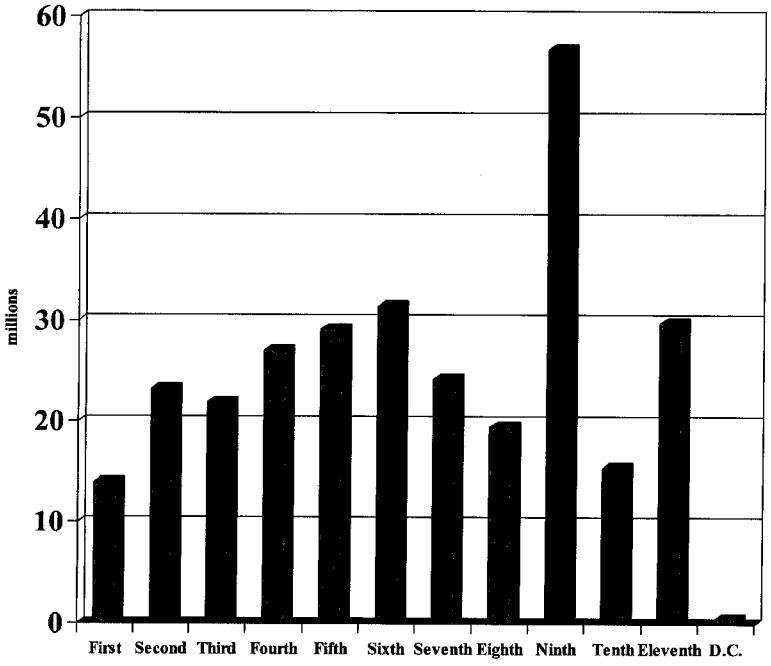
Total Judges per Circuit
(Authorized + Senior)



SOURCE: 28 U.S.C. § 44 (2003); 2002 Appellate Judicial Caseload Profile, http://www.uscourts.gov/cgi-bin/cmsa2002.pl

Exhibit 8

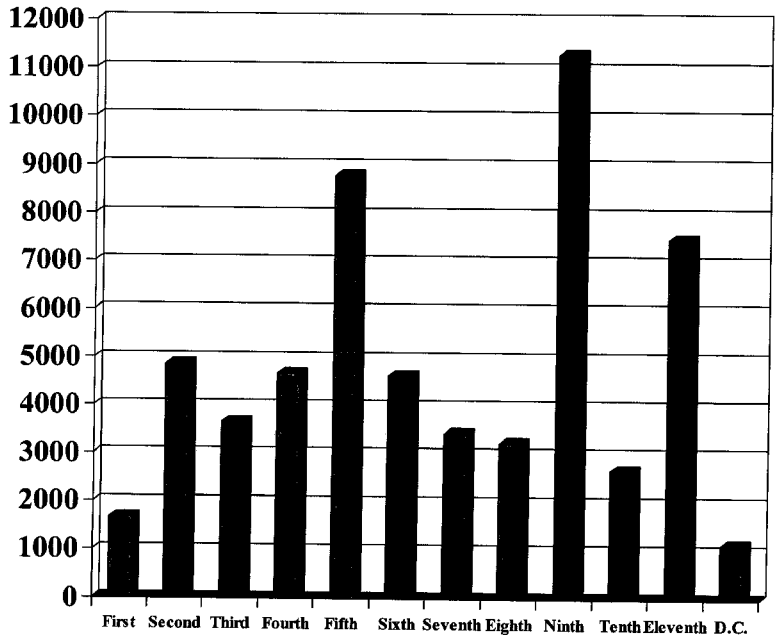
Population by Circuit



SOURCE: U.S. Census Bureau, States Ranked by Estimated 2002 Population, http://eire.census.gov/popest/data/states/tables/ST-EST2002-01.php; U.S. Census Bureau, Census 2000 Results for the Island Areas, http://www.census.gov/population/www/cen2000/islandareas.htmland www.census.gov/ipc/ww/idbsum.html

Exhibit 9

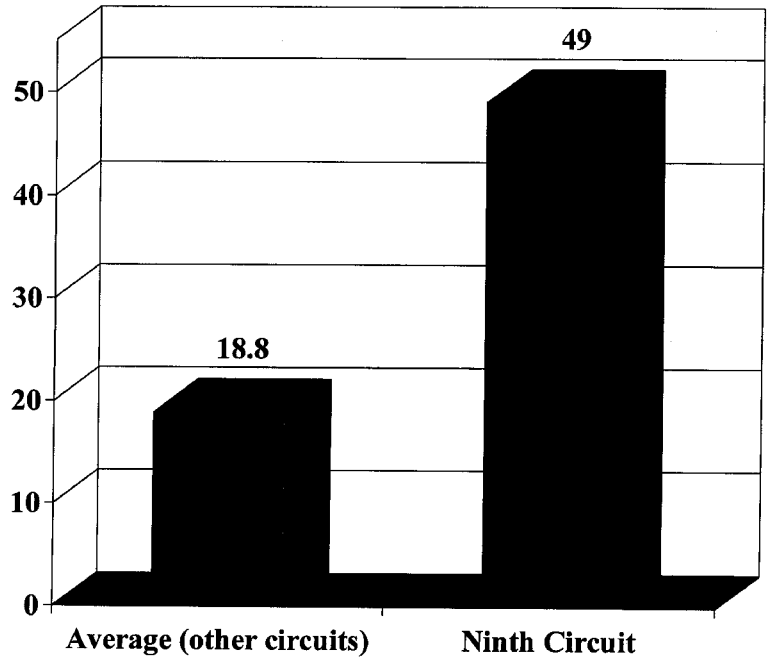
Number of Appeals Filed per Circuit



SOURCE: Ninth Circuit AIMS database, Fiscal Year 2002, October 1, 2001 to September 30, 2002; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director, http://www.uscourts.gov/judbus2002/contents.html

Exhibit 10

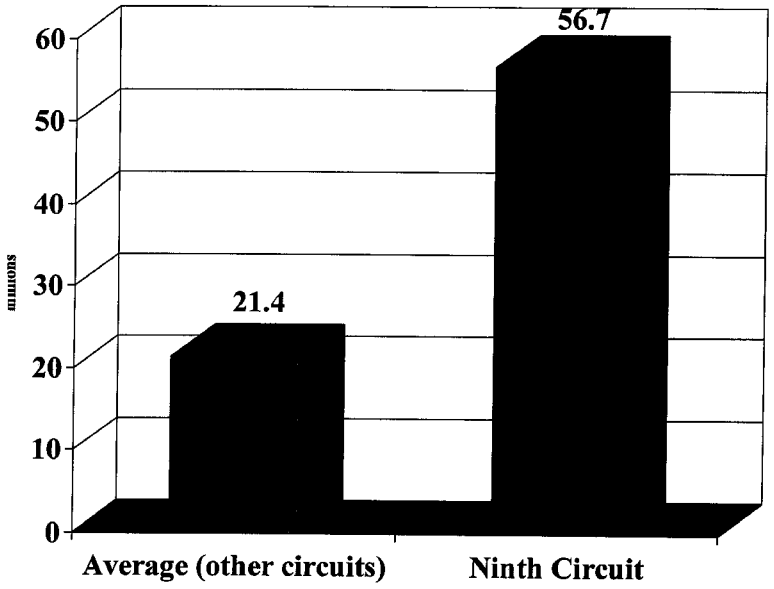
The Ninth Circuit has more than double the average of total judges (authorized + senior) of all other circuits.



SOURCE: 28 U.S.C. § 44 (2003); 2002 Appellate Judicial Caseload Profile, http://www.uscourts.gov/cgi-bin/cmsa2002.pl

Exhibit 11

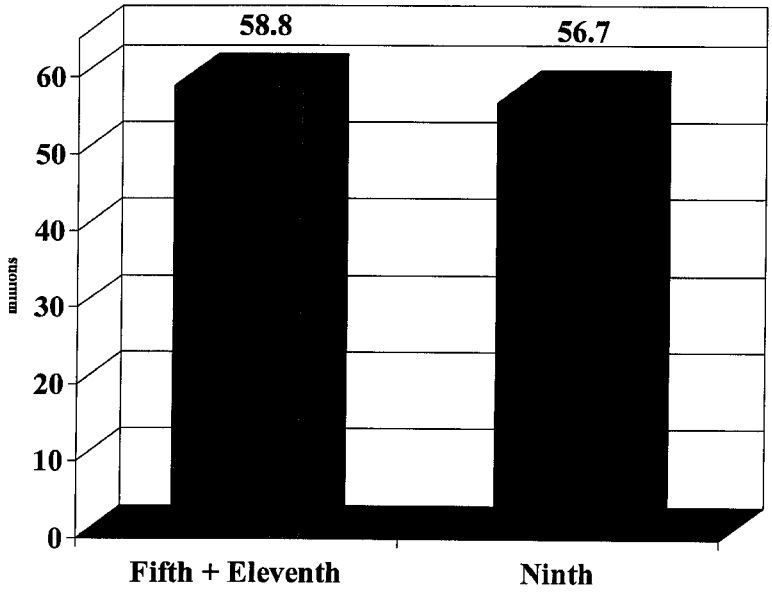
The Ninth Circuit has more than double the average population of all other circuits.



SOURCE: U.S. Census Bureau, States Ranked by Estimated July 1, 2001 Population, http://eire.census.gov/popest/data/states/tables/ST-EST2002-01.php; U.S. Census Bureau, Census 2000 Results for the Island Areas, http://www.census.gov/population/www/cen2000/islandareas.htmland www.census.gov/ipc/ww/idbsum.html

Exhibit 12

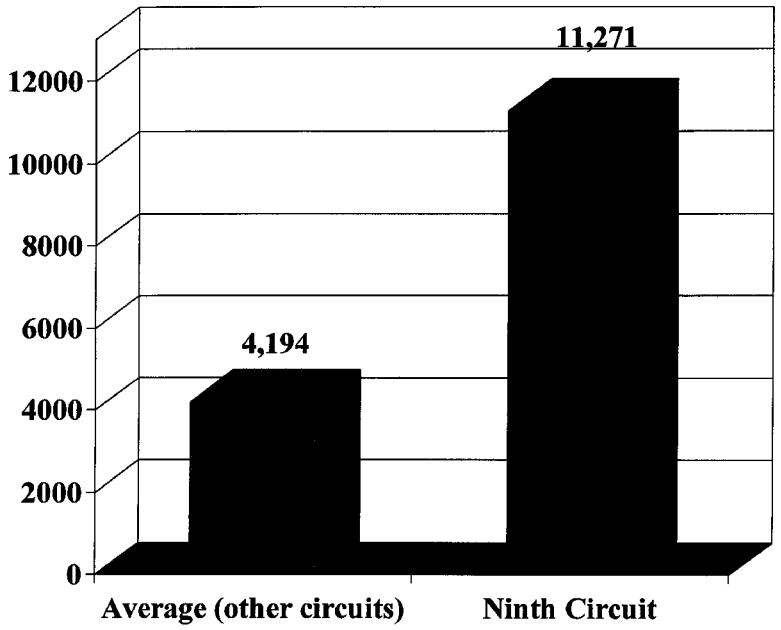
The Eleventh Circuit was carved out of the old Fifth Circuit in 1981 largely because of size. Today's Ninth Circuit is <u>over 96%</u> of the size of the current Fifth and Eleventh <u>combined</u>!



SOURCE: Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director, Table B: U.S. Courts of Appeals -- Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2002, http://www.uscourts.gov/judbus2002/contents.html

Exhibit 13

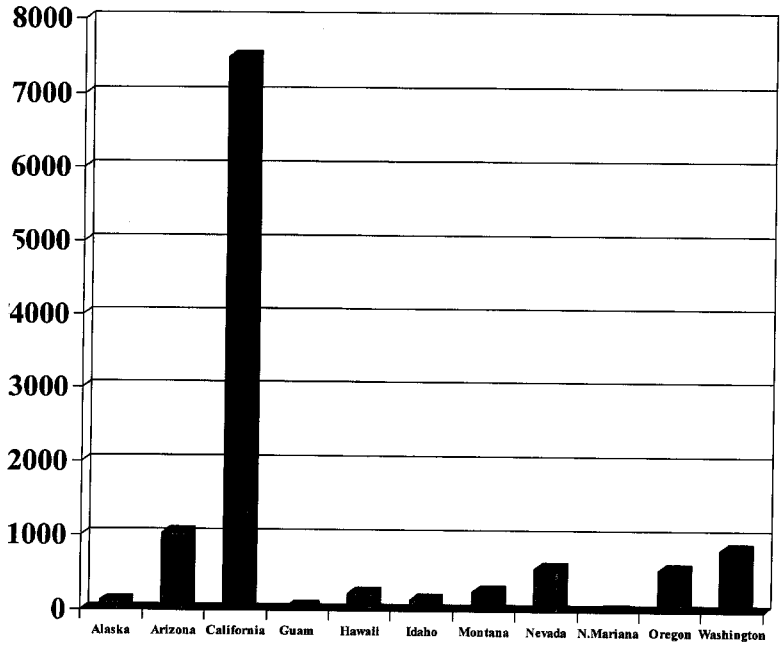
The Ninth Circuit has nearly triple the average number of appeals filed of all other circuits.



SOURCE: Ninth Circuit AIMS database, Fiscal Year 2002, October 1, 2001 to September 30, 2002; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director, http://www.uscourts.gov/judbus2002/contents.html

Exhibit 14

California alone accounts for two thirds of all appeals filed within the Ninth Circuit.



SOURCE: Ninth Circuit AIMS database, Fiscal Year 2002, October 1, 2001 to September 30, 2002.

Exhibit 15

Number of Judges by Circuit

Court	Headquarter City	Appellate Judgeships	%	Senior Judges	%	Total Judges*	% U.S.
First	Boston, MA	6	3.6%	5	5.6%	11	4.3%
Second	New York, NY	13	7.8%	11	12.2%	23	9.0%
Third	Philadelphia, PA	14	8.4%	7	7.8%	21	8.2%
Fourth	Richmond, VA	15	9.0%	1	1.1%	16	6.3%
Fifth	New Orleans, LA	17	10.2%	5	5.6%	22	8.6%
Sixth	Cincinnati, OH	16	9.6%	12	13.3%	28	10.9%
Seventh	Chicago, IL	11	6.6%	4	4.4%	15	5.9%
Eighth	St. Louis, MO	11	6.6%	9	10.0%	20	7.8%
Ninth	San Francisco, CA	28	16.8%	21	23.3%	49	19.1%
Tenth	Denver, CO	12	7.2%	7	7.8%	19	7.4%
Eleventh	Atlanta, GA	12	7.2%	6	6.7%	18	7.0%
D.C.	Washington, DC	12	7.2%	2	2.2%	14	5.5%
Total		**167**	**100%**	**90**	**100%**	**256**	**100%**

* Total judges includes authorized judgeships and senior judges.

SOURCE: 28 U.S.C. § 44; 2002 Appellate Judicial Caseload Profile, http://www.uscourts.gov/cgi-bin/cmsa2002.pl

Exhibit 16

Population and Caseload by Circuit, 2002 Court Year

Court	Population*	% Pop.	Appeals**	% Appeals
First	13,925,852	4.8%	1,667	2.9%
Second	23,234,627	7.9%	4,870	8.5%
Third	21,841,551	7.5%	3,643	6.3%
Fourth	26,989,881	9.2%	4,658	8.1%
Fifth	29,134,321	10.0%	8,784	15.3%
Sixth	31,361,893	10.7%	4,619	8.0%
Seventh	24,200,884	8.3%	3,418	6.0%
Eighth	19,463,491	6.7%	3,216	5.6%
Ninth	56,715,478	19.4%	11,271	19.6%
Tenth	15,386,158	5.2%	2,661	4.6%
Eleventh	29,759,967	10.2%	7,472	13.0%
D.C.	570,898	0.2%	1,126	2.0%
Total	**292,585,001**	**100%**	**57,405**	**100%**

* All population figures are based on U.S. Census 2002 estimates. The total U.S. population in 2002, which does not include Puerto Rico or island territories, was estimated at 288,368,698.

** Ninth Circuit caseload numbers were generated by its internal AIMS database. All other caseload numbers come from the Administrative Office of the United States Courts. Both sets of numbers cover the same time period: Oct. 1, 2001-Sept. 30, 2002.

SOURCE: Ninth Circuit AIMS database, Fiscal Year 2002, October 1, 2001 to September 30, 2002; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director, http://www.uscourts.gov/judbus2002/contents.html
U.S. Census Bureau, States Ranked by Estimated July 1, 2002 Population, http://eire.census.gov/popest/data/states/tables/ST-EST2002-01.php;
U.S. Census Bureau, 2002 Estimates for the Island Areas, http://www.census.gov/ipc/www/idbsum.html

Exhibit 17

Population and Number of Appeals by District Within Ninth Circuit, 2002 Court Year

Court	City	Authorized District Judgeships	Population*	% Pop.	Appeals	% Appeals
D. Alaska	Anchorage	3	643,786	1.1%	118	1.0%
D. Arizona	Phoenix	12	5,456,453	9.6%	1,026	9.1%
C.D. California	Los Angeles	27	17,700,680	31.2%	3,910	34.7%
E.D. California	Sacramento	7**	7,042,861	11.9%	995	8.8%
N.D. California	San Francisco	14	7,488,670	13.6%	1,695	15.0%
S.D. California	San Diego	8	3,052,908	5.5%	885	7.9%
D. Guam	Agana	1	161,057	0.3%	34	0.3%
D. Hawaii	Honolulu	4**	1,244,898	2.2%	229	2.0%
D. Idaho	Boise	2	1,341,131	2.4%	143	1.3%
D. Montana	Helena	3	909,453	1.6%	260	2.3%
D. Nevada	Las Vegas	7	2,173,491	3.8%	574	5.1%
D. N. Mariana Is.	Saipan	1	74,003	0.1%	16	0.1%
D. Oregon	Portland	6	3,521,515	6.2%	561	5.0%
E.D. Washington	Spokane	4	1,336,844	2.4%	174	1.5%
W.D. Washington	Seattle	7	4,732,512	8.4%	651	5.8%
TOTAL		**107**	**56,715,478**	**100%**	**11,271**	**100%**

* All population figures were calculated using 2002 estimates. Populations of California and Washington districts were calculated by adding the relevant 2002 U.S. Census county population estimates.
** Includes one temporary judgeship.

SOURCE: 28 U.S.C. § 133; Ninth Circuit AIMS database, Fiscal Year 2002, October 1, 2001 to September 30, 2002; U.S. Census Bureau, States Ranked by Estimated July 1, 2002 Population, http://eire.census.gov/popest/data/states/tables/ST-EST2001-04.php; U.S. Census Bureau, 2002 Estimates for the Island Areas, http://www.census.gov/ipc/www/idbsum.html

Exhibit 18

Population and Number of Appeals by State Within Ninth Circuit, 2002 Court Year

State	Authorized District Judgeships	Population*	% Pop.	Appeals	% Appeals
Alaska	3	643,786	1.1%	118	1.0%
Arizona	12	5,456,453	9.6%	1,026	9.1%
California	56**	35,116,033	61.9%	7,485	66.4%
Guam	1	163,593	0.3%	34	0.3%
Hawaii	4**	1,244,898	2.2%	229	2.0%
Idaho	2	1,341,131	2.4%	143	1.3%
Montana	3	909,453	1.6%	260	2.3%
Nevada	7	2,173,491	3.8%	574	5.1%
N. Mariana Islands	1	76,129	0.1%	16	0.1%
Oregon	6	3,521,515	6.2%	561	5.0%
Washington	11	6,068,996	10.7%	825	7.3%
TOTAL	**107**	**56,715,478**	**100%**	**11,271**	**100%**

* All population figures were calculated using 2002 U.S. Census estimates.
** Includes one temporary judgeship.

SOURCE: 28 U.S.C. § 133; Ninth Circuit AIMS database, Fiscal Year 2002, October 1, 2001 to September 30, 2002; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2002 Annual Report of the Director, http://www.uscourts.gov/judbus2002/contents.html; U.S. Census Bureau, States Ranked by Estimated July 1, 2002 Population, http://eire.census.gov/popest/data/states/tables/ST-EST2001-04.php; U.S. Census Bureau, 2002 Estimates for the Island Areas, http://www.census.gov/ipc/www/idbsum.html

Mr. SMITH. Judge Kozinski.

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

Judge KOZINSKI. Good afternoon, Mr. Chairman, and Members of the Committee. My name is Alex Kozinski. I am a judge on the Ninth Circuit. Like my junior colleague Judge O'Scannlain, I was appointed by President Reagan, and I am confident that when Judge O'Scannlain reaches my level of seniority, he will see the error of his ways.

I want to start out by thanking very seriously the Committee for allowing me to testify and for the courtesy it has shown in the

process. And I want to specifically commend the Committee staff. They are just wonderful. I have testified here twice, and it really speaks well for the Committee and its Chairman that they have such wonderful people working for them and make us out-of-towners feel so comfortable.

I will submit my statement for the record, and I don't want to reiterate the dry facts and figures and statistics to which I allude there. Instead, what I would like to talk about in the few minutes that I have is an illustration of how a process works with reference to the case that Congresswoman Waters referred to, the California recall case, the *Southwest Voter Registration* v. *Shelley* case. I believe this case illustrates that the Ninth Circuit is neither too big nor too far dispersed nor too diverse to deal with its business effectively and quickly.

As you may recall, and probably don't, but the record shows the opinion of the three-judge panel enjoying the election in California was issued at 10 o'clock on September 15th, 2003. Thirteen minutes later it was circulated to the entire court. At 4:12 a.m., the following day, Tuesday, 16 hours later, there was an en banc call made by one of the judges of the circuit with not simply a call but also a memorandum of law supporting the en banc call.

At 11:24 the next day, only 24 hours after the opinion was issued, the en banc coordinator issued an order notifying the parties that the call had been made and asking for their views.

Only an hour later, schedule was set for internal circulation of memos.

During the 3 days that we had to circulate memos in the case, more than 25 memos were circulated by 15 different judges in seven States. The voting was set to start on Friday morning at 9 o'clock, and it was completed at 11:03 a.m., 2 hours and 3 minutes later.

Four minutes after that, 11:07 on Friday morning, an en banc panel was drawn, and 12 minutes—I am sorry—an order was filed notifying the world that the case had gone en banc, and 12 minutes after that, 11:15 a.m., we had a panel of judges drawn to sit in the case. The case was heard the following Monday.

As some of you may recall having watched the hearings, judges in that case came from California, Arizona, Oregon, Washington, Nevada, and Alaska. I hope I am not being presumptuous in saying that those who observed the hearing believe the judges were well prepared and asked pertinent questions and fully understood the issues. And less than a day later, the following morning, the court, consisting of judges from seven States, from judges appointed by Presidents from Clinton—from Carter to Clinton and every President in between, issued an unanimous opinion that was so well accepted that put the process—voting process well intact, that even those who disagreed with the result felt it was unnecessary and perhaps hopeless to take it to the Supreme Court, it was so well received, and the appellants in that case notified that they would not take an appeal.

Now, I believe the case is more visible and therefore I have spoken about it, about the speed with which the court acted, despite its size, despite the diversity in the number of the judges. And the fact that we were able to get the job accomplished as quickly and

as effectively, I think, speaks quite well, and I think refutes the notion that the Ninth Circuit is somehow too unwieldy, too big, too diverse, or too acrimonious in any sense to remain intact—and I believe that that case is not unique. From my own experience on the court through 18 years, longer than Judge O'Scannlain——

Judge O'SCANNLAIN. By 1 year.

Judge KOZINSKI. Well, it was an important year. I believe that that case reflects the work of the court, and I urge the Committee to, after careful consideration, reject the bill.

Mr. SMITH. Thank you, Judge Kozinski.

[The prepared statement of Judge Kozinski follows:]

STATEMENT OF CIRCUIT JUDGE ALEX KOZINSKI
TO THE HOUSE JUDICIARY SUBCOMMITTEE ON COURTS
October 21, 2003
Re: HR 2723

I appreciate the opportunity to appear before you today. My name is Alex Kozinski. I was appointed to the Ninth Circuit in 1985 by President Ronald Reagan, and I maintain my chambers in Pasadena, California. I am here today to speak in opposition to HR 2723, the Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003.

The question before the subcommittee is how best to administer justice in the region covered by the Ninth Circuit, and whether HR 2723 achieves that purpose. I submit it does 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 public that it serves that division is the appropriate remedy.

I plan to focus my remarks on three subjects which I believe demonstrate that this circuit functions effectively. The first is the systems our court has in place to maintain consistency of law; second, our en banc process; and third, the use of technology in managing a large appellate court. Not surprisingly, all three of these subjects are interconnected.

Consistency of law: One of the concerns expressed about a large circuit is its ability to achieve consistency in dispositions, and the ability of its judges to monitor opinions. The Court must be able to recognize potential or perceived conflicts early and address them directly and immediately. To that end, the Court

established a system of inventorying cases to make sure that issues were identified in each case, placed in a database and monitored to make sure that panels were alerted as to all other pending cases in which the same issue was being raised. This system of identifying issues and grouping cases, which is unique among the circuits, allows for efficient resolution of scores of cases at a time once the central issue is decided by a panel. For example, after a final decision issued in *Magana-Pizano v. INS,* 200 F.3d 603 (9th Cir. 1999), which the Court had designated as the lead case raising immigration law issues regarding the retroactivity of a section of the Antiterrorism and Effective Death Penalty Act, one three-judge panel was able to resolve approximately ninety cases involving the same issues in a single sitting.

The Court's Pro Se Unit efficiently processes more than one third of our cases each year, proposing resolutions in cases in which procedural problems dictate the result or when the decision is compelled by existing case law. In addition, the Court issues pre-publication reports circulated to members of the Court to advise them two days in advance of the filing of every published opinion, and to identify cases pending before the Court that might be affected by the opinion. The Court also implemented a website on which published opinions were available immediately upon filing to members of the Court and the public. The Court continues to refine its practice of grouping for oral argument cases involving similar issues, in order to promote consistency, and to advise the lawyers in those cases of such groupings so they can coordinate their oral arguments before the Court.

The Court adopted an experimental rule that allows parties to cite to unpublished decisions of the Court in a petition for rehearing or a request for

publication. That rule has been in place for more than two years, and was recently extended. Very few requests are made, and to date neither requests for publication nor petitions for rehearing have identified a legitimate conflict among unpublished dispositions or published opinions.

Some judges complain about the difficulty in keeping up with reading the number of published opinions from our Circuit. That problem, if there is one, is not confined to our Circuit. Other circuits with fewer judges also have a high number of published opinions. For example, both the Seventh and Eighth Circuits issued more than 600 published opinions last year; our circuit published approximately 800. The sheer number of judges and law clerks examining our opinions makes it unlikely that any opinion will evade scrutiny for consistency and for legal soundness. More important, with the advances of computer aided legal research as well as the court's internal issue tracking system, one can get up to the minute information on the state of the law in a given subject matter with the stroke of a few keys.

We must also bear in mind that it is healthy to have a large number of published opinions in a circuit. It provides binding guidance to district courts and prevents an issue from being litigated repeatedly. It provides for the uniform application of federal over a large geographic area. Circuit division means that same issue will be litigated twice, and will necessarily result in the repetitive, or conflicting, resolution of issues. Dividing the circuit will result in judges duplicating their legal work. In other words, the same legal issue has to be decided twice. Thus, judicial resources are wasted, as well. The fact that a large number of judges look at a decision to decide whether it should be taken en banc means that cases get a much more thorough review in a large circuit. The process often results in corrective amendments.

Although not directly related to the consistency of the court's opinions, critics cite to a possibility of innumerable combinations of three judge panels in our circuit and the perceived problem in not sitting with other circuit judges on a regular basis, and how this might affect a consistent body of circuit law. I submit that is a non-problem. Our judges are well acquainted with one another and communicate constantly. It is a benefit to the development of the law of a circuit and the public it serves to have a diverse group of judges who approach the law from different perspectives and backgrounds. It is healthier than having the same three judges sit together for a year, who differ very little with one another, and who may feel some pressure to go along.

The En Banc Process: Members of the Court are extremely active in the en banc process, which is the ultimate mechanism for altering decisions of a three judge panel. Most split advocates point to our en banc procedures and how only eleven judges sit as the en banc court rather than the full court of 28 authorized judgeships. Here is what they almost never point out: every active Ninth Circuit judge participates in the decision whether to take a panel decision for en banc review. Extensive memoranda are exchanged and the commentary reflects the wide range of views on the subject matter of the appeal. The vote requirement is a statutory mandate – no matter the size of a circuit, a majority of the active judges must vote affirmatively for en banc review to occur. 28 U.S.C. § 4(c). There have been proposals to lower that requirement, most recently by Senator Feinstein, and that seems a far less costly and divisive approach than circuit division.

And in the unlikely event that six judges might command a majority of an 11-judge en banc court and express a view inconsistent with the views of the other 21 active judges on the court, the circuit rules provide for review by the full court

upon the request of any judge. This has never happened since the limited en banc rule was adopted by the Court in 1980. The Court accepts the decision of the en banc court as the law of the circuit.

Technological Advances: The advances in technology in the past quarter century have transformed the world, and that world includes the court system. The Ninth Circuit was the first circuit to institute an automated docketing system; we are now on the verge of an electronic web-based filing system. The use of instantaneous electronic mail has allowed circuit judges over wide geographic distances to communicate as if they were in the same courthouse. Videoconferencing for motion panels, and administrative meetings has become common place.

As noted earlier, the court's ability to manage its caseload, and to track novel and potential precedential though the use of computer programs has allowed this court to function more efficiently today than it ever has. I believe that HR 2723 would impede much of the progress we have made in managing a large appellate court.

As Chief Judge Schroeder referred to in her remarks, our Court's recent experience with the Recall case in California of Governor Gray Davis demonstrated how well and efficiently a large appellate court can work. The complaint in the case was filed in the district court in Los Angeles on August 7, 2003. The district judge denied the application for a temporary restraining order on August 20, 2003, and a notice of appeal and motion to expedite was filed on August 27, 2003. Following expedited briefing by the parties, oral argument took place before a three-judge panel in Pasadena on September 11, 2003. The three-judge panel issued its per curiam decision on September 15, 2003 reversing

the district court and enjoining the October 7, 2003 election. During this time, all of the pleadings in the case along with the digital recording of the September 11 hearing were immediately made available on our court's web page.

The three-judge panel stayed its opinion to allow the parties to pursue further appeals, through en banc review at the Ninth Circuit or through the Supreme Court of the United States. This Court voted to take the case en banc on Friday, September 19, 2003 and oral argument took place the following Monday, September 22, 2003 in San Francisco. All eleven members of the en banc court traveled to San Francisco for the argument. Oral argument was televised live on a number of television networks. The en banc court of eleven judges issued its unanimous per curiam opinion the next day, September 23, 2003, affirming the district court and allowing the election to proceed as scheduled. The parties did not file any further appeals with the Supreme Court of the United States. The election proceeded as scheduled on October 7, 2003.

The system worked and it worked exceedingly well.

Thank you for allowing me the opportunity to testify.

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Mr. SMITH. Professor Hellman.

STATEMENT OF PROFESSOR ARTHUR D. HELLMAN, PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

Mr. HELLMAN. Thank you, Mr. Chairman, for holding a hearing on this new bill and for inviting me to express my views. It is certainly true that there have been many hearings in both houses of Congress on the subject of reorganizing the Ninth Circuit. But as I see it, the issue today is significantly different from what it has been in the past.

In the past, the issue has always been should Congress divide the Ninth Circuit, or should Congress leave the circuit alone? That is not the issue today.

Earlier this year, the Judicial Conference of the United States asked Congress to authorize seven additional judgeships for the Court of Appeals. That was in response to a request from the Ninth Circuit.

As I said last June when I had the privilege of testifying before this Subcommittee, there is no doubt that that request is justified. So the choice today is this: Should Congress simply authorize the seven new judgeships, creating a court of 35 active judges, or should Congress move forward with H.R. 2723, which authorizes the new judgeships but also divides the circuit?

I think that is a question on which reasonable people can disagree, and it is because there is so much that can be said on both sides that my statement is so regrettably long.

What I would like to do now is to identify three issues that particularly require discussion and investigation. First, there is the fact that even today the judges sit with one another so infrequently. Here is one example. Judge William Fletcher joined the court in February 1999. Today, 4-1/2 years later, he still has not sat on a regular argument panel with all of the active judges appointed through 2000.

Outside the Ninth Circuit, most appellate judges would say that an appellate court cannot operate effectively when the judges have so little opportunity to sit together in deciding cases. But maybe they say that because their only experience is on a smaller court, and, as Justice Frankfurter used to say, they are confusing the familiar with the necessary.

On the other hand, it is also possible that the judges of the Ninth Circuit, when they say there is no problem, are confusing the necessary with the desirable. I am not a judge, and I cannot tell you which of those positions is correct. I do say this: It is something the judges should be thinking very hard about and discussing with one another. They should be looking at the data, at the printouts, and asking: Are we satisfied with this way of carrying out our work today? What will our professional lives be like on a court of 35 active judges?

The second issue is the one that the Chairman has mentioned, delay; delay in the disposition of cases by the Ninth Circuit Court of Appeals.

Now, the record doesn't look very good, but that alone is not a reason for dividing the circuit. You would have to find a causal connection between the size of the circuit and delay, and that has just not been established. But that doesn't mean that the issue should be off the table. The pattern is a very troubling one, and it is something that should be investigated in a systematic and scientific way.

If it does turn out that there is a link to circuit size, that will have to be considered along with the other factors.

The third issue involves the flood of immigration appeals, discussed I think in some of the other testimony. There are a number of questions raised about this. To what extent is this phenomenon a product of the Justice Department's decision to clear a backlog,

which I believe it has now done, and to what extent is it the product of circumstances that are going to continue? Should these appeals—and there are just a huge number of them—should they be weighted as ordinary cases, or should they maybe be weighted a bit like pro se cases because so many of them involve similar issues?

And there is also a broader aspect of counting these cases. You cannot ignore these appeals in making the choice I have identified between those two courses of action, but it would be shortsighted to let them overshadow everything else.

Well, those are only a sampling of the issues that should be discussed. Some of those issues are relevant to all members of the Ninth Circuit legal community. Others involve matters that are uniquely within the experience of the Court of Appeals judges. What is important is that the discussion take place.

I continue to believe, and I do want to emphasize this, I continue to believe that it would be wrong for Congress to divide a circuit unless the proposed reorganization has substantial support from the judges and lawyers in the affected region. They are the ones who know best what is going on there. But the judges and lawyers—and I think particularly the judges—have a correlative obligation to formulate their position through a process that is thorough and open-minded. And that includes a willingness to reconsider previously stated positions in the light of new information and new legislative proposals such as H.R. 2723.

I want to thank you again, Mr. Chairman, for holding this hearing, because it puts these issues on the table, and it invites the judges to take the next step in this process. Thank you.

Mr. SMITH. Thank you, Professor Hellman.

[The prepared statement of Mr. Hellman follows:]

Statement of

Arthur D. Hellman
Professor of Law and Distinguished Faculty Scholar
University of Pittsburgh School of Law

House Committee on the Judiciary
Subcommittee on Courts, the Internet, and
Intellectual Property

Hearing on

H.R. 2723

"The Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003"

October 21, 2003

Arthur D. Hellman
University of Pittsburgh School of Law
Pittsburgh, PA 15260
Telephone: 412-648-1340
Fax: 412-648-2649
E-mail: hellman@law.pitt.edu

Executive Summary

1. General principles. Congress should not restructure a circuit unless there is substantial evidence indicating that the circuit will be better off with a particular reorganization than with the status quo or other possible courses of action. The most persuasive evidence generally will be found in the experience of the legal community of the circuit, particularly the judges.

2. What has not changed. Three familiar arguments for dividing the Ninth Circuit are no more persuasive today than they have been in the past. These arguments, which focus on the "coherence and correctness" of circuit law, are undercut by empirical studies.

3. The prospect of a 50-judge court. The primary reason for taking a fresh look at the idea of dividing the circuit is the recommendation by the Judicial Conference of the United States that Congress authorize 7 new judgeships for the Ninth Circuit Court of Appeals. With 35 active judges, the members of the court would sit with one another even less frequently than they do today. (For example, after joining the Ninth Circuit Court of Appeals, a judge must ordinarily serve for more than three years before he or she will sit on a regular argument calendar with all other active judges.)

Arguably, this dispersion impairs the court's ability to carry out its work effectively. But no outsider can speak with authority on that point. I urge the judges to consider the question in light of the new data and their own experiences on a 28-judge court.

4. Other reasons for reconsideration. The prospect of a 50-judge court also provides an incentive to take a fresh look at aspects of the court's operations that, at least in the past, would not have sufficed to justify a division of the circuit. Among them: a persistent history of delay in the disposition of cases.

5. What's in it for the new Ninth Circuit? The potential benefits of H.R. 2723 are not as great for the judges of the proposed new Ninth Circuit as they would be for the judges of the northwest, but they are more than de minimis. They include: more opportunities for the judges to sit with each other, a reduction in travel, and the prospect of a more broadly participatory Circuit Judicial Conference.

6. The arguments against dividing the circuit. Opponents emphasize the value of having a single court interpret and apply federal law in the west. But the "uniformity" argument is undercut by empirical studies showing that conflicts between circuits generally do not present a serious problem in the legal system.

Most of the other concerns are addressed by H.R. 2723. However, even under H.R. 2723 the judges from Arizona, California, and Nevada would lose out

on some of the caseload relief that the Judicial Conference has said is needed. To avoid this, the judges from the northwest could commit themselves in advance to providing the judgepower that would help to redress the inequality in per-judge workloads in the two circuits.

7. Conclusion. If Congress accepts – as I believe it should – the conclusion of the Judicial Conference that the Ninth Circuit needs 7 additional appellate judgeships, then the choice lies between moving forward with H.R. 2723 and simply adding 7 judgeships to the present Ninth Circuit Court of Appeals. That is a question on which reasonable people can disagree. This hearing is a valuable first step in the process of discussion and inquiry that can lead to a sound judgment on the best course of action.

Contents

Statement of
Arthur D. Hellman

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to express my views at this hearing on H.R. 2723, the "Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003."

By way of personal background, I am a professor of law and Distinguished Faculty Scholar at the University of Pittsburgh School of Law. I have been studying the Ninth Circuit for more than 25 years, starting in the mid-1970s, when I served as Deputy Executive Director of the Commission on Revision of the Federal Court Appellate System (Hruska Commission). In the late 1980s I supervised a distinguished group of scholars in analyzing the innovations of the Ninth Circuit and its court of appeals.[1] From 1999 through 2001, I served on the Ninth Circuit Court of Appeals Evaluation Committee appointed by Chief Judge Procter Hug, Jr. Turning to the present – and by way of disclosure – I was consulted by Rep. Simpson in the drafting of H.R. 2723. Of course, in my testimony today I speak only for myself.

Because this statement is rather lengthy, I begin with a roadmap and summary. The first part of the statement offers some general guidelines for considering legislation such as H.R. 2723. The standard I suggest is this: Congress should not restructure a circuit unless there is substantial evidence indicating that the circuit will be better off with a particular reorganization than with the status quo or other possible courses of action.

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[1] The results of the research were published as a book by Cornell University Press. See RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS (Arthur D. Hellman ed. 1990) [hereinafter RESTRUCTURING JUSTICE].

The remainder of the statement examines the considerations relevant to making that judgment. Here are some of the major points:

- Part II briefly reviews three familiar arguments for dividing the Ninth Circuit. The arguments focus on the "coherence and correctness" of the law of the circuit. They are not persuasive because they are undercut by empirical studies.
- Parts III and IV explain why recent developments lead me to believe that the idea of dividing the circuit deserves a new look. Primary among these is the recommendation by the Judicial Conference of the United States that Congress authorize 7 new judgeships for the Ninth Circuit Court of Appeals.
- With 35 active judges, the members of the court would sit with one another even less frequently than they do today. (For example, after joining the Ninth Circuit Court of Appeals, a judge must ordinarily serve for more than three years before he or she will sit on a regular argument calendar with all other active judges.) Arguably, this dispersion impairs the court's ability to carry out its work effectively. But no outsider can speak with authority on that point. I urge the judges to consider the question in light of the new data and their own experiences on a 28-judge court.
- The prospect of a 50-judge court also provides an incentive to take a fresh look at aspects of the court's operations that, at least in the past, would not have sufficed to justify a division of the circuit. Among them: a persistent history of delay in the disposition of cases.
- Part V asks: how would H.R. 2723 help the judges of the proposed new Ninth Circuit? The benefits are not as great as they would be for the judges of the northwest, but they are more than de minimis. They include: more opportunities for the judges to sit with each other, a reduction in travel, and the prospect of a more broadly participatory Judicial Conference.
- Part VI considers the arguments against dividing the circuit. The "uniformity" argument is not persuasive, and most of the other concerns are addressed by H.R. 2723. However, even under H.R. 2723 the judges from Arizona, California, and Nevada would lose out on some of the caseload relief that the Judicial Conference has said is needed. To avoid this, the judges from the northwest could commit

> themselves in advance to providing the judgepower that would help to redress the inequality in per-judge workloads in the two circuits.

How should the balance be drawn? If Congress accepts – as I believe it should – the conclusion of the Judicial Conference that the Ninth Circuit needs 7 additional appellate judgeships, then the choice lies between moving forward with H.R. 2723 and simply adding 7 judgeships to the present Ninth Circuit Court of Appeals. That is a question on which reasonable people can disagree. This hearing is a valuable first step in the process of discussion and inquiry that can lead to a sound judgment on the best course of action.

I. General Principles

Before turning to details, it is helpful to look at the issue in general terms. What principles should guide Congress and its Judiciary Committees in considering legislation such as H.R. 2723? What criteria should the judges and lawyers of the Ninth Circuit focus on as they make their own evaluation of the proposed Judgeship and Reorganization Act?

First, some proponents of a circuit split openly acknowledge that they are motivated by disagreement with decisions of the Ninth Circuit Court of Appeals. This is wrong. As the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission) said, "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."[2]

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[2] Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 6 (1998) [hereinafter White Commission Report]. The Commission was chaired by the late Justice Byron R. White.

Second, I continue to believe that it would be a mistake for Congress to divide a circuit unless the proposed reorganization has substantial support from the judges and lawyers in the affected region. This is partially a matter of comity – the respect due to a co-equal branch of the government. It is also the course suggested by history – the history of circuit reorganization controversies over the last century.[3] And it is good policy as well. If the arguments in favor of a split have not persuaded those who would be most directly affected by any inadequacies in the existing structure, it is hard to see why Congress should conclude otherwise.

But comity is a two-way street. If Congress is to give such heavy weight to the views of the judges and lawyers, it must have confidence in the process by which those views have been reached. This means that the judges and lawyers (particularly the judges) have an obligation to reconsider previously stated positions in the light of new information and to give a fair and thorough hearing to reasonable new legislative proposals.

In any event, it must be acknowledged that Congress has a constitutional responsibility to make its own assessment of the need for change. This leads to the question: what standard should Congress apply in considering proposals for circuit realignment?

The Long Range Plan of the Federal Courts, approved by the Judicial Conference of the United States in 1995, offered this standard: "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to

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[3] For a brief account of the history, see Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 Montana L. Rev. 261, 268-70 (1996) [hereinafter Hellman, Dividing the Ninth Circuit].

deliver quality justice and coherent, consistent circuit law in the face of increasing workload."[4]

This is an extraordinarily demanding standard. I doubt very much that Congress would insist on having "compelling empirical evidence demonstrating … dysfunction" before moving ahead with the restructuring of any other governmental institution. While it may be appropriate to apply a somewhat higher standard to judicial institutions, this one goes too far. Among other things, the nature of the issue is such that empirical evidence will never be "compelling," especially to those who resist the conclusion to which it points.[5]

There is a further difficulty. Empirical evidence requires time to gather, analyze, and absorb. Legislation too takes time. Under the approach of the Long Range Plan, relief for a beleaguered circuit would often be delayed until long after most lawyers and judges have concluded that the existing structure is indeed dysfunctional.

So I do not think Congress should accept the standard of the Long Range Plan. Instead, I suggest this: Congress should not restructure a circuit unless there is substantial evidence indicating that the circuit will be better off with a particular reorganization than with the status quo or other possible courses of action. The burden remains on the proponents of change. The most persuasive evidence generally will be found in the experience of the legal community of the circuit, particularly the judges. But the focus must be on the benefits and drawbacks of a

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[4] Judicial Conference of the United States, Long Range Plan of the Federal Courts 44 (1995) [hereinafter Long Range Plan].

[5] This holds true both ways. I have carried out extensive empirical research on the asserted problem of inconsistency in Ninth Circuit panel decisions, see infra notes 9 & 10, but that research has never persuaded those who believe that pervasive inconsistency is inevitable in a large circuit.

particular reorganization plan. Congress does not legislate in the abstract; benefits and drawbacks cannot be assessed in the abstract.

With this standard in mind, I turn now to the considerations bearing on the desirability of circuit realignment generally and H.R. 2723 in particular.

II. What Has Not Changed

The White Commission believed that "a smaller decisional unit [than the existing Ninth Circuit Court of Appeals] can more effectively maintain the coherence and correctness of the law of that unit."[6] That belief underlies three of the most often heard arguments for dividing the Ninth Circuit. But these arguments are no more persuasive today than they have been in the past.[7]

First, proponents of the split insist that the circuit's size "increases the likelihood of inconsistent decisions between panels within the circuit."[8] There is no empirical support for this argument, and indeed the existing empirical evidence (primarily my own studies) strongly negates the assertion. Of particular interest is a comparative study published in 1999.[9] This research seriously undercuts the contention that conflicts between panels are more prevalent in the Ninth Circuit than in smaller circuits.[10]

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[6] White Commission Report, supra note 2, at 51.

[7] I have dealt with these arguments in great detail in my published writings. In this statement I offer only brief summaries of my conclusions, with citations to some of the relevant articles.

[8] Senate Judiciary Committee, Ninth Circuit Court of Appeals Reorganization Act of 1995, S. Rep. No. 104-197 at 10 (1995) [hereinafter 1995 Senate Report]. This report endorsed a bill to split the Ninth Circuit.

[9] Arthur D. Hellman, Precedent, Predictability, and Federal Appellate Structure, 60 U. Pitt. L. Rev. 1029 (1999).

[10] See id. at 1088-1100. For a summary of previous studies, with citations to detailed reports, see Hellman, Dividing the Ninth Circuit, supra note 3, at 274-80.

Second, proponents frequently emphasize the Ninth Circuit's record of reversals by the Supreme Court. I do think that the record is troubling, but after careful empirical analysis I was not able to substantiate a causal connection between the court's size and the pattern of reversals.[11]

Third, proponents criticize the limited en banc court as insufficiently representative. I do not share these criticisms. Again, I rely in part on empirical research. My studies indicate that, "far more often than not, decisions of the limited en banc court in the Ninth Circuit do reflect the position of a majority of the court's active judges."[12] Further, it is open to question whether majority rule is an essential characteristic of multi-judge courts that generally hear cases in panels of three.[13]

Thus, with respect to two of the arguments (inconsistency and the limited en banc), the evidence does not show that a problem exists. As for the third (the reversals by the Supreme Court), there may be a problem, but it cannot be traced to the size of the circuit.

III. The Prospect of a 50-Judge Court

If the arguments just discussed encompassed all of the relevant considerations, I would probably continue to simply urge Congress to leave the Ninth Circuit alone. However, recent developments lead me to believe that the idea of dividing the circuit deserves a fresh look. Primary among these is the prospect of a substantial expansion in the size of the Court of Appeals.

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[11] See Arthur D. Hellman, Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals, 34 U.C. Davis L. Rev. 425, 431-52 (2000).

[12] Id. at 462.

[13] See id. at 462-66.

A. The Judicial Conference request and the FJC study's concern

Currently, the Ninth Circuit Court of Appeals has 28 authorized judgeships. On March 18, 2003, the Judicial Conference of the United States recommended creation of 7 new judgeships (5 permanent, 2 temporary) for the court. The Judicial Conference acted in response to the court's request for 7 permanent judgeships.

As the Judicial Conference Subcommittee on Judicial Statistics pointed out in explaining the recommendation, adjusted filings per panel in the Ninth Circuit are now the third largest in the nation.[14] Even with 7 additional judgeships, adjusted filings would be more than 20% above the standard that triggers consideration of a judgeship request. As I testified at a hearing of this Subcommittee in June 2003, there can be no doubt that the Judicial Conference recommendation is justified.

If the pending request is approved by Congress, the Ninth Circuit will become a court of 35 active judges. In addition, we can expect that the court will have a corps of between 15 and 20 senior judges who will regularly participate in the court's decisional work (except for en banc cases).[15] Thus, in practical terms, the court will be a court of 50 or more judges. I believe that there is a real question

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[14] The two circuits with the largest adjusted filings are the Fifth and the Eleventh. The judges of these circuits have decided, as a policy matter, that they will not request additional judgeships for their courts notwithstanding enormous increases in caseloads. See Federal Judiciary: Is There a Need for Additional Federal Judges? Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 108th Cong. at 61 (2003) (statement of Arthur D. Hellman) [hereinafter Judgeships Hearing].

[15] In 2002, the court had 14 senior judges who sat on four or more calendars in the course of the year. (This figure does not include Judge Fernandez, who took senior status on June 1, 2002.) In January 1999, when the court of appeals had 7 vacancies, 35 judges voted at a court meeting. See White Commission Report Hearing, supra note 2, at 23 (statement of Chief Judge Procter Hug, Jr.). On this basis, I think it is reasonable to assume that a court of 35 authorized judgeships is likely to have at least 15 senior judges who regularly participate in the decision of cases.

whether the judges on a court of that size will be able to know one another as members of a court should do.

In saying this, I do not embrace the concept of "representative collegiality" discussed by the Federal Judicial Center's 1993 report on structural alternatives.[16] But I do have concerns about the "process" element. I think there is at least some validity to the idea that when judges "feel themselves a part of a court and know the minds of their fellow judges,"[17] they will find it easier to reach agreement when agreement can be reached and easier to disagree amicably when disagreement is unavoidable. Perhaps, too, when judges must view their colleagues as men and women whom they will be seeing on a more or less regular basis rather than as disembodied names on opinions and e-mail messages, they will have a greater incentive to smooth out differences and to respect the spirit as well as the letter of unpalatable precedents.

Yet even if these ideas are valid as generalizations, they do not necessarily point to any kind of actual dysfunction in the Ninth Circuit Court of Appeals as it exists today. Nor do they necessarily tell us what we would like to know about the consequences of creating an appellate court in which 50 or more judges are regularly participating in the work of three-judge panels. Those questions require more searching inquiry.

B. Interaction among the judges: some empirical data

Even with a court of 28 judgeships, the White Commission said in its Final Report, "constraints on the assignment schedules of the court's judges have meant that some judges do not sit with every other judge even once in a three-year

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[16] Federal Judicial Center, Structural and Other Alternatives for the Federal Courts of Appeals 106 (1993).

[17] Id.

period."[18] To test this proposition, I have carried out a new study examining the experience of the 7 judges appointed by President Clinton in 1999 and 2000. The new research strongly confirms the White Commission's observation.

The study was carried out in July 2003.[19] As of that time, the 7 judges had served on the court for periods ranging from 2 years and 11 months (Judge Rawlinson) to 4 years and 5 months (Judge W. Fletcher). But not one of the 7 judges had sat on a regular argument panel with all of his or her active colleagues – let alone the many senior judges who regularly participate in the decision of cases.[20] Here are some details.

- Judge Paez joined the court in March 2000 and sat on his first argument calendar in June 2000. As of July 2003 he had not yet sat on an argument panel with 6 of the court's active judges (not counting the judges appointed by President George W. Bush). Nor had he participated in a motions/screening panel with any of those 6 judges.
- Judge Berzon also joined the court in March 2000 and sat on her first argument calendar in June 2000. As of July 2003, she too had not yet sat on an argument calendar with 6 of the court's active judges (again not counting George W. Bush appointees).[21] However, she participated in a motions/screening panel with 2 of the 6 judges.
- Judge W. Fletcher is the most senior of the judges in the group. He joined the court in February 1999 and sat on his first argument calendar the following month. As of July 2003 – more than 4 years later – he had not sat on an argument panel with 2 of the court's active

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[18] White Commission Report, supra note 2, at 47 n. 106.

[19] The study was based primarily on an examination of the court's public calendars, which are posted on the court's web site. This information was supplemented by Westlaw searches.

[20] Because of vacancies, the court never had a full complement of active judges during the period studied. For purposes of the study, Judge Fernandez, who took senior status on June 1, 2002, was included among the active judges. Judge Hug, who took senior status on Jan. 1, 2002, was not. The total number of active judges in the study was 24.

[21] If only full argument weeks are counted, the number would be 9.

judges.[22] He sat for only a single day of argument with 2 other active judges. He did not participate in a motions/screening panel with any of the 4 judges.

- Judge Fisher is the second most senior of the judges studied. He joined the court in October 1999 and sat on his first calendar in February 2000. As of July 2003, he had not sat on an argument panel with 5 of the court's active judges.[23] He participated with one of those judges in 2 motions/screening panels.

A fair summary is this: after joining the Ninth Circuit Court of Appeals, a judge must ordinarily serve for more than three years before he or she will sit on a regular argument calendar with all other active judges. Indeed, the data suggest that the process will take closer to four years than to three.[24]

C. The effect of adding new judgeships

How would these patterns be affected if Congress were to create the 7 additional judgeships without dividing the circuit, thus expanding the Ninth Circuit to a court of 35 active judges? It might seem obvious that on a larger court, the judges would sit even less frequently with each of their colleagues. But before reaching that conclusion, it is necessary to consider several variables whose interplay will determine the actual consequences of enlarging the court.

A detailed analysis will be found in Appendix A. That analysis yields two conclusions. First, taking all of the relevant considerations into account, I am quite

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[22] Both were judges who joined the court in 2000. Once again, the figure in the text does not include appointees of President George W. Bush.

[23] Two of the active judges who never sat on an argument panel with Judge Fisher participated with him in the decision of one case each. The 2 judges were drawn to replace Judge Wiggins, who sat on the February 2000 panel but died shortly afterwards.

[24] I acknowledge that the experience of new judges is not entirely representative, because a new judge's sittings must be fitted into calendars that were set up before he or she became a member of the court. Nevertheless, it is significant that after completing three years as a member of the Ninth Circuit Court of Appeals, a new judge probably will not have sat on a regular argument calendar with one-fourth of the court's active judges

confident that, for the foreseeable future, the Ninth Circuit Court of Appeals would use its new judgepower to increase the number of argument panels sitting each month. Second, the intuitive assessment is correct: adding 7 judges to a 28-judge court will probably diminish the frequency with which the members of the court sit with each of their colleagues.

D. Other possible responses to the findings

Even if the effect of expanding the court is to perpetuate or exacerbate the patterns revealed by the study, that would not necessarily be a reason for dividing the circuit. I can anticipate three lines of argument in response to the concern expressed by the White Commission.

First, one might point out that, as the White Commission itself acknowledged, "there are other opportunities for interaction [among the judges], such as en banc proceedings, court symposia, and committee work."[25] But en banc proceedings involve participation by 11 judges; thus, interaction with individual members of the limited en banc court is likely to be minimal. As for court symposia, court meetings, and committee work, these do not involve adjudication. While the judges may have the opportunity to work closely with one another, they would not gain an understanding of their colleagues' approach to deciding cases.

A second response is that White Commission did not take account of the Ninth Circuit's motions and screening panels.[26] That is true, but these panels do not give the judges the opportunity to delve into legal issues and learn one another's philosophies that argument panels do. By hypothesis, screening panels

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[25] White Commission Report, supra note 2, at 47-48 n. 106.

[26] The study reported above did so to this extent: I ascertained whether judges who did not sit together on an argument panel participated in a motions/screening panel. As indicated in the text, this additional information did not alter the overall conclusion.

decide only easy cases. These cases almost never generate published opinions. Occasionally a motion will present a difficult issue, but rarely will the panel publish an opinion. And without the need to agree on a rationale and an explanation that will have the status of precedent, the process is not likely to expose the "ways of thinking and reasoning"[27] that judges draw upon in cases where they must struggle to understand and apply the law.

Finally, one might respond with a question: So what? What difference does it make if the judges do not sit with one another except at long intervals? Does it really interfere with the court's ability to perform its error-correcting and law-declaring functions in an effective way?

Outside the Ninth Circuit, many if not most appellate judges would say that it does. They believe that frequent interaction in the decisional process does bring important and even necessary benefits. Judge Harry T. Edwards of the District of Columbia Circuit recently summarized this view:

> Familiarity is one of the major components of collegiality … Through the experience of working as a group, one becomes familiar with colleagues' ways of thinking and reasoning, temperaments, and personalities. All of this makes a difference in how smoothly and comfortably group members can share, understand, and assimilate each other's ideas and perspectives.[28]

On the other hand, Judge Edwards's observations may reflect only one way of carrying out the federal appellate function – the way that he has experienced and believes to be best.[29] It is quite possible that the system that has evolved in the Ninth Circuit is equally valid and equally effective.

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[27] Harry T. Edwards, The Effects of Collegiality on Judicial Decision Making, 151 U. Pa. L. Rev. 1639, 1648 (2003).

[28] Edwards, supra note 27, at 1647-48.

[29] Judge Dennis Jacobs of the Second Circuit Court of Appeals spoke in a similar vein in discussing why the various circuits differ in their judgeship needs. He said that "in smaller courts

Ultimately, only the judges can answer the question I have posed. No outsider can say with confidence how much, if anything, is lost when judges sit with one another only at infrequent intervals. Indeed, even the judges themselves may have difficulty ascertaining the consequences of the dispersion that is now an established part of their working environment. A study based on interviews conducted in 1986 suggests that the dispersion does make a difference, but the published information is too fragmentary to be conclusive.[30]

The question is important. I urge the members of the Ninth Circuit Court of Appeals to reflect on their own experiences and to consider the likely consequences of being part of a court in which 50 judges (and perhaps more) are regularly rotated among the argument panels in the six cities where calendars are regularly scheduled.[31]

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like the First Circuit or the Second Circuit, we all sit with each other, and we all know each other, and we all deal with each other, and we all understand each other better." See Judgeships Hearing, supra note 14, at 69 (testimony of Judge Jacobs).

[30] See Stephen L. Wasby, Communication in the Ninth Circuit: A Concern for Collegiality, 11 U. Puget Sound L. Rev. 73, 131 (1987). Professor Wasby wrote:

> Instead of sitting with each other every two to three months (when the court had eleven judges), as long as two years would elapse before one judge would sit with another. … Their infrequent sitting together reduces judges' chances to communicate to "an occasional social visit if they are in the same town at the same time, or at court functions." Thus it is "less comfortable . . . to carry on communication," particularly personal communication. As an overall result, "you know less about how [other judges] respond to cases." "When you sit with someone new for a whole week, it can change that judge's outlook about you," leading that judge "to call and kick things around." Maintaining "close collegial relationships" in the court is also more difficult.

Professor Wasby did not indicate how many different judges were being quoted or how many of them served on the court "when it had only 13 active-duty judges." See id. at 83.

[31] As already suggested, the constraints of the geographical parity rule reinforce the effect of numbers. For further discussion, see infra Part V.

IV. Other Reasons for Reconsideration

The prospect of a 50-judge court is important in its own right. It also provides an incentive to take a fresh look at aspects of the court's operations that, at least in the past, would not have sufficed, alone or in combination, to justify a division of the circuit.

A. The problem of delay

As discussed in Part II, three familiar arguments for dividing the Ninth Circuit should be given no weight because they are undercut by empirical evidence. But another oft-heard argument cannot be dismissed so readily.

Proponents of reorganization assert that the Ninth Circuit's size results in delays in the disposition of cases. They point out 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.[32] For example, in 2002 the median time in the Ninth Circuit was 15.1 months, compared with a national median of 10.7

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[32] Here is the ranking of the Ninth Circuit for the last ten years (12th is slowest):

2002	11
2001	12
2000	12
1999	11
1998	10
1997	12
1996	11
1995	11
1994	11
1993	12

The rankings and other data in this section are limited to cases terminated on the merits. Here and elsewhere in this statement, case management data are taken from publications of the Administrative Office of U.S. Courts – Annual Reports and Federal Court Management Statistics – unless otherwise stated.

months.[33] Moreover, the phenomenon has persisted even in years when the court has had virtually its full complement of active judges.[34]

To be sure, there is contrary evidence also: if one considers only the time that the cases are in the hands of the judges, the circuit is among the fastest. But that is little consolation to the litigants whose cases linger in the pipeline.

On balance, this record does suggest dysfunction of some sort. But is the dysfunction related to the size of the circuit? That is a much more difficult question. To provide a broader range of data, I have compiled a table that lists the three slowest circuits for each year from 1980 through 2002. The table will be found in Appendix B. Analysis of the patterns suggests that in most of the courts of appeals, delay is the product of transient circumstances. When circumstances change, the circuit goes off the list. But in the Ninth Circuit, delay appears to be chronic and persistent.

This finding does lend support to the argument. But correlation does not prove causation. And in the absence of a well-grounded theory that would explain why delay is a consequence of the court's size, it is impossible to conclude that splitting the circuit would provide a cure.[35]

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[33] These figures are quite typical. Since 1987, there has been only one year in which the Ninth Circuit's median time dropped below 14 months. During that period the national median has generally been less than 11 months. See Table 1 in Appendix B, infra.

[34] From 1990 through 1993 – a span of four years – the court was short no more than one active judge. (To be more precise, the number of vacant judgeship months was 12 or fewer each year.) Yet in all four years the Ninth Circuit was the slowest in the median time from filing the notice of appeal to final disposition. More recently, the vacancy rate has been much higher, but the court has also had a larger cohort of sitting senior judges.

[35] One might speculate, for example, that the many manifestations of circuit size – number of cases, number of circuit judges, number of districts, number of trial judges, etc. – somehow combine to produce a complexity that defies even the most skillful and determined management efforts. But speculation – even plausible speculation – is not enough.

Without further information, Congress might choose to provide more judges to help the court dispose of its backlog – and to split the circuit later only if the additional judgepower does not enable the court to speed up its pace of disposition. The drawback is that if size does contribute to the pattern of delay, adding judges to the existing circuit could make the situation even worse. From this perspective, splitting the circuit in accordance with H.R. 2723 could actually be the less risky course of action.

B. The proposed rule on citation of unpublished opinions

In June 2003, the Judicial Conference Committee on Rules of Practice and Procedure decided to move forward with an amendment to the Federal Rules of Appellate Procedure that will allow lawyers to cite unpublished or "non-precedential" opinions in their briefs and arguments. The Ninth Circuit Court of Appeals has steadfastly resisted this proposal, and it has given the impression that its position rests to some extent on the size of the circuit – both the volume of appeals and the number of judges. To the extent that that impression is accurate, the court's resistance to an otherwise desirable change provides evidence that the court's size does hinder its performance of its essential functions.

The citation rule now under consideration by the Standing Committee originated with the Solicitor General's office in the Clinton administration. The Justice Department in the Bush administration continues to favor such a rule, but when the Advisory Committee on Appellate Rules held its meeting, the Solicitor General's representative abstained. He explained that Judge Kozinski (and perhaps other Ninth Circuit judges) had called the Solicitor General and expressed concerns about the proposed amendment.

According to a report in The New York Times, the Solicitor General explicitly linked the judges' objections to the court's size. He said: "The immense size of the circuit, the number of judges there and the huge volume of work they handle make it very difficult for them to monitor all of the decisions of their colleagues."[36] Earlier, at the hearing on unpublished judicial opinions held by this Subcommittee in June 2002, Judge Kozinski himself said:

> I believe very strongly there is a justification for having different rules for different circuits. … We don't want a lot of clutter. … And given that we have over two dozen judges doing the speaking, plus 10 senior judges, plus visiting judges, you can actually get quite a cacophony going; and then we speak to a very large group as well, more district judges than any other circuit.[37]

Judge Kozinski also said:

> In our circuit, in our court of appeals, you always get an explanation in writing. One of the points I want to make is if you make all of those things citable, we are simply going to say less. We are simply going to say less, because everything that you say and you put in an opinion, anything that is precedential, lawyers will look at, lawyers will try to twist and find a way of using to their advantage, and we will simply say less.[38]

I recognize that Judge Kozinski does not speak for the Ninth Circuit Court of Appeals. But the position he is defending is the position of the court.[39] And I do not think it is far-fetched to read his comments as saying that (a) the court adheres to its non-citation rule in part because the court is so large (both in number of

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[36] Adam Liptak, Federal Appeals Court Decisions May Go Public, N.Y. Times, Dec. 25, 2002 (quoting Solicitor General Theodore B. Olson).

[37] Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 107th Cong. 58 (2002) (testimony of Judge Kozinski).

[38] Id. at 56 (testimony of Judge Kozinski).

[39] In his written statement, Judge Kozinski said: "The views I express are … my own, although I believe that they reflect the views of a substantial majority of my Ninth Circuit colleagues …" Id. at 11 (statement of Judge Kozinski).

judges and in the volume of decisions);[40] and (b) if the proposed national rule is adopted, the court may respond by issuing non-precedential opinions that "simply say less" – i.e., opinions that do not do as good a job of explaining to the losing party why he or she lost. If those are the consequences of the court's size, then Judge Kozinski has given a good reason for the judges to reconsider their opposition to a division of the circuit that would create two smaller appellate courts.[41]

Perhaps I have misunderstood Judge Kozinski's comments. Fortunately, Judge Kozinski is testifying today, and he can clarify his position on the connection, if any, between the Ninth Circuit's size and its resistance to the proposed rule that will allow lawyers to cite unpublished opinions.

C. Burdens of air travel

One of the familiar arguments for dividing the circuit relies not on the number of judges or the volume of appeals but on the circuit's far-flung geographical reach. Because of that geography, judges and other court personnel must fly long distances, often via connecting flights, for arguments and other court business. I suspect that this argument has always seemed something of a makeweight, but two recent developments give it greater force.

The first is the new world of air travel. I am not referring to the post-9/11 security measures; those have been normalized, and experienced travelers can generally get through security without great delays. (Of course that may change if

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[40] Judge Kozinski emphasized not only the size of the court, but also the size of the circuit: "we speak to a very large group as well, more district judges than any other circuit."

[41] As I said in my own testimony at the Subcommittee hearing, I do not share Judge Kozinski's concerns about the effect of a rule allowing lawyers to cite "unpublished" opinions. But if the court acts in accordance with Judge Kozinski's position, my own view is irrelevant.

there is another terrorist attack.) The long-range problem is that the airlines are in terrible shape financially, and one consequence is that service is being cut back. This makes travel more burdensome. As the Wall Street Journal reported recently, "To a degree [that surprises] even travel experts, the nation's much-publicized airline troubles are reshaping the American skies, and giving fliers a whole new set of hassles."[42] Judges will spend more time traveling, and the court will have less flexibility in scheduling oral arguments and other proceedings.

I also believe that the burdens of travel may weigh more heavily on judges today than they would have done in the past. Professor Michael Gerhardt has noted that recent nominees to the federal courts of appeals tend to be younger than their predecessors.[43] They are thus more likely to have children at home. Additionally, judges today will often be part of a dual career family. "Personal time" is more precious than it used to be.

One possible response is that the court could make greater use of videoconferencing. But if the judges communicate electronically from their own chambers or courthouses rather than meeting in person for oral arguments and conferences, they lose the principal opportunities for getting to know one another in a way that really makes them part of a common enterprise. The effect will be felt even more strongly if the court expands in accordance with the Judicial Conference recommendation.

Video hookups also have their limitations for the attorneys who argue the cases. A leader of the ABA's Section on Litigation commented recently that "a

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[42] Nancy Keates & Paula Szuchman, Where Did My Flight Go? Wall St. J., Apr. 11, 2003.

[43] Michael J. Gerhardt, Here's What Less Experience Gets You, Washington Post, Mar. 2, 2003.

lawyer can more effectively communicate in person. A lot of information that can be used in presenting an argument involves reading the judges' body language, their facial expressions, and their reactions. Sometimes, that cannot be caught [on camera]."[44]

In this light, I would give more weight today than I did in the past to the desirability of dividing the Ninth Circuit into two relatively compact circuits and thus reducing the burdens of travel. There would also be some savings in costs, and the judges would regain productive time that is now lost in transit.

D. Caseload developments

Opponents of circuit reorganization have often relied on the assumption that federal appellate caseloads will continue to grow at a rapid pace.[45] This assumption has been important for two reasons. First, a pattern of continuing growth suggests that dividing the Ninth Circuit would be almost futile; before long, the new Ninth Circuit would reach the same caseload levels and require the same large number of judges. Second, if one believes that other circuits will experience similar growth, the continued existence of an undivided Ninth Circuit can provide a valuable source of guidance for managing the ever-increasing volume of appeals elsewhere in the nation.[46]

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[44] Thomas E. Zehnle, Court Uses Video Technology for Appellate Arguments, Litigation News, Mar. 2003, at 4.

[45] See, e.g., White Commission Report Hearing, supra note 2, at 29 (statement of Judge Charles E. Wiggins).

[46] This theme has been prominent in my own writings. See, e.g., Arthur D. Hellman, Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court, 56 U. Chi. L. Rev. 541, 542-43 (1989); Hellman, Dividing the Ninth Circuit, supra note 3, at 286-87.

Today, however, assumptions of inexorable growth are open to question. New – and newly available – data may reduce the force of arguments grounded in those assumptions. Three developments point in that direction.

First, the rate of growth has slowed. In 1995, when the last major Congressional debate over circuit division took place, the federal courts of appeals had experienced more than three decades of rapid and almost unrelenting expansion in their caseloads. Filings doubled between 1960 and 1967, and again between 1967 and 1974. Another doubling took place between 1974 and 1985. In the decade that followed, the volume of filings increased by about 50%.[47] A member of the 104th Congress, considering whether to support the Ninth Circuit Court of Appeals Reorganization Act of 1995, could reasonably assume that similar rapid growth lay ahead.

As it happens, we need not speculate about what the future looked like in 1995. In December of that year, the Judicial Conference of the United States approved a Long Range Plan for the Federal Courts. The Plan included projections of caseload growth for the courts of appeals. The projected caseload for the year 2000 was 85,700.[48]

The reality has been very different. In 2002, filings were only 57,555, two-thirds of the total anticipated for 2000. In contrast to the 50% increase registered

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[47] Here are the figures on filings for the years mentioned in the text:

1960 3,899
1967 7,903
1974 16,436
1985 33,506
1995 50,072
2002 57,555

[48] See Long Range Plan, supra note 4, at 161.

in the decade ending in 1995, the increase for the most recent decade amounts to less than 25% (from 47,013 to 57,555).

It is true that appellate filings in the Ninth Circuit have continued to increase at a rapid rate. This is primarily because of changes in the way the Justice Department processes immigration appeals. However, it is not clear whether this represents a transitional bump or a long-term phenomenon. And the total for 2002 is well below the number projected for 2000 in the Long Range Plan.[49]

This brings me to the second development. Starting in 1993, the Administrative Office has collected and published data on appeals filed by litigants acting pro se. Although pro se appeals may consume a great deal of staff time, they can generally be dealt with expeditiously by the judges. For that reason, when the Judicial Conference calculates judgeship needs, pro se appeals are counted as only one-third of a counseled appeal.[50]

We now have 10 years' data on pro se and counseled appeals. Nationwide data show that, remarkably, counseled appeals have actually decreased in numbers during the decade, from 33,181 in 1993 to 30,931 in 2002. In the Ninth Circuit, counseled filings have increased, but only modestly, from 6,333 in 1993 to 6,585 in 2002.

Finally, the idea that other circuits would look to the Ninth Circuit as a model for managing caseload growth now appears wildly unrealistic. Other courts of appeals do not see the Ninth Circuit as an exemplar to be followed; on the

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[49] The Long Range Plan anticipated that the Ninth Circuit Court of Appeals would have 15,900 new filings in 2000. Id. at 163. Even in FY 2002, with the enormous influx of immigration cases, the total was under 12,000.

[50] For further discussion, see Judgeships Hearing, supra note 14, at 57-58 (statement of Arthur D. Hellman).

contrary, they see it as the "jumbo circuit" they do not want to become. The Fifth and Eleventh Circuits have resolutely set themselves against adding judges. No other circuit has demonstrated the slightest interest in adopting a limited en banc court.

I am not saying that appellate caseloads will level off permanently, or that the undivided Ninth Circuit is an experiment that has failed. But I do think that perhaps the experiment has run its course; that one of the major arguments for keeping the circuit intact no longer carries much weight; and that reorganizing the Ninth Circuit today could give us a structure that would not require adjustment for many years to come.

V. What's in It for the New Ninth Circuit?

It is hardly surprising that the strongest support for legislation to divide the Ninth Circuit has come from the judges and lawyers of the five northwestern states. For example, if the circuit is split as proposed by H.R. 2723, the Twelfth Circuit would be a court of 9 active judges, the second smallest in the federal appellate system. The judges would have numerous opportunities to develop working relationships as members of argument panels; they could easily maintain a sense of cohesiveness. All active judges could participate in all en banc cases. The judges' overall travel burdens would be substantially reduced.

But how would a split help the judges of the new Ninth Circuit? The answer depends in large part on the specific provisions of the legislation. In my view, three elements are essential if a bill is to deserve support from throughout the existing Ninth Circuit. First, the new Ninth Circuit should comprise a minimum of three states. Otherwise, the circuit would lose the influence and diversity in

appointments that come from having three pairs of senators.[51] Second, Arizona and Nevada should be included in the new Ninth Circuit along with California.[52] Finally, the legislation should authorize the 7 new appellate judgeships recommended by the Judicial Conference of the United States, and all 7 should be allocated to the new Ninth Circuit.

Unlike previous circuit division legislation, H.R. 2723 satisfies all three criteria. The new Ninth Circuit would be composed of three states: Arizona, California, and Nevada. The Ninth Circuit Court of Appeals would have 24 judgeships on a permanent basis, augmented by 2 temporary judgeships for at least 10 years. With those provisions, I can see four benefits that the new Ninth Circuit could expect to gain after the reorganization contemplated by the bill.

A. Caseload relief for the judges

First, of course, the judges of the new appellate court would enjoy a reduction in their individual workloads. In 2002, filings per judgeship in the Ninth

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[51] The White Commission cogently explained why a federal judicial circuit should be composed of at least three states:

> Circuit realignment to produce circuits smaller than three states is undesirable. We conclude this because we believe three is the minimum necessary for units of the intermediate tier of a *federal* system to serve an appropriate federalizing function. Appellate courts serve this function better when they comprise judges from several states. This not only ensures a broader, more national perspective essential to a federal court system, but enlists the continuing interest of several congressional delegations and spreads among a larger number of senators the informal but ingrained influence over the appointment of the court's judges. Concentrating such influence in one or two senators over a court with appellate caseloads as large as those generated, for example, by California, New York, or Texas, would not be, in our view, wise policy.

White Commission Report, supra note 2, at 52-53. See also A. Leo Levin, Lessons for Smaller Circuits, Caution for Larger Ones, in RESTRUCTURING JUSTICE, supra note 1, at 339-40.

[52] Arizona's closest legal and commercial ties are with California. The state also has close ties with Nevada. It is also relevant that Arizona and Nevada generate substantial appellate caseloads. Each state will be entitled to several seats on the court of appeals, thus promoting the "federalizing function" described by the White Commission.

Circuit Court of Appeals were 403. If H.R. 2723 had been in effect, filings per judgeship in the new Ninth Circuit would have been 349, a decrease of 13%.[53] This figure may understate the probable effect over time; in 2002, the extraordinary influx of immigration appeals was concentrated in the Central and Northern Districts of California.

B. More opportunities for the judges to sit with their colleagues

Second, the judges would have more opportunities to sit with one another as members of three-judge argument panels. As shown in Part II, it is quite possible today that a judge will go for three years – or even longer – without sitting with all of his or her active colleagues. The situation would only get worse if Congress were to add 7 new judgeships while leaving the circuit intact. But if the circuit were split in accordance with H.R. 2723, the new Ninth – even with the additional positions – would become a court of only 26 judges (to be reduced to 24 when the temporary judgeships expire).

In fact, I believe that the opportunity for equalizing judges' sittings with one another in a reorganized Ninth Circuit may be greater than the numbers alone would suggest. Currently, the court's calendaring program aims at achieving parity not only in judge pairings but also in geography – the assignment of judges to the various cities where the court regularly schedules oral argument.[54] The cities of rotation include "Seattle/Portland" as well as Honolulu and Anchorage. In 2002,

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[53] The figures in this paragraph are for statistical year 2002 (Oct. 1, 2001 through Sept. 30, 2002); they are taken from a chart prepared by the Clerk's Office of the Ninth Circuit. I would prefer to use adjusted filings, the workload measure used by the Judicial Conference of the United States in calculating judgeship needs in the federal courts of appeals. See Arthur D. Hellman, Assessing Judgeship Needs in the Federal Courts of Appeals: Policy Choices and Process Concerns, -- J. App. Prac. & Proc. – (forthcoming). Unfortunately, the data that are needed for calculating adjusted filings in the two new circuits are not available.

[54] For further discussion, see Appendix A.

the court deployed 13 panels in Seattle, 4 in Portland, 2 in Honolulu and 1 in Anchorage.

If the Ninth Circuit consisted of only three states, the court would have to equalize sittings among only two (perhaps three) cities.[55] With no need to give judges a fair share of sittings in the cities of the Twelfth Circuit – or even to schedule judges for argument panels there – it should be easier to assure that each active judge sits with every other active judge at least once in a three-year period.

C. Less travel for the judges

Third, the judges in the three states of the new Ninth Circuit would enjoy some reduction in their travel burdens. No longer would they be regularly flying to Seattle, Portland, Anchorage, and Honolulu. The judges who have their chambers in the Los Angeles area – a group that currently includes 8 of the court's 27 active judges – would probably be able to participate in at least half of their oral argument calendars without having to get on a plane at all.

I do not want to overstate the point. Currently, the judges from the northwestern states travel to California for oral arguments far more than the judges from the proposed new Ninth Circuit travel to the northwest. But if H.R. 2723 is enacted, there would be fewer journeys for the California judges and shorter journeys for the judges from Arizona and Nevada.[56]

D. Wider participation in the Circuit Judicial Conference

Finally, creation of a three-state Ninth Circuit would make possible a more broadly participatory Judicial Conference. Congress requires each circuit to

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[55] Today, the court holds oral argument sessions every month in Pasadena and San Francisco. A new Ninth Circuit composed of Arizona, California, and Nevada might choose to hear arguments on a regular basis in Phoenix as well.

[56] This month (October 2003), four judges from southern California traveled to Seattle for oral arguments.

provide "for representation and active participation at [the circuit conference] by members of the bar of [the] circuit."[57] The Ninth Circuit has probably done more than any other to encourage "active participation" by lawyers in Conference activities.[58] But because of the circuit's size, the number of lawyers who can participate is severely limited. For example, the Central District of California is by far the most populous federal judicial district in the nation.[59] But in 2000 the Central District sent only 38 lawyer representatives to the Circuit Conference.

In a three-state Ninth Circuit, the Conference would not include the judicial officers, lawyer representatives, and other participants from the districts of the Twelfth Circuit. This means that without increasing the total number of people in attendance, the circuit could more than double the number of lawyers who participate.[60] If it wished, it could substantially augment the number of lawyer representatives from each of the six remaining districts. Or, the circuit could invite some lawyers to attend as individuals without obligations as representatives, as is done in other circuits. Either way, more lawyers would have an opportunity to meet the judges, to learn about the operation of the courts, and to share their experiences and ideas with the other participants.

Over the years, I have attended several of the circuit's Conferences. Without doubt, they are a good advertisement for the federal courts generally and for the Ninth Circuit in particular. I am confident that the lawyers who participate come

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[57] 28 U.S.C. § 333.

[58] See Stephen L. Wasby, The Bar's Role in Circuit Governance, in RESTRUCTURING JUSTICE, supra note 1, at 281.

[59] See Judgeships Hearing, supra note 14, at 5 (Letter of Chief Judge Consuelo B. Marshall).

[60] In 2000, there were 97 lawyer representatives from the districts of Arizona, California, and Nevada. The number of participants from the districts of the proposed Twelfth Circuit was about 180.

away with a renewed appreciation for the dedication of the judges and the importance of an independent judiciary. In an era when the courts need all the support they can muster, there would be substantial value in making it possible for a larger number of lawyers to enjoy this experience.

E. Conclusion

In sum, the benefits of H.R. 2723 for the judges of the new Ninth Circuit, while not as great as they would be for the judges of the northwest, are certainly more than de minimis – perhaps substantially more. The question is whether these benefits are outweighed by the disadvantages of breaking up the existing structure. I turn now to the negative side of the balance.

VI. The Arguments Against Dividing the Circuit

At the House Judiciary Committee hearing on H.R. 1203 in the 107th Congress, Chief Judge Schroeder and Judge Thomas presented the arguments against dividing the circuit.[61] Some of their concerns have been addressed by H.R. 2723. Others remain open to debate.

A. Preserving "uniform federal law" in the west

Both Judge Schroeder and Judge Thomas argued that that dividing the Ninth Circuit "would deprive the West and the Pacific seaboard of a means to maintain uniform federal law in the area."[62] On this point the hearing generated differing views. Judge O'Scannlain characterized the uniformity argument as a "red herring;" he noted that there are five separate circuits on the eastern seaboard,

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[61] Ninth Circuit Court of Appeals Reorganization Act of 2001: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Judiciary Comm. (2002) [hereinafter House Hearing].

[62] Id. at 10 (statement of Chief Judge Schroeder) (quoting Final Report of White Commission); id. at 63 (statement of Judge Thomas) (same).

without any apparent disruption of commercial or other relationships governed by federal law.[63]

If the uniformity argument is well taken, it stands as an obstacle to any plan for dividing the Ninth Circuit. I therefore deal with it first.

Judge O'Scannlain's response, standing alone, is not a sufficient rebuttal. His observations do not negate the possibility that intercircuit disagreements create problems in the eastern seaboard region, but that people take them for granted and have adjusted – perhaps at some cost – to the consequences. However, we need not rely on speculation. In the Judicial Improvements Act of 1990, Congress asked the Federal Judicial Center to study the extent and effect of unresolved conflicts between federal judicial circuits. The Center asked me to design and conduct the study. Working with the Center, I carried out an elaborate program of empirical research, including interviews with lawyers. Recently I summarized my findings as follows: "When one considers both the tolerability of the unresolved conflicts and their persistence, the evidence points strongly to the conclusion that unresolved intercircuit conflicts do not constitute a problem of serious magnitude in the federal judicial system today."[64]

On the basis of this research, I see little reason for concern about the loss of "jurisprudential coherence"[65] that would result from division of the Ninth Circuit. No doubt there would be some disagreements between the two new circuits on

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[63] Id. at 31-32 (statement of Judge O'Scannlain).

[64] Arthur D. Hellman, Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts, 63 U. Pitt. L. Rev. 81, 89-90 (2001). For a report on the lawyer interviews, see Arthur D. Hellman, Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience, 1998 Sup. Ct. Rev. 247 (1999) [hereinafter Hellman, Time and Experience].

[65] House Hearing, supra note 61, at 63 (statement of Judge Thomas).

issues of federal law, but these would be no more troublesome than the disagreements that sometimes arise today between the Ninth and other circuits. And with rare exceptions those disagreements have minimal impact on counseling and litigation.

It is true that the White Commission emphasized the value of "[h]aving a single court interpret and apply federal law in the western United States."[66] But the Commission's commitment to uniformity in the west was more rhetorical than real. As Chief Judge Hug pointed out in his analysis of the Commission proposal, the divisional structure contemplated by the Commission fell "far short of the Commission's goal of maintaining consistent law throughout the circuit."[67] On the contrary, if the Commission's plan were to be adopted, it is likely that "the law of the circuit would steadily drift apart."[68] My own analysis reached a similar conclusion.[69]

There is another reason why the Final Report of the White Commission lends little support to the uniformity argument. The Commission acknowledged that uniformity is important only "on issues of law that matter to the entire circuit."[70] Its examples make clear that it was referring to issues that affect the conduct of multi-circuit actors. But my research – including interviews with lawyers – has

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[66] White Commission Report, supra note 2, at 49.

[67] Procter Hug, Jr., Potential Effects of the White Commission's Recommendations on the Operation of the Ninth Circuit, 34 U.C. Davis L. Rev. 325, 329 (2000).

[68] Id. at 330.

[69] Arthur D. Hellman, The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit, 73 S. Cal. L. Rev. 377, 381-92 (2000).

[70] White Commission Report, supra note 2, at 44 n.99.

shown that appellate decisions play a much smaller role in that context than one might suppose.[71]

Perhaps it goes too far to characterize the uniformity argument as a "red herring." But if dividing the Ninth Circuit is otherwise a good idea, concern about uniformity of law in the west should not stand in the way.

B. Cost and efficiency

The judges testifying in opposition to H.R. 1203 also focused on considerations of cost and efficiency. First, the judges pointed to the economies of scale that the circuit now enjoys in administrative and managerial functions. For example, Judge Thomas noted that the resources of a central staff "are available to manage courthouse construction, assist in information technology, provide aid in personnel management, and help in capital case management."[72]

This concern is addressed by H.R. 2723. Section 13 of the bill authorizes any two contiguous circuits to jointly carry out administrative functions and activities when the circuit councils of the two circuits determine that these functions will benefit from coordination or consolidation. Thus, if it is efficient to have a single person or office handle matters like courthouse construction or information technology for both of the new western circuits, there will be no need to forgo that efficiency.[73]

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[71] See Hellman, Time and Experience, supra note 64, at 293-95.

[72] House Hearing, supra note 61, at 63 (statement of Judge Thomas). In a similar vein, Chief Judge Schroeder observed that the new circuit would have to replicate functions such as "processing complaints against judges, ascertaining budgetary requirements for the courts, … and meeting [heightened security requirements]." Id. at 11 (statement of Chief Judge Schroeder).

[73] There is precedent for this kind of intercircuit coordination; the statute governing bankruptcy appeals allows "the judicial councils of 2 or more circuits" to establish "a joint bankruptcy appellate panel" for the participating circuits. See 28 U.S.C. § 158(b)(4). That statute requires authorization by the Judicial Conference of the United States, but there is no reason to include such a requirement in the circuit division legislation.

Second, the judges called attention to economies of scale at the judicial level. The Subcommittee was told that "any division will inevitably result in circuit judges assuming greater administrative burdens" because the Twelfth Circuit Court of Appeals would have to duplicate the administrative tasks that one judge now carries out for the unitary court.[74]

There is some merit to this point. Because the two courts would be separate juridical entities, coordination of the administrative functions performed by circuit judges would not be feasible. However, it is not clear that all of the administrative tasks required in a large court would necessarily be required in a small court. For example, the Twelfth Circuit might want to designate one of its judges to serve as death penalty coordinator, but I doubt that the court would need a judge to act as coordinator for en banc proceedings. Overall, division of the circuit would probably result in some net increase in the circuit judges' administrative burdens, but I think the effect would be modest.

Third, there was discussion at the hearing of the cost of creating a new circuit. Because the witnesses offered different estimates, Chairman Coble asked a representative of the Administrative Office to get some figures on the probable cost. As far as I know, that information has not yet been provided, but if dividing the circuit will improve the administration of justice in the west, even the larger estimates strike me as a rather modest price to pay.

Beyond this, arguments about cost differ in a significant way from most of the other arguments over circuit reorganization. When the question is whether dividing the circuit will improve or hinder the administration of justice, the judges can draw on their experience and expertise. They speak with a special authority.

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[74] House Hearing, supra note 61, at 59 (statement of Judge Thomas).

That is not so with respect to issues of cost. If Congress is persuaded that the benefits of creating a new circuit are worth the additional expenditures, contrary views from the judges deserve respect, but there is no reason to give them special weight.[75] By the same token, the judges, in formulating their recommendations to Congress, need not devote much attention to cost issues.

C. Adequacy and allocation of resources

Judge Schroeder and Judge Thomas also raised issues about the adequacy and allocation of resources for the proposed new circuits.

First, the judges expressed concern that splitting the Ninth Circuit would impair the ability of courts within the circuit "to lend judges to those districts suffering temporary judicial need."[76] In response, section 12 of H.R. 2723 authorizes each of the new circuits to designate judges for service in the other circuit without having to seek authorization from the Chief Justice of the United States, as current law would require. This would not quite replicate the current arrangement; two approvals would be required instead of one. But if we assume, as I do, that the two circuits would do their best to make the system work, the argument loses much of its force.

Second, the judges emphasized the need for additional judgeships to meet caseload demands. As already discussed, H.R. 2723 responds by authorizing the 7 new appellate judgeships requested by the Judicial Conference of the United States. That might seem to take care of the problem, but it does not quite do so. The reason lies in a point made by Judge Thomas.

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[75] However, it may be desirable to include a provision in the reorganization statute specifically authorizing an appropriation for the start-up costs for the new circuit.

[76] House Hearing, supra note 61, at 63 (statement of Judge Thomas).

Judge Thomas noted that H.R. 1203 would have given the new Ninth Circuit a disproportionately large share of the cases and a disproportionately small share of the judges. One might think that this inequality would disappear under H.R. 2723, because the new bill allocates all 7 of the additional judgeships to the new Ninth Circuit. And it is certainly true that with the creation of the new positions the per-judge caseload in the new Ninth Circuit would decrease. But the per-judge caseload in the Twelfth Circuit would shrink substantially more. This means that the judges of the new Ninth Circuit would not receive the full benefit of the additional judgepower that the Judicial Conference deems necessary.

The disparity is particularly great if we look at the caseload data for 2002 – data skewed by the heavy influx of immigration appeals spurred by the Attorney General's directive to clear an administrative backlog. In 2002, as already noted, the Ninth Circuit Court of Appeals had 403 filings per judgeship.[77] If the 7 new judgeships had been created for the existing court in accordance with the Judicial Conference recommendation, the figure would have dropped to 322. But if the circuit had been divided as proposed by H.R. 2723, filings in the new Ninth Circuit would have been 349, while in the Twelfth Circuit the figure would have decreased to 243.

H.R. 2723 does not ignore this problem. As stated in Rep. Simpson's summary of the bill: "Section 11 maximizes flexibility in the allocation of judges between the two circuits by allowing circuit judges of each circuit serve in the other circuit without the need to seek designation by the Chief Justice." But unless this authority is invoked, the judges from Arizona, California, and Nevada would

[77] Again, these are actual filings for the statistical year. Data on adjusted filings are not available. See supra note 53. I have used statistical year 2002 as the basis for my calculations so that my figures will be consistent with those used by Judge O'Scannlain in his statement.

lose out on some of the caseload relief that the Judicial Conference has recommended for them.

One possible solution would be for the judges of the northwest and Hawaii to commit themselves in advance to providing judgepower that would help to redress the inequality in per-judge workloads in the two circuits. But as long as the circuit continues to be flooded by immigration appeals concentrated in the Central and Northern Districts of California, complete parity would require substantial effort. For example, based on the 2002 data, if each of the 9 active judges from the Twelfth Circuit states had sat on one calendar or screening panel in the new Ninth Circuit in the course of the year, that would have given the Ninth Circuit judges most of the relief that the Judicial Conference has requested for them, but it would not have come close to equalizing the per-judge filings between the two circuits.[78]

How much assistance will be needed in the future will depend on patterns of caseload growth, the fortuities of judicial vacancies, and the courts' choices regarding calendaring practices. Moreover, if the judges from Arizona, California, and Nevada decide that reorganization is otherwise a good idea, they might well be willing to forgo complete parity as long as they get substantial workload relief. But I suspect that without some sort of commitment along the lines I have described, the judges of the southwest will be understandably reluctant to endorse legislation that denies them their full share of the new judgeships.[79]

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[78] Active judges ordinarily sit on 8 argument calendars and 1 screening panel a year (or 7 argument calendars and 2 screening panels). Thus, 9 judges sitting for one calendar each would provide the equivalent of exactly one active judge. A shift of 1.0 judges would result in per-judge filings in the new Ninth Circuit of 336. The figure for the Twelfth Circuit would have been 273.

[79] In addition, Congress might create an additional temporary judgeship for the new Ninth Circuit Court of Appeals to help in coping with the enormous volume of immigration appeals.

VII. Conclusion

For many years, I have written and testified in opposition to successive proposals to divide the Ninth Circuit. My view has been shared by a majority of the judges of the Ninth Circuit Court of Appeals and – so far as one can tell – by a majority of the lawyers in the western states. Today, however, I think the time has come for the judges and lawyers to take a fresh look at the question.

One reason judges and lawyers have resisted efforts to reorganize the circuit is that, too often, the legislation has been motivated by hostility to decisions of the Ninth Circuit Court of Appeals, particularly on issues of environmental law and Indian law. It is especially unfortunate that Senator Murkowski, in introducing her circuit division bill in the current Congress, took aim at the Ninth Circuit ruling on the Pledge of Allegiance. But the fact that some who support a circuit split do so from improper motives does not mean that all do. Further, bad motives do not necessarily mean that the idea is bad.

A second reason for opposition has been that all previous proposals were seriously flawed in one way or another – and supporters of the legislation in Congress showed little interest in fixing the problems or accommodating the legitimate concerns that the judges expressed.

H.R. 2723 is different. The new bill addresses most of the objections that were raised at the hearing on H.R. 1203 in the 107th Congress. And Congressman Simpson has made clear that he welcomes suggestions for further improvements in the legislation.

I continue to believe that it would be wrong for Congress to divide a circuit unless the proposed reorganization has substantial support from the judges and lawyers in the affected region. But I also believe that the judges and lawyers

(particularly the judges) have a correlative obligation to give fair and open-minded consideration to reasonable new legislative proposals such as H.R. 2723.

The Ninth Circuit Court of Appeals and the Judicial Conference of the United States have determined that the circuit needs 7 additional appellate judgeships. If Congress accepts that conclusion – as I believe it should – then the choice lies between moving forward with H.R. 2723 and simply adding 7 judgeships to the present Ninth Circuit Court of Appeals.

That is a question on which reasonable people can disagree. The Subcommittee has done the Ninth Circuit a great service by holding this hearing, because the statements and other materials in the record will frame and illuminate the issues that should be addressed. I hope the judges and lawyers of the Ninth Circuit will reflect on these issues and communicate their views to the Subcommittee.[80] The hearing thus constitutes a valuable first step in the process of discussion and inquiry that can lead to a sound judgment on the best course of action.

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[80] In my testimony at the Subcommittee's hearing on federal judgeship needs, I suggested a more broadly participatory process using the courts' web sites as communication centers. See Judgeships Hearing, supra note 14, at 64-65 (statement of Arthur D. Hellman). A variation on this process might work very well in this setting.

Appendix A
Interaction Among Ninth Circuit Judges:
The Effect of Adding New Judgeships

As noted in Part III, it might seem obvious that if the Ninth Circuit Court of Appeals were to add 7 judgeships to its present complement, the members of the court would sit with each of their colleagues even less frequently than they do today. But before reaching that conclusion, it is necessary to consider several variables whose interplay will determine the actual consequences of enlarging the court.

A. Other criteria in the panel composition process

First, even with a court of 28 authorized judgeships, the patterns revealed by the study reported in Part III were not mathematically inevitable. For example, although Judge Berzon never sat on an argument calendar with Judge Rymer or Judge McKeown, she sat on three calendars with Judge Trott.[81] Almost certainly, it would be possible to adjust the court's calendaring program to assure that every judge sits at least once with every other active judge during a three-year period.[82]

The difficulty is that to do this, the court would have to compromise – or perhaps abandon – the other criteria that it uses in assigning judges to argument panels. For example, the General Orders include a provision requiring what might be called geographical parity in sittings:

> Insofar as possible, over a two-year period, each active judge should sit on approximately the same number of panels in San

[81] Disparities abound. For example, Judge Tallman never sat with 4 of his active colleagues – but he sat on 3 full panels with Senior Judge Lay of the Eighth Circuit.

[82] Currently, the General Orders provide: "Insofar as possible, each active judge should sit with every other active and senior judge approximately the same number of times over a two-year period." 9th Cir. General Orders 3(2)(d) (eff. Mar. 26, 2003).

> Francisco, Pasadena, Seattle/ Portland as each of the other active judges, and, over a span of several years, each active judge should sit on approximately the same number of panels in Honolulu and Anchorage as each of the other active judges.

As long as the circuit remains a single juridical entity, the court will probably adhere to some form of the geographical parity rule.

Assignment of judges to calendars also takes account of "the wishes of each judge with regard to sitting during particular months." Today, many judges are part of a two-career family. I suspect that judges' preferences "with regard to sitting during particular months" often reflect the desire to coordinate schedules with those of a working spouse or other family members. Eliminating this flexibility would not be without cost.

In this light, it is understandable that the court has not been willing to subordinate all other considerations and give absolute priority to equalizing the number of times active judges sit with one another. And one would think that the addition of 7 judges would only diminish the frequency with which the members of the court sit with each of their colleagues. But panel composition criteria are not the only considerations that affect the pairing of the court's judges.

B. Participation by visiting and senior judges

In recent years the Ninth Circuit has made extensive use of visiting judges from other courts to fill out its argument panels. There are obvious drawbacks to relying on outsiders to decide Ninth Circuit cases and establish Ninth Circuit law. With 7 additional judgeships, the court would be able to reduce its dependence on these outsiders. To the extent that visiting judges are replaced on calendars by judges appointed to the newly created positions, the members of the court will have more opportunities to sit with their own colleagues.

That is one possible outcome, but the analysis is incomplete. In particular, the court has also relied heavily on its own senior judges. However, as the Judicial Conference of the United States pointed out in explaining why the new positions are needed, a majority of the Ninth Circuit's senior judges are "75 years of age or older, including seven that are at least 80 years old." Thus, some of the additional judgepower will be needed, not to replace visitors but to replace senior judges who are no longer able to sit on cases. To the extent that this occurs, the court might have to continue to bring in judges from other courts. And the members of the Ninth Circuit Court of Appeals would gain no additional opportunities to sit with their own colleagues.[83]

C. Increasing the number of argument panels

The preceding analysis might suffice if we could assume that, after the addition of new judgeships, there would be no change in the total number of argument panels that sit each year. Under this scenario, the Court of Appeals would cut back somewhat on its use of visiting judges, but otherwise it would carry out its work pretty much as it does today. However, that assumption is highly doubtful. Reducing dependence on visiting judges is not the only the only benefit the court would expect to obtain from an expansion in the size of the bench. There are at least three other ways in which the court might make use of the new judgepower, and all would point to an increase in the number of argument panels.

First, as discussed in Part IV, the Ninth Circuit Court of Appeals has for many years been one of the slowest of the federal appellate courts in processing

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[83] Another relevant variable is the effect of vacancies. This is so unpredictable that I have not attempted to take account of it in this analysis.

cases from filing the notice of appeal to final disposition.[84] Almost certainly, the court would use its new judges to reduce these delays. That means increasing the number of panels that will sit each year.

Second, the court may want to reduce the number of cases that are decided by screening panels. Although the court's method of dealing with apparently insubstantial appeals is as good as that of any circuit, it remains a distinctly second-best form of adjudication, especially for counseled cases. With more judges, the court could limit screening panels to the simplest and most straightforward appeals.

Third, the court may want to cut back on the number of cases heard by each argument panel. This would enable the judges to study the cases in greater depth; it would also allow them to give somewhat closer scrutiny to the unpublished dispositions that may soon be citable.

Taking all of these considerations into account, I am quite confident that, for the foreseeable future, the Ninth Circuit Court of Appeals would use its new judgepower to increase the number of argument panels sitting each month. And if that is so, the intuitive assessment is correct: adding 7 judges to a 28-judge court will probably diminish the frequency with which the members of the court sit with each of their colleagues.

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[84] See also Appendix B and Table 1, infra.

Appendix B

Delay in the Federal Courts of Appeals:
The Three Slowest Circuits, 1980-2002

As explained in Part IV, proponents of reorganization assert that the Ninth Circuit's size results in delays in the disposition of cases. To assist in evaluating this argument, I have compiled a table that lists the three slowest circuits for each year from 1980 through 2002. The table appears at the end of this Appendix. Column two gives the Ninth Circuit's median time from filing the notice of appeal to final disposition. Column three provides the national median. The remaining columns list the three lowest-ranked circuits for the particular year. (The Ninth Circuit is shown in boldface.) Several points stand out:

- Five circuits do not appear on the list at all: the First, Second, Fourth, Fifth, and Eighth.
- The Ninth Circuit appears on the list in every year except 1984 and 1985. Those were the only two years in which the Ninth Circuit's median dropped below the 13-month mark.
- The Third Circuit appears on the list only once – in 2002. Remarkably, in 1989 the Third Circuit was the fastest in the country. Its median time increased every year thereafter, and in 2002 it became the third slowest of the courts of appeals.
- The Sixth Circuit appears on the list for every year from 1980 through 1986, disappears from 1987 through 1995, and then reappears. In each of the last five years it has been the slowest or second slowest of the courts of appeals.
- The Seventh Circuit appears on the list in 1984 and 1985 and then from 1989 through 1992. That is its last appearance.
- The Tenth Circuit appears on the list every year from 1980 through 1990; for seven years in a row it had the longest median time of any circuit. It disappears from the list until a single reappearance in 2001.

- The Eleventh Circuit makes its first appearance on the list in 1991. It appears on the list every year through 2000. For three years in a row it was the slowest of the circuits.

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Table 1
Three Slowest Circuits, 1980-2002

Year	9th Circuit Median Time (Months)	National Median Time (Months)	#12	#11	#10
2002	15.1	10.7	6th	**9th**	3rd
2001	15.8	10.9	**9th**	6th	10th
2000	15.8	11.6	**9th**	6th	11th
1999	14.2	12.0	6th	**9th**	11th
1998	13.8	11.6	6th	11th	**9th**
1997	14.4	11.4	**9th**	11th	6th
1996	14.3	10.4	11th	**9th**	6th
1995	14.3	10.4	11th	**9th**	DC
1994	14.5	10.5	11th	**9th**	DC
1993	14.6	10.3	**9th**	11th	DC
1992	15.2	10.6	**9th**	11th	7th
1991	15.6	10.2	**9th**	7th	11th
1990	15.7	10.2	**9th**	10th	7th
1989	15.8	10.3	10th	**9th**	7th
1988	14.7	10.2	10th	**9th**	DC
1987	14.1	10.3	10th	**9th**	DC
1986	13.6	10.3	10th	**9th**	6th
1985	12.6	10.3	10th	6th (tie)	7th (tie)
1984	12.1	10.8	10th	6th	7th
1983	13.3	11.1	10th	6th	**9th**
1982	16.4	11.5	**9th**	6th	10th
1981	20.3	11.5	**9th**	6th	10th
1980	20.8	10.8	**9th**	6th	10th

Mr. SMITH. Judge Schroeder, let me address my first question to you. You said a few minutes ago that the most important point was, quote, our circuit works well.

Given sort of the cumulative message of the charts that you saw a few minutes ago, particularly—and to me it is one of the most important—the time or disposition which is longer with the Ninth Circuit than with any other circuit by far, it seems to me—and given what was on the charts a while ago, where I indicated in my opening statement that if you were to rank the circuits, the Ninth Circuit would be 12th out of 12.

Given all of that, it seems to me that the circuit does not necessarily work well. And my question to you is if splitting the court

would reduce the backlog—and in that case you also hold a record, because you have the fastest increasing backlog load—if it would reduce the time of disposition, why wouldn't you favor splitting the Ninth Circuit?

Judge SCHROEDER. Well, thank you for the question. First of all I want to point out that we are not the—if we are talking about the time from filing a notice of appeal to final disposition, the Sixth Circuit is about 16 months, and the Ninth Circuit is 14. So we are not the slowest, but——

Mr. SMITH. We were looking over the cumulative 23 years, and I think——

Judge SCHROEDER. Oh, over the 23 years.

Mr. SMITH. The Ninth Circuit was 21 of the 23. But anyway, it is not a good picture, shall we say, and it would belie, I think, the claim that everything is going well.

Judge SCHROEDER. Well, first of all, we have reduced the delay, and we are continuing to reduce delay. We did have in the past few years as many as 10 vacancies of our 28 judges. We are very encouraged by the fact that those have been filled. We had a vacancy in Hawaii that went from 1984 until last year.

So we have had to deal with those issues. Those are not issues that are the responsibility of the House of Representatives.

Mr. SMITH. If we saw improvement on some of those issues, like time decision position and reducing the backlog, are you in favor of dividing the Ninth Circuit?

Judge SCHROEDER. If we see improvement that are in favor of it——

Mr. SMITH. If dividing the circuit would lead to improvement in some of those statistics——

Judge SCHROEDER. There has been no indication, no showing that it would, because as this bill—as I tried to make clear, this bill would put 80 percent of the cases into one circuit and leave nine judges to decide cases that range from one-sixth of the world's surface. So I see no indication from that, that that would make for a more efficient operation. And we have been very much concerned about increasing efficiency and making sure that our litigants are heard.

Mr. SMITH. It seems to me that even if it only improved things by 20 percent it would be worth doing, but that may just be a difference of opinion. But thank you for your answer.

And Judge O'Scannlain, let me direct my next question to you. You pointed out in your testimony that the special virtue of H.R. 2723 is that it addresses substantially all of the arguments against H.R. 1203 advanced last year. And I agree. I also think your testimony goes a long ways toward addressing all of the criticisms of the current bill in its improved form.

You say in your testimony that the court size negatively affects the ability of us judges to do our jobs. In what way does it negatively affect your ability to do your jobs? And do you feel by dividing the court we would see an improvement in some of these indications of jurisprudence?

Judge O'SCANNLAIN. Size gets to be an unmanageable issue after a certain level. As I mentioned in my remarks, the clerk of court, Kathy Catterson who is in the room and has already been identi-

fied, has done a fabulous job with managing the numbers that we have to deal with. But we are a human institution, and if we get the seven new judges that we have requested through the omnibus judge bill, we would be up at 57 judges. And when you look at that comparison, which is Exhibit No. 7, you just see how off the charts we are in terms of comparison to other circuits.

It seems to me that we have to remember that we are not unique in any way in terms of what other circuits ought to be doing, and the circuits should have some reasonable comparability. Obviously they are not meant to be copies of each other, but the sheer amount of the volume of work that we now have, the number of judges, has an effect on the court, which is I believe manifested and is going to become more and more manifest in the future as all of the other forces that are driving our size continue, unless we do something about it.

Mr. SMITH. Thank you, Judge O'Scannlain.

Judge KOZINSKI. Mr. Chairman, might I speak to this——

Mr. SMITH. My time is up, but I am going to come back in a minute and have some more questions for you all, so when that time comes, perhaps you can respond then.

The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. Judge Kozinski, would you like to speak to that?

Judge KOZINSKI. Thank you, Mr. Berman.

Just very briefly, it is not the case, as Judge O'Scannlain suggested, the larger circuit in fact is less efficient. In fact, it is quite the contrary. The Ninth Circuit issues 700 or so opinions a year. Those opinions become the binding law of the Ninth Circuit. They do nothing for the Tenth Circuit, the Eighth Circuit. Those issues have been decided by panels in those circuits separately, even if only to provide an opinion to say we agree with our colleagues in the Ninth, which sometimes they do, sometimes they don't.

If you split the Ninth Circuit in half, all of those cases we now decide that become binding law for the entire Ninth Circuit would have to be duplicated. Many issues would have to be heard in the Ninth Circuit and in the future Twelfth Circuit. We are doubling the work.

Mr. BERMAN. In other words, the notion that an issue that is ruled on by a Ninth Circuit panel is binding on future cases coming up in the Ninth Circuit would now be cast aside, not simply for the new circuit but for both circuits because——

Judge KOZINSKI. They would both have to decide.

Mr. BERMAN. They have to redecide cases that—before they could summarily affirm or overturn——

Judge KOZINSKI. But based on prior Ninth Circuit precedent, now the judges in the other circuit would have to write an opinion, duplicate the work.

Mr. BERMAN. And just to understand Judge Schroeder's point earlier on the issue of time of disposition in the year 2002, the Ninth Circuit was not the slowest circuit, and that at least some part of the earlier length of time was as a result of a significant number of vacancies in the Ninth Circuit positions, that it was the lack of judges rather than the size of the circuit that contributed to the delay in disposition.

Judge SCHROEDER. That was a major factor.

Mr. BERMAN. And that even this bill before us creates seven new judges for the two circuits, as I understand it, in order to deal with the issue of caseload and judges.

Judge SCHROEDER. To make up for the loss of the judges that would go to another circuit, yes, and also—and to assist us in—the Ninth Circuit in doing its job, that's right.

Mr. BERMAN. On the issue of travel time and travel burden, it is obviously true that the Ninth Circuit judges travel great distances. But in the new Twelfth Circuit created by this legislation, Alaska, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, Oregon, and Washington are all in one circuit. This split would shift the burden from the Ninth Circuit, it seems to me, to the new Twelfth Circuit. And my guess is with what little I know about airplane routes, that the best way to get from Montana to Hawaii may be through California.

Judge SCHROEDER. San Francisco or Los Angeles, that's correct.

Mr. BERMAN. Judge Kozinski, it is sometimes argued that the size of the Ninth Circuit and the ever-changing composition of panels reduces collegiality amongst Ninth Circuit judges. Professor Hellman, whose own research shows that conflicts between the Ninth Circuit panels are no more prevalent than in smaller circuits, has concerns about whether the Ninth Circuit judges feel themselves a part of the court and know the minds of their fellow judges. I think that was part of the illustration of Judge Fletcher. And Professor Hellman, you gave that illustration. Right?

Reduced collegiality, as suggested, may make it harder to reach agreement, disagree amicably, or craft a stable body of law.

Do you, Judge Kozinski, believe the level of collegiality among Ninth Circuit judges is insignificant or somehow impairs the operation of the court from your—because you, unlike Professor Hellman, by his own words, are a judge and presumably could make some observations about that.

Judge KOZINSKI. I was told by Professor Hellman's observations and speculations on this point, it is certainly not consistent with my experience of the many years spent on the Ninth Circuit; but as it turns out, we don't need to speculate or rely on judges. And there was in fact a study just issued by Professor Kazenstien and some of his colleagues that go to this very question. And if I may distribute this, because it would be helpful, there is a chart that speaks to this issue, and if I could have—just explain what it says.

The study looked into the matter of how often circuits—one of the issues looked at is what they call panel effects, the degree to which judges are likely to be swayed by colleagues when they are on the same panel. And if you would look at the chart which comes from this study, you will see that the circuits are lined up by size, with the Ninth Circuit being the greatest. The points on the chart, the other graph, shows the degree of cooperation, the willingness of panel judges to be swayed to collaborate with other judges; in other words, to be collegial. The Ninth Circuit is the highest, and this is not based on opinion, this is based upon actual voting pattern.

Size in fact has very little to do with it. If you notice the Second—Fifth, Sixth, and Second Circuit, vary drastically in the level

of collegiality, much lower than the Ninth Circuit. And look at the Seventh circuit, which is about the same size as the Tenth, Eighth, and Eleventh, and it has much lower level of panel effects of collegiality.

In fact, size of circuit seems to have no effect at all on this. And it is not only contrary to my own experience, I believe the experience of most of my colleagues, it in fact is a very well respected study. I have given the cite, and I hope the Committee will have an opportunity——

Mr. SMITH. Without objection, the chart will be made a part of the record. I thank you, Judge.

The gentlewoman from Pennsylvania, Ms. Hart, is recognized for her questions.

Ms. HART. Thank you, Mr. Chairman. There has been a lot of discussion regarding how large the caseload is of the current circuit, and I am interested in Professor Hellman's response. And I know he had some things to say that were cut off earlier. Feel free to put those in if they actually speak to this issue as well.

The proposed new Ninth Circuit, how would you respond to the suggestion that it would also have a huge caseload, that that really wouldn't be acted?

Mr. SMITH. Would the gentlewoman yield for just a second? If she wouldn't mind, would she address that question to both Professor Hellman and to Judge O'Scannlain? I was going to ask them the same question.

Ms. HART. Okay. Then I will address it to both Professor Hellman and Judge O'Scannlain. Thank you.

Mr. HELLMAN. Well, as it happens, I would actually like to start with Judge O'Scannlain's statement. If you look at page 25, his Exhibit 9, number of appeals filed per circuit, you look at that exhibit, bar graph there, you will see that the Fifth Circuit is closing in on 9,000 filings a year. The Eleventh Circuit is not far behind. You are going to have large circuits no matter what you do with the Ninth, no matter how the Ninth Circuit is configured. And trying to configure the new Ninth as a circuit that is the only second largest or that is smaller than the Fifth Circuit is not a worthwhile goal for a realignment plan.

Now, of course you may say, as many do say, don't realign at all. But I think we are addressing the question if you realign, how do you do it? But it just does not serve any useful purpose to try to create a circuit smaller in filings than the Fifth.

But even if you did think it somehow served a useful purpose, you would have to weigh that against something that is much more important, and that is having a minimum of three States in the new Ninth Circuit. The White Commission spoke very cogently and eloquently about this, and their reasoning I think carries even more weight today at a time when the confirmation process is so politicized. It is vital that you have three pairs of Senators influencing the appointment to a court of appeals. It is vital in maintaining diversity in appointments. It is vital in getting positions filled in the face of a stalemate such as the one that has precluded any appointments to the Sixth Circuit from Michigan for more than 4 years.

So if the circuit is to be split—and, again, I think reasonable people can disagree about that—I would agree with the comment made I think in a letter from Judge Kleinfeld that this alignment in H.R. 2723 is the optimum alignment, and the fact that the new Ninth Circuit would still be a very large circuit is not I think a reason for not doing it.

Ms. HART. Thank you. Yield back.

Oh, I am sorry, Judge O'Scannlain. I am sorry.

Judge O'SCANNLAIN. Well, I could simply elaborate that one needs to keep some historical context. Restructuring is what larger circuits do. This is what happened to the Eighth Circuit when it carved out—when the Tenth Circuit was carved out in the 1920's. This is what happened to the Fifth Circuit when the Eleventh Circuit was carved out in 1980. If it were a question of the optimum caseload allocation between—in other words, to take what we have and to split it as close to half as possible, then we would be following the Hariska Commission recommendation in 1974 which suggested that the Ninth Circuit be split—in fact recommended that the Ninth Circuit be split in such a way that there would be a northern circuit based in San Francisco and a southern circuit based in Los Angeles. In other words, that would imply that a single State could be split.

If we had done that in 1974 when it was recommended, or even at 1980 when the Fifth did it, because they—it had been recommended that the Fifth Circuit split—then you would have equal-sized circuits today.

The problem of course with that recommendation is that from a political standpoint, it is my understanding, particularly based on some conversations I have had with Senator Feinstein, that there is some resistance to the idea of splitting a State, having a State in two separate circuits. Conceptually it can be done, but if there are other considerations that would prevent it, of course then that has to be off the table.

So in the end, large circuits split. They do the best they can. If it turns out that one portion is going to be larger than the other, well, that is the way it is going to have to be for a while.

Mr. CONYERS. Mr. Chairman.

Mr. SMITH. Yes. Thank you, Ms. Hart. The gentleman from Michigan, the Ranking Member of the Judiciary Committee, is recognized for his questions or comments.

Mr. CONYERS. Thank you, sir.

A question, starting with the Honorable Judge Kozinski. In 1980 the Fifth Circuit was split because the judges thought it was too big. Now the Congress wants to split the Ninth because they think it is too big, and so I think it is who is calling for the split that—it is my suspicion the judges have some resistance to other people figuring out what is best for them, and I just wanted the conversation to revolve around that comment of mine for a while.

Judge KOZINSKI. Yes, you are absolutely right. The Fifth Circuit was split after many years of consideration by the bar and the judges in that circuit, and they reached a substantial agreement. I don't remember whether there was unanimity, but there was virtual unanimity among the judges of the court, with the support of the bars of the six States in the old Fifth Circuit, that a split was

appropriate. It was done. Congress acquiesced to the decision made essentially by the judges and the lawyers representing the litigants or States.

That is not our situation. I will leave it up to our Chief Judge to speak to the question—on the question of the Ninth Circuit official position. But speaking for myself personally, it is my understanding there is a firm commitment on the part of the judges in the Ninth Circuit that the circuit remain in one piece, not unanimous. We do have Judge O'Scannlain here and some of his colleagues, many of them senior judges, but it is a substantial majority.

But I also speak for the bar, because I meet with lawyers, and that is a question that comes up a lot. I was with a group of lawyers meeting this weekend, and a number of lawyers from our circuit, and the question must have come up two dozen times. I did not find a single lawyer who thought it would be a good idea.

Mr. CONYERS. Chief Judge Schroeder, what do you think?

Judge SCHROEDER. Well, I would agree with what Judge Kozinski has said. It was a substantial majority of the Fifth Circuit—of the judges that wanted to divide. We have never had a division. We have only had two in history. That was the last one. It was almost 25 years ago, and it was with the substantial majority of those judges.

Our court has remained consistently throughout with a substantial majority who do not favor division of the circuit, and I think that the—it is wise for Congress to listen to the judges, because Congress has done so in the past.

Mr. CONYERS. Thank you all.

Oh, yes, sir.

Judge O'SCANNLAIN. May I make an observation?

Mr. CONYERS. Absolutely.

Judge O'SCANNLAIN. Mr. Conyers, I am reluctant to raise this, but when it became known that there was going to be a hearing and that I was going to be one of the panelists invited, I specifically suggested to the Chief that we have a straw vote, because her perception and the perception of Judge Kozinski seems to be that the opposition is overwhelming.

My perception is different. My perception is that there is a significant and growing support for the idea that we have to start thinking about restructuring and start planning for that and do something about it.

I suggested that we have this straw vote, and the Chief suggested—well, didn't suggest, just simply said, no, there won't be any until we have a chance to talk about it, which presumably will be at our next court meeting which is presently scheduled for December. So perhaps one product of this hearing might be to extract a commitment from my Chief that at the next court meeting we will actually hear it—raise this subject, discuss it, and see where we are on it.

My hunch is it will still be little less than 49–51 percent. But nevertheless, if I am correct in my perception about what my colleagues are telling me, then it seems to me that there is a progression of interest in and commitment to the idea of doing something about restructuring.

Judge KOZINSKI. I am sure he is able to talk to other judges. He was here with nine names last year. He is still with nine names today. You can be sure that there are other judges who were willing to join the cause. Judge O'Scannlain, as a good enough advocate to have found them.

Mr. CONYERS. Madam Chief, did you want to add anything?

Judge SCHROEDER. Any judge who wished to be added to the list had full opportunity to do so, and no one did.

Mr. CONYERS. Professor Hellman, you are the only one who hasn't helped us on this question.

Mr. HELLMAN. Well, as I have said in my statement, I do think the judges should be discussing this. I think they should be looking at some of these data, some of which have not been presented before, including this very interesting chart from the Sunstein study. I don't think simply a straw vote is what this Committee would like. I think this Committee would like to know what the judges think about these very specific issues that have been raised.

Now, Judge Kozinski described the I think very excellent process that the court went through for the recall case in a very short period of time, a period of—period initially with the exchange of memos and then in that case a hearing.

Well, there was a similar process 25 years ago now when the court decided how it would take advantage of the opportunity that Congress gave it to create the limited en banc, and that was a period of several weeks, maybe even more than weeks, where the judges exchanged memos, winnowed out bad ideas, and improved good ones. And then they came together for a meeting and talked about it and did come to a consensus.

Now, I don't think there is going to be a consensus on this issue, but I think that kind of structured process is the one that would help this Committee in knowing the answer to the question, which I agree is very important and indeed critical: What has the experience of the judges been and what does that experience tell us about how effective a large court is today and, what is even more important, how effective it would be with seven new judges. That is a 25 percent expansion, and I think that has to be factored into what the judges talk about.

Mr. SMITH. Thank you, Mr. Conyers.

The gentleman from Virginia, Mr. Goodlatte, is recognized.

Mr. GOODLATTE. Thank you, Mr. Chairman. I am not sure where I come down on all this, but it is very interesting hearing. Let me ask the three justices if they can tell me their opinion about how that vote would go if we just took the vote from those States which would comprise the proposed new Twelfth Circuit. Would they be in favor of it, or would they be opposed——

Judge SCHROEDER. I have no reason to think that anything has changed since last year.

Mr. GOODLATTE. And how was that last year?

Judge SCHROEDER. There were 9 judges who supported a split last year. Most of those nine were from the Northwest, as I recall.

Mr. GOODLATTE. So a majority of the justices in Oregon——

Judge SCHROEDER. No, I did not say that. I said of the nine judges——

Mr. GOODLATTE. There are only nine active justices in the——

Judge SCHROEDER. No, the 9 judges of the 48 who supported a spilt, and that includes senior judges.

Mr. GOODLATTE. I see what you are saying. You are saying that 9 of the 48 that were opposed to splitting were from the part of the district——

Judge SCHROEDER. I am not even sure that that is——

Judge O'SCANNLAIN. If my Chief is finished, I think I perhaps can answer the question. Judge Kleinfeld of Alaska is a very enthusiastic supporter of this legislation and has written a letter to the Chairman in support. Judge Tallman from Seattle is an enthusiastic support over this legislation and has written a letter in support. Judge Tom Nelson and judge Steve Trott, both of whom are in Idaho, are also supporters of this legislation.

Mr. GOODLATTE. Now, are they all active judges or any of them senior?

Judge O'SCANNLAIN. All four are active.

Mr. GOODLATTE. And you are active.

Judge O'SCANNLAIN. Yes.

Mr. GOODLATTE. So at least a majority of the active judges in this new area support the creation of this——

Judge O'SCANNLAIN. That is probably right, but I have to add one caveat. And that is, both Judge Graber, who is a colleague of mine in Portland in the same courthouse, and Judge Gould in Seattle have indicated that they refuse to express their views, because they do not think it is appropriate as judges to express a view on this issue.

Now, with respect to that, obviously the three of us disagree with that proposition. We feel comfortable communicating to Congress——

Mr. GOODLATTE. I understand. I only have a limited amount of time, Justice——

Judge O'SCANNLAIN. I am sorry, but I just want to say you have to exclude those two in terms of those in the Ninth——

Mr. GOODLATTE. But five of the nine active judges have expressed a favorable opinion of the idea, and two are unknown. And we don't know what the other two are——

Judge O'SCANNLAIN. No. Judge Thomas would probably be an opponent, because he testified here last year. He is from Montana.

Mr. GOODLATTE. A majority of the justices from the area where this would have its greatest impact favor the concept.

Now, Justice Schroeder—did you want to respond to that?

Judge KOZINSKI. No. I have nothing further.

Mr. GOODLATTE. Judge Schroeder, you made a point, which I think is a valid point, of how far-flung this circuit is. You said everything from the Arctic Circle to Guam. I note that 95 percent-plus of that is water and not too many appeals come from that, but—and I also note from the chart that only 34 are from Guam and 16 from the Northern Marianas, which is less than one-half of 1 percent of the appeals. So I wouldn't think the burden of going to those two places for those hearings would be extraordinarily onerous.

Judge SCHROEDER. No. It is not the Guam and Northern Marianas that are the problem. The——

Mr. GOODLATTE. Alaska is 1 percent and Hawaii is 2 percent of the total caseload of the current circuit.

Judge SCHROEDER. The Hawaii cases would have to be heard either—it is true that there is water, but it takes hours to traverse it. The Hawaii cases would be presumably heard primarily in Seattle, which means that those lawyers would have to travel to Seattle, which—and many of them are government lawyers. This is all very expensive. The traditional route is to San Francisco.

Mr. GOODLATTE. Well, it wouldn't have an embargo on those justices traveling through the Ninth Circuit to reach their destination, would you?

Judge SCHROEDER. No. It probably doesn't make a lot of sense, but it could.

Mr. GOODLATTE. In fact, if justices from those areas go to provide the personnel to hear cases in Hawaii or Guam or in the Northern Marianas now, they do that now, travel through San Francisco.

Judge SCHROEDER. Well, at the present time our judges go to Hawaii approximately once every 5 years and to Alaska once every 8 years. Presumably the judges in the new circuit would have to go to those places every year.

Mr. GOODLATTE. I would think so, and I don't think that is a bad idea.

But let me ask this as well. I wonder what motivates most of the justices in California and in the remainder of the circuit that have expressed their opposition to this. The Ninth Circuit is by far the largest circuit and, by virtue of that, has I think a higher profile and a higher influence. It also has a reputation, fairly or not, for having more opinions that are outside of a central moderate viewpoint. I say that from somebody from the Fourth Circuit which has the reputation for being the most conservative circuit of the current 12 circuits. So I wonder if the motivation here is that there might be some diminution of the influence of the decisions made by virtue of some reduction in the size, although it will still be the largest circuit.

Judge SCHROEDER. Well, I can assure you that this is simply not a political issue for us. Our Chief Judges, from Judge Chambers who was from Tucson, Arizona, through Judge Browning, who was from Belt, Montana, to Judge Goodwin from Oregon——

Mr. GOODLATTE. But I know a strong correlation here between the opposition to this proposal being from the States that would remain—particularly California that would remain the core of the Ninth Circuit and at least some majority, we don't know exactly how much, but some majority from those States that would comprise the new Twelfth Circuit supporting the idea, and I am wondering why that correlation exists.

Judge KOZINSKI. Perhaps the allure of becoming Chief Judge.

Judge O'SCANNLAIN. Who is sitting on my right.

Judge KOZINSKI. I am next in line, but I am not anxious to take the job, and I am not committed to doing so. But there are judges who think that the chance to be Chief Judge of a circuit, even though a smaller circuit than the Ninth, is a good enough reason to split, I would suspect. Just since we are being cynical together here.

Judge O'SCANNLAIN. Well, while we are at it, let the record show that this judge is ineligible to become Chief Judge of the new circuit, because I have already reached age 65, which means that I would not be eligible to serve as Chief Judge.

Mr. BERMAN. Does it pay more?

Judge O'SCANNLAIN. No, it doesn't, but I thought the record ought to be fairly——

Mr. SMITH. The gentleman's time has expired.

Thank you, Mr. Goodlatte.

Let me recognize myself for just a couple more questions, and maybe following the line of questions by Mr. Goodlatte, I might also ask the question to Mr.—to Judge O'Scannlain. Why, just in general, the resistance to change? Do you think judges are concerned about the appearance of a loss of influence? Do you think that it is just, as we all are sometimes opposed to a change in the status quo? In addition to reasons you might have given Mr. Goodlatte, I would just ask you to speculate as to what you think is the motivation here.

Judge O'SCANNLAIN. Well, as I said in my testimony and repeated in my oral remarks, I am at a loss to explain it, but it seems to go with the office of Chief Judge past, Chief Judge present, and Chief Judge future and——

Mr. SMITH. Maybe there is a certain vested interest here that no one wants to see diminished in any way. I don't know.

Judge O'SCANNLAIN. Could be.

Mr. SMITH. Thank you, Judge.

Professor Hellman, I felt like in your testimony a few minutes ago you didn't get to the best part of your testimony, and I wanted to ask you to elaborate upon it right now. You said in your written testimony, I can see four benefits that the new Ninth Circuit could expect to gain after the reorganization contemplated by the bill. I don't think you got to those four benefits in your testimony, and would you get to them now?

Mr. HELLMAN. Thank you, Mr. Chairman. I think I can lead into that by also addressing a little bit the prior question, which is why the opposition from California. It seems to me that we have to take into account the fact that every other circuit division bill until this one has shortchanged California in one way or another. Either it hasn't given California enough judges or it has been an alignment that would have been disadvantageous to the effective operation of the court in California. So you have a very long history. I mean, this controversy has been around for a very long time, and every prior bill has left California with the short end of the stick.

That leaves a history which I think is very, very hard to overcome, and that is one of the reasons why I think it is so important that the judges talk about this bill, which is so different from the prior ones.

Now, I do list in my testimony some of the benefits that I think the new Ninth Circuit can get. I don't want to oversell them. I don't think that they alone would be a reason for splitting the circuit if you didn't have some other good reasons, but it seems to me that having less travel for the judges is a benefit. I don't think it is just a cozier situation for the court. It seems to me that in any organization that we expect to do what we expect from our judges

and the judges of an appellate court, having a working environment that is conducive to working effectively is important, and a lot of travel, it seems to me, is something of a burden. Now, the judges are used to it. Maybe it doesn't have the effect on them that it has on many other people, but it seems to me less travel is something that is worthwhile.

I think there would be some benefit to having a more participatory circuit judicial conference. The Ninth Circuit Judicial Conference is a wonderful institution. It is an organ of governance, which is not in most of the other circuits, and it works very well. But a very limited number of lawyers can participate in that, and one of the benefits of having a three-State circuit is that a lot more lawyers could participate, they would learn something about how the courts work, and the courts would get the benefit from that.

And of course this bill, this particular bill would give the judges of the new Ninth Circuit a substantial—I shouldn't say substantial—by itself it gives some reduction in their per-judge caseload. If the judges of the Twelfth Circuit provide some of the help that Judge O'Scannlain has indicated is forthcoming, they would get a lot of help.

Now, a lot of the difference in terms of the individual work loads comes about because of this flood of immigration appeals. If we had done these calculations based on 2001, which is before they came in, it would have worked out just about right. Now, we can't ignore these immigration appeals, but I am not sure that they are going to be coming in at the same rate forever. So those are some of the benefits. They are not huge, but they have to be weighed against the other side: How much would be lost if this bill were enacted?

Mr. SMITH. Thank you, Professor Hellman.

Mr. Berman, do you have other questions?

The gentleman from California, Mr. Berman, is recognized.

Mr. BERMAN. I have a letter here from a law firm opposing the bill that says, somewhat harshly, although the bill is disingenuously labeled the Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003, it is in fact the "pack and split bill" of 2003. It combines the unmeritorious features of a circuit split, with a court-packing plan reminiscent of President Roosevelt's infamous court-packing plan of 1937. It invokes the image of wrongful tying arrangements. On its face it bears the marks of undue political influence with the judiciary. And I will just sort of—it is an interesting—I don't know if it is accurate, but it is an interesting insight about the combination of these two things in the new bill.

The thing that I don't understand is the notion of why splitting the circuits will fundamentally deal with the issue of time of disposition. The Chairman in his opening remarks made that the major argument to demonstrate that the Ninth Circuit isn't as efficient, isn't operating as well as it should be over a long period of time, the time of disposition being the worst. It has been pointed out that in the last year it was no longer the worst. It has been pointed out that there were——

Mr. SMITH. If the gentleman will yield, that really wasn't a correct statement. I listed a number of criteria that was——

Mr. BERMAN. That was the first one.

Mr. SMITH. Just because it was the first doesn't mean it was the only.

Mr. BERMAN. I didn't say the only. I never said the only.

Mr. SMITH. If the gentleman recalled, his main point had to do with reversal rates which weren't mentioned, so keep that in context.

Mr. BERMAN. My only—but I don't even—if it is true, it may be a reason. If there is something inherent that a split will make cases still be determined wisely and a good decision, but in a faster period of time, that to me is—in other words, I am accepting the premise that if that is true and if a split helps that, it is an argument, but what I don't understand is why it helps it. It isn't that—why isn't it a function of the number of judges, whether it is in one circuit or in two circuits? In fact, I could argue in a very small circuit the chances of one or two illnesses could—over a long period of time could much more dramatically impede the processing of cases in that small circuit than it might have in a much larger circuit.

And then I guess I ask you, Judge O'Scannlain, since—given your position on the issue, why will this be helped by a split because of the very seven judges that Mr. Trainer suggests is a court-packing bill. That is what makes me think that the Cooley Godward letter is just over the top. It is an extraordinary comment from a highly distinguished law firm, particularly dealing with this issue, but the key to moving the cases along and to reducing the backlog and accelerating our record of performance is more judges.

Mr. BERMAN. All right. So then give the seven judges—what does a split have to do with it?

Judge O'SCANNLAIN. Well, it is really the timing of all of this. If we get 7 more judges and go to 57 judges compared to the next largest circuit, which is in the twenties or so, where are we going? I mean, can we grow infinitely? Can we grow to 80, 100 judges? It may not be all that long before we get to numbers like that; and my key interest in this is emphasizing the notion of size and the fact that we cannot grow infinitely. That is the point——

Mr. BERMAN. That I understand—I understand that argument, and I guess you could debate whether this is the size which it shouldn't be——

Judge O'SCANNLAIN. Reasonable people can differ on that.

Mr. BERMAN. But on the issue of time of disposition, I hear you saying more judges is the solution to that problem. And it is not the Ninth Circuit is filled with lazy judges, it is not that there is something magic about a split that will shorten time of disposition. We need more judges is what you are really saying.

Judge O'SCANNLAIN. Oh, there is no question about that. I think all of us would agree with that.

Mr. BERMAN. Either of you, both of you.

Judge SCHROEDER. I just want to point out we haven't had any new judges since 1984.

I also wanted to point out that both the Fifth Circuit has grown since the division, more than doubled in the number of cases. The Eleventh Circuit has grown by 400 percent in the number of cases. No one is suggesting that those circuits should divide again, and

no one should. Growth in caseload is something that goes with the growth and advancement of our society.

Mr. BERMAN. I want to make one comment, since the red light is blinking.

My colleague, Mr. Goodlatte's comments, his interest in whether the judges of the new—of what would be the new Twelfth Circuit, how they felt about it. I mean, that is sort of what we fought a Civil War over. I mean, I know that if there are a number of Congress—if Members of Congress from northern California could decide whether or not there should be a 51st State, our California is split. I mean, in other words, I am just wondering, this whole issue of what body do you look at to decide, it raises problems. Did you have anything on this?

Mr. SMITH. Would the gentleman like to be recognized for another 30?

Judge KOZINSKI. If I may just have 30 seconds? I think the Chairman's last question is really a profound one, if I may just speak to it, the one that he addressed to Professor Hellman. He asked why the resistance of the judges, or most of the judges, in the Ninth Circuit to split, and if I may focus on the word a little bit, if I may, on the word resistance. I have been there 18 years, and I have never been a strong advocate one way or the other on this issue. I have been more or less on the fence. I think there are good reasons, as Professor Hellman has pointed out and as Judge O'Scannlain pointed out, why a split at some point might be appropriate. This is the first time I have spoken in public on the issue, and so I have been largely on the fence about it.

To me, the case of splitting has not been proven. I look at cases. I look at other circuits. I look at circuits like the Sixth Circuit which are much smaller, and they have an atmosphere that has become public and quite poisoned. I hope something like that does not happen to our circuit which has truly, even though we disagree with each other at times, we disagree respectfully and graciously, and we get along marvelously well. I am simply afraid that splitting will cost us that collegiality and that friendliness, which is borne out by the figures. I hope this Committee will take that seriously into account.

Mr. SMITH. Thank you, Judge Kozinski; and thank you, Mr. Berman. I will recognize myself for questions.

Judge O'Scannlain, you wanted to respond to that. You probably had the same impression I did, that the collegiality would be increased if it were smaller.

Judge O'SCANNLAIN. Well, it would have to be. I can't imagine—I simply don't understand the argument that we have just heard, because it doesn't seem to follow from itself.

With respect to other matter of the judges of the new Twelfth, I had a chance to look at Exhibit 5 and, so far as the 8 judges in the Northwest are concerned, one is an opponent, two have no position, and the remaining five support it. So those are the actual numbers.

In terms of the voting numbers I suppose it would be 5 to 1. But, in any event, it is just spelling out in detail the response to Mr. Goodlatte's question.

Mr. SMITH. Thank you, Judge O'Scannlain; and I ought to point out that both you and Professor Hellman have in the past opposed legislation to split the Ninth Circuit and you now favor it, and perhaps other judges will come around, too, and that might be an argument.

Judge O'SCANNLAIN. Well, that is right. When I first came on the court in 1986, I was approached by my senior Senator and very good friend Mark Hatfield, who was a very strong proponent of splitting the circuit at that time. But it was very clear, because of speeches that were made, that the motivation was having to do with environmental issues and, in particular, the spotted owl case. It was a very, very hot issue in our part of the country.

I continued to oppose the circuit until I started thinking about when I went to an LLM program at the University of Virginia, an LLM program for appellate judges. During that time I did a lot of research on court structure and organization, and somewhere in the early 1990's I began to take a different point of view and, obviously, totally unrelated to anything to do with cases.

Mr. HELLMAN. Could I just clarify? I have not taken the position that the circuit should be split.

Mr. SMITH. I thought those four reasons you gave sort of put you in that camp.

Mr. HELLMAN. I listed there some of the benefits that the new Ninth Circuit could expect to get, and I went on to say that those benefits should be weighed against the drawbacks of splitting. I think the judges should think about these issues and then come back to your Subcommittee in the first instance and give their position. I would not support the split at this time, based on the opposition of the judges.

Mr. SMITH. And if the judges change their mind, then you would change your mind as well, is that right?

Mr. HELLMAN. I think the Congress—I agree with what Judge Schroeder said in her initial comment, that the history of this kind of controversy has been that Congress has waited until there has been a pretty strong consensus from the affected circuit. That has worked well, and I see no reason why Congress should abandon that approach.

Mr. SMITH. Okay. Fair enough. Thank you all for your comments.

I want to say that Mr. Berman pointed out that one of the concerns that I have is the length of time for the disposition of cases. That continues to trouble me; and I do feel that that would go a long way to justifying a split of the circuit if, in fact, we could show that the time of disposition was reduced. You know the cliche as well as I do: Justice delayed is justice denied. So that is why I have a particular concern about that part of the argument, in any case.

But we appreciate your testimony. It has been very, very helpful, and we thank you for appearing before us today.

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

Mr. HELLMAN. Thank you, Mr. Chairman.

[Whereupon, at 3:35 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

STATEMENT OF REP. JOHN CONYERS, JR.
Courts, the Internet, and Intellectual Property Subcommittee
Hearing on H.R. 2723, the "Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003"
Tuesday, October 21, 2003

The issue before us today is whether the Ninth Circuit Court of Appeals is able to competently perform its duties as it is currently structured.

H.R. 2723 purports to divide the Ninth Circuit because the Court is too big and as a result, the Ninth Circuit experiences an unmanageable caseload, inconsistent decisions, and higher reversal rates. Refusing to speculate on other reasons as to why there is such a strong interest in dividing this Circuit, I will focus today on why the Ninth Circuit is able to efficiently and effectively carry out its responsibilities.

First, I would like to address the argument that the Ninth Circuit should be split in order to relieve it of its heavy caseload. As 80% of the cases come from California, reducing the composition of the Ninth Circuit to California, Nevada, and Arizona would not decrease the amount of work experienced by the Court.

Today, Mary Schroeder, Chief Judge of the United States Court of Appeals for the Ninth Circuit, will testify that in addition to not reducing the caseload, her Court is fully equipped to handle all of its work. Twenty-seven of its 28 judgeships have been filled and the Court has substantially reduced the time needed to calendar and decide cases since July 2002, when Judge Schroeder first appeared before this Committee and testified on this matter.

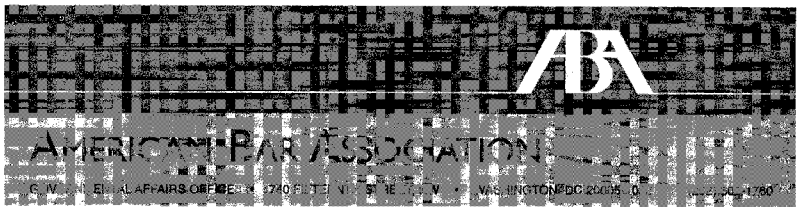
Second, I would like to respond to the argument that the Ninth Circuit in its current form produces inconsistent decisions. Advancements in technology have had a profound effect on our courts and new resources, like an issue tracking system, allow judges to remain up to date with decisions by other panels on similar issues.

Furthermore, maintaining the Ninth Circuit in its existing form promises efficiency and uniformity as the states that currently make up the Circuit share significant legal interests. The states share an interest in land and water issues, as well as Native American issues.

Lastly, I would like to address the theory that the Ninth Circuit experiences a higher reversal rate. The Ninth Circuit's reversal rate is just 2% higher than the national average. Last term the Court's reversal rate was 75%, while four other circuits had 100% reversal rates.

The sole basis for dividing the Ninth Circuit should be if the Court is unable to competently perform its duties. For the reasons that I have just stated, as well as for others that will be discussed at today's hearing, this is not the case. Splitting the Ninth Circuit will not do anything to improve judicial efficiency. Actually, such a split appears as if it will do little more than unnecessarily burden taxpayers, as a significant financial cost will come with the restructuring of the Ninth Circuit and creating a new Twelfth circuit as proposed by H.R. 2723.

As such, I oppose any attempt to restructure the Ninth Circuit Court of Appeals.



Statement

of the

American Bar Association

on

H.R. 2723, the "Ninth Circuit Court of Appeals Judgeships and Reorganization Act of 2003"

submitted to the

Subcommittee on Courts, the Internet and Intellectual Property

Committee on the Judiciary

U.S. House of Representatives

October 21, 2003

The American Bar Association appreciates the opportunity to present this written statement for the hearing record of the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property on H.R. 2723, the "Ninth Circuit Court of Appeals Judgeships and Reorganization Act of 2003." The ABA has examined the issue of appellate court restructuring multiple times since 1925. After reviewing the most current statistical data and testimony, we reaffirm our position conveyed to this committee last year: there continues to be no compelling reason to restructure the Ninth Circuit and, therefore, we oppose enactment of H.R. 2723 or any other legislative proposal that would divide the Ninth Circuit into two separate circuits.

I. Historical Overview of Congressional Interest in Restructuring the Ninth Circuit Court of Appeals

The federal courts of appeals have been the subject of intense study and debate for over three decades, primarily because of concerns generated by the dramatic and persistent growth in federal appellate caseload.[1] The Ninth Circuit -- the largest circuit in terms of geographic size, population served, number of authorized judgeships and total annual caseload -- has often been, and continues to be, at the vortex of the debate.

In the early 1970s, the congressionally created Hruska Commission, formally called the Commission on Revision of the Federal Court Appellate System, recommended several procedural and structural changes, including division of both the Fifth and Ninth Circuits, then composed of 15 and 13 judges respectively, because they were considered too large. Congress declined to implement that recommendation and instead substantially increased the number of authorized judgeships in both circuits and authorized any circuit with 15 or more judges to adopt the use of limited en banc panels or administrative units (other recommendations of the Hruska

Commission) to deal with rising caseloads.[2] The Ninth Circuit chose to adopt these new procedures. The Fifth Circuit, having resisted these innovations, subsequently chose to petition Congress for division. Congress agreed in 1980 and created a new Eleventh Circuit. The only other time Congress has divided a circuit occurred in 1929, after a consensus was reached among members of the circuit bench and bar of the Eighth Circuit that the western states should be placed in a new Tenth Circuit.

Although there was general consensus in the legal community that the various techniques adopted in the 1980s were working well in the Ninth Circuit, some Members of Congress who resided in the Pacific Northwest were not satisfied and repeatedly introduced legislation during the 1980s and 1990s to split the Ninth Circuit into various configurations. None of the proposals received serious legislative attention until the 105th Congress, when an attempt to press Ninth Circuit restructuring resulted in passage of compromise legislation creating the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by the late Justice Byron R. White.[3] The Commission was directed to study the structure and alignment of the federal appellate system, with particular reference to the Ninth Circuit, and to submit its final recommendations regarding changes in circuit boundaries or structure to the President and to Congress by December 1998.

The "White Commission," as it was popularly known, concluded that the Ninth Circuit should not be split. In its final report, released at the end of the 105th Congress, the Commission stated:

> There is no persuasive evidence that the Ninth Circuit (or any other circuit for that matter) is not working effectively, or that creating new circuits will improve the

[1] In 1960, 3,899 appeals were filed in the regional U.S. Courts of Appeals, on which a total of 68 judges sat. In 2002, 57,555 cases were filed before an appellate judiciary consisting of 179 judges.
[2] Omnibus Judgeship Act of 1978, Pub.L. No. 95-486.

> administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.[4]

The Commission also acknowledged that certain benefits derived from the current alignment of the Ninth Circuit, including the development of a consistent body of law that applies to the entire far western region of the United States and governs relations with the other nations of the Pacific Rim, and the practical advantages of the Circuit's administrative structure. Nevertheless, the White Commission recommended that Congress restructure the Ninth Circuit Court of Appeals into three regionally based adjudicative divisions. The ABA opposed the recommendation, observing that it was not supported by the Commission's findings and conclusions, but rather by the Commission's stated subjective preference for smaller decisional units. Congressional reaction was similarly tepid, and implementing legislation introduced during the 106th Congress by Senator Murkowski (R-AK) received minimal attention.

During the 107th Congress, identical bills were introduced in the House and Senate by Representative Simpson (R-ID) and Senator Murkowski (R-AK) to split the Ninth Circuit into two circuits, with Arizona, California and Nevada remaining in the Ninth Circuit, and Alaska, Hawaii, Oregon, Washington, Idaho and Montana forming a new Twelfth Circuit. This Subcommittee held a hearing on H.R. 1203 on July 23, 2002. The ABA submitted a written statement for the record opposing the legislation.

This Congress, Representative Simpson and Senator Lisa Murkowski again have introduced circuit-splitting bills. Representative Simpson, in fact, introduced two: H.R. 1033,

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[3] Pub.L.No. 105-119.
[4] Final Report, *supra note 2 at 29.*

would fashion California and Nevada into a new Ninth Circuit, while H.R. 2723 -- the subject of this hearing -- proposes a different circuit reconfiguration by retaining Arizona, California and Nevada in the Ninth Circuit and creating a new Twelfth Circuit out of the remaining states and territories. In response to concerns raised during last year's hearing, H.R. 2723 includes new provisions authorizing seven new judgeships for the newly configured Ninth Circuit and permitting inter-circuit transfer of judges between the new Ninth and Twelfth Circuits upon mutual consent of their chief judges.

Despite these modifications in design, the ABA remains opposed to H.R. 2723. Its new provisions do not advance the debate: the issue is not how to split the circuit, but whether there are serious problems with the administration of justice in the Ninth Circuit, and, if so, whether they would be remedied by dividing the circuit into two circuits.

II. Circuit Restructuring Should Not Occur Absent Compelling Evidence of Current Dysfunction.

The standard by which the ABA assesses the need for circuit restructuring states: "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload." This standard, first suggested by the Judicial Conference of the United States in its *Proposed Long Range Plan for the Federal Courts*,[5] clearly embodies the principle that circuit restructuring is a "remedy" of last resort and should only be used if there is compelling evidence that justice is being denied to individual litigants and the integrity of the law of the circuit is threatened. Contrary to the views expressed by Professor Hellman in his testimony before this subcommittee, we believe that Congress should

adhere to this very stringent standard because circuit restructuring profoundly affects every component of the justice system and creates its own set of serious problems which may be temporary or may linger for years, including: substantial start-up expenses for new construction or renovation of existing facilities and for relocation of personnel and tangible property; administrative disruption; and, of course, fostering an unpredictability of case law in the circuits whose boundaries are moved.

In determining whether this standard is met, we believe that the views of the judges of the circuit in question and the lawyers who practice daily before them should be accorded great deference. They are in the best position to know how the Circuit operates on a day-to-day basis and to evaluate its strengths and weaknesses.[6] Unless there are truly extraordinary circumstances, Congress should continue its past practice of refraining from using its power to restructure a circuit absent the substantial support of the affected legal community out of deference for a co-equal, independent branch of government.

It is noteworthy that, since the 98th Congress, every legislative proposal to split the Ninth Circuit (a total of 16) has been introduced and cosponsored by Congressional members from the Pacific Northwest -- i.e., those jurisdictions that would be severed from the Ninth Circuit to create a new Twelfth Circuit.[7] None of the legislative proposals were ever supported by the Judicial Council of the Ninth Circuit or more than a few state bar associations. These observations give rise to the inference that Congressional concerns over the quality and administration of justice in the Ninth Circuit do not reflect the views of the affected legal community as much as they reflect geographic concerns. This certainly may not be the case, but

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[5] Judicial Conference of the United States, LONG RANGE PLAN FOR THE FEDERAL COURTS, 44 (1995).
[6] See Appendix A for a supplemental statement submitted by the ABA Litigation Section reaffirming the opposition of its members who practice in the Ninth Circuit to restructuring proposals.

the insistence by legislators from such a prescribed geographic area that Congress mandate a split, in the absence of widespread support, raises questions whether issues other than judicial efficiency are involved.

III. No Compelling Evidence Exists To Support Claims That The Ninth Circuit Needs Restructuring at This Time.

After examining the most recent judicial statistics and evaluating the claims of those who support division, we do not detect a deterioration of conditions in the Ninth Circuit. The ABA, therefore, again concludes that there is no compelling evidence to suggest that the Ninth Circuit is failing to deliver quality justice or that any of the perceived problems identified by supporters of the legislation would be remedied by the proposed circuit division.[8] In fact, court statistics compiled by the Administrative Office of the U.S. Courts and submitted to Congress annually suggest that the Circuit is functioning very well and utilizing its resources effectively.[9] The Ninth Circuit terminated more than 10,000 cases in 2002, rendering decisions in over 5,000 of them. Each judge terminated, on the average, 492 cases on the merits, making the Circuit the fourth most productive out of the thirteen circuits in 2002.

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[7] Appendix B contains a chart listing the original sponsors and cosponsors of all the circuit splitting bills introduced since the 98th Congress.

[8] The ABA has not always opposed circuit restructuring. In 1928, the Association supported splitting the Ninth Circuit and in 1973 the ABA supported the Hruska Commission's recommendation to split both the Fifth and Ninth Circuit. The ABA however, rescinded that position in 1990 with respect to the Ninth Circuit, because of the belief that the procedural changes implemented during the preceding decade, in conjunction with other innovations, gave the Circuit the tools it needed to handle rising caseloads.

[9] Administrative Office of the U.S. Courts, JUDICIAL BUSINESS OF THE FEDERAL JUDICIARY (2002). Same-titled reports are produced annually by the A.O. Unless otherwise noted, statistics relied on in this statement were extracted from this report, which covers the twelve-month period ending 9/30/02.

IV. Complaints Raised About The Ninth Circuit Do NOT Justify Its Restructuring.

1. Collegiality

A small group of the judges of the Ninth Circuit Court of Appeals have voiced their concern that collegiality among judges of the Circuit is harmfully diminished because of its size. While concerns about collegiality, even if voiced by only one judge of the circuit, deserve attention, the degree of collegiality among a court's judges, its impact on a court's functioning and its relation to size of the court evade measurement.

Subjective notions regarding the relationship between collegiality and the size of a court do not provide a basis for splitting a circuit. For one thing, such notions change over time. As an example, the 1975 Report of the Hruska Commission reported that many people believed that nine judges were the optimal, or even the maximum, number of judges for circuit efficiency and collegiality (p.127). Currently, all but one Circuit exceed that number of judges, and it is doubtful that anyone seriously adheres to that view anymore. Another discounting factor is that such notions, even if valid, do not provide any substantiation of actual dysfunction in the Ninth Circuit today.

2. En Banc Panels

Many critics of the Ninth Circuit's current configuration claim that the en banc procedures, necessitated by its size, prevent the Court from ever delivering an opinion that is truly representative of the view of a majority of its judges. Judge Kozinski convincingly countered this assertion while he was testifying before this subcommittee by explaining how the en banc process works. He noted that every active judge participates in deciding whether to take a panel decision for en banc review. Extensive memoranda and emails are exchanged before a vote. A majority of the active judges can have a limited en banc decision reviewed by the full

court. Since 1980, there have only been five such requests, and a majority of judges has never voted to consider a limited en banc before a full court en banc. Furthermore, if an en banc panel renders a decision by a 6-5 vote that is inconsistent with the view rendered by the three-judge panel, circuit rules provide for review by the full court upon request of any judge. That, likewise, has never happened. These facts suggest that a majority of the circuit judges do agree with en banc determinations.

3. Quantity of Published Opinions

Restructuring proponents argue the large number of annual filings in the Ninth Circuit is causally related to the large number of opinions it publishes each year. According to them, by splitting the Circuit, the two new resulting circuits, with their smaller numbers of filings, would produce fewer published opinions with which the judges and attorneys practicing in each new circuit would need to be familiar.

The argument is flawed; the casual connection between number of filings and number of published opinions is not at all clear. One example will suffice. Last year, the Seventh Circuit issued 602 signed, published opinions and the Ninth Circuit issued 718 signed, published opinions; however, 3, 418 appeals were filed in the Seventh Circuit, which has eleven authorized judgeships, and 11,421 appeals were filed in the Ninth Circuit, which has twenty-eight authorized judgeships.

The Ninth Circuit, like all the other circuits, has worked out various systems to monitor its published opinions and examine them for consistency and legal soundness. The Circuit's size may in fact give it an advantage here, since the sheer number of judges and law clerks monitoring decisions in combination with the number of en banc reviews conducted almost guarantees a high level of scrutiny for every published opinion.

4. Reversals by the Supreme Court

Critics who point to the number of Ninth Circuit cases reversed by the Supreme Court each year as proof of the need for division often fail to provide other relevant information that would provide perspective. When the public hears that 12 appeals from the Ninth Circuit were reversed by the Supreme Court compared to two or three from a smaller circuit, it sounds like the Ninth Circuit has an extraordinarily high error rate on appeal. In fact, when the number of reversals is viewed as a percentage of the total number of cases that the Supreme Court has reviewed from each circuit the Ninth Circuit's average reversal rate is not significantly different than the reversal rate for the other circuits. And when the number of Supreme Court reversals is compared with the total number of opinions rendered by the Court for any specific year the reversal rate is miniscule.

5. Backlog of Pending Appeals

It is unlikely that division will alter the backlog of appeals since the actual number of cases waiting to be heard will remain the same. In a well-administered circuit such as the Ninth Circuit, backlog is created when the workload outweighs the judicial resources, not because the circuit is too large. The number of pending appeals in the other circuits supports the thesis that there is a lack of correspondence between size and backlog. The Courts of Appeals for the District of Columbia and the First Circuit concluded last year with approximately the same number of appeals pending, yet the D.C. Circuit has twelve authorized judgeships and the First Circuit has six authorized judgeships. As another example, the D.C. Circuit and the Eleventh Circuit both have twelve authorized judgeships, yet the D.C. Circuit had 1,092 pending appeals at the end of 2002, while the Eleventh Circuit had 3,490.

The Ninth Circuit does have a significant backlog of pending appeals that is indeed troubling. Substantial numbers of long-standing vacancies on the Court during the 1990s, not circuit size, are primarily responsible for the Ninth Circuit's backlog. The best and most expedient way to reduce the backlog and prevent its recurrence is for Congress to authorize additional, needed judgeships for the Ninth Circuit and to promptly fill existing and future vacancies.

6. Delay in Processing Appeals

The degree to which the Ninth Circuit varies from other circuits in its disposition time depends on how you evaluate the statistics. If one compares the median processing time from the date of the first hearing to final disposition, then the Ninth Circuit was the second fastest in 2002 -- 1.5 months. The Second Circuit, moderate in size, ranked first, disposing of cases in .7 months. Similar results are obtained when one compares the time from submission to disposition: the Ninth Circuit's time was .3 months (shared by the Eighth Circuit) while the Second and Seventh Circuits shared the fastest disposition time of .2 months. However, if one compares the median processing time of each of the federal circuits from the filing of an appeal to final disposition, the Ninth Circuit was the second slowest -- 15.1 months. The Sixth Circuit experienced the most delay, with median disposition time of 16.0 months.

There is no agreement among court administration scholars whether a correlation exists between circuit size and disposition time. Even if some correlation does exist, other factors, such as vacancy rates, the adequacy of the number of judges and support staff, and case management techniques also exert an influence. We believe that the Ninth Circuit's delay in processing cases is not due to circuit size, but rather to the lingering effects of the high number of vacancies that existed in the 1990s and, to a lesser extent, a few years ago. This is borne out by the fact that the

only significant delays in disposition in the Ninth Circuit, occur in the interval between brief completion and submission or oral argument. As further evidence that the vacancy rate is causally related, recall that the Sixth Circuit Court of Appeals, which has labored under a 50% vacancy rate for several years, has the second slowest rate of disposition from filing date to final action. It is also worth noting that in the last six months the overall disposition time has been reduced in the Ninth Circuit, where vacancies have been filled, whereas the overall disposition time in the Sixth Circuit, where no vacancies have been filled, has deteriorated.

V. Conclusion

The case for restructuring the Ninth Circuit has not been made. There is no compelling evidence that the Ninth Circuit is failing to deliver quality justice or that any of the perceived problems identified by supporters of the legislation would be remedied by circuit division. Congress can best address the Ninth Circuit's most pressing problems by promptly filling existing vacancies, authorizing the creation of – and immediately filling – needed judgeships and providing adequate funding for all components of the federal judicial system.

Thank you for the opportunity to submit this statement for the hearing record.

SECTION OF LITIGATION
American Bar Association

Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5662
Fax: (312) 988-6234
http://www.abanet.org/litigation

APPENDIX "A"

Supplemental Statement of
Patricia Lee Refo, Chair
Section of Litigation
American Bar Association
on Proposed Legislation to
Split the United States Court of Appeals
for the Ninth Judicial Circuit

submitted to

Subcommittee on Courts, the Internet and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives

October 31, 2003

I am the Chair of the Section of Litigation of the American Bar Association, and I write in opposition to the proposed legislation to divide the United States Court of Appeals for The Ninth Judicial Circuit.

The Litigation Section is the largest section in the ABA and represents over 72,000 members in the United States. I want to emphasize at the outset that the Litigation Section is not "pro-plaintiff," "pro-defendant" or "pro-anyone." Our charter is to improve the quality of justice among practicing lawyers and their clients. We therefore have no axe to grind other than making sure that our nation's justice and judicial administration are the best they can be.

I, along with some 14,000 of the Section's members, practice in the states and territories that comprise the Ninth Circuit. We regularly appear in both the federal District Courts within the Ninth Circuit, and also in the Ninth Circuit itself. More importantly, our clients will be directly affected by any action taken to modify the current structure of the Ninth Circuit.

The key point that we, as practicing lawyers, would like to underscore - as so many others, including the report of the White Commission in 1998, have concluded - is that there is still "no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that treating new circuits will improve the administration of justice in any circuit or overall."

The ABA itself, Chief Judge Schroeder and other affected bar groups have pointed out the significant short- and medium-term costs and dislocations that a split would produce. They have also demonstrated that there has been no showing that splitting the Ninth Circuit would produce any meaningful benefits to anyone, including litigants or the public at large, much less that they clearly outweigh the downsides of doing so, which should be the touchstone for making such a significant change. We join in their statements and fully support them.

The fact that the majority of Judges on the Ninth Circuit - including those whose appointments came from "both sides of the aisle" - are opposed to a split and see no benefits from one is itself compelling.

It is extremely useful to have both the collective and individual views and experiences of appellate judges from Arizona to Alaska and from Idaho to Hawaii in framing the Ninth Circuit's jurisprudence. This is particularly important for states such as Arizona and Nevada, which should not be relegated to a minor role as judicial satellites of a much more populous California. The Court's diversity also helps to bring balance to the other states within its boundaries. The Ninth Circuit may be large, both in geography and the number of its judges, but it serves the important purpose of collecting all of the western-most states together in one appellate judicial unit to arrive at an overall, balanced perspective on the important legal issues that come before it.

Most importantly, as noted above, the Ninth Circuit is working, and it is working well with support from not only its own judges, but the bar associations and lawyers within its jurisdiction.

Appendix B

Sponsors of Legislation to Divide the Ninth Circuit
1984-2003

Note: Names in bold are original sponsors.

Congress Bill #	CA	I. NV	AZ	OR	WA	ID	MT	AK	HI
98th									
S. 1156					**Gorton**				
101st									
HR 4900				Smith	**Morrison**, Chandler	Stallings, Craig	Marlenee	Young	
S 948				Hatfield, Packwood	**Gorton**	McClure, Symms	Baucus, Burns	Stevens, Murkowski	
102nd									
S. 1686				Hatfield, Packwood	**Gorton**	Symms, Craig	Burns	Stevens, Murkowski	
103rd									
HR 3654	Farr			**Kopetski**, Smith	Unsoeld			Young	

Congress Bill #	CA	I. NV	AZ	OR	WA	ID	MT	AK	HI
104th									
S. 956				Hatfield, Packwood	**Gorton**	Craig, Kempthorne	Baucus, Burns	Stevens, Murkowski	
HR 2935				**Bunn**, Cooley	Dunn, Hastings, Tate, White			Young	
S. 853				Hatfield, Packwood	**Gorton**	Craig, Kempthorne	Burns	Stevens, Murkowski	
105th									
HR 639						Chenoweth	**Hill**		
S. 431				Smith	Gorton	Craig, Kempthorne	Burns	Stevens, **Murkowski**	
106th									
S. 253								Stevens, **Murkowski**	

Congress Bill #	CA	I. NV	AZ	OR	WA	ID	MT	AK	HI
107th									
S. 346								Stevens, **Murkowski**	
HR 1203						**Simpson**			
108th									
S. 562								**Murkowski**	
HR 1033						**Simpson**			
HR 2723						**Simpson**			

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

October 17, 2003

The Honorable F. James Sensenbrenner, Jr.
Chairman, House Committee on the Judiciary
United States House of Representatives
2449 Rayburn House Office Building
Washington, D.C. 20515-4905

VIA FACSIMILE & FEDERAL EXPRESS

Re: H.R. 2723

Dear Chairman Sensenbrenner:

I've served on the United States Court of Appeals for the Ninth Circuit for 12 years, and I strongly endorse the bill to split the court, H.R. 2723.

I will send a more extensive statement of the reasons for my views under separate cover. In short, the court is too big for two reasons. First, a court with so many judges issues too many opinions. The judges cannot adequately review each others' opinions. Nor can district judges and attorneys within the circuit, who are supposed to apply the law, achieve sufficient knowledge of what the law is.

Second, we cannot hold a true en banc. So far as I know, all other courts in the English speaking world, when they rehear a case en banc, do it with all members of the court. On our court, that is impractical because of our size. As a result, an en banc consists of eleven judges, and a majority, six, is not even one-quarter of our judges. That is not adequate to provide an authoritative and final resolution of controverted issues, let alone the views of a majority of the court.

Like the Sixth Circuit when it got too big, and the Fifth Circuit when it got

too big, the Ninth Circuit should be divided into two smaller circuits. While I do not think the exact nature of the division matters much, the one proposed by H.R. 2723 is probably optimal.

Sincerely yours,

Andrew J. Kleinfeld
Circuit Judge

/meh

cc: The Honorable Michael K. Simpson
United States House of Representatives

The Honorable Don Young
United States House of Representatives

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

October 28, 2003

Honorable Lamar Smith
2231 Rayburn House Office Building
Washington, DC 20515-4321

Honorable Howard L. Berman
2221 Rayburn House Office Building
Washington, DC 20515-0528

Re: H.R. 2723

Gentlemen:

I submit this letter as part of the record for H.R. 2723, the Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003, in which a hearing was held October 21, 2003 before the House Judiciary Subcommittee on the Courts, the Internet and Intellectual Property.

During the hearing, a number of questions were raised concerning the length of time it takes for a case to be decided in the Ninth Circuit, and whether or not there is any correlation between the size of a court and its disposition time. To answer that question, the Subcommittee must look at the components of the appellate process that make up the total disposition time. With regard to the most important time frame, and the only one over which judges have complete control, is the time it takes judges to decide the cases following argument or submission. Here, the Ninth Circuit is one of the most efficient circuit courts and has been consistently so for many years. For argued cases, it takes 2.1 months[1] nationally

[1] AO Table B-4, 6/30/03

the filing of a decision compared to 1.4 months in the Ninth Circuit; and for submitted cases it takes .5 months nationally and .2 months in the Ninth Circuit. The Court has done this while still providing the parties with a reasoned, written disposition of its holding, not a one word judgment order.

The first stage of the appellate process is record preparation and briefing by the parties. Unlike some circuits that have taken the position that no extensions of time should be permitted, our Court has allowed the parties some say in how long they need to prepare their case. We could limit their time and make our stats look better, but in response to many outreach programs with the bar, they legitimately noted that until the court had a full complement of judges that allowed the cases to proceed to argument more promptly, it made no sense for them to file briefs and then "hurry up and wait." Also, stale briefs are of little assistance to any court, and result in more work when judges and law clerks must update the research presented in the briefs.

The middle time frame, the period from briefing completion to oral argument, is where our Court has experienced delay. This is due to the many long years of vacant judgeships; our reluctance to borrow substantial numbers of outside judges; and our desire to retain the opportunity for hearing oral argument in most counseled cases.

At last year's hearing on H.R. 1203, my colleague Judge Sidney Thomas of Billings, Montana, described the program the Court adopted in 2002 to address the backlog of cases that had accumulated during the years when our court was down almost one third of its authorized judgeships. That program has been successful. Indeed, our court's internal statistics demonstrate that we have cut the time from completion of briefing to argument in non-priority civil cases from more than fourteen months to closer to six or seven months within the last two years. Criminal appeals and cases that with statutory hearing priorities are scheduled even more promptly. The Court has also dramatically reduced the backlog of certificates of appealability in habeas corpus cases, required by 28 U.S.C. § 2253(c), from more than 1500 to fewer than 400.

As the Subcommittee is well aware, the Commission on Structural Alternatives for the Federal Courts of Appeal ("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.*** (emphasis supplied).

Commission on Structural Alternatives for the Federal Courts of Appeal, Final Report, p. 39 (1998).

Our Court continues to review and refine its case management procedures to address the changing caseload that comes before it. Currently, this Circuit and the Second Circuit are experiencing a large increase in the number of immigration appeals. The increase is a result of the Attorney General's efforts to streamline the processing of immigration cases before the Immigration Judges and the Board of Immigration Appeals. Due to our issue tracking and case weighting systems, as well as increasing uses of technology, we anticipate that a large majority of these cases will be dealt with expeditiously through our screening program once the lead cases in the circuit are decided.

I wish to address specifically the chart Chairman Smith displayed at last week's hearing that was included as Table 1, page 45, in Professor Hellman's statement. The data from that table was excerpted from statistics produced by the Administrative Office of the U.S. Courts Table B-4, from 1980 to 2002. I offer some observations about that data as well as some additional and more complete information.

The table does not take into account the judicial vacancy rate. If it did, we would see a correlation between vacancies and disposition time. Since it takes about a year in all the circuits for an appeal to be terminated on the merits, one must look at the data with the number of vacant judgeships during the previous year. In 1983, there were no vacancies on the Court; in 1984, the Court's disposition rate was 12.1 months, roughly the national average. In the mid 1990s, when almost a third of the court's judgeships remained vacant, our median

disposition time reflected the lack of judge-power, as well as some lingering impact of the 1989 Loma Prieta earthquake in San Francisco and the three sequential moves of court operations.

In the past year, as the Court has gotten more of its vacancies filled, our disposition time has decreased to 14.1 months. We expect that trend should continue in the next year or so as our remaining vacancies get filled.

The same correlation is reflected in the statistics for the Sixth Circuit. That Court has been down almost half of its sixteen authorized judgeships for the last few years. It has repeatedly come in last in terms of the time lapsed from filing the notice of appeal to disposition. In the most recent AO Table B-4 (6/30/03), its disposition time is 16.6 months, two a half months longer than the Ninth Circuit.

Although we must respond to criticisms rooted in statistics, we should also step back and ask what role statistics should play generally. The circuit courts are not engaged in a competition as to who can be the fastest court. I believe *all* circuit courts strive to decide the cases that come before it in a just and prompt manner.

The division proposed in H.R. 2723 cannot serve that objective for most litigants in our circuit. The new Ninth Circuit, composed of Arizona, California and Nevada would have 82% of the filings, and only 19 of the current judges, or 398 filings per judge. This compares to the new Twelfth Circuit that would have 18% of the filings, at 190 filings per judge. We would appreciate and welcome the new judges proposed in the bill, but they could not come on board in time to provide any relief to the overburdened judges in Arizona, California and Nevada, and thus division would doubtless create more, not less, delay.

In conclusion, I reiterate what I stated on October 21, 2003. There was no reason to divide the Circuit two weeks after the issuance of the Pledge of Allegiance decision and there is absolutely none now. Further, as stated by my colleague Alex Kozinski and also worth repeating, 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 public that it serves that division is the appropriate remedy. That burden

has not been met.

I also attach an exhibit prepared by the office of our Circuit Executive relating to the projected additional financial costs of creating a new circuit that were of interest to the subcommittee at last year's hearing. As the Members of Congress are well aware, there are serious shortages in the federal budget, and the possibility of an 11% across-the-board cut, which will impact staffing. That coupled with the increase in immigration cases, will put a severe strain on court operations. This is no time to complicate matters further by dividing and unnecessarily duplicating resources.

Thank you for allowing me the opportunity to supplement the record.

Sincerely,

Mary M Schroeder

Mary M. Schroeder
Chief Judge

Attachment

Costs for Establishing a New Circuit
Addendum to the Statement of the
Honorable Mary M. Schroeder
Chief Judge
United States Court of Appeals for the Ninth Circuit

1. Space and facilities- Constructing a new courthouse estimated up to **$100 million.** Nakamura US Courthouse is too small to serve as a new circuit headquarters and this is a rough estimate of what it would cost to acquire a site, design and construct a new courthouse. For comparison on construction costs the new Seattle US district courthouse is estimated to cost $208 million. This no-growth estimate is based on ten resident chambers and nine visiting judge chambers, based on projected needs to 2013. GSA would need to prepare a definitive estimate of total expenses based on the projected number of authorized judges and staff.

$100 Million

2. Personnel- To staff a new court of appeals clerks office, staff attorneys, mediators, library system and circuit executive office - **$10.23 million.** This is a 2002 cost estimate prepared by the AOUSC. The staffing formula is dependant upon caseload. Establishing the circuit headquarter's unit executives alone, a fixed administrative overhead cost irrespective of circuit size, will have an annual reoccurring cost of more than $650,000.

$10.23 Million

3. Personnel transitions-This is an estimate based on the need to transfer some employees to Seattle and the need to terminate excess personnel in San Francisco (severance) **$2.3 million.**

$2.3 Million

4. Telecommunications, Computer Equipment and Library Costs are estimated by the AOUSC at **$3 million.**

$3 Million

5. New Furniture, Office Equipment, and Offices Supplies are estimated by the AOUSC at **$4.83 million.** **$4.83 Million**

ESTIMATED TOTAL START-UP COST: **$120.36 million**[2]

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[2]With additional annual costs of at least **$4.2 million** for rent, duplication of personnel and equipment.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FRED VAN SICKLE
Chief Judge

Post Office Box 2209
Spokane, Washington 99210-2209
(509) 353-3224

October 16, 2003

Honorable F. James Sensenbrenner, Jr.
Chairman, House Committee on the Judiciary
U.S. House of Representatives
2449 Rayburn HOB
Washington, D.C. 20515-4905

Dear Hon. Sensenbrenner:

I am writing in support of HR 2723. While I am aware others support the division of the Ninth Circuit, I speak only for myself.

I have the greatest respect for the Ninth Circuit Judges, the Circuit Executive, and the several staff members who work hard to support the Circuit.

The time has come to divide the Ninth Circuit. This is based on sound judicial policy, not political needs. The sheer large number of cases handled by this appellate court require a large number of judges who really don't have the time to make sure rulings are consistent. Even an en banc hearing is not really a hearing of the full court.

Also, the size of the Court means it seems to function more like a legislative body rather than an appellate court. Getting all the judges together in one room to deal with issues is no small task.

Sound judicial policy supports certainty of the law. An appellate court that functions and speaks as an effective unit serves an important role in our judicial system. Dividing the Ninth Circuit is a step in the right direction.

Thank you for the opportunity to address this important legislation.

Respectfully,

Fred Van Sickle
Chief United States District Judge

cc: Hon. Michael K. Simpson

United States Court of Appeals
FOR THE NINTH CIRCUIT
1200 SIXTH AVENUE
PARK PLACE BUILDING, 21ST FLOOR
SEATTLE, WASHINGTON 98101-3123

Chambers of
RICHARD C. TALLMAN
United States Circuit Judge

Telephone: (206) 553-6300
Facsimile: (206) 553-6306

October 13, 2003

By Facsimile and Regular Mail:

Honorable F. James Sensenbrenner, Jr.
Chairman, House Committee on the Judiciary
U.S. House of Representatives
2449 Rayburn HOB
Washington, DC 20515-4905

Re: Ninth Circuit Split

Dear Chairman Sensenbrenner:

On my own behalf, I write to express my strong support for H.R. 2723, which proposes to split the existing Ninth Circuit into smaller Ninth and Twelfth Circuit Courts of Appeals. I again join with my colleague Judge Diarmuid O'Scannlain and with the other circuit and district court judges who publicly favor splitting our court to better serve the citizens of the West.

Congressman Simpson, H.R. 2723's sponsor, has made a genuine attempt to address the valid concerns raised by some members of my court in their testimony on H.R. 1203 before the House Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property on July 23, 2002. The new bill is a practical and welcomed solution to a problem that has been growing for several years. This issue was already under discussion twenty-five years ago when I became a member of the California and Washington bars. Inevitable and continuing growth will not permit us to ignore this conundrum indefinitely.

A United States circuit judge since 2000, I am acutely aware of the way in which the sheer size of our court has impeded the critical development of strong

personal working relationships with my fellow judges. In my three years on the bench, I have not yet sat on a regular oral argument panel with some of my other active colleagues and, in fact, have not even *met* some of the more senior members of our court.

In only three years, the workload has increased thirty-three percent from some 9,000 to more than 12,000 cases docketed annually. Judicial resources have simply 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. We find ourselves relying heavily upon visiting district and senior circuit judges from throughout the country in an attempt to staff more and more oral argument panels. We borrowed more than 100 visiting judges in 2002. I personally appreciate the enormous contribution these jurists make to the processing of our caseload. But there is a price to be paid in the form of judges who do not regularly sit with us and who may understandably be less familiar with the voluminous jurisprudence of the country's largest court of appeals.

As we struggle to keep up with the thousands of dispositions, including hundreds of published opinions, and more than 1,200 petitions for rehearing filed by disappointed litigants urging that we rehear their case en banc or amend the result, I find that there simply are not enough hours in the day for even the most conscientious and hardworking judge to remain current. This is important because the decisions by my fellow judges constitute the ever-growing jurisprudence declaring the law of the West. The petitions for rehearing are also significant since 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 amendment of the original panel opinion. It is also important to understand the practical limits of the Supreme Court, which does not have the capacity to issue certiorari writs to correct every errant Ninth Circuit decision.

Coupled with the primary responsibility of each active circuit judge to thoughtfully review and consider the appellate briefs and excerpts of record in some 500 cases assigned to each of us annually, there is a limit to the available time and human endurance required to decide these cases in a timely and thorough manner. As a judge who would be assigned to the new Twelfth Circuit Court of

Appeals, and assuming the current caseload generated by the states of the Pacific Northwest and the Pacific Islands, the caseload per judge would be reduced by half. That would mean more time available to study and prepare appellate decisions and it would guarantee faster processing of cases on appeal, including faster oral argument hearings and quicker decisions on the merits.

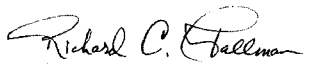
When I came on the court and assumed my duty station in Seattle, I was surprised to learn that I would spend very little time actually hearing cases from the Pacific Northwest. I was also surprised at how much time I am required to spend traveling between Seattle and California, where I hear the majority of my cases. Next year, I will spend only seven days hearing oral argument in Northwest cases. The remaining time is assigned by the clerk of court to hearing appeals from California, Arizona, and Nevada. While I have no objection to deciding cases from all over the Western United States and the Pacific Territories, it seems wasteful of taxpayer money and precious time that could be devoted to more efficiently processing the work when I am required to spend inordinate amounts of time in airports and on airplanes. The White Commission's suggestion that geographical diversity in the makeup of our panels would help alleviate regional biases in Ninth Circuit decision-making failed to account for the fact that more than two-thirds of our cases arise from the Southwestern part of the circuit. The result is continued borrowing of Pacific Northwest judges to make up for the shortage of appellate judges in California.

California needs more judges, and I am pleased to see that H.R. 2723 would replace the judges reassigned to the Twelfth Circuit with significant additional resources to ensure a reduced caseload per judge in the New Ninth Circuit. I would certainly be willing to visit as often as necessary during the transition period while new judges were nominated and considered for appointment. I am also pleased to see that the bill encourages joint sharing of administrative staff, facilities, and judicial conferences where such sharing would reduce duplicative and unnecessary expenditures. I would also point out that Seattle currently has the ten-story Nakamura United States Courthouse, to be vacated by the district court judges in May 2004 (when they move to a new facility), which is in the process of being earthquake retrofitted and renovated by GSA for use as an exclusive court of appeals courthouse. It would make a fine headquarters building for the Twelfth Circuit.

Circuit splits have, of necessity, occurred in the past to address the problems inherent in unmanageably large courts, such as the splitting of the former Fifth and Eighth Circuits. The time has come to split the Ninth Circuit so that we may attain the optimal size, efficiency, and organizational structure for the judges to excel at their duties in a collegial fashion, promoting shared development of judicial precedent in our respective regions for the benefit of the people who live in the American West.

After so many stalled legislative attempts to address the burgeoning needs of the Ninth Circuit, H.R. 2723 provides a comprehensive and much-needed resolution of my court's long-standing judicial administration dilemma. I urge you and your colleagues to pass this bill.

Sincerely yours,



Richard C. Tallman
United States Circuit Judge

RCT:sfk;ar
cc: Hon. Michael K. Simpson

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHAMBERS OF
THOMAS G. NELSON
UNITED STATES CIRCUIT JUDGE

P.O. BOX 1339
304 NORTH EIGHTH STREET
BOISE, IDAHO 83701-1339
TEL (208) 334-9744
FAX (208) 334-9739

October 14, 2003

Honorable F. James Sensenbrenner, Jr.
Chairman, House Committee on the Judiciary
U.S. House of Representatives
2449 Rayburn HOB
Washington, D.C. 20515-4905

Re: H.R. 2723

Dear Chairman Sensenbrenner:

I am an active judge on the Ninth Circuit Court of Appeals, having been appointed by President George H.W. Bush in 1990. I write to support passage of H.R. 2723.

The most compelling reason for dividing the Ninth Circuit is that it is simply too big – in caseload and in administrative problems associated with that caseload and the number of judges needed to handle it.

Adding more judges is a necessity. The additional judges will start to address the caseload, but will add to the rest of the problem – too many decisions to read, too many decisions to regulate by the en banc process, and too many decisions to apply to pending cases.

The Circuit's ability to keep its decisions consistent is already seriously compromised, and the addition of seven new judges without a split will only make it worse.

I urge you to support H.R. 2723.

Very truly yours,

Thomas G. Nelson
Circuit Judge

cc: Congressman Simpson

United States District Court
District of Nevada
Lloyd D. George United States Courthouse
333 Las Vegas Boulevard South, Room 7015
Las Vegas, NV 89101-7079

Philip M. Pro
Chief Judge

Telephone (702) 464-5510
Facsimile (702) 464-5511

October 28, 2003

Honorable James Sensenbrenner, Jr., Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Re: H.R. 2723

Dear Mr. Chairman:

I write on behalf of the judges of the United States District Court for the District of Nevada to express our opposition to H.R. 2723, the Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003.

The specific alignment proposed in H.R. 2723 would result in a new Ninth Circuit consisting of Nevada, Arizona and California with at least 24 judges and a potentiality for additional judgeships. We remain of the view that the reorganization proposed in H.R. 2723 does not meaningful address the issues of judicial administration posed by a large circuit. Thank you for the opportunity to comment on this legislation.

Sincerely,

PHILIP M. PRO
Chief Judge

cc: Senator Harry Reid
Senator John Ensign
Congressman Shelley Berkley
Congressman Jim Gibbons
Congressman Jon Porter
Hon. Mary Schroeder
Hon. Kozinski
Hon. O'Scannlain
All Nevada Judges

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

October 28, 2003

Hon. Lamar Smith, Chairman
Subcommittee on the Courts, the Internet,
and Intellectual Property
B-351A Rayburn House Office Building
Washington, D.C. 20515

Re: H.R. 2723

Dear Chairman Smith:

I am a United States Circuit Judge with chambers in Billings, Montana. I write in opposition to H.R. 2723. I am also authorized to state that the following Ninth Circuit Judges whose official stations are within the boundaries of the proposed Twelfth Circuit join me in opposing H.R. 2723: Judge Otto R. Skopil (Portland, Oregon), Judge Betty Binns Fletcher (Seattle, Washington), and Judge Jerome Farris (Seattle, Washington). In addition, Judge James R. Browning (San Francisco, California), Judge Alfred T. Goodwin (Pasadena, California), Judge Robert Boochever (Pasadena, California) and Judge M. Margaret McKeown (San Diego, California), whose initial official duty stations were within the boundaries of the proposed Twelfth Circuit (Montana, Oregon, Alaska, and Washington, respectively), have authorized me to register their opposition to H.R. 2723. All of these judges maintain strong connections with their former states of residence. In particular, Judges Goodwin and McKeown wished me to emphasize that they spend a significant amount of time each year in the Northwest, maintain offices there, and retain close professional relationships with the bar and bench in Oregon and Washington, respectively.

Sincerely,

Sidney R. Thomas

cc: Hon. Howard Berman

FEDERAL BAR ASSOCIATION
NORTHERN DISTRICT OF CALIFORNIA CHAPTER

October 17, 2003

Honorable F. James Sensenbrenner, Jr.
Chair – Committee on the Judiciary
Washington, DC 20515

Honorable Lamar S. Smith
Chairman, Subcommittee on Courts
Committee on the Judiciary
Washington, DC 20515

Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
Washington, DC 20515

Honorable Howard L. Berman
Ranking Member, Subcommittee on Courts
Committee on the Judiciary
Washington, DC 20515

Re: H.R. 2723, The Ninth Circuit Court of Appeals – Judgeship and Reorganization Act of 2003

Dear Judiciary Committee Members:

The Northern District of California Chapter of the Federal Bar Association submits this letter in opposition to H.R. 2723, the Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003. This letter expresses the position only of the Chapter, and not that of the Federal Bar Association itself.

Size alone does not warrant splitting the Circuit. The only genuine justification would be failure of the Circuit to operate effectively. The most recent study of the federal courts, by the Commission on Structural Alternatives for the Federal Courts of Appeal, known as the White Commission, examined the structure of the Ninth Circuit and, in December 1998, recommended against splitting the Circuit. The White Commission concluded:

> There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall.

The Long Range Planning Commission in 1995 reached the same conclusion. "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent consistent circuit law in the face of increasing workload." *Long Range Plan of the Federal Courts (1995) of the Judicial Conference of the United States* 44. No such evidence of either adjudicative or administrative dysfunction has been shown.

Chief Judge Schroeder and her administrative staff have succeeded in effectively managing the Circuit. The Ninth Circuit has requested additional judges so that it can deal with the increased workload, largely attributable to a spike in the number of immigration cases on the Court's docket, a spike that is by no means limited to the Ninth Circuit. These additional judgeships can be added without splitting the Circuit, by Congressional action on S. 9920, The Federal Judgeship Act of 2003.

While any large circuit faces the challenge of avoiding inconsistent decisions, the Ninth Circuit has effectively dealt with that challenge. It has established procedures to minimize inconsistent decisions, and where inconsistency appears, the Court's limited *en banc* procedure is designed to restore consistency. The empirical evidence is that this system works. And the Court's recent *en banc* decision in *Southwest Voter Registration Education Project v. Shelly*, demonstrates that the size of the Circuit does not impair its ability to invoke and complete *en banc* proceedings quickly.

The proposed legislation is not only unnecessary, it is not reasonably calculated to solve any problems relating to size or judicial efficiency that might exist. It would create two dramatically unequal Circuits and do little to decrease the size of the Ninth Circuit. The proposed new Ninth Circuit would consist of Arizona, California and Nevada, which states currently have 82% of the filings for the existing Ninth Circuit, while the proposed new Twelfth Circuit would consist of Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam and the Northern Mariana Islands, which have only 18% of the filings of the existing Ninth Circuit. And even after adding new judges for the new Ninth Circuit, the workload per judge would be substantially less for the judges in the proposed Twelfth Circuit, imposing a

proportionately greater workload on the judges of the Ninth Circuit.

Moreover, the cost of splitting the Court will be expensive, because a new Court of Appeal headquarters building would have to be built and substantial administrative expenses for duplication of staff and other resources would be necessary. The fact that Congress could be considering such an action in the absence of any official estimate of the costs associated with the split, and in light of the skyrocketing national deficit and the marginal reduction in the size of the Ninth Circuit that would result, suggests that politics and not policy are in play.

If there is one thing upon which legal scholars and thoughtful citizens should agree, it is that a decision by Congress to split the Ninth Circuit, or indeed take any punitive action against a part of the judicial branch, because of unpopular Court decisions, would be antithetical to the principles of our Constitution and its careful construct of separation of powers. As the White Commission found:

> There is one principle that we regard as undebatable: It is wrong to realign circuits (or not realign them) and to restructure courts (or leave them alone) because of particular judicial decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.

In the past, Congress has spilt circuits only when there existed a consensus in the affected legal community that a spilt was warranted. Both of the earlier circuit splits -- the creation of the Tenth Circuit from the old Eighth Circuit and the creation of the Eleventh Circuit from the old Fifth Circuit, occurred only after the a consensus had been reached in legal community in the affected region that division was warranted. When the old Eighth Circuit was split in 1929, and again when the old Fifth Circuit was split in 1980, all of the affected judges had expressed their approval, and division was supported by the bar associations in the affected states. The notion that a consensus should first exist ensures that the decision is not a political one. No consensus for splitting the Ninth Circuit exists, and any action to do so will fairly be perceived to be politically motivated.

For all of these reasons, we urge that your Subcommittee kill this bill.

Sincerely,

Sharon L. O'Grady
Vice President – San Francisco

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 OREGON
1527 United States Courthouse
1000 S.W. Third Avenue
Portland, Oregon 97204-2902

Chambers of
JAMES A. REDDEN
United States District Judge

Phone: 503-326-8370
Fax: 503-326-8379

October 9, 2003

Honorable F. James Sensenbrenner, Jr.
Chairman, House Committee on Judiciary
U.S. House of Representatives
2449 Rayburn HOB
Washington, D.C. 20525-4905

Dear Congressman Sensenbrenner:

I write in support of H.R. 2723. I was appointed to the District of Oregon court in 1980 and am currently a Senior Judge with a substantial caseload.

One of my first observations as a judge was that the Ninth Circuit Court of Appeals was too large to be as efficient as it needs to be. This is not intended to be, nor is it, criticism of the leadership of the Ninth Circuit over the past 20 and more years. Our present and past Chief Judges and the administrative staff have done yeoman's work. The Ninth Circuit is simply too large, geographically and numerically.

The federal trial judges of the circuit also work hard and do a good job. However, it is impossible to keep up with the weekly flood of slip opinions from the circuit. The circuit judges have that problem as well. A "split" would improve our efficiency.

In recent years, the arguments for and against a split have been ideological rather than logical. I believe this has been counter-productive and demeans all three branches of our government.

I hope the Committee and the witnesses concentrate on the real question – is the Circuit too large to give its citizens the kind of prompt and thoughtful decisions on important matters? We try, but all of us, district and circuit judges, could better function within a smaller circuit.

Thank you for your attention.

Very truly yours,

James A. Redden

JAR:sh
cc: Honorable Michael K. Simpson
Member of Congress
1339 Longworth HOB
Washington, D.C. 20515-1202

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

October 8, 2003

Honorable F. James Sensenbrenner, Jr.
Chairman, House Committee on the Judiciary
U.S. House of Representatives
2449 Rayburn HOB
Washington, D.C. 20515-4905

Re: H.R. 2723, Ninth Circuit Court of Appeal Judgeship and Reorganization Act of 2003

Dear Chairman Sensenbrenner:

Please accept this letter as my expression of wholehearted support for H.R. 2723.

The bill specifically and precisely addresses numerous concerns related to splitting the Circuit previously expressed. Moreover, it is very well written.

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

Sincerely,

Sam E. Haddon

SEH/tr

cc: Honorable Michael K. Simpson,
Member of Congress

Honorable Denny Rehberg,
Member of Congress

United States Court Of Appeals
Ninth Circuit
7th at Mission Street
P.O. Box 193939
San Francisco, California 94119-3939

Joseph T. Sneed
Circuit Judge

Tel.: (415) 556-9685
Fax: (415) 556-9625

October 7, 2003

Honorable F. James Sensenbrenner, Jr.
Chairman, House Committee on the Judiciary
U.S. House of Representatives
2449 Rayburn HOB
Washington, D.C. 20515-4905

Re: United States Court of Appeals for the Ninth Circuit

Dear Chairman Sensenbrenner:

I am a Ninth Circuit Court of Appeals Senior Judge appointed to this court in 1973. During my thirty years on the court I have seen its caseload increase enormously. The causes are fairly obvious -- population and economic growth augmented by the increasing reach and complexity of federal and state laws.

From time to time additional judges have been appointed to serve in this Circuit in response to an ever-increasing caseload. At present there are 27 active judges and 21 senior judges. This is too many judges for one court. However, that number and even more will be necessary unless the circuit is reorganized into at least two circuits. The caseload for the year 2002 was 12,388.

I could say more concerning the complications this caseload imposes on maintaining the consistency of the precedents in this circuit, but that is unnecessary. It is obvious.

I realize my view differs from that of the Chief Judge of the Circuit. That is not surprising. She has responsibilities that differ from mine. Were I in her position perhaps I would take that position. Fortunately I am not.

I acknowledge that our en banc hearing procedure eliminates many

conflicts. However, it does not embrace the entire court, nor could it do so in an efficient manner.

I hope that you and your Committee will consider these realities.

Sincerely,

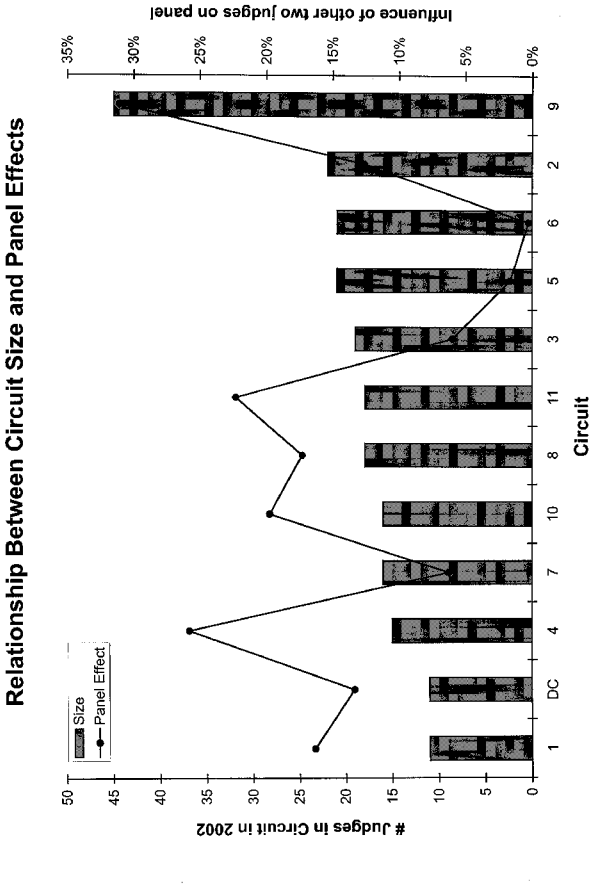
Joseph T. Sneed

cc:
Honorable Michael K. Simpson
Member of Congress
1339 Longworth HOB
Washington, D.C. 20515-1202

Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation

Cass R. Sunstein, David Schkade & Lisa Michelle Ellman
available at http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID442480_code030918630.pdf?abstractid=442480

Panel Effects: A panel effect occurs when one member of a three-judge panel is swayed to vote with two like-minded colleagues, even if he was originally inclined to vote the opposite way. Sunstein, Schkade and Ellman posit that panel effects may derive from many sources, an important one being collegiality. The attached chart, which was provided by Professor Schkade based on the data from his study, demonstrates the level of panel effects for each of the circuits.


Relationship Between Circuit Size and Panel Effects
Size
Panel Effect
Judges in Circuit in 2002
Influence of other two judges on panel
Circuit
0
5
10
15
20
25
30
35
40
45
50
0%
5%
10%
15%
20%
25%
30%
35%
1
DC
4
7
10
8
11
3
5
6
2
9