

**NINTH CIRCUIT COURT OF APPEALS
REORGANIZATION ACT OF 2001**

HEARING
BEFORE THE
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED SEVENTH CONGRESS
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ON
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NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 2001

TUESDAY, JULY 23, 2002

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

The Subcommittee met, pursuant to call, at 3:04 p.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble [Chairman of the Subcommittee] presiding.

Mr. COBLE. Good afternoon, ladies and gentlemen. The Subcommittee will come to order. Good to have a distinguished panel before us.

To be informal initially, I received a telephone call yesterday from a real good Federal judge friend of mine. He said, "I want you to treat those witnesses fairly tomorrow." Pardon my immodesty, but I think Mr. Berman and I have built a pretty good reputation of treating witnesses fairly—would you not agree, Mr. Berman—immodest though it may be.

But it's good to have you all here.

Today we will evaluate the merits of H.R. 1203, the Ninth Circuit Court of Appeals Reorganization Act of 2001, which was introduced by our colleague, Representative Mike Simpson of Idaho.

This is the latest installment of a long-running saga involving the Ninth and its operations. I can recall at least 5 or 6 years ago, we went through a similar exercise.

I'm hopeful that we will review the legislation and history of the Ninth in a sober and thoughtful way by adhering to the facts. We need to explore whether the Ninth has become so big or so cumbersome, if you're in favor of splitting it, in geographic size, in workload, in number of active and senior judges, that it can no longer appropriately discharge its civic functions on behalf of the American people.

My own opinion is that judicial temperament as it is reflected in a given case or by a trend in case law is not an adequate reason by itself to split a circuit.

I guess, to sum up, will the reconfiguring of the Ninth Circuit, or the establishment or creation of a new twelfth circuit, result in more detriment or more benefit? Or will there be subtle shades of gray between the white and black extremes of the equation?

We'll hear from both sides in this matter, and I'm looking forward to a good discussion. I think it will be paired off, two versus two, in favor of the split or retaining its present boundary lines.

I'm now pleased to recognize the distinguished gentleman from California, my friend Mr. Berman, the Ranking Member, for his opening statement.

[The prepared statement of Mr. Coble follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Good morning. The Subcommittee will come to order.

Today we will evaluate the merits of H.R. 1203, the "Ninth Circuit Court of Appeals Reorganization Act of 2001," which was introduced by our colleague, Representative Mike Simpson of Idaho. This is the latest installment of a long-running saga involving the Ninth and its operations.

I am hopeful that we will review the legislation and history of the Ninth in a sober and thoughtful way by sticking to the facts. We need to explore whether the Ninth has become so big—in geographic size, in workload, in number of active and senior judges—that it can no longer appropriately discharge its civic functions on behalf of the American people. My own opinion is that judicial temperament as it is reflected in a given case or by a trend in case law is not an adequate reason, by itself, to split a circuit.

We will hear from both sides in this matter, and I am looking forward to a civil discussion. I now turn to the Ranking Member from California, Mr. Berman, who has more of district dog in this fight than I.

Mr. BERMAN. Thank you very much, Mr. Chairman.

Unfortunately, today I can't express my appreciation to you for convening our Subcommittee on this subject. As you know, I don't fault you at all for the holding of this hearing, as I understand that the Chairman of the full Committee insisted on it. And I certainly don't blame our colleague for doing everything he can to try and get a hearing on a bill that he believes in, has introduced, and cares about.

But the fact that my respect and affection for you remain as strong as ever doesn't mean that I'm happy to be here.

For several years now, I've had the honor of being your Ranking Member, and you've graciously shared with me a schedule of Subcommittee activities for the upcoming months. With your typical grace, you have conferred with me about the scheduling of hearings and, on many occasions, have accommodated requests for scheduling changes. Unfortunately, this hearing is a deviation from the norm.

This hearing was nowhere to be found on our Subcommittee schedule for May, June, and July. And we only learned of it in the middle of last week. Despite entirely reasonable concerns about the short notice and inconvenience to our witnesses, who have had to shuffle very busy hearing dockets and travel across the country, the full Committee Chairman refused to reschedule this hearing for September.

And frankly, one could take these very unique circumstances on a subject which we've had a number of hearings on already, and look at the very short timeframe for the calling of this hearing, and one could perhaps reasonably come to a conclusion that it is an attempt to punish or embarrass the Ninth Circuit for a Ninth Circuit panel's decision involving the Pledge of Allegiance. Most troubling, these circumstances lend credence to those who believe proposals to split the Ninth Circuit are more about politics than judicial efficiency.

And I don't have to just rely on speculation, because the majority's memo starts out: "Proposals to split the Ninth Circuit have

percolated with varying intensity for nearly 30 years. The issue is currently topical in light of a recently issued Ninth Circuit decision.” Which one? “A three-judge panel ruled on June 26 that the Pledge of Allegiance violates the first amendment’s prohibition against the establishment of a State religion. This decision spotlights the reputation of the Ninth for being metaphorically ‘isolated’ from the rest of the country, based on its size.”

I don’t quite understand how one follows from the other, but perhaps the proponents of the legislation can explain that.

But in any event, one can reach their own judgments about a specific decision, which I might point out, incidentally, has been stayed. I don’t know what its exact status is now, but I think there is a request for Ninth Circuit en banc review of that decision, but the decision has been stayed. But one can draw your own conclusions about the wisdom of scheduling a hearing in a very unusual time frame based on a specific decision.

I don’t impugn the sincerity of any of our witnesses. I ought to make that clear. You’re summoned, you come. I recall favorably, in fact, the testimony of Judge O’Scannlain before this Subcommittee almost 3 years ago.

Well-meaning minds can differ regarding which judicial structures will best promote judicial efficiency and consistency in circuit decisions. But it’s equally true that those with political motives may adopt such proposals to advance their agendas. For my part, I don’t intend to mask my opinion on the merits of this issue by questioning the process. By the way, no one has ever accused me of always being devoid of political motives.

In any event, I am unequivocally opposed to splitting the Ninth Circuit. However, I believe it is a serious issue worthy of discussion by our Subcommittee. I would just have preferred that we had been given a little more notice and an opportunity to identify a more convenient hearing date, not simply for me but more importantly, I think, for at least some of the witnesses.

We have studied this issue extensively through Subcommittee hearings. I find merit in arguments on both sides. Each time, I eventually come around to the same conclusion: The Ninth Circuit isn’t broken, so why try to fix it? And can we be sure that the cure won’t be worse than the supposed disease?

For each reason offered as a justification to split the Ninth Circuit, there is an equally reasonable response. For example, it has been noted that, due to the Ninth Circuit’s size, panels rarely involve the same three judges. It is argued that the shifting nature of panels leads to inconsistent opinions. However, it can also be said that the shifting nature of panels contributes to the objectivity of decision-making and makes it difficult for any one bias or philosophy to predominate.

Similarly, many statistics can be cited to support the arguments of both sides in this debate. Judge O’Scannlain appended tables 1 and 2 to his testimony to support his conclusion that the efficiency of the Ninth Circuit compares unfavorably to the other circuits. But table 1 and 2 show that the Ninth Circuit handled about 207 appeals per circuit judge from October 2000 through September 2001. It sounds like a lot, but that is less than the Fourth, Fifth, Sev-

enth, and Eleventh circuits, with the Fifth Circuit handling almost twice as many appeals per judge.

Once again, 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 don't believe it's appropriate or prudent for Congress to legislate a split of the Ninth Circuit.

That's not to say that the Ninth Circuit is incapable of improvement. Even Chief Judge Schroeder and Judge Thomas, who appear today to oppose a split, are advocates of further improvements to the efficiency and operations of their circuit.

Frankly, the best way for Congress to participate constructively in the effort to improve the Ninth Circuit would be to create additional judgeships at both the district and circuit court level. There is an absolute crisis in the Southern District of California—that's the San Diego area—due to the insufficient number of judges, and the Central District is only marginally better off. The Ninth Circuit has four vacancies and, according to the Judicial Conference, needs Congress to create several new judgeships.

While my colleagues in the Senate may not appreciate the added aggravation, I believe Congress should move to create and approve new judges in the Ninth Circuit and its district courts.

And aside from that, Mr. Chairman, I'm totally open on the issue. [Laughter.]

I yield back the balance of whatever time I have left.

[The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman,

Unfortunately, I cannot start out today with my usual commendation to you for convening our Subcommittee. I do not fault you for holding this hearing, as I understand the Chairman of the full Committee insisted on it, and my respect and affection for you remain as strong as ever. But that doesn't mean I'm happy to be here.

For several years, Mr. Chairman, you have graciously shared with me a schedule of Subcommittee activities for the upcoming months. With your typical grace, you have conferred with me about the scheduling of hearings, and on many occasions have accommodated requests for scheduling changes.

Unfortunately, this hearing is a deviation from the norm. This hearing was nowhere to be found on our Subcommittee schedule for May, June, and July, and we only learned of it in the middle of last week. Despite entirely reasonable concerns about the short notice and inconvenience to our witnesses, who have had to shuffle busy hearing dockets and travel across the country, the full Committee Chairman refused to reschedule this hearing for September.

Frankly, these unusual circumstances make this hearing look like an attempt to punish or embarrass the 9th Circuit for a 9th Circuit panel's decision involving the Pledge of Allegiance. Most troubling, these circumstances lend credence to those who believe proposals to split the 9th Circuit are more about politics than judicial efficiency.

I do not intend to impugn the sincerity of any of our witnesses. In fact, I recall favorably the testimony of Judge O'Scannlain before this Subcommittee almost exactly 3 years ago. Well-meaning minds can differ regarding which judicial structures will best promote judicial efficiency and consistency in circuit decisions. But it is equally true that those with political motives may adopt such proposals to advance their agendas.

For my part, I don't intend to mask my opinion on the merits of this issue by questioning the process. I am unequivocally opposed to splitting the 9th Circuit. However, I believe it is a serious issue worthy of discussion by our Subcommittee—

I just would have preferred that we had been given a little more notice and an opportunity to identify a more convenient hearing date.

In fact, we have already studied this issue extensively through Subcommittee hearings. Each time I find merit in some of the arguments on both sides. Each time, I eventually come around to the same conclusion: The Ninth Circuit isn't broken, so why try to fix it? And, can we be sure that the cure won't be worse than the supposed disease?

For each reason offered as a justification to split the 9th Circuit, there is an equally reasonable response. For example, it has been noted that, due to the 9th Circuit's size, panels rarely involve the same three judges. It is argued that the shifting nature of panels leads to inconsistent opinions. However, it can also be said that the shifting nature of panels contributes to the objectivity of decision-making, and makes it difficult for any one bias or philosophy to predominate.

Similarly, many statistics can be cited to support the arguments of both sides in this debate. For instance, Judge O'Scannlain appended Tables 1 and 2 to his testimony to support his conclusion that the efficiency of the 9th Circuit compares unfavorably to other circuits. Looking at those same Tables, I can draw the opposite conclusion. Table 1 and 2 show that the 9th Circuit handled about 207 appeals per circuit judge from October 2000 through September 2001. Sounds like a lot, but that is less than the Fourth, Fifth, Seventh, and Eleventh Circuits, with the Fifth Circuit handling almost twice as many appeals per judge. The 9th Circuit numbers are also basically comparable to the Second, Third, and Sixth Circuits, while significantly more than the First, Eighth, and Tenth Circuits.

Once again, 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 9th Circuit.

That is not to say that the 9th Circuit is incapable of improvement. Even Chief Judge Schroeder and Judge Thomas, who appear here today to oppose a split, are advocates of further improvements to the efficiency and operations of their Circuit.

Frankly, the best way for Congress to participate constructively in the effort to improve the 9th Circuit would be to create additional judgeships at both the District and Circuit Court level. There is an absolute crisis in the Southern District of California due to the insufficient number of judges, and the Central District is only marginally better off. The Ninth Circuit has four vacancies, and according to the Judicial Conference, needs Congress to create several new Judgeships. While my colleagues on the Senate may not appreciate the added aggravation, I believe Congress should move to create and approve new judges in the 9th Circuit and its District Courts.

Thank you, Mr. Chairman, I yield back the balance of my time.

Mr. COBLE. I thank the gentleman. Thank you, Mr. Berman.

You know, ladies and gentlemen, in this town, oftentimes, if a Member of Congress does not want to become involved in an issue, he will say, "Well, I have no dog in that fight." Oftentimes, we have nothing but dogs in fights, when you see both sides that have reasonable presentations.

Now, we on this Judiciary Committee are blessed with several Members from California, and I'm now pleased to recognize the gentleman on my right-hand side, Mr. Issa, the distinguished gentleman from California, for his opening statement.

Mr. ISSA. Thank you, Mr. Chairman. And I only hope that the panel will be as illuminating as my colleague from California is on the issues.

It may not come as a surprise to you that I start off interested in hearing what you have to say, but with a slightly different bent than Mr. Berman. I do find that those of my friends who say that the Ninth Circuit is too large and those who say that it's too liberal, I'm with both of them, because there is no question that this is a circuit that has a long history of being overturned; this is a Court of Appeals that has more on its plate than its fair share.

If I do the simple business arithmetic, if there are 11 circuits, that means about one out of every nine Americans should be rep-

resented by a circuit. California alone is about one out of every nine Americans. So on its face, breaking up the circuit, in order to get a closer to equality size of the circuit, seems to make sense.

In San Diego, where we are short and are working desperately to get five more judges, I'm acutely aware—and it has been authorized—we are acutely aware of the growth in the Federal judiciary, and the likelihood that your caseloads are only going to grow.

To that extent, what I'm hoping to hear from this panel is not do we or don't we, but if we did, what would be the benefits? If we did, how would we do it in a way that did not simply say we are punishing the Ninth Circuit for being too liberal, because that alone would not be enough of a justification?

I need to know why the Ninth, Tenth, Eleventh and twelfth would all be better for the particular proposals. And my colleague will hopefully lead the charge, but to each of the judges and the attorney general, that's my big concern. It's not, "Do we do it?" I believe that eventually we will do it. But are the potential plans that are being proposed of sufficient merit that we should begin the dialogue on the Committee of either the existing proposals or follow-up proposals, because I believe sooner or later, the load and the size and the growth in the West is going to mandate this.

So as I said, my colleague from just north of me notwithstanding, I start off with an assumption that we will have this discussion again and again until eventually we break it up. I would hope that we are not citing one isolated panel in order to have this hearing, but rather the ongoing growth of the West and the likelihood that eventually you cannot have a circuit that is twice the size of other circuits and then call it, if you will, equal in the justice that it hands out.

Mr. BERMAN. Would the gentleman yield?

Mr. ISSA. I certainly would yield to my colleague from California.

Mr. BERMAN. Thank you for yielding.

Actually, the new judgeships in the Southern District have not yet been authorized.

Mr. ISSA. They're in the process. We have a deal.

Mr. BERMAN. A lot of things are in the process.

Mr. ISSA. We're going to get them, Howard.

Mr. BERMAN. All right.

Mr. ISSA. Trust me, as a San Diegan, we're going to get them.

Mr. BERMAN. That's good to know.

Mr. ISSA. Thank you, Mr. Chairman. I yield back.

Mr. COBLE. I thank the gentlemen for their opening statements. And before we begin with the formal witness introduction, I would like to recognize our friend and colleague, Representative Mike Simpson of the Second District of Idaho. He is the co-sponsor of H.R. 1203 and would like to introduce his attorney general, Attorney General Lance, also of Idaho.

Mike, good to have you with us. I will let you introduce your attorney general when we get to him on the podium.

Our first witness today is the Honorable Mary M. Schroeder, the Chief Judge for the United States Court of Appeals for the Ninth Circuit. Prior to her service on the Federal bench, Judge Schroeder worked as a trial attorney at the Department of Justice, clerked for the Arizona Supreme Court, and practiced law with the firm of

Lewis & Roca. She also served as a judge for the Arizona Court of Appeals. President Carter appointed her to the Ninth Circuit in 1979. Judge Schroeder earned her B.A. in 1962 from Swarthmore College and her J.D. in 1965 from the University of Chicago School of Law.

Our second witness is the attorney general for the State of Idaho, and I will permit Representative Simpson to introduce his attorney general.

Mr. SIMPSON. Thank you, Mr. Chairman. I appreciate the opportunity to introduce a good friend of mine, someone that I served with in public service for a number of years. When I was in the State legislature, he was in the State legislature with me. And when I became Speaker, he became the caucus chairman or the conference chairman. So we have served together many years. Then he went on to much greater things and was elected attorney general of the State of Idaho and is completing his second term.

When we served together in the State legislature on the Judiciary Committee, one of the issues that we dealt with there and talked about many times was the need to create a new twelfth circuit, that the current Ninth Circuit was too large, both in volume and in geographic size. And the State legislature many times passed memorials and sent them to Congress, asking that the court be split.

Since Al has become the attorney general in the State of Idaho, he has been an advocate for splitting the court for efficiency reasons. Whatever reason brings us here today—Mr. Berman suggests maybe it's politics—I want to tell you that we've been dealing with this for a number of years, and we've been advocates for a number years. And he's correct; reasonable people can disagree on that.

But we're very proud to have the attorney general of the State of Idaho here to testify today.

Thank you, Mr. Chairman.

Mr. COBLE. I thank you, Mike.

And, Mr. Attorney General, I noticed in your bio, it appears that you are a native Ohioan. Is that correct? You know, it's difficult enough to be elected in a State where you're the native son or native daughter, but to be a transplant is even better and of course speaks well for you.

Our next witness is the Honorable Judge Diarmuid F. O'Scannlain, who was appointed to the Ninth Circuit by President Reagan in 1986. Judge O'Scannlain has also practiced law and worked for the State of Oregon in various public capacities. He retired from the U.S. Army Reserve in 1978, having obtained the rank of major. Judge O'Scannlain earned his J.D. in 1963 from the Harvard Law School and his B.A. in 1957 from St. John's University. He also earned the LL.M. degree at the University of Virginia School of Law in 1992 and was awarded the LL.D. degree by the University of Notre Dame in 2002.

Our final witness today is also a Ninth Circuit judge, the Honorable Sidney R. Thomas, who was nominated by President Clinton in 1995. Judge Thomas has worked on educational pursuits in the Montana State Government, practiced law, and taught. He has received numerous awards and authored publications on the law and other topics. Judge Thomas received his B.A. in 1975 at the Mon-

tana State University and his J.D. in 1978 from the Montana School of Law.

It's good to have each of you panelists with us. I see we've lost our colleague from Idaho. But it's good to have you four with us. We have written statements from all of you, and I ask unanimous consent that they be submitted into the record in their entirety.

Ladies and gentlemen, we fairly firmly—as I say, Mr. Berman and I are fair, but we're also firm. We try to live by the 5-minute rule, as you all were told earlier. If you can reduce your oral testimony to 5 minutes—and your 5 minutes will have elapsed when you see the red light appear into your eye. If you violate that, we're not going to keelhaul anybody or give you 20 lashes, but that will be the time to wrap down, if you will.

Judge Schroeder, why don't we begin with you?

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

Judge SCHROEDER. Thank you, Mr. Chairman. And I thank you for the opportunity to be here this afternoon.

My name is Mary M. Schroeder, and I am the chief judge of the Ninth Circuit, a position I have held since December of 2000. My chambers are in Phoenix, Arizona, where my husband and I have lived for more than 30 years and where we raised our family.

Appearing with me today is my colleague, Sidney Thomas of Montana, who is prepared to address our en banc processes and some of our innovations in managing our growing caseload. Also, because we have had short notice and because we want to be as informative as we can, we have with us our Clerk of Court, Cathy Catterson.

The Ninth Circuit Court of Appeals since 1984 has had a total of 28 authorized active judgeships. Because of vacancies and last week's welcome confirmation, we now have 24 active judges and 22 senior judges. The Judicial Conference U.S. has approved our requests for additional judgeships as part of its own proposals, but no legislation is currently pending for any national judgeships.

As chief judge, I chair our circuit's governing body, the Ninth Circuit Judicial Council, which has consistently opposed our circuit's division. I want to make it clear, however, that I do not speak for the Judicial Conference U.S., which has never taken any position with respect to Ninth Circuit division or realignment.

I appear in opposition to H.R. 1203 that deals only with the Ninth Circuit and which proposes to divide the circuit into two circuits but does not address the growing need for additional judgeships or any other resources to handle greater numbers of increasingly complex cases.

I begin by observing that my opposition to legislation to divide the circuit is the same as the position of my predecessors as chief and of the overwhelming majority of our judges since this subject was first broached between 30 and 40 years ago. We have had a lot of exhaustive studies of circuit realignment, the most recent by the congressionally created Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by former Justice Byron White and known as the White commission.

It reached a number of conclusions that are relevant, but I quote one that may be especially pertinent today. The commission report concluded that “there is one principle that we regard as undebatable: It is wrong to realign circuits and to restructure courts 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.”

The White commission also observed that there are many advantages to our circuit remaining intact. These include the ability of a large circuit to make temporary assignments of judges from one area of the circuit to other areas that are experiencing heavy demands on limited resources. And in this time, we are today experiencing those demands in our border districts.

The commission also recognized that our circuit is a Pacific jurisdiction with ports and airports that look toward Asia and Australia. And the report concluded that to split the Ninth Circuit would deprive the courts now in the Ninth Circuit of the administrative advantages afforded by the present circuit configuration and deprive the West and the Pacific seaboard of a means of maintaining uniform Federal law in that area.

We are currently undertaking a number of innovations and experiments, one on the limited citation of non-precedential opinions. Your Subcommittee conducted an oversight hearing on that very topic last month.

Let me turn briefly to the practical matter of costs. Circuit division is expensive. The cost of a new courthouse and administrative headquarters for a new circuit would begin at \$100 to \$120 million. Our Court of Appeals’ administrative staff includes a Clerk’s Office, staff attorneys to provide assistance to judges, an office of mediation that was a pioneer in the area and remains a model to the country, and libraries and satellite libraries. We have growing computer resources. Replicating all of these would cost \$10 million annually.

A new circuit will have administrative needs, including assessing budgetary requirements and meeting the now heightened security requirements to protect our judges, our staff, and our public buildings. The Circuit Executive’s Office now provides these services for the Circuit and would have to be replicated for a new circuit at an annual cost of over \$4 million.

In any new circuit, there would be large distances and multiple large population centers. Substantial travel costs will remain. It’s a long way from Seattle to Honolulu, no matter what circuit they’re located in. And any circuit with Alaska would be the largest circuit in terms of area and any circuit with California would be the largest circuit in terms of population and caseload.

As one of our distinguished former judges and former Secretary of Education Shirley Hufstедler once observed, you can’t legislate geography.

And finally, since the White commission report, we have seen undiminished acceleration in technology advances around the world. Our Federal courts face increasing numbers of international and global issues. Fracturing the Federal courts does not contribute to the solution of these looming issues.

So I return, in closing, to our greatest need, which is additional judgeships. We have had no additional judgeships since 1984. Our caseload since that time has doubled. It is that need I urge the Committee to address.

[The prepared statement of Judge Schroeder follows:]

PREPARED STATEMENT OF CHIEF JUDGE MARY M. SCHROEDER

Thank you for the opportunity to appear before you. My name is Mary M. Schroeder and I am the chief judge of the Ninth Circuit, a position I have held since December of 2000. Appearing with me is my colleague Judge Sidney Thomas of Montana, who is prepared to address our en banc processes and innovations in managing a growing caseload. The Ninth Circuit Court of Appeals since 1984 has had a total of 28 authorized judgeships. Because of vacancies we presently have 24 active judges. The Judicial Conference U.S. has approved our requests for additional judgeships as part of its own proposals for an Omnibus Judgeship Bill. Such legislation creating additional judges nationwide is sorely needed to enable federal courts to better manage the growing court caseload. However, no national judgeship legislation is currently pending.

I appear in opposition to H.R. 1203 that deals only with the Ninth Circuit. The Bill proposes to divide the Circuit into two circuits but does not address the growing need for additional judgeships or other resources to handle greater numbers of increasingly complex cases.

I am happy to appear before the subcommittee to provide information about the potential effects of this Bill, as well as how it relates to some of these other issues.

I begin by observing that my opposition to legislation to divide the Circuit does not differ from the position of my predecessors as Chief and of the overwhelming majority of our judges since this subject was first broached more than 40 years ago. This history of Circuit realignment proposals has been marked by a number of exhaustive studies involving all three branches of government. The most recent was by the congressionally created Commission on Structural Alternatives for the Federal Courts of Appeals. This Commission, known as the White Commission, was chaired by retired Supreme Court Justice Byron White and was released in December 1998. It reached a number of important conclusions. I quote one that may be especially pertinent today.

"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."

The Report recognized that with a large appellate court, there may be problems with maintaining consistency, predictability and coherence of circuit law. These relate to the quality of judicial decisions. The Report concluded that such problems of decisional law are "largely unrelated to the administration of the circuit."

The Commission also observed many advantages to the Circuit remaining intact. These included the ability of a large circuit to make temporary assignments of judges from one area of the circuit to other areas experiencing heavy demands on limited resources, as today we are experiencing in our border districts. The Commission also recognized that the Circuit is a Pacific jurisdiction with ports and airports looking toward Asia and Australia. The Commission saw a high value in having the controlling federal law for the entire region emanate from a single circuit court. The Report concluded that "to split the Ninth Circuit . . . would deprive the courts now in the Ninth Circuit of the administrative advantages afforded by the present circuit configuration and deprive the West and the Pacific seaboard of a means of maintaining uniform federal law in that area."

Since the Commission Report was filed, our court has responded to its concerns about consistency of decisions in a large circuit. Our court has been conducting a two year experiment permitting the limited citation of unpublished, non-precedential decisions in petitions for rehearing in order to help us to decide the extent of a problem that needs to be addressed. We hope to have the results of that two year project within the year. Your subcommittee conducted an oversight hearing on this very topic just last month.

We have also instituted a system of notifying the court of decisions early. A summary of the holding, along with the names of any other pending cases that raise the same issues are included in a pre-filing report.

Although the White Commission did not identify delay as a concern, we have also embarked on an aggressive program to ensure that justice in our courts is not delayed.

I turn to the practical matter of costs. Circuit division is expensive. The cost of a new courthouse and administrative headquarters for a new circuit would begin at \$100 to \$120 million. Our Court of Appeals' administrative staff includes a Clerk's Office with personnel to process the filings; like all circuits we have an office of staff attorneys providing assistance to judges in the disposition of cases; an office of mediation to help resolve disputes before they require judicial attention, and a central library and satellite libraries. We have growing computer resources. Replicating all of these resources we estimate would cost at least \$10 million annually.

A new circuit will have circuit-wide administrative needs that will include, for example, processing complaints against judges, ascertaining budgetary requirements for the courts, assessing the needs for new space and facilities, and meeting now heightened security requirements to protect our judges, staff, and public buildings. The Circuit Executive's Office that now provides these services for the Circuit would have to be replicated for a new circuit at an annual cost of over \$4 million.

In any new circuit, there would be large distances and multiple large population centers. Substantial travel costs would remain. As one of our distinguished former judges, Shirley Hufstедler once observed, you can't legislate geography.

Finally, since the White Commission Report, we have seen undiminished acceleration in technology advances around the world. Our federal courts face increasing numbers of international and global issues. Fracturing the federal courts does not contribute to the solution of those looming issues. So, I return in closing to our greatest need: additional judgeships. Our circuit is the fastest growing in the United States. We have had no additional judgeships since 1984. Our caseload since that time has doubled. It is that need I urge the Committee to address.

Mr. COBLE. Thank you, Your Honor.

By my own admission, Mr. Berman and I are fair-minded people, and we gave you 6 minutes and 20 seconds, so I am going to be obliged to give the other witnesses 6 minutes and 20 seconds.

Mr. Lance, I have been accused by my friend as being too verbose when I introduce panelists. But the reason I give detailed introductions is it is my belief that there may be many visitors in the audience who don't know of the impressive credentials that you all bring to this hearing room. And Mike failed to tell us, Mr. Lance, that you are a 1973 graduate of the University of Toledo College of Law, where you served on the Law Review and were named distinguished alumnus in 2002. I didn't want you to feel omitted when we gave the other credentials of your colleagues.

If you will give your testimony, Mr. Lance, we will recognize you for a minute and 20 seconds. [Laughter.]

Or 6 minutes and 20 seconds. I stand corrected.

STATEMENT OF THE HONORABLE ALAN G. LANCE, ATTORNEY GENERAL, STATE OF IDAHO

Mr. LANCE. Thank you very much, Mr. Chairman.

Mr. Chairman, I have submitted to the clerk some supplement to my written testimony, which is a letter signed by 48 attorneys general, joining with the State of California petitioning the Ninth Circuit Court of Appeals to take another look at the Pledge of Allegiance case. Let me point out that that's signed by 32 Democrats and 16 Republicans.

The Ninth Circuit issue has been an ongoing concern since I became attorney general of the State of Idaho in 1995. In 1995, five northwestern attorneys general, three Democrats and two Republicans, urged Congress to split the Ninth Circuit Court of Appeals and create a new twelfth circuit.

H.R. 1203 would accomplish just that. It's good government. It's good legislation, which would improve efficiency, service, predictability, and justice.

The Ninth Circuit has certainly received considerable attention recently, and I hope this attention is channeled into constructive problem-solving. The problem is not the Pledge of Allegiance. The problem is the Ninth Circuit Court of Appeals.

The Ninth Circuit issue is the most important law and justice issue in the West. Thirty years ago, the Hruska commission recommended to Congress that both the Fifth and Ninth circuits be split. Congress split the Fifth Circuit in 1980, and we're still waiting for ours.

The reason underlying the Ninth Circuit's problems are quite simple: size. The Ninth Circuit's population is two and one half times greater than the average of the other circuits. All Ninth Circuit States are in the top 20 projected growth States. By 2025, over 75 million people will live in the Ninth Circuit. The Ninth Circuit covers 40 percent of the United States. That is more than 1.3 million square miles. The other circuits average about 200,000 square miles. The Ninth Circuit consists of nine States and two territories. The other circuits average about three and one half. The Ninth Circuit has 28 authorized circuit judges. The other circuits average about 12 and one half.

This is quite significant. As the commission chaired by former U.S. Supreme Court Justice Byron White advised Congress 3 years ago, and I quote, "The maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between 11 and 17." None of the other circuits have more than 17 judges.

These structural facts certainly distinguish the Ninth Circuit from the other Federal circuits. They also lead directly to some very serious problems.

Almost 25 percent of the Nation's entire backlog of appeals is in the Ninth Circuit. The Nation's appeals backlog has increased by 1 percent since 1997; in the Ninth Circuit, the backlog has increased 20 percent. Last year, appeals increased nationally by 5 percent; the Ninth Circuit appeals increased by 13 percent. Also last year, the Ninth Circuit accounted for almost one-third of all requests filed for Supreme Court review.

The U.S. Supreme Court has struck down a large number and a very high percentage of Ninth Circuit cases. From 1990 to 1996, the Supreme Court struck down 73 percent of the Ninth Circuit decisions it reviewed. The other circuits averaged about 46 percent.

In 1997, 27 out of 28 Ninth Circuit decisions were reversed. Since 1998, the Supreme Court has granted review in 103 Ninth Circuit cases, affirming only 13 decisions. Also since 1998, the Supreme Court has unanimously reversed or vacated 26 Ninth Circuit decisions.

In addition to the backlog and reliability problems, citizens in the Ninth Circuit have to wait longer to receive justice. Last year, the Ninth Circuit was in last place and 53 percent slower than the other circuits in resolving its appeals.

Let me give you one example of a case that was handled by my office. On April 3rd, 1996, two inmates filed a denial of access to

court claim against Idaho's Governor and other State officials. The U.S. district court denied the inmates' request for temporary restraining order. On March 31, 1997, the inmates appealed to the Ninth Circuit. Four years later, the Ninth Circuit issued a cursory one-page decision dismissing the appeal for lack of jurisdiction. Ironically, the inmates had been released from prison before the Ninth Circuit decided the case. Clearly, access to the courts was functionally denied by the Ninth Circuit, not by the State of Idaho.

Justice delayed is justice denied. All Americans are entitled to equal justice and equal protection under the law, and we in the West are not getting it.

Idahoans have lost confidence in our Federal circuit court. It's too big, too slow, and too unreliable. We want out of this unmanageable judicial bureaucracy.

Attorneys general must be able to advise their Governors, their legislators, and citizens as to the status of the law. In the Ninth Circuit Court of Appeals at the present time, that can be best facilitated with a Ouija board and not a law library. We urge you to give favorable consideration to H.R. 1203. Thank you, sir.

[The prepared statement of Mr. Lance follows:]

PREPARED STATEMENT OF ALAN G. LANCE

Chairman Coble and members of the Subcommittee on Courts, the Internet, and Intellectual Property:

My name is Alan G. Lance and I am the Attorney General of the State of Idaho. It is an honor to represent the legal interests of the State of Idaho in support of H.R. 1203, the Ninth Circuit Court of Appeals Reorganization Act of 2001.

The State of Idaho is one of nine states located within the Ninth Circuit. The people of Idaho count on the court to resolve legal disputes involving federal laws and issues arising under the Constitution of the United States. They expect the court to deliver timely and reliable justice.

Idahoans are also keenly aware of the problems associated with the Ninth Circuit's sheer size. Those problems include delay in receiving final decisions from the court, an enormous backlog of cases awaiting action, and the inability to have confidence in the court's decisions. Idahoans know the Ninth Circuit is too big to function effectively as an appellate court.

The State of Idaho stands solidly in support of H.R. 1203. In 1998, members of the Idaho State Bar voted overwhelmingly in favor of splitting the Ninth Circuit and creating a new Twelfth Circuit Court of Appeals. Former Governor Batt and current Governor Kempthorne have spoken out in favor of a split. Both of Idaho's Ninth Circuit judges, Thomas G. Nelson and Stephen Trott, support a split. In 1995, shortly after I began my first term as Idaho's Attorney General, I joined with the other four northwestern Attorneys General in urging Congress to split the Ninth Circuit and create a new Twelfth Circuit Court of Appeals.

The Ninth Circuit is simply too big, too slow, and too unreliable. The objective measures of justice provide all the evidence necessary to justify a split and creation of a new federal circuit court. The facts, as they currently exist, compel me to urge the Congress to take action this year by passing H.R. 1203.

The Ninth Circuit issue has been discussed and studied for almost thirty years. In 1973, the Commission on the Revision of the Federal Court Appellate System, popularly known as the Hruska Commission, was empowered to study and make recommendations relative to the structure of the federal appellate courts. It recommended the Fifth and Ninth Circuits be split.

In its report, the Hruska Commission noted the Ninth Circuit's "striking" size, its "serious difficulties with backlog and delay," and its "apparently inconsistent decisions by different panels of the large court." Senator Conrad Burns, *Dividing the Ninth Circuit Court of Appeals: A Proposition Long Overdue*, 57 MONT. L.R. 245 (1996), citing 62 F.R.D. 223, 224 (1973). Accordingly, the Hruska Commission "concluded that the creation of two new circuits is essential to afford immediate relief." *Id.*

In an effort to address the serious problems identified by the Hruska Commission, the Congress in 1978 authorized large circuit courts to create "administrative units"

to address size-related problems. The Fifth Circuit attempted this approach, but it proved unworkable. Ultimately, in 1980, Congress split the Fifth Circuit and created the Eleventh Circuit Court of Appeals.

Meanwhile, the Ninth Circuit Court of Appeals continued to grow. In 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals, popularly known as the White Commission, to once again study these issues. The White Commission recognized the Ninth Circuit's size-related problems, but it recommended that Congress create three regionally based administrative units within the structure of the Ninth Circuit.

The White Commission recommendation was basically a return to the approach that failed in the Fifth Circuit, with some additional bells and whistles. If adopted, there would have been another step of appellate review for litigants in the Ninth Circuit. There also would have not been a true en banc hearing. A new step called the "circuit panel" would have been empowered to correct conflicting opinions from the administrative units. The circuit panel could have exercised its power without briefing from the parties or a hearing. In short, it would have been a radical, experimental approach, causing further delay, additional costs, and even more confusion for all litigants in the Ninth Circuit. I believe Congress was absolutely correct in rejecting the White Commission recommendation.

It is my belief that the problems in the Ninth Circuit Court of Appeals are directly related to and caused by its sheer size. Consider the following:

1. The Ninth Circuit's population is two and one-half times greater than the other circuits. Over 51 million people reside in the Ninth Circuit. The other circuits average 20 million people. Moreover, the Census Bureau projects that all nine of the states located within the Ninth Circuit will fall into the top twenty growth states over the next 23 years. By 2025, the Ninth Circuit's population will be greater than 75 million.
2. The Ninth Circuit encompasses almost 40% of the United States. It covers more than 1.3 million square miles. The other circuits average about 200,000 square miles.
3. The Ninth Circuit represents nine states and two territories. The other circuits average about three and one-half.

In an effort to manage this sprawling judicial entity, the Congress has authorized twenty-eight circuit judgeships in the Ninth Circuit. The other circuits average about twelve and one-half. None of the other circuits have more than seventeen authorized circuit judges.

The total number of circuit judges is a critical point, which goes straight to the heart of a circuit's ability to manage its caseload. The White Commission report advised Congress on this point as follows:

The maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between eleven and seventeen.

White Commission Report at 29.

The sheer size of the Ninth Circuit has caused a number of problems for the litigants who depend on the court to deliver quality justice. The recently released annual report of the federal courts, entitled *Judicial Business of the United States Courts 2001*, shows the Ninth Circuit in last place in the critical and objective measures of justice. Consider the following:

1. The Ninth Circuit has a huge backlog of appeals awaiting action by the court. Almost one-quarter (9,160 out of 40,303) of the nation's pending appeals are in the Ninth Circuit.
2. Since 1997, pending appeals nationwide have increased by only 1%. In the Ninth Circuit, pending appeals have increased by 20% since 1997.
3. More and more appeals are being filed in the Ninth Circuit, at a rate more than double the national average. Nationally, the number of appeals increased by 5% last year. In the Ninth Circuit, appeals increased by 13%. Moreover, the Ninth Circuit accounted for 43% of the raw increase in appeals filed nationally.
4. Litigants in the Ninth Circuit have to wait much longer to receive final decisions from the court. In the Ninth Circuit, it takes the court an average of almost sixteen months to reach a final decision after an appeal is filed. The other circuits average slightly more than ten months. The Ninth Circuit is in last place, 53% slower than the other circuits in deciding appeals.
5. The Ninth Circuit accounts for 60% of all appeals which have been pending in the nation's circuit courts for more than twelve months.

6. The Ninth Circuit also accounts for one-third of all pending requests for review by the Supreme Court. Last year, a total of 3,110 requests were made for Supreme Court review of circuit court decisions. Ninth Circuit decisions accounted for 953 of those requests. Of course, the chance of a Ninth Circuit decision being reviewed by the Supreme Court is miniscule, because the Supreme Court accepts a very small percentage of such requests.

The Ninth Circuit has earned a national reputation as a frequently reversed court. This reputation has factual support. Consider the following:

1. From 1990 to 1996, the Supreme Court struck down 73% of the Ninth Circuit decisions it reviewed. The other circuits averaged 46%. Jeff Bleich, *The Reversed Circuit: The Supreme Court versus the Ninth Circuit*, 57 OREGON STATE BAR BULLETIN 17 (May 1997).
2. In 1997, the Supreme Court reversed 27 out of 28 Ninth Circuit decisions.
3. Since 1998, the Supreme Court has granted review in 103 Ninth Circuit cases, affirming only 13. Moreover, the Supreme Court has unanimously reversed or vacated 26 Ninth Circuit decisions since 1998.

The Ninth Circuit's number and rate of reversals is troubling. The number of unanimous reversals is perhaps even more troubling. Make no mistake about this—the reputation, which is founded in fact, has caused serious erosion in confidence for our federal circuit court.

The *New York Times*, generally considered to be the newspaper of record for the country, began its recent story on the pledge of allegiance decision with the following line: "Over the last 20 years, the Court of Appeals for the Ninth Circuit has developed a reputation for being wrong more often than any other federal appeals court." Adam Liptak, *Court that Ruled on Pledge often runs Afoul of Justices*, N.Y. Times, July 1, 2002.

In response to a question about the high number of unanimous reversals by the Supreme Court, Yale University law professor Akhil Amar bluntly stated: "When you're not picking up the votes of anyone on the Court, something is screwy." *Id.*

In response to three former Chief Judges of the Ninth Circuit who denied that the Ninth Circuit has a poor track record in the Supreme Court, Justice Scalia said: "There is no doubt that the Ninth Circuit has a singularly (and, I had thought, notoriously) poor record on appeal. That this is unknown to its chief judges may be yet another sign of an unmanageably oversized circuit." *Id.*

The solution for the Ninth Circuit's problems begins with the Congress passing legislation to split the Ninth Circuit and create a new Twelfth Circuit Court of Appeals. H.R. 1203 would do just that, by putting the five northwestern states, Hawaii and the two Pacific territories in the Twelfth Circuit, and leaving California, Nevada, and Arizona in the Ninth Circuit. Although I am not adamant about the precise makeup of the new circuit, the framework of H.R. 1203 is certainly logical with respect to geography, economies, and the Colorado and Columbia River Basins.

I am aware that creation of a new circuit would require adequate funding. Congress should certainly explore this issue carefully, because a new circuit must be adequately funded. However, I note that the existing court buildings located in the nine states would serve the new circuits. I also understand that large federal buildings in Portland and Seattle are, or will shortly be, available for use. In his law review article, Senator Conrad Burns referred to a letter sent to Senator Orrin Hatch from the Congressional Budget Office, indicating a new circuit would require additional operating costs in the first year of approximately \$5 million and increased annual operating costs of \$2-3 million. Senator Conrad Burns, *Dividing the Ninth Circuit Court of Appeals: A Proposition Long Overdue*, 57 MONT. L.R. 245, 255 (1996), citing Letter from the Congressional Budget Office, to Sen. Orrin Hatch, Senate Judiciary Comm. (Dec. 9, 1995).

If the Ninth Circuit is not split, then I have also suggested that Idaho be moved into one of our nearby federal circuits. The Eighth Circuit is separated from Idaho by Montana. Idaho is contiguous to the Tenth Circuit (Wyoming and Utah). In fact, a small portion of Idaho (West Yellowstone) is already assigned to the jurisdiction of the Tenth Circuit Court of Appeals. I would strongly prefer a split and creation of a new circuit, but if politics stands in the way, then I have suggested this as an option for Idaho.

I believe a split of the Ninth Circuit and creation of a new Twelfth Circuit should happen immediately. I also believe that if Congress declines to do so by passing H.R. 1203, we will continue to suffer from delays, backlogs, and a lack of confidence in our federal circuit. Splitting the Ninth Circuit is inevitable. We can delay the inevitable, but we cannot stop the West from growing. I urge Congress to act now and pass H.R. 1203.

Thank you for your time and consideration of this issue—the most important law and justice issue in the West.

Mr. COBLE. Thank you, Mr. Lance.
Your Honor, Judge O'Scannlain.

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

Judge O'SCANNLAIN. Thank you, Chairman Coble 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 the Pioneer Courthouse in Portland, Oregon, although the vast majority of my assignments have been on panels in Pasadena and San Francisco, California.

Perhaps the heightened profile that our court has received may have a fortunate development in that it has sparked a renewed interest in how the Ninth Circuit conducts its business.

Nevertheless, I wish to emphasize that I have supported a fundamental restructure of the Ninth Circuit for many years, and I do support a bill like H.R. 1203, but based solely on judicial administration grounds, not premised on reaction to unpopular decisions or Supreme Court batting averages.

Of course, I speak only for myself and eight colleagues of my court, specifically Judges Sneed, Hall, and Fernandez from California; Judges Trott and Nelson from Idaho; Judges Beezer and Tallman from Washington; and Judge Kleinfeld from Alaska. I do not speak for the court, of course, nor, I should add, for the American Bar Association, where I happen to be the national Chair of its Judicial Division.

When the circuit courts of appeal were created over 100 years ago by the Everts Act of 1891, there were only nine regional circuits, and now there are 12. For the longest time, there were only three judges on each circuit, including the time when I was at law school, when there were only three on the First Circuit.

As circuits became unwieldy because of size, they were restructured. The District of Columbia Circuit goes back to a few years after the Everts Act was passed. The Tenth was split out of the Eighth in 1929. The Eleventh was split off from the Fifth in 1981. And in due course, I have absolutely no doubt that a new twelfth circuit will be created out of Ninth, hopefully through legislation like the one we are considering today.

Mr. Chairman, there is nothing sinister, immoral, fattening, politically incorrect, or unconstitutional about the reconstructing of judicial circuits. This is simply the natural evolution of the Federal appellate court structure responding to population changes. As courts grow too big, they evolve into smaller, more manageable judicial circuits. No circuit, not even mine, has a God-given right to an exemption from the natural order of evolution. And there is nothing sacred about the Ninth Circuit keeping essentially the same boundaries for over 100 years. The only legitimate consideration is the optimal size and structure for judges to perform their duties.

The problem with our court and the circuit can be stated quite simply: We are too big now, and we are getting bigger every day.

And this is so whether you measure size in terms of number of judges, caseload, or population. Even though we're officially allocated 28 judges, we currently have 24 and 22 seniors. In other words, regardless of our allocation, there are 46 judges on our court today. And when the four existing vacancies are filled, there will be 50 judges. I have compiled a roster of the Ninth Circuit judges, which you will find in Exhibit C.

To put the figure of 50 in perspective, consider the fact that this is almost double the number of total judges of the next-largest circuit, more than quadruple that of the smallest circuit. And as you can see from charts 1 and 2, it's a remarkable array of judge power—more judges on one court than the entire Federal judiciary when the circuit courts of appeal were created.

With every additional judge that takes senior status, we grow even larger. Indeed, if we get the seven new judgeships that we have asked for, there will be 57 judges on the circuit, while the average size of all other circuits is only 19.

Chart 3 will give you a sense of the enormity of the circuit's population relative to other circuits. Looking at the population, which ranges from the Rocky Mountains to the Sea of Japan, and from the Mexican border to the Arctic Circle, we have 56 million people. We have double the average number of judgeships handling double the average number of appeals and double the average population of all other circuits. And in essence, this means that the Ninth Circuit is already two circuits in one.

Mr. Chairman, I'm going to skip over the portions of my expanded testimony that deal with intracircuit conflicts, predictability, the en banc process, the delay issue, and the burdens of travel. But I do want to state that a common argument made again today by my chief judge is that we need to stay together to keep a consistent law for the West and for the Pacific seaboard. Mr. Chairman, you live on the Atlantic Coast, where there are five separate circuits. Have you noticed whether freighters are colliding more frequently off Cape Hatteras than they are Long Island or along the Pacific Coast? I tend to doubt it. I simply think that the idea of a single circuit because of a single seacoast is simply, if I may say so, with respect, an absurd argument.

Mr. Chairman, I'm going to conclude by saying that, unfortunately, the problems of size and growth are irrepressible. They will only get worse. We've been engaged in guerrilla warfare on this circuit split now for much too long. What we need to do is get back to judging, and I ask that you do indeed force us to restructure now one way or another, so that we can concentrate on our sworn duties and end the distractions caused by this never-ending controversy.

Thank you very much, Mr. Chairman.

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

PREPARED STATEMENT OF JUDGE DIARMUID F. O'SCANNLAIN

Good morning, Chairman Coble 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 the Pioneer Courthouse in Portland, Oregon, although the vast majority of my assignments have been on panels in Pasadena and San Francisco, California. Thank you for inviting me to appear before you today to discuss the future of the Ninth Circuit and specifically H.R. 1203, an issue of great significance to the federal judiciary as a whole. I speak on behalf of myself and 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 support the restructuring of the Ninth Circuit.¹

I

Having served as a federal appellate judge for over a dozen years on what has long been the largest court of appeals² in the federal system (now 46 judges, soon to be 50) and having written and spoken repeatedly on issues of judicial

¹ Of course, I do not speak for the Court of which I am a member, nor the American Bar Association where I serve as national Chair of its Judicial Division.

² I have previously served as Administrative Judge for the Northern Unit of our court and two terms as a member of our court's Executive Committee.

administration,³ I welcome the chance to offer my perspectives as a member of the court in this never-ending saga of “what to do about that judicial Goliath,” the Ninth Circuit.

My court, never immune from controversy, has been the subject of a great deal of recent public attention. Perhaps this heightened profile has been a fortunate development in that it has sparked a renewed interest in how the Ninth Circuit conducts its business.⁴ However, I wish to emphasize that I have supported a fundamental restructure of the Ninth Circuit for many years, and I do support a split like H.R. 1203, but based solely on judicial administration grounds – not prerogative action to unpopular decisions or Supreme Court batting averages.

The Ninth Circuit’s judicial epic, which has been ongoing since at least World War II, must be brought to closure, and decisively. The White Commission

³ See Statement of Diarmuid F. O’Scaannlain, 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’Scaannlain, 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’Scaannlain, Should the Ninth Circuit be Saved?, 15 J.L. & Pol. 415 (1999); Diarmuid F. O’Scaannlain, A Ninth Circuit Split Commission: Now What?, 57 Mont. L. Rev. 313 (1996); Diarmuid F. O’Scaannlain, A Ninth Circuit Split is Inevitable, But Not Imminent, 56 Ohio St. L. J. 947 (1995).

⁴ See, e.g., Adam Liptak, Court That Ruled on Pledge Often Runs Afoul of Justices, The N.Y. Times, June 30, 2002.

of 1998,⁵ like the Hruska Commission of 1973, came to the same conclusion. Regardless of which party controlled Congress, when each was authorized, each study commission concluded that the Ninth Circuit needs restructuring. Congress can no longer afford to luxuriate in passivity over the future of this lumbering judicial entity.

I first became interested in judicial administration issues when I was studying for my LL.M. in judicial process at the University of Virginia in studies between 1990 and 1992. When I was appointed in 1986, however, I was opposed to any change whatsoever. As former Senators Hatfield and Gorton would recall, I refused to support their efforts throughout the 1980s to split our court because of the widespread perception that they were in response to dissatisfaction with some environmental law case decisions. Mr. Chairman, we have moved beyond those inappropriate concerns. The more I consider the issue from the judicial administration perspective today, the more I appreciate the benefits of restructuring our circuit. Creating two smaller, more workable circuits, will promote consistency in law, predictability, and collegiality in both the new

⁵ See Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (Dec. 18, 1998) [hereafter “White Commission Report”].

Twelfth and the new Ninth. This is exactly what we need now and is essentially the solution embodied in H.R. 1203.

When the circuit courts of appeals were created over one hundred years ago by the Evarts Act of 1891, there were only nine regional circuits. Today, there are twelve. For a long time, each court of appeals had at most three judges; indeed, the First Circuit was still a three-judge court when I was in law school. Over time, courts grew to six, seven, seventeen, and eventually, to a high of twenty-eight judges for my court. As circuits became unwieldy because of size, they were restructured. The District of Columbia Circuit can trace its origin as a separate circuit to a few years after the Evarts Act was passed.⁶ The Tenth Circuit was split off from the Eighth in 1929. The Eleventh Circuit was split off from the Fifth Circuit in 1981.⁷ And, in due course, I have absolutely no doubt that a new Twelfth Circuit will be created out of the Ninth, hopefully through legislation like H.R. 1203.

And there is nothing sinister, immoral, fattening, politically incorrect, or unconstitutional about the restructuring of judicial circuits. This is simply the

⁶ 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.

⁷ This is not to mention the Federal Circuit, which was created in 1982.

natural evolution of the federal appellate court structure responding to population changes. As courts grow too big, they evolve into smaller, more manageable judicial units. No circuit, not even mine, has a God-given right to an exemption from the natural order of evolution. There is nothing sacred about the Ninth Circuit's keeping essentially the same boundaries for over one hundred years. The only legitimate consideration is the optimal size and structure for judges to perform their duties. We certainly have no vested interest in retaining a structure that may not function effectively, and Congress has a responsibility through its oversight to prod the judiciary to keep up with the changing times. I am mystified by the relentless refusal of some of my colleagues,⁸ to contemplate the inevitable. As loyal as I am to my own circuit, I cannot oppose the logical evolution of our judicial structure as we grow to colossus size.

The problem with the Ninth Circuit can be stated quite simply: we are too big now, and getting bigger every day. This is so whether you measure size in terms of number of judges, caseload, or population. Even though we are officially

⁸ 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).

allocated 28 judges, we currently have 24 active judges⁹ and 22 senior judges. In other words, regardless of our allocation, there are forty-six judges on our court today. And when the four existing vacancies are filled, our court will have 50 judges.¹⁰

I have compiled a roster of Ninth Circuit judges in Exhibit C, page 24, which you may find quite revealing. To put the figure of 50 in perspective, consider the fact that this is almost double the number of total judges of the next largest circuit (the Sixth Circuit) and more than quadruple that of the smallest (the First Circuit).¹¹ As you can see from Charts 1 and 2, pages 27-28, it is a remarkable array of judge power -- more judges on one court than the entire federal judiciary when the circuit courts of appeals were created. With every additional judge that takes senior status, we grow even larger. Indeed, if we get the seven new judgeships we have asked for, there will be 57 judges on the circuit, while the average size of all other circuits today is 19 judges.

⁹ I am including Richard Clifton of Hawaii, who was confirmed July 18, 2002 by the Senate, although he has not yet taken his oath to enter on duty.

¹⁰ See Exhibit C. Most of our senior judges carry a substantial load ranging from 100 percent to 25 percent of a regular active judge's load.

¹¹ See Table 1; Chart 2.

Chart 3, page 29, gives a sense of the enormity of the Circuit's population relative to other circuits, and caseload tracks population quite closely. Last year, we handled 10,342 appeals -- over double the average and 1,700 more than the next busiest court (the Fifth Circuit).¹² Unfortunately, these numbers are probably only going to get worse. For example, we are receiving a higher than usual number of immigration cases, primarily because the Board of Immigration Appeals has streamlined its review procedures, which is allowing it to clear its backlog more quickly. Because we hear BIA appeals directly from the Board, we are feeling the crunch of their increased volume. We now receive around one hundred immigration appeals per week; if this rate continues until the end of 2002, immigration cases will make up almost half of the Ninth Circuit's docket.¹³

Looking at population, the Ninth Circuit's nine states and two territories, which range from the Rocky Mountains to the Sea of Japan and from the Mexican Border to the Arctic Circle, contain almost 56 million people -- or 24 million more

¹² See Table 2; Charts 6 and 7. There may be slight variations in terms of the summary statistics reported here and those reported elsewhere as a result of differences in sources. 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: 2001 Annual Report of the Director and population statistics compiled by the United States Census Bureau.

¹³ See Jason Hoppin, Crowding the Docket: A Surge in Immigration Appeals Threatens to Swamp the Ninth Circuit, The Recorder, July 10, 2002.

than the next largest circuit (the Sixth).¹⁴ Together the charts reveal that the Ninth Circuit has double the average number of judgeships, handles double the average number of appeals, and has double the average population.¹⁵ In essence, the Ninth Circuit already is two circuits in one.

Is the extraordinarily large size of our court of appeals and of our population a cause for concern? Undoubtedly, yes. After careful analysis, the White Commission concluded that any court with more than eleven to seventeen judges lacks the ability to render clear, circuit-consistent, and timely decisions. This is the central finding of the Commission. Incidentally, you may wish to hear from my colleague and White Commission member Judge Pamela Rymer of California, who would be willing to offer written testimony, I'm sure, to elaborate on the importance of this finding. I agree that a court with as many judges as the Ninth cannot continue to function well. Courts of appeals have two principal functions: correcting errors on appeal and declaring the law of the circuit. Having more judges may help us keep up with our error-correcting duties, but it severely hampers our law-declaring role by making it more difficult to render clear and consistent decisions.

¹⁴ See Table 2; Charts 3 and 4.

¹⁵ See Tables 1 and 2.

We need smaller decision-making units. 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. Because the Ninth Circuit has so many judges, the frequency with which any pair of judges hears cases together is quite low, thus making it difficult to establish effective working relationships in developing the law. Unlike a legislature, a court is expected to speak with one consistent authoritative voice in declaring the law; the Ninth Circuit's size creates the danger, however, that our deliberations will start to resemble those of a legislative rather than a judicial body.

Having a smaller body of judges also allows three-judge panels to circulate opinions to the entire court before publication, which is the practice of most, if not all, other circuits. Pre-circulation not only prevents intra-circuit conflicts, but 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 when the public does and frequently later, which can lead to some unpleasant surprises. For example, some of my colleagues were caught unaware by a recent decision of one of our three-judge panels, which seemed to receive an unusual amount of media

attention. Even with our pre-publication report system, we don't get the full implications of what another panel is about to do.

Furthermore, as several Supreme Court Justices have commented, the risk of intracircuit conflicts is heightened in a court which publishes as many opinions as the Ninth.¹⁶ In addition to handling his or her own share of the 10,000 plus appeals filed last year, each judge is faced with the Sisyphean task of keeping up with all his or her colleagues' opinions, which last year numbered 801, compared, for example, with the Supreme Court's output of only 85 opinions last term and 83 this term. Frankly, we are losing the ability to keep track of our own precedents, which is as embarrassing as it is intolerable. None of us can read all the opinions from the other panels. It is imperative that judges read opinions as they are published at least, since this is the only way to stay abreast of circuit developments as well as to ensure that no intra-circuit conflicts develop and that, when they do (which, alas, is inevitable as we continue to grow), they be reconsidered en banc. This task is too important to delegate to staff attorneys.

As consistency of law falters, predictability erodes as well. The Commission pointed out that a disproportionately large number of lawyers indicated that the difficulty of discerning circuit law due to conflicting precedents

¹⁶ See White Commission Report at 38.

was a “large” or “grave” problem in the Ninth Circuit. From my own experience since 1986, I can tell you that this problem has worsened notably as the court has grown in size. Predictability is difficult enough with 28 active judgeships. But this figure understates the problem because it does not count either the senior judges who participate in the court’s work (most very productively) or the large numbers of visiting district and out-of-circuit judges who are not counted in our present 46-judge roster.

The en banc process -- often pointed to as a solution for some of these problems -- is simply a band-aid. As a member of the court, I can tell you that, although the en banc process, in theory, promotes consistency in adjudication by resolving intra-circuit conflicts once and for all, this has not been the case in the Ninth Circuit. Initially, as a practical matter, only a fraction of our published opinions can receive en banc review. Last year we published 801 opinions, but we agreed to hear only 18 cases en banc out of the 40 voted upon by the full court. Furthermore, all courts of appeals other than the Ninth Circuit convene en banc panels consisting of all active judges. The Ninth, however, uses limited en banc panels comprised of eleven of the twenty-eight active 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.¹⁷

The Ninth Circuit's problems do not just hinder judicial decision-making, but they also create administrative difficulties and waste. In my court, the median time from when a party files its notice of appeal to when it receives a disposition is 15.8 months (the slowest of all the circuits);¹⁸ the average median time for the rest of the Courts of Appeals is 10.9 months. More disturbingly, in 2001, 116 appeals were under submission for one year or more in the Ninth Circuit, which is almost four times more than the next slowest circuit. Judges need time to deliberate and to ensure that they are making the correct decision, but this backlog unfortunately

¹⁷ A good example of this limitation is United States v. Hayes, 190 F.3d 939 (9th Cir. 1999), aff'd, 231 F.3d 663 (9th Cir. 2000) (en banc), in which the original three-judge panel affirmed (2 to 1) the district court and upheld the defendant's conviction. On rehearing en banc, an 11-judge panel also affirmed the district court, but by a 7 to 4 margin. Thus, despite the fact that a majority of the then 22 active judges on the Ninth Circuit voted to rehear the case en banc, presumably because they thought the three-judge panel got it wrong, the end result after en banc rehearing remained the same.

¹⁸ See Judicial Business of the United States Courts: 2001 Annual Report of the Director, Table B-4, at 95.

increases the pressure on us to dispose of cases quickly, which, in turn, increases the chance of error and inconsistencies.

Also, because of the circuit's geographical reach, judges must travel, on a regular basis, from faraway places throughout the circuit to attend court meetings and hearings. For example, in order to hear cases, my colleague Judge Kleinfeld must, many times a year, fly from Fairbanks, Alaska to distant cities including San Francisco and Pasadena. In addition, he must travel on a quarterly basis to attend court meetings generally held in San Francisco. Obviously, all this travel entails not only time, but a considerable amount of cost. A circuit split would do much to curtail this extensive travel and expense.

II

At almost 56 million people and counting, we are faced with a fundamental choice: either do nothing and let the court of appeals become even more unwieldy, or carve out a new Twelfth Circuit with a resulting smaller, more manageable Ninth Circuit. The first option is not responsible, and the latter option is inevitable. On this point, however, my Chief Judge and I appear to disagree, although with the greatest of respect.

Importantly, the White Commission's principal findings told us:

1. that a federal appellate court cannot function effectively with more than eleven to seventeen judges;
2. that decision-making collegiality and the consistent, predictable, and coherent development of the law over time is best fostered in a decision-making 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.

In light of these many problems -- and notwithstanding the Ninth Circuit's longstanding official position that everything is working just fine -- a substantial restructuring of the circuit's adjudicative operations is sorely needed.

The common argument that keeping the Ninth Circuit together is necessary to retain a consistent law for the West generally, and the Pacific Coast specifically, is a red herring. Mr. Chairman, you live on the Atlantic Coast, where there are five separate circuits. Have you noticed whether freighters are colliding more frequently off Cape Hatteras or Long Island than along the Pacific Coast because of the claimed uncertainties of maritime law on the East Coast? Frankly, but with respect, the need to preserve a single circuit for the Pacific Coast is absurd. The

same goes for the call for a single circuit to adjudicate the law of the West. What about the law of the South? Mr. Chairman, you live in the Fourth Circuit, and the Fifth and Eleventh Circuits are also in the South. I simply cannot imagine that having three circuits has been deleterious to the development of the law of the South.

Nor should cost be a reason for maintaining the status quo. I respectfully must reject my Chief's assertion that the Twelfth Circuit would require a new courthouse and administrative headquarters at a cost of \$100 to \$120 million. This is simply not the case. The Gus J. Solomon Courthouse in Portland has remained unoccupied by any court activities since the construction of the new Mark O. Hatfield Courthouse, which houses the District of Oregon. Likewise, the Nakamura Courthouse in Seattle will empty within the next three years when the Western District of Washington moves to its newly constructed building. Either of these buildings would be appropriate for the Twelfth Circuit's administrative headquarters without any new costs beyond the usual expense of design and remodeling.

As a judge on the Ninth Circuit, I must also take issue with any assertion that an overwhelming majority of the judges on the Ninth Circuit believe that the

disadvantages of splitting the circuit outweigh the advantages. A large proportion of judges on our court favor some kind of restructuring, many strongly so, and I have reason to believe that there are many Ninth Circuit judges, including Californians, who, if given the opportunity, would vote today for an outright split off of five Northwestern states into their own circuit. And while we're at it, I should mention that many district court judges agree as well. Finally, I would also note that the five Supreme Court Justices who commented on the Ninth Circuit in letters to the Commission "all were of the opinion that it is time for a change."¹⁹ 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 intracircuit conflicts in a court with an output as large as that court's."²⁰

After denying that anything is wrong, our official court position straddles the fence by arguing that we can alleviate any problems we have simply by making changes at the margin. Judge Thomas's testimony highlights the admirable and continuous efforts Chief Judge Schroeder and her predecessors

¹⁹ White Commission Report at 38.

²⁰ Id.

have taken to chip away at the mounting challenges to efficient judicial administration. However, I must disagree, respectfully once again, that any problems with our circuit can be solved by tinkering at the edges. The time has come when cosmetic changes will no longer suffice and a significant restructuring is necessary. I am not, however, saying that our circuit as a whole is already broke. I would emphasize that our Chief Judge and the Clerk of the Court are presently doing a marvelous job of administering this circuit as a whole, but my instant focus is on where we go from here. If the Ninth Circuit Court of Appeals is not yet broke, it's certainly on the verge.

III

How, then, should Congress restructure the Ninth Circuit? H.R. 1203 would create 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), which would leave the reconfigured Ninth Circuit with California, Nevada, and Arizona.²¹ This solution requires no new judgeships;

²¹ See Exhibit B. The restructuring provisions provided by H.R. 1203 are identical to S. 346, a bill introduced in the Senate on February 15, 2001.

total active judges remain at 28, with 20 allocated to the reconfigured Ninth Circuit and 8 to the new Twelfth Circuit.²²

The restructuring provided by H.R. 1203 corrects many of the problems currently facing my court that I explained earlier. It creates smaller decision-making units, which will foster collegiality among judges, greater decisional consistency, increased accountability, and responsiveness to regional concerns. As it moves forward, the new Twelfth Circuit would still be bound by pre-split Ninth Circuit precedent, which will help minimize confusion in interpreting the law.

This is not to say that H.R. 1203 could not be improved. Instead of 20 and 8 authorized judgeships, perhaps the ratio of judgeships should be 19 and 9 to reflect existing positions; better still, the total number of judges for the new Ninth should be increased by creation of new judgeships to reflect the more rapid caseload growth of the Southwest. The new Ninth Circuit would still have a disproportionate share of the country's population and case filings. This raises the question of what to do with California, which currently accounts for 60 percent of

²² See Exhibit D.

our court's caseload.²³ Possible ideas are to make California its own free-standing circuit or maybe even divide California in half as parts of new Southwest and Northwest Circuits.²⁴ Another issue is what to do with Arizona. Might it be better aligned with the Tenth Circuit instead of the reconfigured Ninth? The effective date of the split should be revised appropriately, as well.²⁵ It also may be appropriate to grandfather free inter-circuit judicial assignments and to permit joint Ninth-Twelfth Circuit Judicial Conferences for an interim period.

These are all potential courses of action for your consideration. Ultimately, however, you must restructure the Ninth Circuit. This task has been delayed for far too long, and we are almost at our breaking point.

IV

Unfortunately, the Ninth Circuit's problems won't go away -- they will only get worse. We've been engaged in guerilla warfare on this circuit split issue for

²³ See Chart 8; Tables 3 and 4.

²⁴ Incidentally, this was the recommendation of the Hruska Commission in 1973. See *supra* at 2.

²⁵ I note that H.R. 1203's effective date is October 1, 2001, which, of course, would need to be changed, presumably to October 1, 2003. The effective date of the Eleventh Circuit's split from the Fifth Circuit was October 1, 1981.

much too long. What we need to do is get back to judging. I ask that you force us to restructure now, one way or another, 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. 1203.

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

Exhibit A
The Current Regional Circuits
The largest by far is the Ninth Circuit

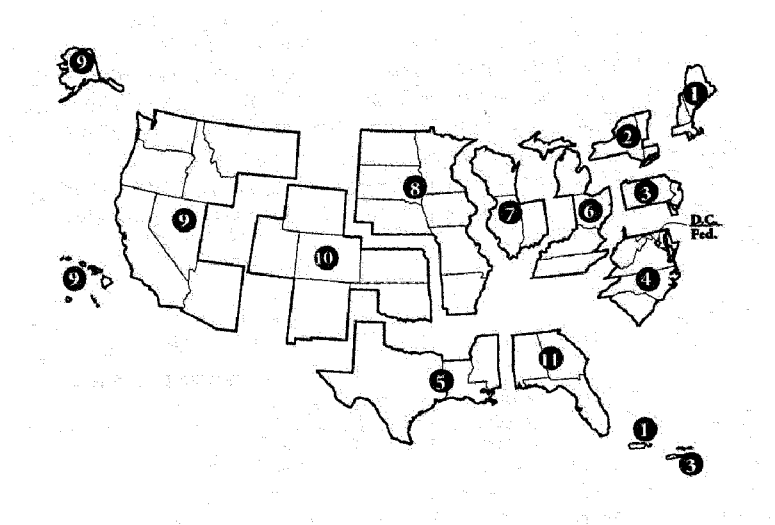


Exhibit B
The Circuits after the Restructuring Proposed by HR 1203

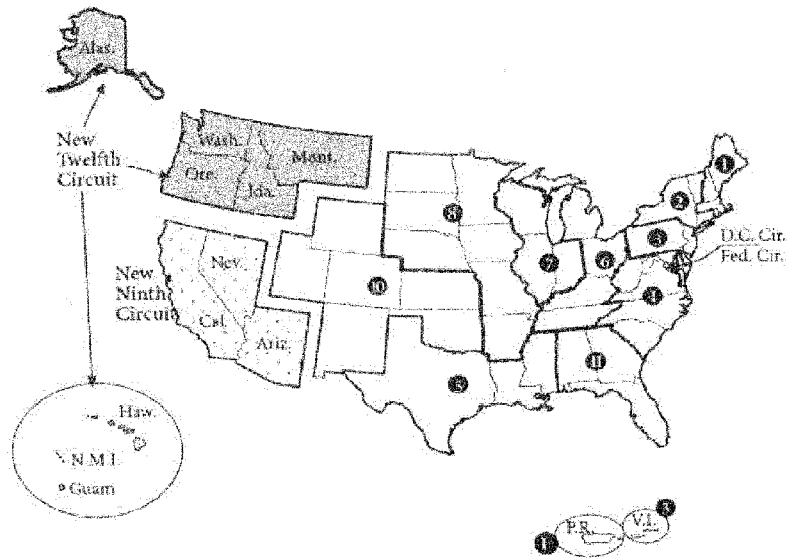


EXHIBIT C
ALL NINTH CIRCUIT JUDGES BY SENIORITY
(as of July 18, 2002)

Judge	Appointed by	State	City	Status (Active/Senior)
1. Browning	Kennedy	California	San Francisco	Senior
2. Wright	Nixon	Washington	Seattle	Senior
3. Choy	Nixon	Hawaii	Honolulu	Senior
4. Goodwin	Nixon	California	Pasadena	Senior
5. Wallace	Nixon	California	San Diego	Senior
6. Sneed	Nixon	California	San Francisco	Senior
7. Hogg	Carter	Nevada	Reno	Senior
8. Skopel	Carter	Oregon	Portland	Senior
9. Schroeder (Chief Judge)	Carter	Arizona	Phoenix	ACTIVE
10. Fletcher, B.	Carter	Washington	Seattle	Senior
11. Harris	Carter	Washington	Seattle	Senior
12. Pregerson	Carter	California	Woodland Hills	ACTIVE
13. Alarcon	Carter	California	Los Angeles	Senior
14. Ferguson	Carter	California	Santa Ana	Senior
15. Nelson, D.	Carter	California	Pasadena	Senior
16. Canby	Carter	Arizona	Phoenix	Senior
17. Boocchever	Carter	California	Pasadena	Senior
18. Reinhardt	Carter	California	Los Angeles	ACTIVE
19. Becker	Reagan	Washington	Seattle	Senior
20. Hall	Reagan	California	Pasadena	Senior
21. Brunetti	Reagan	Nevada	Reno	Senior
22. Kozinski	Reagan	California	Pasadena	ACTIVE
23. Newman	Reagan	California	San Francisco	Senior
24. Thompson	Reagan	California	San Diego	Senior
25. O'Scannlain	Reagan	Oregon	Portland	ACTIVE
26. Leavy	Reagan	Oregon	Portland	Senior
27. Trotti	Reagan	Idaho	Boise	ACTIVE
28. Hernandez	Bush	California	Pasadena	Senior
29. Rymer	Bush	California	Pasadena	ACTIVE
30. Nelson, T.	Bush	Idaho	Boise	ACTIVE
31. Kleinfeld	Bush	Alaska	Fairbanks	ACTIVE
32. Hawkins	Clinton	Arizona	Phoenix	ACTIVE
33. Tashima	Clinton	California	Pasadena	ACTIVE
34. Thomas	Clinton	Montana	Billings	ACTIVE
35. Silverman	Clinton	Arizona	Phoenix	ACTIVE
36. Graber	Clinton	Oregon	Portland	ACTIVE
37. McKeown	Clinton	California	San Diego	ACTIVE
38. Wardlaw	Clinton	California	Pasadena	ACTIVE
39. Fletcher, W.	Clinton	California	San Francisco	ACTIVE
40. Fisher	Clinton	California	Pasadena	ACTIVE
41. Gould	Clinton	Washington	Seattle	ACTIVE
42. Paez	Clinton	California	Pasadena	ACTIVE
43. Berzon	Clinton	California	San Francisco	ACTIVE
44. Tallman	Clinton	Washington	Seattle	ACTIVE
45. Rawlinson	Clinton	Nevada	Las Vegas	ACTIVE
46. Clifton	Bush	Hawaii	Honolulu	CONFIRMED
47. [Kuhl]	Bush	California	Los Angeles	Nominee
48. [Bybee]	Bush	Nevada	Las Vegas	Nominee
49. [Open seat]	Bush	--	--	Nominee
50. [Open seat]	Bush	--	--	Nominee
SUMMARY:				
Authorized Judgeships				28
ACTIVE/CONFIRMED Judges				24
Senior Judges				+ 22
Sitting Judges				46
Vacancies				4
Total, including nominees				50

EXHIBIT D
JUDGES BY CIRCUIT AFTER SPLIT
(as of July 18, 2002)

I. Court of Appeals for the Twelfth Circuit

<u>Judge</u>	<u>Appointed by</u>	<u>State</u>	<u>City</u>	<u>Status (Active/Senior)</u>
1. Wright	Nixon	Washington	Seattle	Senior
2. Choy	Nixon	Hawaii	Honolulu	Senior
3. Skopil	Carter	Oregon	Portland	Senior
4. Fletcher, B.	Carter	Washington	Seattle	Senior
5. Ferris	Carter	Washington	Seattle	Senior
6. Becker	Reagan	Washington	Seattle	Senior
7. O'Scannlain	Reagan	Oregon	Portland	ACTIVE
8. Leavy	Reagan	Oregon	Portland	Senior
9. Iron	Reagan	Idaho	Boise	ACTIVE
10. Nelson, T.	Bush	Idaho	Boise	ACTIVE
11. Kleinfeld	Bush	Alaska	Fairbanks	ACTIVE
12. Thomas	Clinton	Montana	Billings	ACTIVE
13. Graber	Clinton	Oregon	Portland	ACTIVE
14. Gould	Clinton	Washington	Seattle	ACTIVE
15. Tallman	Clinton	Washington	Seattle	ACTIVE
16. Clifton	Bush	Hawaii	Honolulu	CONFIRMED

SUMMARY:

ACTIVE/CONFIRMED Judges	9
Senior Judges	+ 7
Sitting Judges	16
Vacancies	+ 0
Total, including nominees	16

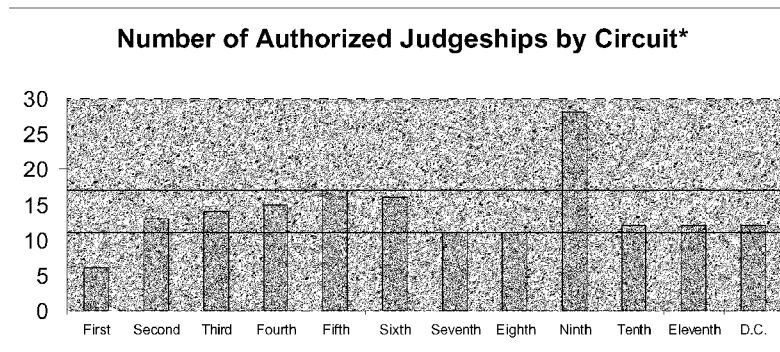
EXHIBIT D (CONT.)**II. Court of Appeals for the “New” Ninth Circuit**

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 (Chief Judge)	Carter	Arizona	Phoenix	ACTIVE
7. Proctorson	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. Bochever	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. Moxman	Reagan	California	San Francisco	Senior
18. Thompson	Reagan	California	San Diego	Senior
19. Fernandez	Bush	California	Pasadena	Senior
20. Rymner	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. Paerz	Clinton	California	Pasadena	ACTIVE
29. Berzon	Clinton	California	San Francisco	ACTIVE
30. Rawlinson	Clinton	Nevada	Las Vegas	ACTIVE
31. [Kuhl]	Bush	California	Los Angeles	Nominee
32. [Bybee]	Bush	Nevada	Las Vegas	Nominee
33. [Open seat]	Bush	--	--	Nominee
34. [Open seat]	Bush	--	--	Nominee

SUMMARY:

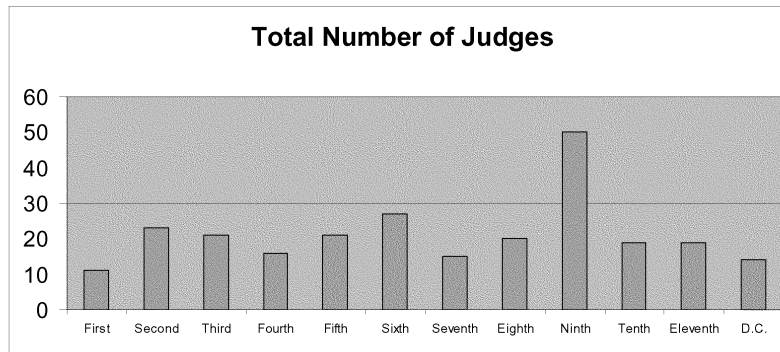
ACTIVE Judges	15
Senior Judges	+15
Sitting Judges	30
Vacancies	4
Total, including nominees	34

Chart 1



*** The area blocked by the parallel lines reflects the White Commission's finding that an appellate court cannot function effectively with more than eleven to seventeen judges.**

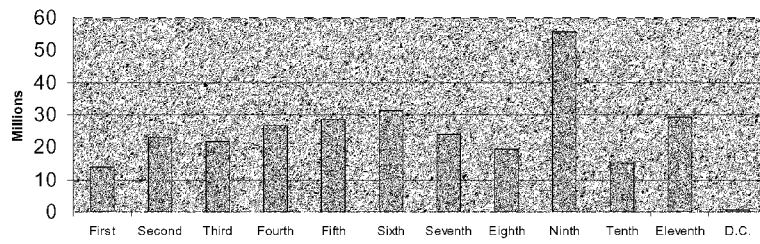
Chart 2



* “Total Judges” Means Authorized Judgeships + Senior Judges

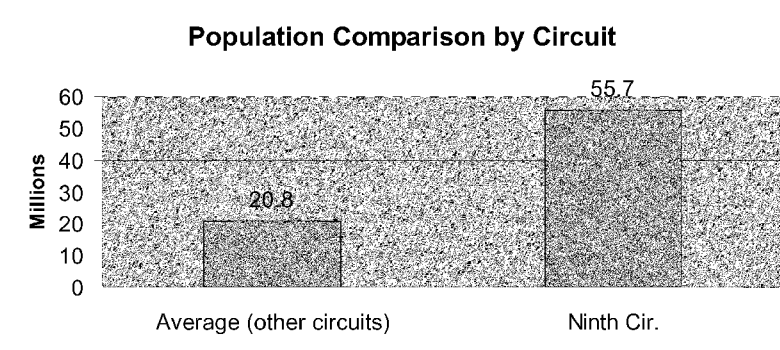
Chart 3

Population by Circuit



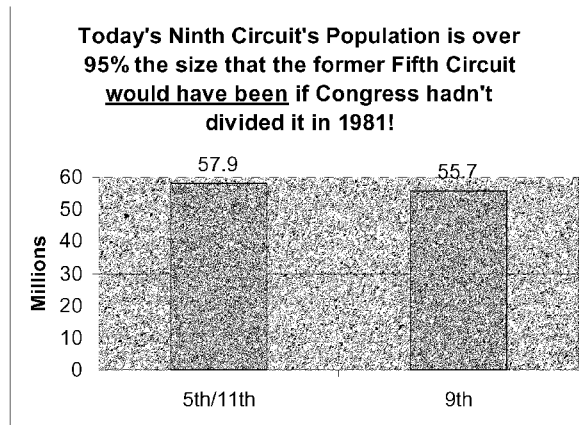
***2001 Census Bureau Data**

Chart 4



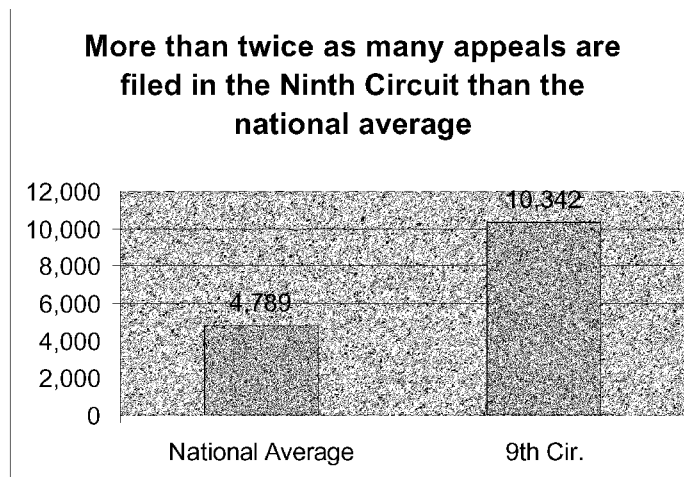
* 2001 Census Bureau Data

Chart 5



* 2001 Census Bureau Data

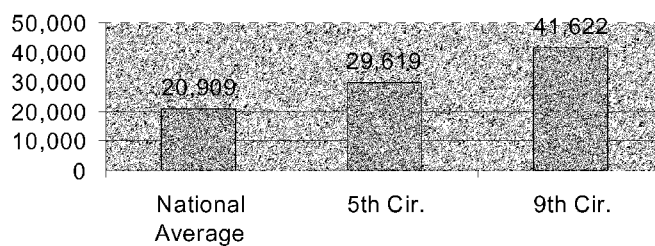
Chart 6



* Appeals filed October 2000 - September 2001 (Source: Judicial Business of the United States Courts: 2001 Annual Report of the Director)

Chart 7

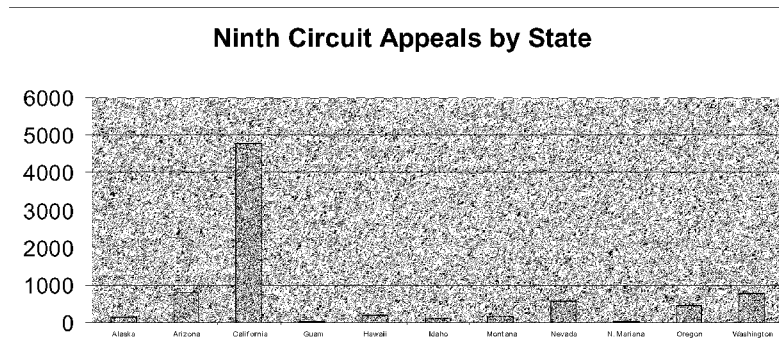
Almost twice as many civil cases are filed in the Ninth Circuit district courts than the national average, far more than the next-busiest circuit



*** Source: Judicial Business of the United States Courts: 2001 Annual Report of the Director**

Chart 8

* Source: Judicial Business of the United States Courts: 2001



Annual Report of the Director

TABLE 1
NUMBER OF JUDGES
BY CIRCUIT
(as of June 2002)

Court	Headquarter City	Appellate Judgeships	%	Senior Judges	%	Total Judges*	% U.S.
First	Boston, MA	6	3.6%	5	5.7%	11	4.3%
Second	New York, NY	13	7.8%	10	11.4%	23	9.0%
Third	Philadelphia, PA	14	8.4%	7	8.0%	21	8.2%
Fourth	Richmond, VA	15	9.0%	1	1.1%	16	6.3%
Fifth	New Orleans, LA	17	10.2%	4	4.5%	21	8.2%
Sixth	Cincinnati, OH	16	9.6%	11	12.5%	27	10.5%
Seventh	Chicago, IL	11	6.6%	4	4.5%	15	5.9%
Eighth	St. Louis, MO	11	6.6%	9	10.2%	20	7.8%
Ninth	San Francisco, CA	28	16.8%	22	25.0%	50	19.5%
Tenth	Denver, CO	12	7.2%	7	8.0%	19	7.4%
Eleventh	Atlanta, GA	12	7.2%	7	8.0%	19	7.4%
D.C.	Washington, DC	12	7.2%	2	2.3%	14	5.5%
Total		167	100%	88	100%	256	100%

* Total judges includes authorized judgeships and senior judges.

SOURCE: 28 U.S.C. § 44; Federal Reporter.

TABLE 2
POPULATION AND CASELOAD
BY CIRCUIT

Court	Population*	% Pop.	Number of Appeals (10/1/00-9/30/01)	% Appeals
First	13,799,968	4.8%	1,762	3.0%
Second	23,049,542	8.1%	4,519	7.8%
Third	21,733,649	7.6%	3,860	6.7%
Fourth	26,614,085	9.3%	5,303	9.2%
Fifth	28,648,477	10.0%	8,642	15.0%
Sixth	31,169,935	10.9%	4,853	8.4%
Seventh	23,998,952	8.4%	3,455	6.0%
Eighth	19,321,553	6.8%	3,034	5.3%
Ninth	55,683,130	19.6%	10,342	18.0%
Tenth	15,165,810	5.3%	2,758	4.8%
Eleventh	29,244,786	10.3%	7,535	13.1%
D.C.	571,822	0.2%	1,401	2.4%
Total	284,796,887	100%	57,464	100%

* State figures as of July 1, 2001; territorial figures as of April 1, 2000.

SOURCE: Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2001 Annual Report of the Director, Table B: U.S. Courts of Appeals -- Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2000 and 2001, <http://www.uscourts.gov/judbus2001/contents.html> (visited July 16, 2002); U.S. Census Bureau, States Ranked by Estimated July 1, 2001 Population, <http://c2k01.census.gov/popest/data/states/tables/ST-EST2001-04.php> (visited July 16, 2002); U.S. Census Bureau, Census 2000 Results for the Island Areas, <http://www.census.gov/population/www/cen2000/islandareas.html>

TABLE 3
POPULATION AND NUMBER OF APPEALS BY DISTRICT WITHIN
NINTH CIRCUIT

Court	City	Authorized District Judgeships	Population (2000 figures)	% Pop.	Appeals (10/1/00 - 9/30/01)	% Appeals
D. Alaska	Anchorage	3	626,932	1.1%	135	1.7%
D. Arizona	Phoenix	13	5,130,632	9.4%	791	9.9%
C.D. California	Los Angeles	27	17,019,673	31.2%	2365	29.6%
E.D. California	Sacramento	7*	6,497,366	11.9%	934	11.7%
N.D. California	San Francisco	14	7,398,415	13.6%	852	10.7%
S.D. California	San Diego	8	2,956,194	5.4%	621	7.8%
D. Guam	Agana	1	154,805	0.3%	17	0.2%
D. Hawaii	Honolulu	4*	1,211,537	2.2%	190	2.4%
D. Idaho	Boise	2	1,293,953	2.4%	113	1.4%
D. Montana	Helena	3	902,195	1.7%	165	2.1%
D. Nevada	Las Vegas	7	1,998,257	3.7%	571	7.1%
D. N. Mariana Is.	Saipan	1	69,221	0.1%	18	0.2%
D. Oregon	Portland	6	3,421,399	6.3%	466	5.8%
E.D. Washington	Spokane	4	1,306,948	2.4%	232	2.9%
W.D. Washington	Seattle	7	4,587,173	8.4%	529	6.6%
TOTAL		107	54,574,700	100%	7,999**	100%

* Includes one temporary judgeship.

** Excludes the following cases: bankruptcy (260), tax court (53), NLRB (34), administrative agencies (1,063), and original proceedings (933).

SOURCE: 28 U.S.C. § 133; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2001 Annual Report of the Director, Table B-3A: U.S. Courts of Appeals – Sources of Appeals in Civil and Criminal Cases from U.S. District Courts During the 12-Month Period Ending September 30, 2001, <http://www.uscourts.gov/judbus2001/contents.html> (visited July 16, 2002); U.S. Census Bureau, States Ranked by Estimated July 1, 2001 Population, <http://csrc.census.gov/popest/data/states/tables/ST-EST2001-04.php> (visited July 16, 2002); U.S. Census Bureau, Census 2000 Results for the Island Areas, <http://www.census.gov/population/www/cen2000/islandareas.html>

TABLE 4
POPULATION AND NUMBER OF APPEALS BY STATE WITHIN
NINTH CIRCUIT

State	Authorized District Judgeships	Population	% Pop.	Appeals	% Appeals
Alaska	3	626,932	1.1%	135	1.7%
Arizona	13	5,130,632	9.4%	791	9.9%
California	56*	33,871,648	62.1%	4,772	60.0%
Guam	1	154,805	0.3%	17	0.2%
Hawaii	4*	1,211,537	2.2%	190	2.4%
Idaho	2	1,293,953	2.4%	113	1.4%
Montana	3	902,195	1.7%	165	2.1%
Nevada	7	1,998,257	3.7%	571	7.1%
N. Mariana Islands	1	69,221	0.1%	18	0.2%
Oregon	6	3,421,399	6.3%	466	5.8%
Washington	11	5,894,121	10.8%	761	9.5%
TOTAL	107	54,574,700	100%	7,999**	100%

* Includes one temporary judgeship.

** Excludes the following cases: bankruptcy (260), tax court (53), NLRB (34), administrative agencies (1,063), and original proceedings (933).

EXECUTIVE SUMMARY

The Ninth Circuit is too big today yet continues to get bigger. The strains from the size and ever-increasing caseload of the Ninth Circuit present Congress with a fundamental choice: do nothing and let the circuit become even more unwieldy, or restructure the circuit into two more manageable entities. The first option is irresponsible, and the latter option is inevitable. Smaller decision-making units are necessary to promote consistency and predictability in adjudication, and increased collegiality among judges. H.R. 1203 recognizes the Ninth Circuit's problems, and its proposed course of action—creation of a new Twelfth Circuit and a new, smaller Ninth Circuit—deserves careful consideration.

The natural evolution of the federal appellate court system entails the periodic restructuring of circuits in response to changes in population and work-load. As courts grow too big, they are typically aligned into more manageable judicial units. No circuit, not even the Ninth, has a God-given right to an exemption from inevitable restructuring. The only legitimate consideration is the optimal size and structure for judges to perform their duties. Although it has been suggested that the problems plaguing the Ninth Circuit can be fixed by tinkering at the edges, a more significant overhaul, like H.R. 1203, is clearly needed.

Judge O'Scannlain agrees with the White Commission's principal findings:

1. that a federal appellate court cannot function effectively with more than eleven to seventeen judges;
2. that decision-making collegiality and the consistent, predictable, and coherent development of the law over time is best fostered in a decision-making unit smaller than the one now in use;
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 the Ninth Circuit's limited en banc process is not effective.

An outright split of the circuit is inevitable. Passage of H.R. 1203 would end the guerilla warfare against the inevitable and let judges focus on judging in smaller, more functional, efficient courts like the rest of the circuits.

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

I believe, Judge, your chief judge was in my State on the outer banks. I hope, Judge, you didn't see any maritime collisions while you were there. [Laughter.]

I guess making your point maybe, Judge O'Scannlain, at least for the day.

Judge O'SCANNLAIN. Thank you.

Mr. COBLE. Judge Thomas, good to have you with us, sir.

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

Judge THOMAS. Thank you, sir. Mr. Chairman and Committee Members, my name is Sidney R. Thomas. I serve as a circuit judge on the Ninth Circuit Court of Appeals, with chambers in Billings, Montana. I want to thank the Subcommittee for the opportunity to testify on the pending legislation. It's always a pleasure to participate in any forum with my friends and colleagues Chief Judge Schroeder and Judge O'Scannlain, and I'm pleased that Attorney General Lance has joined us today.

Chief Judge Schroeder requested that I testify because of my familiarity with our case management and en banc procedures. I am happy to do so. Of course, to the extent that I express any of my personal opinions, I emphasize that I speak for myself only and not for the court.

First allow me to address the question of delay. At the present time, the Ninth Circuit is resolving appeals at a faster rate than they are being filed. That means that we are keeping up with current filings. Further, we have not been consistently the circuit with the longest delay in total case processing. That's varied from year to year. In recent years, circuits such as the Sixth, Second, and Eleventh have had the longest periods of total case delay. Our circuit remains among the fastest circuits in resolving cases after a presentation to a panel of judges.

When all of our judgeships were filled, our circuit was current with the caseload. Our present total processing delay is due primarily to the backlog of cases that developed from a period of time in which approximately one-third of our judgeships remained unfilled. To address this backlog, our court has initiated a program, which should significantly reduce and perhaps eliminate the backlog within the next few years.

This program, implemented by the court last January, is in its very initial stages. However, we have already diverted nearly 600 appeals to expedited screening panels and have already noticed a 2-month reduction in overall case processing time. If no complications occur, we should be able to significantly reduce or eliminate the backlog of cases within the next several years.

Over the years, the Ninth Circuit has developed a number of other innovative programs that have reduced delay and allowed us to remain current with filings. These have included a judicial screening program that resolved nearly 1,300 appeals last year, a mediation program that resolved 750 appeals, a pro se unit dedicated to handling the 40 percent of appeals filed by litigants who do not have an attorney, an appellate commissioner who issued orders on 2,500 routine administrative motions last year, and a bankruptcy appellate panel that resolved over 700 appeals last year.

In my personal opinion, circuit division would not reduce delay; it would create more delay.

Every scholarly analysis of the issue, including the White commission, has concluded that size alone is not the primary cause of delay and that circuit division would not reduce delay. The real question is how best to meet the challenge of expanding caseloads with the entire Federal judiciary.

The Ninth Circuit is not unique in having a large caseload. For example, although we had 10,000 appeals filed in our court last year, there were nearly 9,000 new appeals filed in the Fifth Circuit.

The best method, in my opinion, for delay reduction is aggressive and innovative case management and use of administrative efficiencies that economies of scale permit. The solution is not to divide resources and duplicate bureaucracies. We need to create a structure that allows judges to spend most of their time considering and deciding cases rather than performing administrative tasks.

Second, let me address briefly the question of consistency and the ability of our judges to monitor opinions. Our circuit is not alone in issuing a large number of opinions. Several other circuits publish nearly as many opinions as we do. Every study to date has indicated that the consistency of Ninth Circuit decisions does not vary from that of other circuits.

Even so, we have implemented measures to improve our system of case monitoring, including a database of issues, tracking of issues by staff attorneys, grouping cases for presentation to oral argument panels, a pre-publication report identifying cases, and an experimental program allowing parties to cite unpublished dispositions that they believe are inconsistent.

We also have a very good system of en banc review, during which disappointed parties present petitions for rehearing and judges and law clerks review cases independently. The sheer number of judges and law clerks examining our opinions makes it unlikely that any opinion will evade scrutiny for consistency or for legal soundness.

During the last several years, Supreme Court reversal rates of Ninth Circuit decisions have been consistent with that of other circuits. For example, during this past term, on a percentage basis, there were seven other circuits whose reversal rates exceeded ours. Perhaps more importantly, the number of petitions for certiorari granted by the Supreme Court arising out of decisions of the Ninth Circuit has declined significantly in recent years.

Even in the year most frequently cited by critics, 1996, our circuit was not the most reversed circuit on a percentage basis. That year, five circuits had all of their decisions reversed: the First, Second, Seventh, D.C., and Federal circuits. And since that time, we've had 14 new members added to our court.

All of this indicates that our opinions are receiving an appropriate amount of internal examination, and the consistency of our opinions does not vary from that of other circuits.

Can we do a better job of reducing delay and improving the quality of the administration of justice in the West? Of course we can. We must continue to develop better means of case management and staying in touch with the needs of our constituents. However, in my opinion, circuit division would not assist us in that effort. It would seriously complicate it and impede it.

I thank the Subcommittee for the opportunity to testify. Thank you very much, Mr. Chairman.

[The prepared statement of Judge Thomas follows:]

PREPARED STATEMENT OF JUDGE SIDNEY R. THOMAS

Mr. Chairman and Committee members. My name is Sidney R. Thomas. I serve as a Circuit Judge on the Ninth Circuit Court of Appeals, with chambers in Billings, Montana. I thank the Subcommittee for the opportunity to testify on H.R. 1203.

Chief Judge Schroeder requested that I testify because of my familiarity with some of the issues raised in connection with the proposed legislation. I presently serve as En Banc Coordinator for the Circuit Court. I chair the Automation Committee of the Court, as well as an ad hoc committee on staff utilization that was charged with the responsibility of analyzing and proposing means of minimizing delay in appellate case resolution. I am also a member of the Judicial Council of the Circuit. In those capacities, I am pleased to provide any information that is useful to the Committee. To the extent that I express any of my personal opinions, I emphasize that I speak for myself only, and not for the Court of Appeals nor any other member of the Court.

REDUCING APPEAL TIME

The Ninth Circuit has not been consistently the circuit with the longest delay in processing appeals. That has varied year to year. When all of the judgeships were filled on the Ninth Circuit, the Circuit was current with its caseload. Delays began occurring as judicial vacancies developed, particularly when one-third of the judgeships on the Court of Appeals were unfilled.

At the present time, the Ninth Circuit Court of Appeals is resolving appeals at a faster rate than they are being filed. The Court remains among the fastest circuits in resolving cases after presentation to a panel of judges. Our present processing delay is due primarily to the backlog of cases that developed from 1994–1998, during a period when the Court was operating with only eighteen of its twenty-eight judgeships filled. Because of this backlog, our most significant delay time occurs between the time a case is fully briefed and the time it is heard by a panel of judges. This is the period when the appeal is ready for presentation, but there are not enough panels of judges available to hear the case. To address that, we have initiated a program I will describe later that, barring unforeseen circumstances, should significantly reduce, and perhaps eliminate, the backlog within the next few years.

Nationally, as well as in the Ninth Circuit, the most directly relevant factor in causing delay is unfilled judgeships. As I previously indicated, the present Circuit backlog developed when our Court operated for a significant time with a third of its judgeships vacant. To keep the backlog from growing at that juncture, the Court in 1996 began a program to determine whether uncontroversial appeals whose outcome was controlled by existing Circuit precedent could be processed through an expedited procedure. That program was successful. The Court was able to keep case resolutions current with case filings, so that the backlog did not continue to grow, even during this challenging time.

Fortunately, there were a number of judicial confirmations in 1999 and 2000 that reduced the number of vacancies on the Ninth Circuit Court of Appeals. With the additional judges in place, Chief Judge Schroeder appointed an ad hoc committee, which I chair, to determine whether we could eliminate the backlog of cases that had built up during the period when a third of the judgeships on the Court were unfilled. After analyzing the data, our committee concluded that more cases could be processed through our expedited screening program through more rigorous and consistent analysis of appeals upon the initial filing by the parties and through continued re-examination as the case progressed through the appellate process. In our screening program, panels of three judges receive presentations from staff attorneys and recommendations for case dispositions. If all judges agree, then a disposition is filed resolving the appeal. If any judge believes that the case requires more analysis than is possible during the screening process, or that a case does not fit the screening criteria, the case is placed on an oral argument calendar.

Based on our examination, our committee believed that there were a significant number of appeals that were appropriate for expedited screening. However, diversion of these appeals would require additional judges for screening panels. Thus, we recommended adding one additional judicial screening panel per quarter. To supplant the judges required to decide cases through our expedited procedures, we proposed increasing temporarily the number of visiting judges reviewing non-expedited cases on traditional oral argument panels. Our committee's analysis indicated that this program, absent any complicating factors, would result in eliminating most of our delay within two to three years. The Court adopted our proposal in June, 2001, to be implemented beginning in January, 2002.

We are just six months into the program, and it is too early to draw concrete conclusions. However, the initial indications are extremely promising. We have diverted nearly 600 additional appeals to expedited processing, and 78% of those cases have been resolved by judicial screening panels. This has already resulted in a reduction in overall case processing time of approximately two months, a result that has far exceeded our expectations at this early stage. The most recent statistics from the Administrative Office support this conclusion. They demonstrate that we are terminating cases at a faster rate than cases are being filed in our Circuit. If no complications occur, the program within the next several years should succeed in significantly minimizing delay.

In terms of H.R. 1203, the critical inquiries are whether (1) delay in processing appeals is related to circuit size, and (2) division of the Ninth Circuit would reduce delay.

As to the first question, 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.

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

As to the second question, it is my opinion, after carefully examining the data, that a division of the Ninth Circuit would not assist in reducing delay. To the contrary, I believe it would increase the delay in processing appeals. There are an enormous number of appeals filed in the Ninth Circuit, 10,342 in the last calendar year. A large caseload for a circuit is not unusual: There were 8,642 appeals filed last year in the Fifth Circuit, and 7,535 in the Eleventh Circuit. Circuit division does not reduce caseload; it simply reallocates it. The question is the best method of managing the caseload.

Some of our primary assets in reducing delay have included (1) the existence of staff attorneys to manage our expedited appeal process, (2) a Pro Se Unit to manage appeals filed by individuals not represented by counsel, (3) a Mediation Unit, (4) an Appellate Commissioner, and (5) the Bankruptcy Appellate Panel.

These programs have been made possible by the economies of scale available in a large circuit. For example, over 40% of our appeals are now filed by litigants who do not have an attorney. These cases are considered first by our Pro Se Unit, which provides analysis and recommendations. Cases that are best considered by oral argument panels are placed on the oral argument calendar. Cases that are appropriate for expedited consideration—the vast majority of pro se cases—are presented to judges on screening panels. This results in efficient and effective administration of the large volume of pro se cases we receive.

The expedited screening process I have previously described resulted in the resolution of 1,250 of appeals last calendar year. The staff attorneys also assisted in the resolution of 4,311 motions and 1,422 requests for certificates of appealability in habeas cases.

Our Mediation Unit has achieved tremendous results in settling literally thousands of appellate cases, over 750 in the last year alone. The Appellate Commissioner, a position unique in the Ninth Circuit, has removed an enormous administrative load from circuit judges by processing almost 1,000 Criminal Justice Act vouchers yearly, ruling on approximately 2,700 routine administrative motions a year, and conducting hearings in attorney discipline matters.

The Bankruptcy Appellate Panel has successfully resolved a large number of bankruptcy appeals which would otherwise be decided by Circuit Judges. Last year, the Ninth Circuit Bankruptcy Appellate Panel resolved 763 appeals.

All of these innovations have kept appellate delay from increasing, despite large judicial vacancies. Many—if not most—of these services would not be available in a divided circuit. Any division would create unnecessary administrative duplication of core functions which are, by their nature, more efficiently managed on a large scale, such as file and case management, computer operations, procurement, human resources, and space design. There would also be unnecessary replication of other key divisions, such as the Clerk of Court, Circuit Executive and Circuit Librarian, along with their related staffs.

Because budgets are formula-driven and caseload-driven, the creation of a new circuit does not mean more money will be available to the two new circuits. On the contrary, existing resources must be divided. The very services that allow for efficient management of large caseloads would likely be unavailable to the new smaller Twelfth Circuit, which would only have approximately 20% of the present budget; those services would undoubtedly be largely diminished in the remaining Ninth.

In addition, any division will inevitably result in circuit judges assuming greater administrative burdens. The current administrative load, already reduced because of staff assumption of duties, is also lessened because of the number of available judges. For example, the circuit has a judge serving as an en banc coordinator, another judge serving as death penalty coordinator, other judges spearheading the selection of magistrate and bankruptcy judges, and others serving the many essential committees of the circuit. These functions will have to be duplicated in any new circuit, with the result that the overall administrative burden on judges will be increased, to the detriment of caseload management.

Unnecessary administrative duplication and reduced budgets will probably result in the termination or delay of programs designed to further improve efficiency and effectiveness in judicial administration, such as allowing oral arguments by video conference, electronic case filing and promoting public access via the internet, thus reducing labor requirements.

There is, as I have indicated, a general misconception that circuit division will result in a lower caseload. Any split would, of course, only divide the workload, not decrease it. To illustrate this point, in 1981 the last year of the old Fifth Circuit before it was divided into the Fifth and Eleventh Circuits, that Court had 2,781 appeals compared to the Ninth Circuit's 2,074 appeals. That equates to about 34 per-

cent more appeals than the Ninth Circuit. During the last fiscal year, the new Fifth had 8,642 appeals and the Eleventh Circuit had 7,535 appeals, a total of 15, 997 appeals, a total of more than 60% of the 10,342 appeals in our Circuit. More importantly, perhaps, is that the Eleventh Circuit has experienced considerable problems in delay in processing appeals, showing that splitting a circuit does not necessarily mean reduction in delay.

None of the circuit divisions which have been proposed to date, including H.R. 1203, contemplates adding new judgeships; all envision keeping the same caseload per judge. Accordingly, with increased administrative responsibilities, decreased administrative support and identical caseload, processing delays would most likely increase with a circuit division.

EN BANC PROCEDURES, CONSISTENCY AND OPINION MANAGEMENT

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. In response to concerns raised by some submissions to the White Commission, our Court created an evaluation committee ("Evaluation Committee") in 1999, chaired by Judge David Thompson, to investigate those questions. One of the issues addressed by the committee was consistency of decisions within the circuit. In its final report, the Evaluation Committee noted that there was no objective evidence that Ninth Circuit decisions were subject to greater inconsistency than those in other circuits; every scholarly examination has supported this conclusion. However, the committee also believed that measures were available to strengthen the Court's ability to recognize potential or perceived conflicts early and address them directly and immediately.

To that end, the Court took measures to improve its system of inventorying cases by the Case Management Attorneys 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. In addition, the Case Management Attorneys have commenced issuing 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. Further, the Court continued and refined its practice of grouping for oral argument calendars cases involving similar issues, in order to promote consistency. The Evaluation Committee noted that these measures had received a very positive reaction from the practicing bar.

The Evaluation Committee also sought public comment on cases in which the public believed intra-circuit conflict existed. Only a handful of cases were reported; of those, only one presented even a close case of panel conflict.

In addition, based on the recommendation of the Evaluation Committee, the Court adopted an experimental rule that allowed parties to cite to unpublished decisions of the Court in a petition for rehearing or a request for publication. The Evaluation Committee examined the results for a nine-month period. Only fifteen such requests were made, and none of them identified a legitimate conflict among unpublished dispositions or published opinions. The results of this two year experiment will be considered by the Court at the end of this calendar year.

A few judges have complained in testimony before the White Commission that they have had 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, the Eighth Circuit issued 733 published opinions last year; our circuit published 906. However, that concern, in my judgment, is confined to a very few judges. Opinions of our Court are not only read by the judges, but each chambers generally has a system in place for monitoring of opinions by law clerks. 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. This is particularly true given that a petition for rehearing en banc is sought in a high percentage of cases, which requires judges to review the underlying opinion. The individual examination by judges and law clerks, coupled with the rehearing petitions filed by the parties, leads to a very active en banc process, during which innumerable opinions are amended, or reconsidered. We also have a mechanism for full court en banc review. It is safe to say that every opinion of controversy receives considerable review and attention from, not only the three-judge panel, but the other judges of our Court.

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 fed-

eral 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.

The rate of reversal of Circuit decisions by the Supreme Court is an issue that is frequently cited as a rationale for dividing the Circuit. In recent years, our reversal rate has not been markedly different from those of other Circuits. Even in the year that is most often cited, the 1996 term, we were not the most reversed circuit on a percentage basis. During that term, five circuits had all of their decisions reversed: the First, Second, Seventh, District of Columbia, and Federal Circuits.

During the past term, the Supreme Court reversed all of the decisions of Second, Third, Fifth and Eleventh Circuits in which certiorari was granted. It reversed 89% of the Sixth Circuit's decisions, and 80% of the Federal Circuit's decisions. The Supreme Court reversed 78% of the Ninth Circuit's decisions, 75% of the Tenth Circuit's decisions, 67% of the decisions of the District of Columbia and 64% of the Fourth Circuit's decisions. In short, on a percentage basis, there were seven other circuits whose reversal rates exceeded ours. The average reversal rate for all courts was 76%.

As a whole, there are very few cases selected for review by the Supreme Court. There are, on the average, about 900 petitions for certiorari from decisions of the Ninth Circuit each year. Thus, the decisions selected for review by the Supreme Court represent a small fraction of the cases in which review was sought (between 1–2% each year) and a minuscule percentage of the number of cases resolved by the Ninth Circuit in any given year (approximately 0.3% a year).

As the White Commission concluded, a circuit should not be divided simply because of reversal rates or disagreements with its decisions. Nevertheless, it is important to ensure that there are no administrative or structural problems that lead to an abnormally high reversal rate. To that end, our Court raised the issue in 1996 with Justice O'Connor. She expressed the view that our Circuit should consider increasing the number of cases reheard en banc when an inter-circuit conflict existed. As a partial result of that advice, our Court significantly increased the number of cases that we reheard en banc from 8 in 1995 to an average of nearly twenty cases per year in subsequent years. Whether it was due to those actions or not, the number of Ninth Circuit appeals in which the Supreme Court has granted certiorari has dropped fairly dramatically from 28 in the 1996 term to an average of 16 since then. This conforms to the national average. There were 6,298 certiorari petitions filed with the Supreme Court during the fiscal year ending 9/30/01. Of that number, 1,079 petitions, or approximately 17%, were cases seeking review of Ninth Circuit decisions. During this same time frame, the federal circuit courts as a whole issued 28,840 decisions on the merits. The Ninth Circuit decided approximately 17% of those cases. Thus, measured by volume, the Supreme Court reviewed no more Ninth Circuit cases than the national average.

In sum, the Circuit has developed a number of mechanisms to ensure the consistency of its decisions. The 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. All studies to date indicate that the consistency of Ninth Circuit decisions are in line with those of other circuits. During the last several years, reversal rates of Ninth Circuit decisions have been consistent with those of other circuits. The number of petitions for certiorari granted by the Supreme Court arising out of decisions of our Court has declined significantly, and is consistent with the Ninth Circuit's overall percentage of the cases decided nationally.

PROPOSALS TO DIVIDE THE CIRCUIT

Although the primary reason for my testimony is to answer any questions about our Court's internal procedures and the steps that we are taking to reduce delay and ensure the consistency of our decisions, I would be remiss if I did not offer my personal view of the general idea of division of the Ninth Circuit. In doing so, I emphasize that I am speaking solely for myself and not for the Court.

In my view, there are five important criteria for the creation of a new circuit: (1) the new circuit must have sufficient critical mass; (2) the division should allocate cases in approximately equal proportions; (3) the new circuit must have geographic coherence; (4) the new circuit should have jurisprudential coherence; and (5) division should increase the efficiency of judicial administration. Unfortunately, each of the structural alternatives that have been proposed in recent years fails to meet this criteria; by contrast, the existing structure satisfies it. Those proposed structural alternatives have included the Hruska Commission proposal (divide California in half, with Alaska, Montana, Idaho, Washington and Oregon joining the Northern District of California, and with Arizona, Nevada, Hawaii and the Northern Marianas joining

the Central and Southern Divisions of California), a “Northwest” circuit (comprised of Alaska, Washington, Oregon, Idaho and Montana), a “Hopscotch Circuit” (Alaska, Arizona, Idaho, Montana, Oregon, and Washington), a “Stringbean” Circuit (Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington in a new circuit, with California, Hawaii, Guam and the Northern Mariana Islands remaining in the old Ninth, a three-way division (dividing California into thirds and attaching various states to each California district), a California-only circuit, and the present proposal (new circuit of Alaska, Washington, Oregon, Idaho, Montana, Hawaii and the Northern Marianas). There are difficulties with each proposal. However, let me address specifically the circuit division contemplated by H.R. 1203.

First, the new Twelfth Circuit proposed in H.R. 1203 would lack critical mass. The states and territories proposed for inclusion in the new Twelfth (Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam and the Northern Mariana islands) accounted for 2,301 appeals in 2001, or 22.5% of the total number of appeals filed in the Ninth Circuit. Only the First and the D.C. Circuits had fewer appeals (1,762 and 1,401, respectively). Unlike these circuits, however, the proposed new Twelfth Circuit would not be housed, for the most part, in a central location. On the contrary, the new Twelfth would serve one of the largest geographic areas in the United States. As I have previously, discussed, the new Twelfth Circuit would be able to retain few, if any, of the resources now available in the Ninth Circuit to assist in reducing judicial workload (such as the Appellate Commissioner, Bankruptcy Appellate Panel, etc.). Worse, these few remaining resources would be dispersed among an extremely large geographic area. Essential case management functions of the clerk’s office would have to be unnecessarily duplicated, further reducing available resources. Judges would have to assume additional administrative duties, further reducing the time spent deciding cases.

The small caseload of the proposed 12th Circuit cannot justify many judges, as H.R. 1203 recognizes. The proposed legislation allocates eight active judgeships to the new Twelfth Circuit. With the confirmation of Richard Clifton of Hawaii by the United States Senate last week, there are currently nine active judges in the area comprising the new Twelfth. Thus, one judge would have to transfer, or one judgeship declared temporary. This, in all likelihood, would mean that Idaho would lose one of its circuit judges upon one of the judge’s assumption of senior status (an event that could occur anyway), and either Washington would lose one of its traditional three judgeships (because of the current vacancy of one of the positions) or Oregon would eventually lose one of its two judgeships.

Second, the Circuit division proposed by H.R. 1203 would lack proportionality of caseload. Under the proposal, only 22.5% of the Circuit work would be assigned to the proposed Twelfth Circuit, while 77.5% of the caseload would remain with the “new” Ninth (consisting of Arizona, Nevada and California).

The burden to the new Ninth Circuit, as proposed by the legislation, should not be overlooked or understated. Losing 22.5% of its caseload and 29% of its current judgeships cannot be seriously thought to assist California, Arizona and Nevada. In the short term, because there are nine active judges in the states comprising the new Twelfth, and four current vacancies, the new Ninth would have 13 active judges. The special needs of the judicial districts along the Mexican border have been well documented. Thus, at a time when the need for efficient and effective federal judicial administration in the border districts of Arizona and California is greatest, the proposed legislation would cut judges available to decide these cases in half and seriously reduce the available staff resources.

In addition, by far the greatest concentration of capital cases in the present Ninth Circuit is to be found in the states of Arizona, California and Nevada. In fact, 92.4% of the prisoners on death row (817) are in the state prisons of Arizona, California and Nevada. By contrast, there are only 67 total prisoners on death row in Washington, Oregon, Idaho and Montana. Neither Hawaii nor Alaska has adopted the death penalty. Currently, there are 260 capital habeas corpus cases in the federal courts of the Ninth Circuit. Of that total, 250 cases arise from Arizona, California and Nevada, over 96% of the cases. Adoption of H.R. 1203 would seriously impair the ability of the “new” Ninth to process these death penalty cases.

Third, the Circuit division proposed by H.R. 1203 would lack geographic coherence. Although at least many of the states are geographically contiguous (unlike, for example, the so called “Hopscotch Circuit” proposal), the administratively small Circuit would govern federal law from the Arctic Circle to the Equator. Federal law pertaining to issues affecting management of the Pacific Coast would be divided.

Fourth, the proposal would also impair jurisprudential coherence by separating California from other states in the Circuit. Most of the states which form the Ninth Circuit have strong jurisprudential ties to California. California adopted the Field Code in 1850, followed by Oregon and Washington in 1854; Nevada in 1861; and

Arizona, Idaho and Montana in 1864. In addition, all the other Ninth Circuit states have adopted significant aspects of California law, and many rely on California judicial construction. Hawaii, in particular, relies on California law. In addition, however, there are important federal jurisprudential considerations, particularly in admiralty law, which would be better served with uniform application of law along the Pacific coast. The White Commission agreed with this analysis, concluding that realignment of the Ninth Circuit into two or more circuits "would deprive the West and the Pacific seaboard of a means to maintain uniform federal law in the area."

Finally, as I have discussed, the proposal would not result in increased efficiency of judicial administration. The opposite result would occur. In addition to the problems I have previously mentioned, it is important to remember that the Ninth Circuit is not merely comprised of the Court of Appeals. It includes the district courts and bankruptcy courts. Division of the Circuit would impair the ability of these courts to lend judges to those districts suffering temporary judicial need. For example, in my home state of Montana, we recently experienced a judicial emergency by the assumption of senior status of two of our three district judges. The remaining district judge could not handle the vast geography and caseload of the district. To prevent criminal defendants from being set free for lack of a speedy trial, the Ninth Circuit sent in a virtual army of visiting district and circuit judges from California, Arizona, Nevada, Washington and Oregon to keep the District of Montana functioning. We could not have survived without assistance from those Districts, particularly those in areas designated by H.R. 1203 to be separated from Montana. Now that two new district judges have been confirmed, the District of Montana will be in a position to assist other districts in need, as it has in the past. Temporary emergencies in districts throughout the Ninth Circuit have existed every year I have been on the bench; each year, the Circuit has responded to meet those challenges with visiting judges. That ability would be seriously weakened with a division of the Ninth Circuit.

The central staff of the Circuit also means that resources are available to manage courthouse construction, assist in information technology, provide aid in personnel management, and help in capital case management. It is small wonder that the Chief District Judges and the Chief Bankruptcy Judges of the Ninth Circuit have consistently opposed division.

In sum, the division of the Ninth Circuit in the manner proposed by H.R. 1203 would not achieve the goals of (1) having sufficient critical mass; (2) proportional caseload distribution; (3) geographic coherence; (4) jurisprudential coherence; and (5) increasing the efficiency of judicial administration.

That being said, much can be done within the existing Ninth to improve the administration of justice in the western states. The Ninth Circuit is committed to that goal. However, those improvements can be achieved within the present structure, without creating additional administrative inefficiencies and further delay to litigants. The increased use of technology will play a key role, and we must continue to develop better case management procedures. We must also continue to improve access to our Court and improve communications with the litigants who use the court system. However, division of the Circuit will not solve any of the existing problems. In fact, it will seriously complicate them.

The ultimate question is how best to provide justice in the western United States. A close examination indicates that the existing structure provides the most effective and efficient means of resolving the over 10,000 new appeals filed each year in the Ninth Circuit. I believe that with the intelligent and aggressive use of technology and case management techniques, the Ninth Circuit can effectively address the problems facing it, and provide an appellate forum of which we all can truly be proud.

Mr. COBLE. Thank you, Judge Thomas. And thanks to each of you panelists.

We impose the 5-minute rule against ourselves as well. But since Howard and I are here alone, we may well have a second round today.

I mentioned earlier about the expression of not having a dog in that fight. Well, Mr. Berman and Mr. Issa each have District dogs in that fight, because they live in that State. I can say, I have no dog in the fight in that I am far removed from there. But let me put a question, Judge O'Scannlain, to you and Attorney General Lance, since you two are the advocates for the change.

How should the Ninth be split? Now, Mr. Simpson proposes what appears to be a compact proposal, and he would place California, Nevada, and Arizona in a reconfigured Eleventh. And then the remaining eight entities would be elsewhere, a newly created circuit.

Do you all like that proposal, or would you like to see a split that would differ from that?

Mr. LANCE. Mr. Chairman and Members of the Committee, the proposal dealing with Montana, Idaho, Washington, Oregon, and Alaska I think holds a certain amount of merit. First of all, we are, with the exception of Alaska, all part of the Columbia River basin, and in that drainage, we have Endangered Species Act lawsuits filed quite frequently. We have commonalities relative to Native American tribal cases that are litigated quite frequently. And we think there's a commonality of interests. Alaska, by virtue of geography, would be joined there.

Mr. Chairman, as you are aware, we have the issue of Guam, the Northern Mariana Islands, and Hawaii. I suspect that those issues are somewhat unique to those insular holdings. And they should be in the same circuit, in my opinion, regardless of whether it's the Ninth or the twelfth, however you all decide to do something like that.

But keeping in mind that the Ninth Circuit has two major river basins, the Columbia that we're part of, and the Colorado, which is the Southwest, and issues that are common frequently arise, sir.

Mr. COBLE. Earlier I said the Eleventh. I meant to say the Ninth. I misspoke then.

Judge O'Scannlain, do you want to weigh in on that?

Judge O'SCANNLAIN. Well, Mr. Chairman, the fundamental problem is, what do you do about California? California is 60 percent of our caseload. It's about 62 percent of our population. And even at that, you will observe that that one State is larger than the average population of all other circuits. It's larger in caseload than the average for all other circuits.

So what are your choices? One choice would be, which is what the Hruska commission recommended, and that is you create two circuits by putting the northern half of California in a northern circuit and the southern half of California in a southern circuit. But as I understand it, there are some sensitivities from the standpoint of the State of California. And I have had a chance to talk with Senator Feinstein about this, and she seems to be quite determined that it would be inappropriate to put the State of California into two circuits. I think it could be done, and the scholars have all indicated how it can be done. But let's assume that that's out of the picture.

Then what do you have left? You could have California by itself. That's certainly a reasonable option. There are four districts there. But then if you want to have more than one State attached, then, sure, Nevada makes the most sense, because that's the next-door State, and there's a very strong sense, particularly from Senator Reid's point of view, that Nevada and California have to stay together.

Once you go beyond that, it's almost any kind of structure would work. You could conceivably have Arizona assigned to the Tenth

Circuit. Or you could even have California by itself, surrounded by all the other—I mean, there are lots of options.

As far as I'm concerned, this is not perhaps the most ideal rearrangement, but it is acceptable, it is workable, and it should be the basis for further discussion.

Mr. COBLE. I thank you, sir. As I said in my opening remarks, 5 years ago, we were discussing this very issue, and a Member of Congress asked me, he said, "Well, of what does the Ninth comprise?" And when I told him, he said, "That's a powerful lot of land." I said, "That's a powerful lot of land and a powerful lot of water."

Now, Chief Judge Schroeder, I like the idea of making it smaller geographically. I also am bothered by the costs that you mentioned.

Now, surely there would not have to be new Federal courthouses constructed in each of these entities that would be assigned to the new circuit. Am I correct about that, as far as construction costs are concerned?

Judge SCHROEDER. There would have to be a new circuit headquarters constructed, because the circuit headquarters in San Francisco would be adequate for one circuit, but there's nothing in the other circuit that is designed to handle a circuit headquarters with all the staff involved.

Mr. COBLE. And I do think you're right. I think, inevitably, there would be some extra costs involved.

My red light is on. Let me recognize Mr. Berman, and then we'll go to a second round.

Mr. BERMAN. Thank you, Mr. Chairman.

This notion of consistency of decisions, which I guess—is there a difference between the issue of consistency and the issue of predictability? For those who favor the change, they want to enhance consistency and they want to enhance predictability.

Judge O'SCANNLAIN. Is that directed to me, Congressman?

Mr. BERMAN. Sure.

Judge O'SCANNLAIN. The problem is that there are nine conceivable panels that could be hearing cases on the very same day, if they were organized that way, with the 28 judges that we have. In fact, you could even have more than that. And the chance that one panel would see something one way and other panel on a similar issue might see it another is a risk, notwithstanding the efforts that we have taken to identify possible similar cases and be sure to get them all to the same panel.

So we've been receiving criticism that you don't know what the law of the circuit is going to be because it may depend on the panel you get.

Now, in answer to your question, I suppose it is the same. The predictability issue is the same as the consistency issue.

Mr. BERMAN. I don't understand this for several reasons. One, as I understand it, on an issue of precedential value, what the first panel within a circuit decides binds the entire circuit. Is that an accurate statement?

Judge O'SCANNLAIN. That's the way it's supposed to work. That's correct.

Mr. BERMAN. Surely, I can't believe more than very, very rarely has there been a problem of two panels meeting on a similar issue

for which there is no precedent, a new, novel question of law, and deciding on the same day, each unaware of the other's decision. Has this been a problem that's occurred in the Ninth Circuit?

Judge O'SCANNLAIN. Well, my colleagues can answer with me, but, yes, it has occurred. Now, we have mechanisms to try to clean that up. Typically, the best reason to go en banc is because there is a conflict. A panel has just found X, whereas there's a decision we had 5 years ago that found Y. And you go en banc—

Mr. BERMAN. Well, that's because the earlier precedent decision wasn't followed by the subsequent decision. That's a different issue than two panels coming down on the same day with different—

Judge O'SCANNLAIN. I'm assuming that all the panels are made up of men and women of good faith, and the second panel may not have seen things the same way as the first panel, at least in terms of the underlying rule, and may have reached a different conclusion. And that's why, among other reasons, you have re-hearings en banc.

Mr. BERMAN. While your motivations are not political, and we've talked about this in my office several years ago—

Judge O'SCANNLAIN. Sure.

Mr. BERMAN [continuing]. And you have testified, and I believe you and accept that you think this is helpful to the administration of justice. There clearly is, among the advocates of this split, a bit of a political agenda, just as there may very well be from the opponents of the split.

And that makes me think that it is the consistency of the Ninth Circuit decisions that bothers some people, and that they prefer a different circuit, with the hope of getting different decisions, and that that is why they seek this split. I'm just wondering if you have any reaction to that.

In other words, you have a situation now where you have a precedent decision that binds the Ninth Circuit until either the Supreme Court decides, based on conflict with another circuit, or for some other reason, to reverse. You now have a new circuit—by the way, what are the precedent decisions binding that new circuit? I am curious how that works.

Judge O'SCANNLAIN. Well, I would assume that the precedents of the old circuit survive in both places. That would be at least from the starting point.

Mr. BERMAN. Judge Schroeder?

Judge O'SCANNLAIN. I would have to believe that.

Judge SCHROEDER. There have, in fact, only been two divisions of circuits since the circuits were established over 100 years ago. And the last division was about 30 years ago, of the Fifth Circuit. And their first decision was that the law of the old Fifth Circuit will govern both the Fifth and the Eleventh until there's a change.

Judge O'SCANNLAIN. I would assume that would be the same for any division that would come out of this bill.

Mr. BERMAN. So at least initially, the importance of following what all the different panels have decided up to that time is not eased by virtue of a split, right?

Judge O'SCANNLAIN. I'm not sure I follow the last part of the point.

Mr. BERMAN. It seems like part of what you're saying is, a reason for the split is so that—there are too many panels in the Ninth Circuit, too many decisions for a new panel to have to be aware of, and we want to cut that down. And I'm saying, based on what's been said, that a split will not cut that down. You'll still have to review the panel decisions of the old Ninth Circuit, as well as the new decisions within your new circuit.

Judge O'SCANNLAIN. Presumably, they would be smaller circuits. Both of them would be smaller than what we have today.

Mr. BERMAN. But there's a lot of precedent there.

Judge O'SCANNLAIN. Sure. But the focus should be on the decision-making process. I had a chance, when I was teaching at NYU Law School earlier this year, to visit with Chief Judge Walker of the Second Circuit. They have, I believe, 13 or so judges. They pre-screen, pre-circulate every opinion, published opinion, that comes out of that court. In other words, before it gets published, every judge of that circuit, certainly the First, certainly the Third, and I believe several other circuits, with have seen that case, that decision, before it is released to the public. We do not do that in our court, for, among other reasons, there are just so many panels meeting all the time, it would be very, very difficult to do that.

Mr. BERMAN. My time has expired. I don't know if, Judge Schroeder, if you had anything to add to this? Or Judge Thomas?

Judge THOMAS. Just briefly, on the question of consistency—

Mr. COBLE. Judge Thomas, if you would, could you hold your thought?

Judge THOMAS. Sure.

Mr. COBLE. We've been joined by two other Members from California. Let me recognize them. Hold your thought, and we'll get back to you the next round.

Ms. Waters appeared first, so we'll now recognize the gentlelady from California, Ms. Waters, for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman.

I'm sorry that I'm late for this meeting. I think that I'm simply going to give my statement, because I think that explains what I feel about this bill.

Mr. COBLE. That'd be fine.

Ms. WATERS. I am dismayed at the timing of this hearing. Here we have a bill that was introduced in March of 2001 and referred to this Subcommittee in April of that year, and yet no hearings were held or, frankly, even discussed, until a three-judge panel of the Ninth Circuit handed down its decision regarding the Pledge of Allegiance. It is impossible not to infer that this hearing is meant as a warning to all courts that Congress will interfere in your functioning and structure if you do not give us decisions that we like.

This is a blatant disregard for the separation of powers, for the idea of having an independent judiciary. One of the reasons the court of appeals judges are appointed for life is so that they will not be subjected to a politician's whim. Unfortunately, this hearing seems to demonstrate that politicians may chose to find other ways to interfere with the work being done by judges.

The bill itself is fairly straightforward, and it certainly doesn't represent the first time a proposal has been thrown out to split the

Ninth Circuit. There are arguments on both sides of this issue about whether a split is necessary and helpful or whether it would actually cause more problems than it would solve. But these arguments should have been made in an environment completely separate from any particular decisions.

Judges and courts often make rulings that we don't like. I've not always been thrilled with rulings in my State or circuit or in the Supreme Court. However, we simply cannot haul judges into Congress every time there's an unpleasant ruling and threaten to impose significant changes in the way they operate.

For the few minutes that I've been here, I think I've heard what appears to be a serious debate about predictability, consistency. However, I think, if we are to spend any time here at all, we should be talking about how we increase the number of judges for every circuit. We just need to take a look at the increasing number of cases and the complex cases that are coming before these courts and do what we need to do to increase the number of people doing the work.

I certainly appreciate the witnesses being here. And I do not look forward to hearing any more. Normally we say that, you know. But I don't want to have my Chair or the Members of this Committee believe that I really think that this is a serious discussion about whether or not we're concerned about the workload. I think it's political, and I think it's unfortunate. And I think we should not do it this way. But I would welcome, at another time, a discussion about how we increase the number of judges and judgeships.

I yield back the balance of my time.

Mr. COBLE. I thank the lady.

We've been joined again by the gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

Judge Schroeder, perhaps I could ask a rhetorical question, and I know those are always hard for panelists. But, if not today, and if the trends in the West and the Southwest continue, and at some point one out of every let's say five Americans live in the Ninth Circuit, would the Ninth Circuit need to be split in order to maintain some—or would all the circuits need to be rebalanced? Or would you assume, rather, that size doesn't matter?

I mean, if you can sort of answer the rhetorical of, if it gets to where one out of five citizens falls in the Ninth Circuit, then do we take action?

Judge SCHROEDER. Congressman, it's hard to see into the future, and it is a rhetorical question. I would say that we have made so many strides in technology, in our ability to track cases, to instantly bring up research, that it's far easier for me to be a judge on the Ninth Circuit now than it was when I was a judge on the court of appeals in Arizona with only nine judges.

So I don't think that we can predict. But I do think that, when you have a stable structure that is working, that you should keep it.

Mr. ISSA. Okay. Either of the other judges have a different opinion?

Judge O'SCANNLAIN. Well, I certainly do, and it's laid out in my testimony, Congressman Issa. It just seems to me that there has

to be a time—in my personal view, we’ve already passed that time. But there will be a time when it will be so obvious to everybody that we’ve grown so large, we can no longer function as a court. That’s what it comes down to.

If we get the seven judges we’ve asked for—and by the way, I support the request of our court for an additional seven judges, but I would prefer to see those judges allocated in this bill and have almost all of them go to California or at least to that new circuit. Sure, as far as I’m concerned, that’s where the load is. And I think that would be most appropriate.

But it just seems to me that, pretty soon, a body that’s meant to decide cases, and apply very specific principles to specific cases, becomes more and more like a legislature, and that can’t be. It can’t be.

I’m not saying that there’s a particular number that’s ideal. The White commission says the ideal is between 11 and 17. The Supreme Court has only nine. We’ve certainly tried to make it work at 28. And I think thanks to our chief and to my colleague, we’ve been doing a pretty good job of trying to hold off the relentless pressure.

But at some point it begins to collapse, and I think that’s why we’re talking about the future.

Mr. ISSA. And, Judge Schroeder, if I could do a second rhetorical, because that is what we deal with a lot on these panels? If you can make this work, and if—and the demographics, what’s happening in the West, we will get to one in seven or one in six or one in five. That’s an inevitability, unless we run out of water. And one bad ruling and we could, or good ruling, depending upon which side you’re on.

But if you can make it work, then I’ll ask you the other rhetorical question: Then why wouldn’t we have just five or four circuits for the entire United States? Wouldn’t we then in fact have more consistency than we have with 11?

Judge SCHROEDER. Well, one of my predecessors, Chief Judge Browning of Montana, did advocate that circuits join rather than to divide them.

Much of this is history. The three circuits that are all growing are the Ninth, the Fifth, and the Eleventh, because that is where the population is growing. And as I think Judge Thomas’ testimony brought out, the Fifth and the Eleventh are growing; their caseload is now much greater than it was when they originally divided.

And the East Coast reflects the shipping routes and the organization of the 13 colonies. That, too, is historic and geographic.

So while I have colleagues who would like to see circuits join and to have fewer circuits nationwide, because they believe that it would be more effective administratively, I don’t see that happening.

Mr. ISSA. So if I can paraphrase your testimony, you don’t want to increase; you don’t want to decrease; you think we’re just right.

Judge SCHROEDER. I think the system is working well.

Mr. ISSA. Yes, Judge Thomas?

Judge THOMAS. I think one of the interesting things, if you look statistically, is that there is not a direct correlation between population increase and caseload increase. That certainly has been true

for the Fifth, the Eleventh, and the Ninth. The population increase and caseload increase in the Fifth and Eleventh doesn't match that of the Ninth. Their caseload has grown faster than their population.

And within specific districts in the Ninth, that's been very true. For example, if you take the Northwest States, the caseload in the Northwest States, appellate caseload, has actually decreased over the last 10 years.

So what you have is a caseload that is based on other factors, and you're acutely aware of that in San Diego, because of the problems with the border.

The nice thing about a large circuit is that you can divert resources to deal with those temporary problems, and you cannot as easily in a small circuit. For example, in my home State of Montana, we recently had a judicial shortage. We only have three district judges, but we were down two. And judges flew in from Los Angeles, from Arizona, from Oregon, and helped us, because otherwise criminals would have walked free because of Speedy Trial Act violations. You lose that flexibility in a small circuit.

So I think that in the future what we ought to look at is how to best administer resources in a centralized way, because otherwise you're going to end up dividing circuits from now until the end of the century.

Mr. ISSA. So if I can just follow up, Mr. Chairman, you would favor the potential of eventually having five circuits, not because the Ninth is too large but because, by comparison, you don't have those same efficiencies in some of the other circuits?

Judge THOMAS. I think a larger circuit is more efficient. On the other hand, there are historical relationships and there are complications with joining circuits that previously exist. And I think you have to seriously examine those before disrupting those relationships.

Any change is quite disruptive for the litigants—

Mr. ISSA. And fortunately, there are no politics involved in that either.

Thank you. Thank you, Mr. Chairman.

Mr. ISSA. Thank you, Mr. Issa.

As I said at the outset, folks, this has been being discussed at least for the last half decade and perhaps longer than that. And I don't mean to be a prognosticator, but given the very limited legislative time, Howard, that we have left in this session, I would be surprised if this bill moves. I'm not saying it won't, but this gives us a chance to again revisit it, as we've done before.

By the way, Mr. Attorney General Lance, do you feel like a fifth wheel? [Laughter.]

We're putting all of our questions to the judiciary and avoiding you, but most of these involve day-to-day operations. We don't mean for you to feel left out.

Mr. LANCE. Mr. Chairman, having been a member of the Army, I know when I'm outranked. [Laughter.]

Mr. COBLE. Judge O'Scannlain, in your written testimony, you indicate that circuits function best with a reasonable, small body of judges, who have the opportunity to sit together frequently. Elaborate a little more on that. What are the advantages to be de-

rived from that? Strike that. What are the advantages to be derived from that, and do you all enjoy that sort of opportunity in the Ninth?

Judge O'SCANNLAIN. Well, the answer, of course, is we do not, because we're spread to far extremes from Phoenix, Arizona, on the southeast, all the way up to Fairbanks, Alaska, to Honolulu, to Billings, Montana. We only meet as a court four times a year, in terms of a regular court meeting. We also do have an event called the symposium, where we do try to do our best to overcome that obstacle.

But you look at courts like the First Circuit in Boston, which has all of its hearings in Boston. Judges are from neighboring States. They can drive to the headquarters and have their hearings there. The same thing is essentially true of New York, and in Pennsylvania, the Second or the Third. The D.C. Circuit, all the judges of that circuit are in one building, and they see each other every day.

Mr. COBLE. Of course, Judge, if I may interrupt, we will never be able to emulate that sort of convenience back out where you all live.

Judge O'SCANNLAIN. Well, that's true. But to the extent that you can reduce the amount of travel—and there are quite a few of my colleagues who express anxiety about the problem of travel not only because of the recent extra screening and so forth, but just simply the extent to which it cuts into personal time and that sort of thing, where people have to travel on the weekends and that kind of thing.

Mr. COBLE. Chief Judge, do you or Judge Thomas want to weigh in on this in response to my question?

Judge SCHROEDER. Well, I believe that we have been quite successful at achieving collegiality. We think it's very important.

The court that is here in the District of Columbia has had a history at times of not being the most collegial of the intermediate appellate courts. And I personally think that many of our judges are very happy to see each other when we do see each other, and happy that we don't all live in the same building. [Laughter.]

Mr. COBLE. Judge Thomas?

Judge THOMAS. When I joined the court, I was——

Mr. COBLE. Judge, pull that mike a little closer, if you will, please.

Judge THOMAS. When I joined the court, I was concerned about that issue. But I was pleasantly surprised that it's a very collegial court on the Ninth.

We keep in touch with each other electronically as well as in person, and other circuits do as well. So we communicate with each other constantly. We sit every month with each other in three-judge panels in various venues.

Mr. BERMAN. Monitored by the administrative office? [Laughter.]

Judge THOMAS. So I find it a very collegial court, and I think it's sufficiently collegial so that decision-making is—appropriate decision-making is——

Mr. COBLE. Mr. Attorney General, do you have an opinion on this? You don't sit on the court, but I don't want you to feel left out.

Mr. LANCE. Well, I appreciate that, Mr. Chairman, Members of the Committee.

The real problem is, as I see it, maybe these judges can straighten me out, but an appeal from the three-judge panel goes to an 11-judge panel. And six of those 11 justices then can in fact dictate the precedent in that particular area on that particular case. All other circuits, to my knowledge, all judges meet in an en banc panel and you get the majority of those justices telling us what the law is in that particular circuit.

We have too many configurations, too many different potentials there, and that's why we get, at least in my opinion, conflicting decisions, because not all of the judges at the same time sit down and tell us what the law is out in the hustings. Thank you.

Mr. COBLE. Howard, my red light is about to appear. I want to revisit the cost matter. I see my old friend Mike Blommer from the Administrative Office of the Court in the audience.

I don't mean to assign you additional duties, Mike, but I'm thinking aloud now. It wouldn't be a bad idea if we could have an estimated cost. What might be the cost figures, if in fact we reconfigure the Ninth and then create a new circuit? Just think about that, Mike, if you will, and we'll talk about that subsequently.

And I think my red light is about—

Judge O'SCANNLAIN. Mr. Chairman, could I be heard on the point of costs, just for a moment?

Mr. COBLE. Yes, sir.

Judge O'SCANNLAIN. I have to rather strongly disagree with my chief on this estimate of \$100 to \$110 or \$120 million. The fact of the matter is, in Portland and in Seattle, there are empty courthouses.

The one in Portland is the Gus J. Solomon Courthouse, which is filled with commercial tenants. It was vacated to create the Hatfield Courthouse. And as far as I am aware, the GSA would make the courthouse available—it's still in the inventory as a Federal courthouse, but there are no Federal judges in it.

Whereas, up in Seattle, that building is not yet vacated. That's the Nakamura Courthouse. But there's going to be a major new district courthouse in Seattle, which will take all of the district judges and will create a huge vacancy in the Nakamura Courthouse.

So my estimate, in terms of new courthouse construction, is essentially zero. And as far as the staff costs are concerned, I would not replicate staff; I would allocate staff. If it takes 400 staff people to run the court in San Francisco, you'd split them up. If it's going to be roughly one-third in the new circuit, two-thirds in the old, whatever the number is, you just reassign people.

Mr. COBLE. Well, you all will recall that I said earlier today that I did not think that it would require new construction in each geographic area.

Chief Judge?

Judge SCHROEDER. Yes, if I could respond briefly? My understanding is that the Gus Solomon Courthouse in Portland needs major seismic repair work and is not suitable for occupation as a courthouse now. And the Nakamura Courthouse in Seattle is currently being redesigned as a court of appeals courthouse, not as an

administrative headquarters. It would have to start being redesigned all over again. And I do not believe that the space in that building is adequate, although we haven't looked at it from that standpoint, to hold an entire circuit headquarters.

Mr. COBLE. Well, I'd like to get some current information about costs. I think it would be of interest to the entire Subcommittee and the entire full Committee, for that matter.

Howard, my red light has long been on. I recognize the gentleman from California.

Mr. BERMAN. Thank you, Mr. Chairman.

A new circuit would have the impact, perhaps, of increasing the Supreme Court workload, as I understand it, because now the Court would need to—it would be one more circuit dealing with intercourt conflicts, which can only be settled by the Supreme Court. Is that an unfair assumption?

Judge O'SCANLAIN. Mr. Berman, there would be a very marginal increase, I suppose, only because it's an additional unit that the Supreme Court looks at. But in terms of the overall number of petitions for certiorari, I don't know that it would make the slightest difference, whether it's a single circuit or more than one circuit, because you're still dealing with a finite number of cases.

Mr. BERMAN. But the likelihood of more intercourt conflicts has to go up, if there are more circuits.

Judge O'SCANLAIN. Well, presumably marginally, to the extent that you would have 13 circuits instead of 12. I'm including the D.C. Circuit, which is not a numbered circuit.

Mr. BERMAN. I mean, this whole notion of at what point do you increase the circuits because of the increase in population and the increase in caseload, as opposed to simply increasing the number of authorized judgeships, is an interesting one.

When I came here in the early 1980's, the Chairman of this Subcommittee at that time was very committed to the absolute necessity of having an intercourt tribunal to filter out intercourt conflicts because there was no way the nine-member Supreme Court could deal with the incredible—I mean, you talk about the Ninth Circuit, but now the sum total of the whole national increase in population, in litigation, in Federal cases—some even think that the laws that we pass help to contribute to that. [Laughter.]

But of course, that proposal did not pass, and no one is seriously talking about increasing the size of the Supreme Court to deal with what has to be at least as potentially enormous an increase in caseload as the Ninth Circuit faces. At what point does the population in a congressional district, which once might have been 50,000 or 60,000 and now averages 650,000, to what extent do we start changing the size of the House versus finding better ways to communicate and use our advanced technologies to deal with the serving of our constituents?

I mean, one doesn't always have to respond to the increase in size and the increase in caseload by simply—there are other ways to deal the issue than simply increasing the number of circuits.

Judge O'SCANLAIN. Well, Mr. Berman, if you'd be willing to add to this bill that we also get certiorari jurisdiction instead of having to require us to hear every single case that is filed, unlike the Supreme Court, that would be just marvelous. That's the secret about

how nine Justices on the Supreme Court can sift out from about 10,000 filings a year. They only pick 85 cases to hear. I'd love to be in that position. I'm sure I speak for all three of us when I say that.

Mr. BERMAN. But there's a price, in terms of justice, for that.

Judge O'SCANNLAIN. Sure. Sure.

Mr. BERMAN. My guess is your most realistic hope at this point is to hope that we don't ban unpublished opinions. [Laughter.]

But, Attorney General Lance, what if I said, look, let's cut a deal. I'll stop my opposition in the Ninth Circuit. I'll work with my fellow Californians. I'll work with the Senators. We'll create a new circuit. In one circuit will be California and Idaho, and then the other States will be in the second circuit. Will you still be here enthusiastically championing this cause?

Mr. LANCE. Yes, sir. Mr. Chairman, Congressman, yes.

And the one point that I wanted to make is I understand the appearance of conservative versus liberal, that type of thing.

Mr. BERMAN. I was thinking of California versus anti-California. [Laughter.]

Mr. LANCE. Well, we have about half the LAPD retired in Idaho right now. [Laughter.]

Mr. BERMAN. We know of a couple.

Mr. LANCE. But I would like to point out, sir, that the bill here today, which would bring Oregon in the same circuit as Idaho, would bring Justice Goodwin, who lives in Sisters, Oregon, who authored the Pledge of Allegiance case, into the circuit that I'm supporting or proposing.

So I really don't see it as being conservative versus liberal, or Democrat versus Republican. I do see that it takes use about 16 months to get an opinion. And we have to spend a lot of money to appeal these opinions to the Supreme Court. And it takes a lot of time for me to tell my Governor what the law in the Ninth Circuit is, and that's causing some difficulties.

Mr. BERMAN. Is there a huge time difference in the Ninth Circuit versus other circuits, in terms of getting an opinion?

Mr. LANCE. If I may, Congressman, Mr. Chairman, it's about 16 months in the Ninth Circuit and about 10.5 months in the other circuits, average.

Mr. BERMAN. And are there some of those circuits that are closer to 16 than 10.5?

Judge THOMAS. We have not led—last year, we did have the longest delay. The year before was the Sixth Circuit. Traditionally, those circuits whose judgeships go unfilled, have the greatest vacancies, have had the greatest delay.

But in recent years, the Second Circuit, the Sixth Circuit, the Eleventh Circuit, other circuits have had delay problems. So we are not out of line with a group of circuits.

I think we can do a lot better, and we will do a lot better with that.

Mr. BERMAN. Mr. Chairman, however this works out, and I certainly hope that your prediction in terms of action this year takes hold, but however this works out, I do hope, before we start appropriating a lot of money for a remodeled or new courthouse for the new circuit, we get that \$400 million for the district court in Los

Angeles. There are a lot of financial needs of the judiciary that are very pressing and that have been on the docket for a long time.

With that, I yield back.

Mr. COBLE. I thank the gentleman.

Mr. Berman, in addressing you, Mr. Attorney General, referred to the anti-California climate. I want the record to show that I have never given him a hard time about being a Californian, and I want to be held harmless.

Folks, I feel——

Mr. BERMAN. You were exempt from the passions of the moment in terms of these issues.

Mr. COBLE. I appreciate that, sir.

Folks, I think this has been a good hearing.

And, Mike, I don't think I have the authority to give you an assignment, but I would like to talk to you and the AOC people about cost on this.

Judge O'Scannlain, you got my attention when you referred to the five circuits that border the Atlantic. I know much has been said about the Ninth being the gateway to the Pacific, which of course it is—you know, more direct contact with Japan, Australia, New Zealand, et cetera. And I guess in extending that maybe to say that's why the California decisions might have greater impact upon the neighboring States or it may have manifestations or consequences upon maritime law. But I guess your point would be, Judge O'Scannlain, that the same thing would apply on the East Coast. We can plow that field at a later time.

Judge O'SCANNLAIN. Sure.

Mr. COBLE. We're being televised, and maybe I shouldn't say what I'm about to say. It's politically incorrect, maybe. But some of us on this Hill refer to the cityside as Mount Olympus, where the gods used to live. "Used to live," I say.

But in any event, I would be happy if—I'm more concerned right now about the vacancies that occur in the Federal judiciary than I am, very frankly, about the size of the Ninth. And I'd like to see that addressed.

And then, Howard, hopefully one of these days, let's resolve the Ninth one way or the other, hopefully to the satisfaction of those of you who live and work in that very beautiful part of our country.

Prior to slamming the gavel, do you any of the panelists want to be heard for a final adieu?

Howard, do you want to be heard one more time?

Mr. BERMAN. No, I think I've been heard enough.

Mr. COBLE. Well, I feel good about this. I think this is directing attention to an important area, and we will chew on it.

I thank the witnesses again for their testimony. The Subcommittee very much appreciates their contribution and the attendance of those who very dutifully stayed in the audience throughout the hearing.

This concludes the oversight hearing on H.R. 1203, the Ninth Circuit Court of Appeals Reorganization Act of 2001. The record will remain open for 1 week.

[The prepared statement of Mr. Hellman follows:]

PREPARED STATEMENT OF ARTHUR D. HELLMAN

Mr. Chairman and Members of the Subcommittee:

I appreciate this opportunity to express my views on H.R. 1203, the Ninth Circuit Court of Appeals Reorganization Act of 2001. I write in opposition to the bill.

The arguments made in support of dividing the Ninth Circuit are superficially plausible, but they collapse when subjected to closer scrutiny. Although the time may yet come when the Ninth Circuit should be split, the proponents of H.R. 1203 have fallen far short of showing that realignment is warranted at this time.

By way of personal background, I have been studying and writing about the Ninth Circuit and its Court of Appeals for almost 30 years. In the early 1970s I served as Deputy Director of the Commission on Revision of the Federal Court Appellate System (Hruska Commission) and helped to write its report recommending division of the Ninth Circuit. (As I explained in response to a question from Chairman Coble at a hearing in 1999, I believe that this recommendation was well-supported at the time, but that subsequent developments have completely undercut the premises that the Commission relied on.)

In the late 1980s I supervised a distinguished group of legal scholars and political scientists in analyzing the innovations of the Ninth Circuit and its court of appeals. The fruits of our research were published in *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* (Cornell University Press 1990). More recently, I was appointed by Chief Judge Hug to serve on a 10-person Evaluation Committee that studied every aspect of the operations of the Ninth Circuit Court of Appeals, with particular attention to issues identified by the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission). Of course in this statement I speak only for myself; I do not speak for the court or any other institution.

I. THE ISSUES RAISED BY H.R. 1203

As stated at the outset, the arguments for dividing the Ninth Circuit are superficially plausible, but they collapse when subjected to closer scrutiny. In some instances evidence is lacking to show that a problem exists. For other claims the proponents fail to substantiate a connection between the size or configuration of the circuit and the problem they have identified.

In a series of published articles, I have analyzed in detail many of the issues raised by proposals to divide the Ninth Circuit. On some key points of dispute I have carried out extensive empirical research. The most relevant publications are:

- *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. Davis L. Rev. 425 (2000).
- *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. Cal. L. Rev. 377 (2000).
- *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 Montana L. Rev. 261 (1996).

(Some small portions of this statement have been taken from these articles.)

I would be happy to provide copies of these articles to the Subcommittee, and also to answer any specific questions that you might have. For this hearing I think it would be most useful to suggest some general propositions that I think should guide the Subcommittee and Congress in considering H.R. 1203—or indeed any circuit splitting legislation. I also offer some thoughts about the future of the Ninth Circuit.

II. CIRCUIT SPLITTING LEGISLATION IN CONTEXT

At this hearing, you will hear many statistics and other details. These are important, but it is also useful to step back and consider in more general terms how Congress ought to approach a proposal to divide one of the federal judicial circuits. Here are four propositions that I think should guide Congress and this Subcommittee.

1. Congress should not reorganize a federal court out of displeasure with the decisions of its judges.

This principle was established in American political life by the defeat, by members of his own party, of President Roosevelt's plan to "pack" the Supreme Court. It was reiterated in strong terms in the Final Report of the White Commission. It is fundamental.

2. The burden is on those who would alter an existing structure to show that problems exist, that the proposed alteration offers a fair prospect of ameliorating the problems, and that the legislation would not create serious new problems.

No institution is immune from criticism, and change should not be opposed simply because it is change. But change inevitably exacts costs. More important, we can never fully foresee the consequences of replacing one set of institutional arrangements with another. There is always a risk that the cure will be worse than the disease. It is therefore appropriate to put the burden of persuasion on those who seek change.

This burden is not satisfied by the statement of abstractions or generalities. Nor is it satisfied merely by pointing to problems with the existing institution. Rather, the proponents must show how the problems derive from the existing structure and would be cured or ameliorated by the proposed change.

3. In considering proposals to divide the Ninth Circuit, Congress should be guided by its handling of similar proposals in the past.

Twice in the 111-year history of the federal courts of appeals, Congress has divided one of the judicial circuits. In each instance, Congress waited until the legal community in the affected region had reached a consensus that division was warranted.

The first circuit split occurred in 1929, when Congress carved out the Tenth Circuit from the old Eighth. Initially the idea was controversial. But by the time hearings were held on the circuit division proposal, all of the judges of the existing Eighth Circuit and bar associations of eight states had expressed their approval.

Of greater contemporary relevance is the history of the division of the old Fifth Circuit. A bill to divide the Fifth Circuit was introduced in Congress only two months after the Hruska Commission issued its report recommending a split. But the legislation was not enacted at that time, or for several years thereafter. One of the main reasons is that the proposed division was strongly opposed by some members of the court, as well as by some lawyers' groups. By 1980, however, professional opinion had turned around. The judges of the court unanimously petitioned Congress to divide the circuit. Bar associations in each of the six states and others in the legal community agreed. Only then did Congress act.

I am not suggesting that Congress should wait until professional opinion is unanimous in support of a split. But history tells us that Congress has stayed its hand until it received a strong signal from the legal community in the affected region that the existing circuit was too large. That is an appropriate and sensible approach for Congress to take.

4. When there are differences between the Ninth Circuit and other circuits, you should not assume that the problems lie with the Ninth Circuit.

Pro-split witnesses at this hearing, like their predecessors at previous hearings, will undoubtedly call your attention to the enormous array of judges that hear and decide appeals in the Ninth Circuit. They will emphasize how much larger this number is than the number of judges sitting on any of the other courts of appeals. They will offer this as a reason for dividing the Ninth Circuit.

The unstated assumption here is that the other circuits have the right number of appellate judges, and the Ninth Circuit is the one that needs to be fixed. You should not accept that assumption uncritically.

Take a look, in particular, at the Fifth and Eleventh Circuits. In 2001, the Fifth Circuit had 8,642 appeals, only 17% fewer than the Ninth Circuit's total. But the Fifth Circuit has only 17 authorized judges, compared with the 28 in the Ninth Circuit. Isn't it at least possible that the Fifth Circuit lacks a sufficient number of judges to give each appeal the attention it deserves? (Note, too, that the Judicial Conference of United States believes that the Ninth Circuit Court of Appeals should have an authorized complement of 33 judges. That is almost twice the number in the Fifth Circuit, for a caseload that is only modestly smaller.)

The Eleventh Circuit presents an even more extreme picture. Filings in the Eleventh Circuit in 2001 were 7,535. That is almost 75% of the caseload of the Ninth Circuit. But the Eleventh Circuit has only 12 authorized judgeships—not even half of the complement in the Ninth. Moreover, the Eleventh Circuit has not added any judgeships since it was created more than two decades ago. In that period the caseload has more than tripled. Isn't it at least possible that there is cause for concern in the Eleventh Circuit's longstanding refusal to seek additional judges notwithstanding its enormously increased volume of appeals?

I do not know the answers to these questions. I do believe that it is vital that Congress pursue these issues before deciding whether to enact legislation like H.R. 1203. If some courts of appeals lack sufficient judge power to handle their caseloads with expedition and an appropriate measure of thoroughness, that in itself is a problem that should be addressed. More to the point of this hearing, it would be tragic if Congress were to shut down the Ninth Circuit's continuing efforts to manage a large court, only to learn later that other circuits would benefit from that experience as they try to operate courts of 20 or more judges.

III. THE FUTURE OF THE NINTH CIRCUIT

In 1999, Judiciary Committees in both the House and the Senate held hearings on the White Commission's proposal to divide the Ninth Circuit Court of Appeals into two largely autonomous adjudicative units. Witnesses who supported the Commission recommendation argued that the time had come to bring the matter to closure. For example, Ninth Circuit Judge Diarmuid O'Scannlain of Oregon told the Senate Judiciary Committee: "We've been engaged in guerilla warfare on this circuit split issue for quite some time now. What we need to do is get back to judging. You must force us to restructure now, one way or another, so that we can concentrate on our sworn duties and end the distractions caused by this long-running controversy."

It is certainly true that the controversy over dividing the Ninth Circuit has been going on for a long time, and that the judges of the circuit have spent a great deal of time and effort dealing with the issue. But I believe that the "closure" argument can more aptly be directed to the supporters of restructuring than to those who oppose it. At least since 1973, serious proposals for dividing the Ninth Circuit have been put forth by members of Congress and by various study groups. In all that time, the proponents have never succeeded in persuading a majority of the circuit judges that restructuring is necessary or even desirable. Nor have the proponents found a receptive ear among the court's constituents. On the contrary, trial judges and representatives of the organized bar have repeatedly spoken out against circuit-splitting legislation.

I suggest that the time has come for advocates of restructuring to acknowledge that the arguments for dividing the Ninth Circuit (or its court of appeals) simply have not carried the day with the judges and lawyers within the circuit. The reason that so much time and effort has been diverted to "this circuit split issue" is that circuit division proposals have been advanced again and again notwithstanding their rejection by a majority of those who would be most directly affected.

Advocates of circuit division have, of course, every right to put forth their ideas, whether in the form of legislation or otherwise. But their efforts exact a cost—the "distractions" and "guerrilla warfare" that Judge O'Scannlain referred to. As matters stand today, those who care about the Ninth Circuit Court of Appeals can serve it best by freeing the judges from the "distractions" generated by legislative battles. This will allow the judges to "get back to judging." Congress can help by creating the new judgeships that the Judicial Conference of the United States has recommended.

In saying this, I do not suggest that the issue of circuit division should be taken off the table forever. One of my articles is titled: "Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come." The title was chosen with care. I did not say (as others have said) that the idea is one whose time has passed. I did not say that its time would never come. And I do not say that now.

We do not know what the future holds. If Congress approves the Judicial Conference's request for additional judgeships, the Ninth Circuit Court of Appeals will become a court of 33 judges, including 5 newcomers. Other new judges will be appointed to fill vacancies. The new cohort may take a very different view of the issue of circuit division than does the current majority within the court. At the same time, lawyers in the circuit may find that a court of 33 somehow creates problems in litigation and counseling that a court of 28 did not. If these things happen, the judges and lawyers of the Ninth Circuit will probably do what the judges and lawyers of the Fifth Circuit did two decades ago: they will abandon their opposition to division and ask Congress to act. And I anticipate that Congress would respond favorably.

But that is not the only possible scenario. It is worth remembering that, not so long ago, it was widely believed that an appellate court of more than 9 judges could not function effectively. I doubt that anyone holds that view today. A generation from now, a court of 33 may seem quite ordinary.

IV. CONCLUSION

To some, it will seem remarkable that such high passions have been aroused by the issue of whether a judicial circuit and its court of appeals should be split. The reason, I think, is that advocates on both sides are deeply concerned about the effective administration of justice in the states of the west. I believe that when this Subcommittee examines all of the evidence, it will conclude that while proponents of realignment may meet their burden at some time in the future, they have not yet done so. I urge the Subcommittee to reject H.R. 1203 and allow the judges of the Ninth Circuit to continue their impressive record of experimentation and innovation in the mechanisms and structures of appellate justice.

Mr. COBLE. Thank you for your cooperation, and the Subcommittee stands adjourned.
[Whereupon, at 4:30 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Statement of Congressman Greg Walden in support of HR 1203

July 23, 2002

Mr. Chairman, I appreciate having the opportunity to speak in favor of the legislation my friend and colleague from Idaho has introduced to split the 9th U.S. Circuit Court of Appeals into two circuits. While I cosponsored this measure long before the most recent controversy that focused the nation's attention on the 9th Circuit, the recent ruling with respect to the Pledge of Allegiance only reaffirmed my desire to remove Oregon from the jurisdiction of the 9th Circuit's judges.

Mr. Chairman, as you know, during the last term the United States Supreme Court reviewed 29 decisions made by the 9th Circuit and chose to overturn a staggering 28 of them. This level of consistency in incorrectly deciding matters of such great importance to the people of the western United States is disturbing to say the least. When coupled with the offensiveness of its recent ruling concerning the Pledge, I've come to the inescapable conclusion that many, if not most, of the judges who make up the 9th Circuit bench hold both values and philosophical positions that are not consistent with the people of Oregon.

With regard to the ruling on the Pledge of Allegiance, I share the outrage and disbelief of the majority of the American people who found this decision to be a travesty. While I am not an attorney by training, I find it difficult to make the connection between young school children engaging in a voluntary, non-specific reference to God and the First Amendment prohibition that "Congress shall make no law respecting an establishment of religion." Further, if one extends the logic that prevailed in this case, it would seem that the judges believe that any expression of religious belief on public property would be unconstitutional, including the prayer that opens each day on the floor of the House and Senate. So, too, would the motto "In God We Trust" that appears on U.S. currency be forbidden. I would submit that removing these expressions from the daily life of the American people and its representatives in the government would be an extreme and unnecessary action. I do not believe that the Constitution guarantees an individual the right to travel through life without ever being exposed to references of religious belief.

Beyond my philosophical motivation for separating Oregon from the 9th Circuit, there are also practical considerations that I believe fully justify the legislation that Congressman Simpson has introduced. Not the least of these is the sheer size of the circuit, both in terms of population and geography. The 9th Circuit administers a population of nearly 50 million and serves 15 million more citizens than the next largest circuit and 20 million more than the average circuit. In 1999, 1,000 more cases were filed in the 9th Circuit than in the nation's next busiest circuit. Because of this large caseload, the 9th Circuit has established a reputation for being slow in handing down decisions. The median time for completing a case in the 9th Circuit is 14.4 months. The same appeal would be resolved in 9.9 months in the 5th Circuit or 8.5 months in the 2nd Circuit. Clearly we owe it to the people of the West to deliver judicial judgments with no less efficiency than citizens can expect elsewhere in the nation, and I believe this legislation will help alleviate the strain placed on the 9th Circuit by its sheer size.

In conclusion, Mr. Chairman, I strongly support this measure by my colleague from Idaho, and I remain hopeful that the Committee will report the bill favorably.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF THE AMERICAN BAR ASSOCIATION

The American Bar Association appreciates the opportunity to present this written statement for the record of hearings of the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property on legislative proposals to divide the Ninth Circuit into two circuits.

One of the primary goals of the American Bar Association is “to promote improvements in the administration of justice.” It is therefore not surprising that the ABA has examined the issue of federal circuit restructuring on multiple occasions over the past twenty-five years.

Our two most recent circuit restructuring policy positions were adopted in response to the activities of the 1998 Commission on Structural Alternatives for the Federal Courts of Appeals (see discussion below); both policies express the Association’s categorical opposition to division of the Ninth Circuit.

1. Past Congressional Inquiries and Legislative Proposals to Restructure the Ninth Circuit Court of Appeals

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

In 1973, the Hruska Commission, properly called the Commission on Revision of the Federal Court Appellate System, recommended that Congress split the Fifth and Ninth Circuits. Congress rejected the recommendation of the Hruska Commission and instead permitted circuits with 15 or more judges to adopt innovative measures, such as the use of limited en banc panels and administrative units, to deal with rising caseloads. After considerable study by the respective judicial councils of each circuit, the Ninth Circuit chose to adopt these new procedures and the Fifth Circuit chose to petition Congress for division. Congress complied and in 1980 divided the Fifth Circuit into what are now the Fifth and Eleventh Circuits.

Even though the Ninth Circuit’s judicial council concluded that the various techniques adopted in the 1980s were working well, some Members of Congress who reside in the Pacific Northwest persisted in introducing legislation to split the Ninth Circuit into various configurations throughout the 1990s. None of the proposals progressed very far in the legislative process. During the 105th Congress, an attempt to force Congressional consideration of Ninth Circuit restructuring resulted in passage of compromise legislation creating the Commission on Structural Alternatives for the Federal Courts of Appeals.¹ 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 Commission was dubbed the “White Commission” because then-retired Justice Byron R. White was its chair.

The White Commission conducted an extensive review of the operations of the Circuit and concluded that the Ninth Circuit should not be split. In its final report, released at the end of 1998, the Commission stated:

There is no persuasive evidence that the Ninth Circuit (or any other circuit for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.²

Having rejected the notion of splitting the Ninth Circuit in order to solve perceived problems with consistency, predictability and coherence of circuit law, or out of concern solely for its size, the White Commission nevertheless recommended that Congress restructure the Ninth Circuit Court of Appeals into three regionally-based adjudicative divisions.

At the earliest opportunity after the 106th Congress convened, Senator Frank Murkowski (R-AK) introduced S. 253 to implement the recommendations of the White Commission. One day of hearings was held on the bill, and no further action was taken for the rest of the 106th Congress.

¹ Pub.L.No. 105–119.

² Final Report, *supra* note 2 at 29.

During the First Session of the 107th Congress, S. 346 and H.R. 1203 were introduced in the House and Senate to split the Ninth Circuit into two circuits, with Arizona, California and Nevada retaining the moniker of the Ninth Circuit, and Alaska, Hawaii, Oregon, Washington, Idaho and Montana forming a new Twelfth Circuit. S. 346 was introduced by Sen. Murkowski (R-AK) on February 15, 2001 and H.R. 1203—which prompted this subcommittee’s hearing—was introduced by Representative Mike Simpson (R-ID) on March 22, 2001.

II. ABA POLICY: RESPONSE TO THE WHITE COMMISSION

During the spring of 1998, the ABA testified before the White Commission to oppose restructuring of the Ninth Circuit and express its conviction that no compelling reasons then existed to consider restructuring any of the federal circuits. The Association’s testimony was based on the following policy, adopted earlier that year:

RESOLVED, That the American Bar Association opposes restructuring the Ninth Circuit Court of Appeals in view of the absence of compelling empirical evidence to demonstrate adjudicative or administrative dysfunction;

FURTHER RESOLVED, That the American Bar Association, based on compelling empirical evidence, does not support any other restructuring of the federal circuits at this time;

FURTHER RESOLVED, That the American Bar Association supports ongoing efforts by the federal circuit courts of appeals to utilize technological and procedural innovations in order to continue to enable them to handle increased case-loads efficiently while maintaining coherent, consistent law in the circuit.

The standard for circuit restructuring underlying ABA’s policy analysis was first enunciated by the Judicial Conference of the United States in its *Proposed Long Range Plan for the Federal Courts*.³ Adopted by the ABA as policy in August 1995, it states:

Each court of appeals should comprise a number of judges sufficient to maintain access to and excellence of federal appellate justice. 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 clearly embodies the principle that circuit restructuring is a “remedy” of last resort and should only be used if there is uncontrovertible evidence that justice is being denied to individual litigants and the integrity of law of the circuit is threatened. This very stringent standard is appropriate because circuit restructuring brings with it its own set of problems which may be temporary or may linger for years, often including substantial start-up expenses for new construction or renovation of existing facilities and for relocation of personnel and tangible property, administrative disruption and unpredictability of case law in circuits whose boundaries are moved.

As the year came to a close, the White Commission finished its investigations and released its final report with recommendations.

After careful review of the report by many different entities within the Association, the ABA concluded that the Commission’s findings and clearly stated philosophical preferences for divisional units as a way to protect collegial deliberations did not provide for a sufficient basis for dividing the Ninth Circuit into the proposed adjudicative divisions or in any other manner. In our view, the Commission had not produced compelling empirical evidence to demonstrate that justice was being denied to individual litigants or that the integrity of the law was being threatened. In short, the Commission failed to demonstrate adjudicative dysfunction within the Ninth Circuit Court of Appeals—the standard for circuit restructuring adopted by the ABA in 1995.

In 1999, the Association adopted policy specifically opposing the Commission’s restructuring proposal for the Ninth Circuit. In pertinent part, it states:

RESOLVED, that the American Bar Association opposes enactment of legislation that mandates restructuring of the Ninth Circuit Court of Appeals into adjudicative divisions, in view of the absence of compelling empirical evidence to demonstrate adjudicative dysfunction.

Our position has not changed. During the past three years, there has been no deterioration of conditions or disclosure of compelling new evidence to support a dif-

³Judicial Conference of the United States, LONG RANGE PLAN FOR THE FEDERAL COURTS, 44 (1995).

ferent conclusion. 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 better and delivering justice in a more timely fashion today than it did in the 1990s.⁴ We attribute this, in large part, to two factors: the Court's implementation of new case management tools aimed at decreasing the backlog of cases which piled up in the 1990s; and the filling by Congress of a significant number of the Circuit's long-standing appellate vacancies. We will summarize these new developments within the Circuit and then offer brief rebuttals to commonly voiced complaints giving rise to the call for division of the Ninth Circuit.

III. JUDICIAL VACANCIES, BACKLOG OF PENDING APPEALS AND INNOVATIVE CASE MANAGEMENT

Congress last authorized additional judgeships for the Ninth Circuit Court of Appeals in 1984, bringing the total number to 28. While we do not have at our disposal records that go back that far, we are doubtful that the Court has ever operated with a full cadre of judges. We are certain, however, that, for most of the last decade, the vacancy rate has been staggering and detrimental to the Court's ability to operate efficiently and effectively.

Ten authorized judgeships were vacant from 1994 through most of 1998. For most of those five years, the Court was forced to function with only eighteen full-time, active judges, each of whom carried inordinately high caseloads. As a result of the Court's persistently high judicial vacancy rate and rising caseloads, the remaining 18 appellate judges were unable to keep up with assigned caseloads and a backlog of pending appeals inevitably developed. The Court responded by implementing a new expedited procedure for handling non-controversial cases whose outcomes were controlled by existing precedent. This new process enabled the Court to keep abreast of current filings, but the backlog kept growing.

Vacancies were reduced to seven in 1998, six in 1999, and one by the end of 2000. As a result, the Court was able to cap the rising backlog of pending appeals in 2000. In 2001, the last full year for which statistics are available, even though caseload filings increased 13.1% over the previous year, the Court terminated 12.5% more cases and even slightly reduced its backlog of pending cases.

In June of 2001, after rebounding from the deleterious effect of trying to operate on a shoe-string staff of full-time judges, the Court, with almost its full complement of judges, was ready to tackle its backlog of pending appeals. It first implemented enhanced case management techniques to better identify appeals that were appropriate for expedited screening and then it increased the number of judicial screening panels to handle the anticipated increase in expedited appeals.

While the process is still new, the preliminary results are promising. According to Judge Thomas of the Ninth Circuit Court of Appeals, in testimony delivered to this Subcommittee last week, during its first six-months of operation, the Court was able to divert nearly 600 appeals to expedited processing and 78% of those appeals have now been resolved by judicial screening panels. Judge Thomas believes the program has great potential to significantly improve case processing time and reduce the Court's backlog of pending appeals. This is encouraging news; however, we caution that the program could be derailed if the number of vacancies on the Court grows or if existing vacancies are not filled within a reasonable time. For most of 2002, the Court has had to operate with four judicial vacancies; happily, we can report that that number was just reduced last week by the confirmation of Judge Richard Clifton to the Ninth Circuit.

The ABA applauds the Court's initiative and determination to reduce its substantial backlog of pending appeals. Given the current number of vacancies throughout the federal appellate system, the continuing trend in overall caseload growth and limited judicial resources, we support efforts undertaken by the federal courts to utilize innovative techniques to handle their dockets with greater efficiency, as long as coherent, consistent case law throughout the circuit is maintained.

IV. COMPLAINTS RAISED ABOUT THE NINTH CIRCUIT DO NOT JUSTIFY ITS RESTRUCTURING

2. *Backlog of Pending Appeals*

Long-standing, high numbers of vacancies on the Court, not circuit size, are responsible for the Ninth Circuit Court of Appeal's backlog of pending appeals. Division of the Circuit would not, by itself, do anything to reduce this backlog. An exam-

⁴JUDICIAL BUSINESS, Administrative Office of the U.S. Courts (2001). Same-titled reports are produced annually by the A.O. and were consulted for statistics relating to the judicial business of the federal courts during the years, 1997-2000, also.

ination of the numbers of pending appeals in the other circuits demonstrates the lack of correspondence between size and backlog. For example, the Court 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 Eleventh Circuit both have twelve authorized judgeships, yet the D.C. Circuit had 1,270 pending appeals at the end of 2001 while the Eleventh Circuit had 4,157. As discussed above, the Ninth Circuit Court of Appeals is committed to reducing the backlog and has already implemented procedures that appear promising.

3. Delay in Processing Appeals

As explained above, the Ninth Circuit's delay in processing cases is due to the backlog of appeals that built up because of the high number of vacancies that existed on the Court for much of the 1990s, not because of its size. Statistics citing huge delays are often misleading because they do not tell the whole story. If one compares the 2001 statistics on median processing time of each of the federal circuits from the filing of an appeal to final disposition, the Ninth Circuit Court of Appeals is the slowest—15.8 months, followed by the Sixth Circuit, whose median time was 14.3 months. However, 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—1.6 months. The Second Circuit ranked first, disposing of cases in 0.7 months. The most significant delay in processing cases occurs on the front-end: the problem is getting filed cases on the docket and before a panel of judges. As further evidence that persistently high vacancy rates are more directly responsible for processing delays than circuit size, consider this: the Sixth Circuit Court of Appeals, which has labored under a 50% vacancy rate for the last several years, has the second slowest rate of disposition from filing date to final action.

4. Difficulty of Keeping Up with the Number of Published Opinions

Circuit division is touted as the cure for this perceived problem by restructuring proponents who believe 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 this line of reasoning, by splitting the Circuit, each new resulting circuit with its smaller numbers of annual filings will publish less opinions, making it more possible for its judges and attorneys to keep abreast of new developments, which will decrease the likelihood of intra-circuit conflicts.

The argument is flawed: the casual connection between number of filings and number of published opinions is not absolute. One example will suffice. Last year, the Eighth Circuit issued 733 published opinions and the Ninth Circuit issued 906 published opinions; however, 3,034 appeals were filed in the Eighth Circuit with eleven authorized judgeships and 10,342 appeals were filed in the Ninth Circuit with 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 it conducts, almost guarantees a high level of scrutiny for every published opinion.

5. Rate of Reversal of Ninth Circuit Decisions by the Supreme Court

The rate of reversal of Ninth Circuit decisions by the Supreme Court is another statistic that is often proffered as stark and abysmal evidence of the need for structural change. This, in fact, is not the case, but one can only discern that if enough context is provided to properly analyze the statistic. The Ninth Circuit's reversal rate is not markedly different from those of the other circuits. During the past term, the Supreme Court reversed all of the decisions on certiorari from the Second, Third, Fifth, and Eleventh Circuits. It reversed 89% of the Sixth Circuit's decisions, 75% of the Tenth Circuit's decisions, 67% of the decisions of the D.C. Circuit and 78% of the Ninth Circuit's decisions. In total, only about 0.3%—or sixteen—of the decisions of the Ninth Circuit generally are reviewed by the Supreme Court each year. When a reporter announces that twelve appeals from the Ninth Circuit were reversed by the Supreme Court, compared to one or two from some other 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 78% reversal rate is not significantly different than the average reversal rate of 76% for all the other circuit courts last year. Indeed, when one compares the Court's re-

versal rate with the total number of opinions rendered by the Court in any specific year, its reversal rate seems miniscule.

6. The Number of Judges on The Ninth Circuit Court of Appeals Undermines Collegiality

A small number of the judges from the Ninth Circuit Court of Appeals have voiced their concern that collegiality among judges of the Circuit is harmfully diminished because of its size. The importance of collegiality and its relation to circuit size were guiding principles of the White Commission. As we pointed out in the explanatory report attached to our 1999 policy on circuit restructuring, the Commission clearly stated its philosophical preference for small circuits and did not offer any proof that size and collegiality were related. 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. Even if collegiality could be measured, it is very likely that such information would be better used to enhance that court's collegiality and whatever attendant benefits flow from it, rather than as a basis for supporting the division of that circuit court.

V. CONCLUSION

Our staunch opposition to any division of the Ninth Circuit Court of Appeals precludes us from offering you a complete analysis of the restructuring proposal before your Subcommittee. Nonetheless, we would like to briefly point out its obvious flaws. H.R.1203, if passed, would divide the current Court, including its judges, its filings and its backlog of pending appeals, but such a division will not affect overall filings or reduce judicial caseloads. Consequently, passage of H.R.1203 will not provide the "silver bullet" with which to solve the Court's most pressing problems: unfilled judicial vacancies, a large backlog of pending appeals and significant delays in the time it takes to schedule filed appeals for a hearing before a panel of judges.

Congress can best address these problems and improve the quality and timeliness of justice delivered by the Ninth Circuit Court of Appeals by promptly acting to fill existing vacancies, authorizing the creation of—and promptly filling—new judgeships when needed,⁵ and providing adequate funding for all components of the federal judicial system. We urge the House Judiciary Subcommittee on Courts, the Internet and Intellectual Property to shift its attention with respect to the Ninth Circuit Court of Appeals and refocus its efforts on achieving these three legislative objectives.

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

PREPARED STATEMENT OF PROCTER HUG, JR.

I appreciate the opportunity to present this statement opposing the HR 1203, which would divide the Ninth Circuit so as to create a new Twelfth Circuit. As the immediate past Chief Judge from 1996–2000, I have opposed the several efforts to split the Ninth Circuit, along with a great majority of the judges and lawyers in the Ninth Circuit. This includes all of the past Chief Judges and the present Chief Judge. In the effort to split the Ninth Circuit in 1998, members of the House of Representatives resisted that effort, which resulted in the creation of the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by former Justice Byron White. The Commission was commonly known as the White Commission. In accordance with the mandate to the White Commission, special emphasis was given to the structure of the Ninth Circuit.

The major conclusion of the Commission is that the Ninth Circuit should not be split. The Commission made the following statements supporting that conclusion.

There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Ac-

⁵ The Judicial Conference of the United States has developed workload formulas to determine whether new judgeships are needed and whether any existing vacant judgeships should not be filled for the time being. On May 23, 2002, Leonidas, Ralph Mecham submitted the Judicial Conference's draft judgeship bill of 2002 to Congress. The Judicial Conference is requesting that Congress create 54 new judgeships, including two new permanent judgeships and three temporary judgeships for the Ninth Circuit Court of Appeals.

cordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.

. . .

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.

. . .

Maintaining the court of appeals for the Ninth Circuit as currently aligned respects the character of the West as a distinct region. Having a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with the other nations on the Pacific Rim, is a strength of the circuit that should be maintained.

. . .

Any realignment of circuits would deprive the west coast of a mechanism for obtaining a consistent body of federal appellate law, and of the practical advantages of the Ninth Circuit administrative structure.

The conclusion that the Ninth Circuit should not be split corresponds with the overwhelming opinion of the judges and lawyers in the Ninth Circuit, as well as statements of others concerned with this issue who submitted written statements or gave oral testimony before the Commission. Among those opposing the division of the Ninth Circuit were the following:

- 20 out of the 25 persons testifying at the Seattle Hearing of the Commission.
- 37 out of 38 of the persons testifying at the San Francisco Hearing of the Commission.
- The Governors of the States of Washington, Oregon, California, and Nevada.
- The American Bar Association.
- The Federal Bar Association.
- The United States Department of Justice and the U.S. Attorneys within the Ninth Circuit.
- All of the Public Defenders within the Ninth Circuit.
- Respected scholars: Charles Alan Wright, Arthur Hellman, Anthony Amsterdam, Erwin Chemerinsky, Judy Resnik, Jessie Choper, Carl Tobias, and Margaret Johns.
- The past Director of the Federal Judicial Center, Judge William Schwartz.
- The chairman of Long-Range Planning for the U.S. Federal Courts, Judge Otto Skopil.
- A great majority of the judges and lawyers in the Ninth Circuit.

It is established policy that "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload." *Long Range Plan of the Federal Courts* (1995) at 44.

There is no such evidence. On the contrary, the Ninth Circuit is performing its adjudicative and administrative functions exceedingly well. The traditional boundaries and structure of the Ninth Circuit should be preserved. The present time-tested configuration is superior to any proposed alternative.

The size of the Ninth Circuit is an asset that has improved decisionmaking and judicial administration, both within the circuit and throughout the federal judiciary. As a single court of appeals serving a large geographic region, the Ninth Circuit has promoted uniformity and consistency in the law and has facilitated trade and commerce by contributing to stability and orderly progress.

The court of appeals is strengthened and enriched, and the inevitable tendency toward regional parochialism is weakened, by the variety and diversity of backgrounds of its judges drawn from the nine states comprising the circuit. The size of the circuit also has allowed it to draw upon a large pool of district and bankruptcy judges for temporary assignment to neighboring districts with temporary needs for judicial assistance.

The Ninth Circuit Bankruptcy Appellate Panel (BAP) is another advantage attributable to size. Devised as a specialized appellate tribunal to review appeals from

single-judge bankruptcy decisions, the BAP has been well accepted by the bar, works efficiently throughout the circuit, and has helped reduce the number of cases appealed for review to the district court and to the court of appeals. It has been so successful that Congress has repeatedly urged other circuits to establish such panels.

Due to its singular position in the federal appellate court structure, the Ninth Circuit has drawn the attention and assistance of the academic community. A variety of scholars has reviewed and analyzed the circuit's structure, workload, and internal operations. In one of the most in-depth examinations of a circuit court ever attempted, a team of fourteen scholars spent three years in the late 1980s investigating dozens of aspects of circuit adjudication and administration. The result—*Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts*—was a scholarly and thoughtful look at the pressures on appellate courts today and the lessons to be learned from the steps that a large circuit had taken to respond to them. The Ninth Circuit has benefited immensely from its collaborative work with the academic community, and all circuits, large and small, have gained from the insights and recommendations provided by these students of the administration of justice.

The Ninth Circuit is a leader in developing innovative solutions to caseload and management challenges. The ABA Appellate Practice Committee's *Report* applauded three specific operational efficiencies: "—issue classification, aggressive use of staff attorneys, and a limited en banc—were developed by the Ninth Circuit precisely to address the issues of caseload and judgeship growth . . . and hold promise for other circuits as they continue to grow."

The Ninth Circuit's continuing process of self-study and innovation has allowed it to adapt successfully to change. The Ninth Circuit is the first circuit in the country to develop a written long-range plan, by which it established goals, objectives, and implementation strategies and evaluates progress annually. This is in keeping with the circuit's guiding principle that planning and innovations are essential to the court's continued well-being. The long-range plan articulates the institutional aspirations of the circuit, evaluates its present performance against these aspirations, and seeks to facilitate change where necessary. It is a dynamic, ongoing process that encourages debate, study, and practical solutions.

This has resulted in numerous innovations over the years.

1. The Ninth Circuit originated the Bankruptcy Appellate Panel (BAP) to hear intermediate bankruptcy appeals that has since been adopted in other circuits throughout the country.
2. The Ninth Circuit has been a leader in alternate dispute resolution. The Ninth Circuit's Alternative Dispute Resolution Committee consists of judges and lawyers, drawn from all regions of the circuit, and is working to expand the use of ADR in the district and bankruptcy courts.
3. The Ninth Circuit Court of Appeals was the first federal court to establish an issue coding system for its cases. A unique computerized issue-tracking system allows the clustering of cases with similar issues before one panel and keeps judicial panels apprized of other panel decisions on similar subjects, thus, helping to avoid intracircuit conflicts.
4. The Ninth Circuit Court is the only federal circuit court in the country to employ a "weighting" system, whereby cases are assigned weights according to legal complexity. The weighting system streamlines caseload management and promotes efficiency.
5. The Ninth Circuit Court originated use of an Appellate Commissioner, which has expedited rulings on non-dispositive motions and attorneys' fees.
6. The Ninth Circuit Court originated an expedited, highly efficient, and fair procedure for three-judge panels to meet and to resolve those cases that are governed by clearly established precedent.
7. Mediators from the Ninth Circuit Court's Appellate Mediation Program work with parties to settle cases at an early stage in the appellate process. This effective program limits parties' expenses, accelerates dispute resolution, promotes mutually agreeable outcomes, and helps reduce the circuit's caseload.

Creating a new circuit would be a costly proposition. Numerous costs are associated with the creation of a new federal circuit court. If the circuit were divided, all of the administrative functions now successfully performed by the Ninth Circuit would need to be disassembled and reorganized, and new adjudicative and administrative structures would need to be designed and built in another circuit headquarters. Dividing the circuit would require duplicative offices of the clerk of the

court, circuit executive, staff attorneys, settlement attorneys, library, courtrooms, mail, and computer facilities.

There is no real justification for dividing the circuit and important advantages would be lost, including the important objective, noted by the White Commission, of keeping the law consistent throughout the nine western states. The Ninth Circuit operates efficiently and effectively as one circuit, and the present structure is supported by the great majority of judges and lawyers in the circuit.

Having been intimately involved in the operation of the Ninth Circuit as Chief Judge for about five years, I am firmly convinced that its present structure as one circuit should be maintained.

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July 23, 2002

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Attorney General of Kansas

RE: Support for rehearing in *Newdow v. US Congress*, C.A. No. 00-16423

Dear Ms. Catterson:

We, the undersigned Attorneys General, write in support of the petition for rehearing and suggestion for *en banc* review filed by the State of California in the case entitled *Newdow v. US Congress, et al.*, C.A. No. 00-16423.

The Federal Rules of Appellate Procedure permit the States to file *amicus* briefs without leave of court, yet the rules do not appear to contemplate the filing of an *amicus* brief at the rehearing stage of an appeal. FRAP 29. Accordingly, we offer this letter of support to memorialize our conviction that the decision entered in this case is legally flawed and the matter should be reheard by an *en banc* panel. We have also mailed this letter to the counsel of record.

Our interest in this matter arises from the key ruling in the majority opinion – the 1954 Act of Congress, now codified at 4 U.S.C. § 4, which contains the pledge of allegiance, violates the Establishment Clause of the First Amendment to the United States Constitution.

The pledge of allegiance is recited by school children and adults in public and private schools, at community and patriotic events, and in a variety of other public and private forums. It is recognized in state and local laws, ordinances, policies, and practices. Of course, no one may be compelled to recite the pledge of allegiance.

We urge the Ninth Circuit to grant rehearing *en banc*, and to consider the following legal arguments in evaluating this important matter:

1. In *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989), the United States Supreme Court said:

Our previous opinions have considered in *dicta* the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.

This statement deserves careful attention. It explicitly mentions the pledge of allegiance and comments favorably upon its application to the Establishment Clause. Moreover, it reflects an accurate reading of Supreme Court decisions that should provide the framework for an analysis of the issue before this court. To ignore this statement made by the United States Supreme Court only 13 years ago, or to dismiss it as mere *dicta*, would be a terribly thin and legally risky basis upon which to rest a ruling of such national and historic consequence. If, on the other hand, the Supreme Court would like to dismiss or disregard their own statement, they have a right to do that and may well be given the opportunity to do so in this matter.

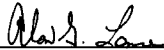
2. In *Engle v. Vitale*, 370 U.S. 421, 435, n.21 (1962), the United States Supreme Court said:

There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contains reference to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State . . . has sponsored in this instance.

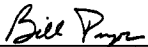
Once again, this may be characterized as *dicta*, but it is nevertheless on point and entirely consistent with the Supreme Court's views on the Establishment Clause. That is, there is a fundamental legal distinction between laws that respect the establishment of a religion versus ceremonial, patriotic exercises that respect the United States of America and recognize the long, historic influence of religion on this country. *School Dist. of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 213 (1963).

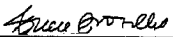
Once again, we urge the Ninth Circuit Court of Appeals to grant the request for rehearing *en banc* in the case entitled *Newdow v. US Congress, et al.*, C.A. No. 00-16423

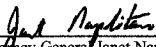
Sincerely,

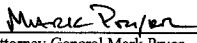

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Attorney General of Idaho

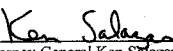

Attorney General W.A. Drew Edmondson
Attorney General of Oklahoma


Attorney General Bill Pryor
Attorney General of Alabama

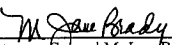

Attorney General Bruce M. Botelho
Attorney General of Alaska

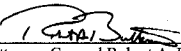

Attorney General Janet Napolitano
Attorney General of Arizona

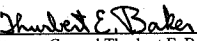

Attorney General Mark Pryor
Attorney General of Arkansas

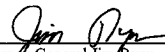

Attorney General Ken Salazar
Attorney General of Colorado

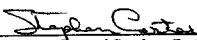

Attorney General Richard Blumenthal
Attorney General of Connecticut

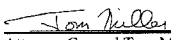

Attorney General M. Jane Brady
Attorney General of Delaware

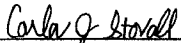

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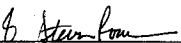

Attorney General Stephen Carter
Attorney General of Indiana

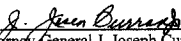

Attorney General Tom Miller
Attorney General of Iowa

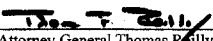

 Attorney General Carla J. Stovall
 Attorney General of Kansas

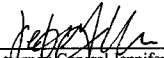

 Attorney General Albert Benjamin Chandler III
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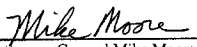

 Attorney General G. Steven Rowe
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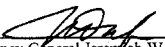

 Attorney General J. Joseph Curran Jr.
 Attorney General of Maryland

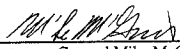

 Attorney General Thomas Reilly
 Attorney General of Massachusetts

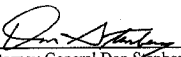

 Attorney General Jennifer Granholm
 Attorney General of Michigan

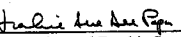

 Attorney General Mike Hatch
 Attorney General of Minnesota


 Attorney General Mike Moore
 Attorney General of Mississippi


 Attorney General Jeremiah W. Nixon
 Attorney General of Missouri

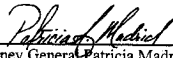

 Attorney General Mike McGrath
 Attorney General of Montana

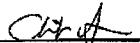

 Attorney General Don Stenberg
 Attorney General of Nebraska

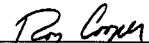

 Attorney General Frankie Sue Del Papa
 Attorney General of Nevada

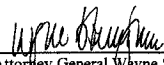

 Attorney General Philip T. McLaughlin
 Attorney General of New Hampshire

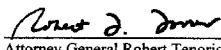

 Attorney General David Samson
 Attorney General of New Jersey

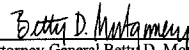

 Attorney General Patricia Madrid
 Attorney General of New Mexico

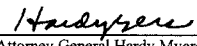

 Attorney General Eliot Spitzer
 Attorney General of New York

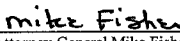

 Attorney General Roy Cooper
 Attorney General of North Carolina


 Attorney General Wayne Stenehjem
 Attorney General of North Dakota

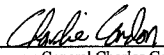

 Attorney General Robert Tenorio Torres
 Attorney General of Northern Mariana Islands

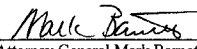

 Attorney General Betty D. Montgomery
 Attorney General of Ohio

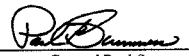

 Attorney General Hardy Myers
 Attorney General of Oregon

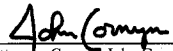

 Attorney General Mike Fisher
 Attorney General of Pennsylvania

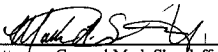

 Attorney General Sheldon Whitehouse
 Attorney General of Rhode Island

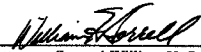

 Attorney General Charles Condon
 Attorney General of South Carolina

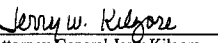

 Attorney General Mark Barnett
 Attorney General of South Dakota

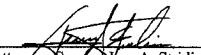

 Attorney General Paul Summers
 Attorney General of Tennessee

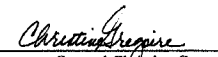

 Attorney General John Cornyn
 Attorney General of Texas

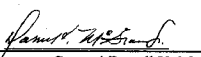

 Attorney General Mark Shurtleff
 Attorney General of Utah

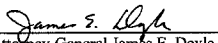

 Attorney General William H. Sorrell
 Attorney General of Vermont

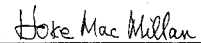

 Attorney General Jerry Kilgore
 Attorney General of Virginia


 Attorney General Wer A. Stridiron
 Attorney General of the Virgin Islands


 Attorney General Christine Gregoire
 Attorney General of Washington


 Attorney General Darrell V. McGraw Jr.
 Attorney General of West Virginia


 Attorney General James E. Doyle
 Attorney General of Wisconsin


 Attorney General Hoke MacMillan
 Attorney General of Wyoming

