

Testimony of

The Honorable Diarmuid O'Scannlain

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"Improving the Administration of Justice: A Proposal to Split the Ninth Circuit"
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Written Testimony of
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Good morning, Chairman Sessions and Members of the Subcommittee. My name is Diarmuid F. O'Scannlain, Judge of the United States Court of Appeals for the Ninth Circuit with chambers in Portland, Oregon. I am honored to be invited to participate in this hearing on "Improving the Administration of Justice: A Proposal to Split the Ninth Circuit." Indeed, the urgency of restructuring the largest judicial circuit in the country is evident in the number of Ninth Circuit reorganization bills pending in this session of Congress. As you know, Senator Murkowski introduced her Ninth Circuit reorganization bill, S. 562, last year. On the House side, Congressman Mike Simpson of Idaho sponsored H.R. 2723, a similar bill, and six months ago the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property held a hearing on that bill, where, at Chairman Sensenbrenner's invitation, I also appeared as a witness. And within the last few days, Senator Ensign has introduced S. 2278 which offers even a third approach. Each of these bills takes a different tack in effecting the reorganization of the Ninth Circuit. But each of them is laudable for recognizing and directly responding to the public concerns of those who have opposed restructuring until now, and for replying with uncommon sensitivity to the concerns of judges on my Court. Because I remain steadfast in my belief that Congress inevitably will restructure the Ninth Circuit, and because S. 562, H.R. 2723, and S. 2278 all would well accomplish that goal, my comments effectively support any of these proposals. Eight of my colleagues-Judges Sneed (California), Beezer (Washington), Hall (California), Trott (Idaho), Fernandez (California), T.G. Nelson (Idaho), Kleinfeld (Alaska), and Tallman (Washington)-publicly support a restructuring of the Ninth Circuit. I believe that an increasing number of District Judges within the circuit also support a restructuring; a number of them have filed statements to that effect in the Report on the House Hearing. And you may recall that my colleague Judge Rymer (California) served on the White Commission, and is on record that our Court of Appeals is too large to function effectively.

I

I have served as a federal appellate judge for more than a decade and a half on what has long been the largest court of appeals in the federal system (now 47 judges, soon to be 50). I have also written and spoken repeatedly on issues of judicial administration. Therefore, I feel qualified to share these perspectives on our mutual challenge to address the judiciary's 800-pound gorilla: The United States Court of Appeals and the fifteen District Courts which comprise the Ninth Judicial Circuit.

I appear before you as a judge of one of the most scrutinized institutions in this country. In many contexts, that attention is negative, resulting in criticism and controversy. Some view these episodes as fortunate events, sparking renewed interest in how the Ninth Circuit conducts its business. But any restructuring proposal should be analyzed solely on grounds of effective judicial administration; grounds that remain unaffected by Supreme Court batting averages and public perception of any of our decisions. However one views our jurisprudence, I want to emphasize that my support of a fundamental restructuring of the Ninth Circuit has never been premised on the outcome of any given case.

Restructuring the circuit is the best way to cure the administrative ills affecting my court, an institution that has already exceeded reasonably manageable proportions. Nine states, thirteen thousand annual case filings, forty-seven judges, and fifty-seven million people are too much for any non-discretionary appeals court to handle satisfactorily. The sheer magnitude of our court and its responsibilities negatively affect all aspects of our business, including our celerity, our consistency, our clarity, and even our collegiality. Simply put, the Ninth Circuit is too big. It is time now to take the prudent, well-established course and restructure this circuit. Restructuring large circuits is the natural evolution of judicial organization. Restructuring has worked in the past. Restructuring will work again. For these reasons alone, I urge serious consideration of S. 562, H.R. 2723, and S. 2278.

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

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

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

II

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

appellate litigation, the circuits expanded as Congress added new judgeships.

At a certain point, larger circuits became unwieldy because of their size. Lawmakers recognized that adding new judges served only as a temporary anodyne rather than a permanent cure. Instead, Congress wisely restructured larger circuits. The District of Columbia Circuit can trace its origin as a separate circuit to a few years after the enactment of the Evarts Act. Part of the Eighth Circuit became the Tenth Circuit in 1929, while portions of the Fifth beget the Eleventh in 1981. The next year saw the creation of the Federal Circuit. And, in due course, I have absolutely no doubt that a Twelfth--and even, perhaps, a Thirteenth--Circuit will be created out of the Ninth. Congress formed each new circuit, at least in part, to respond to the very real problems posed by overburdened predecessor courts. That same rationale applies with special force to the Ninth Circuit, as many experts acknowledge. Indeed, the White Commission of 1998, and the Hruska Commission of 1973 before it, both concluded that the Court of Appeals for the Ninth Circuit is too big. Regardless of which party controlled Congress when the commissions were authorized, each concluded that the Ninth Circuit needs restructuring because of its unsustainable size.

A

From a purely numerical perspective, the sheer enormity of my court is undeniable, whether one measures it by number of judges, by caseload, by population, or by geographic area. Our official allocation is 28 active judges--more than the total number of judges, active and senior combined, on any other circuit. Currently, 26 of those active judgeships are filled, and we have an additional 21 senior judges, who are in no sense "retired," with each generally hearing a substantial number of cases ranging from 100 percent to 25 percent of a regular active judge's load. My colleague, Judge A. Wallace Tashima, has announced that he will take senior status in June, adding another active vacancy and another senior judge to our roster. There are forty-seven judges on our court today. And when the two existing and one imminent vacancies are filled, our court will have 50.

I should pause to put that figure in perspective. At close to fifty judges, the Ninth Circuit is approaching twice the number of total judges of the next largest circuit (the Sixth with 26), and already has more than four and a half times that of the smallest (the First with 10). Indeed, there are more judges currently on the Ninth Circuit than there were in the entire federal judiciary at the birth of the circuit courts of appeals. And every time a judge takes senior status, we grow ever larger. Meanwhile, compared to our 47 judges, the average size of all other circuits today remains at around 20 judges.

Even with the lumbering number of judges on our Circuit, we can hardly keep up with the immense breadth and scope of our Circuit's caseload. In the 2003 court year, 12,632 appeals were filed--over double the average of other circuits, and over 4,000 more cases than the next busiest court, the Fifth. In fact, our total appeals exceed the next largest circuit's by more than the entire annual dockets of the First, Third, Seventh, Eighth, Tenth, and D.C. Circuits. Unfortunately, such disparity has only increased, for in 2003, the Ninth Circuit had the second fastest growth rate in appeals of all the regional circuits. Along with this double-digit percentage growth in overall filings, we have also seen a huge upswing in immigration appeals. Recently, the Board of Immigration Appeals streamlined its review procedures--often abandoning three judge panels in favor of one judge summary dispositions--in an effort to clear its backlog. Because we review BIA appeals directly from the Board, we suffer the immediate effects of this policy change. For court year 2003, we received around eighty immigration appeals each and every week. Indeed, immigration appeals now make up about a third of the Ninth Circuit's docket.

By population, too, does our circuit dwarf all others. The Ninth Circuit's nine states and two territories range from the Rocky Mountains and the Great Plains to the Sea of Japan and the Rainforests of Kauai, from the Mexican Border and the Sonoran Desert to the Bering Strait and the Arctic Ocean. This vast expanse houses more than 57 million people--almost exactly one fifth of the entire population of the United States. Indeed, there are 25 million more people in the Ninth Circuit than in the next most populous circuit, the Sixth. As a result, our population exceeds the next largest circuit's by more than the total number of people in each of the First (encompassing Boston), Second (encompassing New York), Third (encompassing Philadelphia and Pittsburgh), Seventh (encompassing Chicago and Indianapolis), Eighth (encompassing St. Louis, Kansas City, and Minneapolis/St. Paul), Tenth (encompassing Denver and Salt Lake City), and D.C. Circuits (encompassing, of course, Washington, D.C.). And as with the number of appeals filed, the Ninth Circuit's population is growing at an exceptional rate. Of the 10 fastest-growing cities of over 100,000 residents, all but one--the tenth fastest growing--are located in the Ninth Circuit. Similarly, three of the five fastest-growing cities of over 1,000,000 residents--including Phoenix, AZ, the city with the most growth--are also found within the borders of the Ninth Circuit.

No matter what metric one uses, the Ninth Circuit dwarfs all else. Compared to the other circuits, we employ more than twice the average number of judges, we handle almost triple the average number of appeals, and are approaching three times the average population. It makes very little sense to create regional circuits, and then place

a fifth of the people, a fifth of the appeals, and almost a fifth of the judges into one of thirteen subdivisions. From any reasonable perspective, the Ninth Circuit already equals at least two circuits in one.

B

Numbers alone cannot tell the whole story. From the standpoint of a firsthand observer, I have concluded that our court's size negatively affects the ability of us judges to do our jobs. For example, I participated in eight, week-long sittings last year on regular panels. The composition of those panels often changes during a given week. Thus, presuming I sit with no visiting judges and no district judges--a mighty presumption in the Ninth Circuit, where we often enlist such extra-circuit help to deal with the overwhelming workload--I may sit with around twenty of my colleagues on three-judge panels over the course of a year. That is less than half of the total number of judges on my court. Because the frequency with which any pair of judges hears cases together is quite low, it becomes difficult to establish effective working relationships in developing the law.

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

If we had fewer judges, three-judge panels could circulate opinions to the entire court before publication, which is the practice of many other appellate courts. Pre-circulation not only prevents intra-circuit conflicts, it also fosters a greater awareness of the body of law created by the court. As it now stands, I read the full opinions of my court no earlier than the public does--and frequently later, which can lead to some unpleasant surprises. Even with our pre-publication report system, we do not get the full implications of what another panel is about to do. For, in addition to handling his or her own share of our 12,600 plus appeals, each judge is faced with the Sisyphean task of keeping up with all his or her colleagues' opinions--not to mention all the opinions issued by the Supreme Court along with the relevant public and academic commentary.

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

Many point to the en banc process as a solution to some of these problems, but it is nothing more than a band-aid. Theoretically, the ability to rehear en banc promotes consistency in adjudication by resolving intra-circuit conflicts once and for all. In my practical experience, however, this has not been the case in the Ninth Circuit. Only a fraction of our published opinions can receive en banc review. Last year we reexamined less than three percent of our published dispositions. Such a small fraction cannot significantly affect the overall consistency of a court that issued 836 published dispositions in 2003 alone.

Moreover, all other courts of appeals in this country convene en banc panels consisting of all active judges. Yet the Ninth Circuit uses limited en banc panels comprised of 11 of the 28 authorized judgeships. This limited en banc system appears to work less well than other circuits' en banc systems. Because each en banc panel contains fewer than half of the circuit's judges and consists of a different set of judges, en banc decisions do not incorporate the views of all judges and thus may not be as effective in settling conflicts or promoting consistency.

A good example of this limitation was last year's California Recall case. Our unusual alacrity in this extraordinary situation clearly deserves commendation--although we must be careful not to overemphasize our efforts, for as recent research demonstrates, even elephants can run when they find it necessary. But what the circumstances surrounding the case unquestionably demonstrate are the problems inherent in our use of 11-judge en banc panels. As you may remember, a district court initially denied a motion to put a stop to the recall not long before election day. Soon after, however, the original three-judge panel unanimously reversed, ruling that the election campaign to recall Governor Gray Davis had to cease. On rehearing en banc, an 11-judge, randomly selected panel affirmed the district court--also unanimously--and again allowed the election to go forward. Interestingly, none of the original three judges who voted to halt the election wound up on the 11-judge panel. One can reasonably question whether the 11-judge panel was truly representative of the court, for we do not know how the remaining 14 judges would have decided the case. In fact, there are enough active judges so that an entirely separate 11-judge panel could have been formed without even a single member of either the original three-judge or the actual en banc panel. As it stands, our circuit is only a

few active judgeships away from being able to form three separate en banc panels simultaneously. Limited en banc panels pose another troubling defect: unrepresentative results. Judge Tallman eloquently decried this problem in a recent dissent to a six-to-five en banc decision, which I quote:

Today, six judges of this court announce that the legal conclusion reached by seven of their colleagues (plus five Justices of the California Supreme Court) is not only wrong, but objectively unreasonable in light of clearly established federal law. According to the six judges in the majority, those twelve judges were so off-the-mark in their analyses of United States Supreme Court precedent that their shared legal conclusion ... must be deemed objectively unreasonable.

I do not suggest that our use of limited en banc panels is unwarranted under our current circumstances. Given our size, it would be an enormous drain on our resources to do it any other way--for the time being, it is a necessary triage effort. I only mean to point out the sacrifices we must make to deal with the strains that we labor under--strains due entirely to our distended bulk.

C

The Ninth Circuit's enormous size not only hinders judicial decisionmaking, it also creates problems for our litigants. In my court, the median time from when a party activates an appeal to when it receives resolution is 14 months--a third again longer than the average for the rest of the Courts of Appeals. Most disturbingly, 138 appeals wallowed under submission for twelve months or more last year in the Ninth Circuit. We are by far the worst circuit in this regard, with over 50% more stale cases than all the other circuits combined. Indeed, no other circuit had as many as 20 such cases, meaning that our record on this front is over seven times worse than the next slowest circuit.

Whatever point in the process to which this delay may be attributed, the striking length of time our circuit takes to dispose of cases is alarming. No litigant should have to wait that long to receive due justice. But at the same time, judges need time to deliberate and to ensure that they are making the correct decision. This backlog increases the pressure on us to dispose of cases quickly for the sake of the litigants, which, in turn, can only inflate the chance of error and inconsistency. I believe our unreasonable size is directly responsible for this serious problem.

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

D

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

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

III

The question then becomes how to split the circuit: nine states and two territories offer a wealth of possibilities. As I mentioned, there are three current House and Senate proposals, each of which restructures our circuit in a different

way. The special virtue of most of the recent restructuring efforts is that they address substantially all of the arguments against previous proposals advanced by Chief Judge Schroeder and other opponents in recent years, clearly demonstrating that the continuing dialogue between Congress and the judiciary has led to positive results for all. Indeed, each recent reorganization plan also corrects many of the problems currently facing our court by creating smaller decisionmaking units, which in turn fosters greater decisional consistency, increased accountability, collegiality among judges, and responsiveness to regional concerns. And, of course, the new circuits created by each proposal would remain bound by pre-split Ninth Circuit precedent, helping to minimize confusion in interpreting the law.

Despite such similarities, each of the recent proposals offers separate restructuring plans, in turn presenting distinct sets of pros and cons. I firmly believe that the Ninth Circuit must be divided, but the particulars appropriately remain in Congress's hands. Rather than advocating one particular approach, then, I simply examine each of the recent proposals in turn.

A

S. 2278, introduced by Senator Ensign last week, creates a new Twelfth Circuit comprised of the Mountain states of Idaho, Montana, Nevada, and Arizona, and a new Thirteenth Circuit comprised of the Northwestern states of Alaska, Oregon, and Washington. The "new" Ninth Circuit would contain California, Hawaii, and the Pacific island territories of Guam and the Northern Marianas.

S. 2278 includes some very important and much-needed innovations that will dramatically reduce administrative costs in the reconfigured circuits by liberally allowing the sharing of judicial resources. These gains, pioneered by H.R. 2723 and further discussed below, may be particularly helpful given the fact that our circuit's recent productivity increases have been unable to keep pace with the explosion in the number of appeals we receive each year, a discrepancy demonstrating that our internal administrative reforms alone simply are not working as well as we all had hoped.

Senator Ensign's bill adds five new judgeships and two temporary ones, all but one located in the reconfigured Ninth Circuit. Total active judges would increase for at least the next ten years to 35, with 21 allocated to the new Ninth Circuit, 8 to the Twelfth, and 6 to the Thirteenth. This increase in judgeships is particularly notable for, in the past, one of the primary objections to restructuring proposals was that they did "not address the growing need for additional judgeships." As Chief Judge Schroeder has pointed out, these additional judgeships are sorely needed, as there have been no additional judgeships added to the Circuit since 1984.

I also commend S. 2278 for placing six of its seven new judges in California in the reconfigured Ninth Circuit. In the past, critics have condemned other proposals because they did not result in a proportional caseload distribution. S. 2278 answers this first by ensuring that no restructuring occurs until new judges have been appointed to help equalize the share of appellate work. Second, under some past proposals, the new Ninth Circuit would have been left with a very large caseload, while losing an improporportionately large number of judges to the new circuits. In contrast, S. 2278's provisions result in only a marginal caseload disparity. The Twelfth and Thirteenth Circuits would take just under a third of the caseload and, factoring in the additional judgeships, 40% of the judges. The new Ninth would get a little more than two thirds of the caseload and 60% of the judges. Given the relatively small numbers of judges involved, it is hard to get much closer than that. And, of course, I have no doubt that most--if not all--of the new Twelfth and Thirteenth Circuit judges gladly would volunteer on new Ninth Circuit panels to help ease any growing pains. I myself would be assigned to the Thirteenth Circuit but would be more than happy to help out the new Ninth and Twelfth on a regular basis as needed.

Moreover, the new Ninth Circuit's workload, measured by number of appeals per authorized judge, would be less than 30% higher than the current average among the circuits. Indeed, the new Ninth Circuit would have fewer cases filed, per authorized judge, than the Second, Fifth, and Eleventh Circuits. Best of all, the per-judge caseload would markedly drop from the large number that each authorized Ninth Circuit judge currently processes.

On the other hand, S. 2278's Twelfth and Thirteenth Circuits may be subject to a "critical mass" attack, wherein skeptics might suggest that they would be too small to stand on their own. Although the areas are among the fastest growing in the nation, these two new circuits would begin as some of our smaller circuits. Still, S. 2278's Twelfth Circuit would process more litigation than the First and D.C. Circuits, and would be close to the Tenth. And by appeals filed per authorized judgeship, the Twelfth Circuit, as created by S. 2278, would exceed the Third, Tenth, and D.C. Circuits, and would not be far behind the First, Sixth, and Eighth Circuits.

S. 2278's Thirteenth Circuit would be even smaller, though, for its total population and appeals would exceed only the D.C. Circuit. However, measuring appeals per authorized judge, it would surpass the Tenth and D.C. Circuits, and would be on par with the Third. Ultimately, then, the suggestion that either the proposed Thirteenth or Twelfth Circuit would be "too small" might not hold much water, and may impugn each one of the already hardworking circuits with which they would be comparable.

Of course, because these two circuits would start on the small side, the new Ninth Circuit would still remain the largest circuit in the country by judges, population, and case filings--although complete parity is impossible, of course, and there will always be one "largest" circuit. What is more important, however, is that S. 2278's new Ninth would be significantly better off, with fewer appeals, fewer judges, and a smaller population and geographical area to cover. As a result, the benefits of reorganization should be immediately apparent to all involved.

In sum, S. 2278 offers a unique solution by separating the Ninth Circuit into three. And while this will lead to smaller courts at the outset, the exponential growth out West may well counsel such a proactive approach.

B

Congressman Simpson introduced H.R. 2723 in the House of Representatives on July 14, 2003. It employs the traditional dual-split approach, creating one additional circuit, the Twelfth, comprised of the Northwestern states and the Pacific Islands (Washington, Oregon, Idaho, Montana, Alaska, Hawaii, Guam, and the Northern Mariana Islands). The "new" Ninth Circuit would retain California, Nevada, and Arizona. Like S. 2278, H.R. 2723 adds five new judgeships and two temporary ones, all located in the reconfigured Ninth Circuit. Total active judges would increase for at least the next ten years to 35, with 26 allocated to the Ninth Circuit and 9 to the Twelfth. As noted, additional judgeships are sorely needed, which H.R. 2723 should be applauded for recognizing.

Congressman Simpson's proposal also introduced innovative administrative provisions codifying the ability to share resources, including the assignment of district and circuit judges, among the new circuits. To allow the sharing of resources--not only among but between circuits--will serve as an unqualified boon to efforts at managing heavy caseloads. Indeed, these important provisions essentially grant an unprecedented double benefit. Nearly all of the important administrative innovations we have instituted as triage over the last few years may be shared between the new circuits, while at the same time, each circuit receives all the benefits of reorganization into new circuits. So as each circuit develops intimate familiarity with a greatly decreased number of lower court rules and methodologies, we should see the immediate productivity gains inherent in a more cohesive geographical unit.

While H.R. 2723's approach does result in a caseload disparity, it is marginal. The Twelfth Circuit would take just under 20% of the caseload and, factoring in the additional judgeships, about 25% of the judges. And while H.R. 2723's division ensures that the Twelfth Circuit would begin as one of our smaller circuits, it would not be unreasonably so, as it would process more litigation than the First and D.C. Circuits, and would be within a few hundred appeals of the Tenth. And by appeals filed per authorized judge, H.R. 2723's Twelfth Circuit would exceed the Tenth and D.C. Circuits, and would be roughly comparable to each of the First, Third, Sixth, and Eighth Circuits. More than the other recent reorganization proposals, H.R. 2723 would keep the new Ninth as a large circuit, well exceeding all other circuits in terms of population, overall caseload, and number of judges (just two less than the current Ninth). However, H.R. 2723's new Ninth Circuit would have, on average, the exact same caseload per judgeship as a new Ninth would under S. 2278, resulting in a marked decrease from what we now process. So while Congressman Simpson's new Ninth Circuit soon might be subject to many of the same criticisms I have identified above, breaking the current Ninth Circuit into smaller decisionmaking units of any size is undoubtedly preferable to the status quo.

H.R. 2723's additional judgeships and administrative provisions truly stand out, and any future circuit reorganization bill would do well to adopt them. Indeed, I am delighted to see that S. 2278 has adopted H.R. 2723's laudatory administrative proposals whole cloth.

C

Senator Murkowski introduced the first restructuring alternative of this session, S. 562, on March 6, 2003. Like H.R. 2723, it employs a dual-circuit approach, dividing the current Ninth Circuit into a "new" Ninth with California and Nevada, and a Twelfth Circuit that would include Alaska, Arizona, Guam, Hawaii, Idaho, Montana, the Northern Marianas, Oregon, and Washington.

The special virtue of S. 562 is that it presents a reconfiguration that has previously been adopted and passed by the Senate. Unfortunately, however, S. 562 currently does not provide for any new judges, leaving it open to powerful criticism regarding the caseload disparity it creates. For while the Twelfth Circuit's workload significantly would drop compared to the current Ninth Circuit, the new Ninth's would increase appreciably on a per judge basis. This is a genuine weakness: Why reorganize the Ninth Circuit in such a way that one of the resulting subdivisions would be even more overburdened than before?

Still, S. 562 easily could be amended to add the five permanent and two temporary judges provided by S. 2278 and H.R. 2723. Were that to happen, S. 562 would offer a most viable alternative reorganization plan. Instead of a marked increase in its workload, the "new" Ninth Circuit would see a significant drop in the number of appeals filed per judge. And while it would remain the largest circuit overall, it would not be unreasonably so, processing only about 5% more appeals than the Fifth Circuit, and hosting a population within 5 or so million of the Sixth.

Moreover, S. 562's Twelfth would stand as a credible circuit under any metric. It would house more people than the First, Eighth, Tenth, and D.C. Circuits, and less than 10% fewer than the Third. And it would process roughly the same number of appeals as the Third and Seventh Circuits, and more than the First, Eighth, Tenth, and D.C. Circuits. And its appeals-per-judge caseload would be only about 8% less than the current all-circuit average. Indeed, of the three recent proposals, S. 562, if amended to include the seven new judges, yields the most balanced division from a numerical perspective.

Like the other proposals, however, S. 562 is not beyond reproach. For one thing, the layout is somewhat strange, as the Twelfth Circuit "hopscoches" over the new Ninth in order to include Arizona. This result is not entirely cohesive geographically, and may sacrifice some productivity gains that a more tightly knit configuration might yield. Yet there is nothing inherently objectionable about a non-contiguous aggregation--indeed, our own country clearly abandoned such a premise in 1959, when we accepted Alaska and Hawaii into the Union. Because the Ninth Circuit already includes these states, and because the First and Third Circuits include Puerto Rico and the Virgin Islands respectively, three current circuits are already as non-contiguous as S. 562's Twelfth Circuit would be. And now that judges ride circuit by commercial jet rather than stagecoach or train, availability of air routes rather than contiguity should determine the practicality of one layout or another. So while S. 562's particular alignment may be a basis for some criticism, it certainly presents a reasonable approach that brings its own set of benefits to the table.

As currently written, S. 562 probably does not present an attractive solution to the problems facing my circuit.

Nevertheless, with the addition of new judgeships (and, perhaps, the valuable administrative provisions discussed above), Senator Murkowski's bill offers an elegant approach that cannot be overlooked.

D

There is an additional objection, involving S. 562 and S. 2278, that warrants special attention. Under each of these proposals, the new Ninth Circuit would encompass only two states, running contrary to the proposition that a circuit should contain at least three. Of course, it is true that no current circuit contains fewer than three states, but the fact that this is the status quo does not mean that a circuit could be viable with fewer. This may be especially true if one of those states is California.

Which brings us to the pervasive question of what to do with California, which currently accounts for over two thirds of our court's current caseload. Indeed, California by itself already houses more people than any other circuit in the country, and alone accounts for more appeals than any other circuit save the Fifth--which processed only 2% more last year. California also hosts four separate judicial districts, 14 circuit judges, and well over 50 federal district judges. Each of these factors alone, much less in combination, might make a California-only circuit viable.

The 1973 Hruska Commission proposed an interesting alternative to a single-state circuit which solves the California question by splitting that state between a Northwestern circuit based in San Francisco, and a Southwestern Circuit based in Los Angeles. Although this is my personal preference, it appears that any division of California into two circuits is off the table since it is my understanding that Senator Feinstein has expressed disapproval of any restructuring which would put her state in two separate circuits. In any event, given the enormous size of California, inter-circuit parity suggests that the optimal--if not ideal--choice may be one of these two options, and either split California or allow it to be a circuit of its own. From a practical standpoint, either a California-only circuit, or at least allowing California to be paired with only one other state, may make the most sense. Regardless, the simple fact that California is so large should not prevent efforts to reorganize the nine states and two territories that currently form our unreasonably large circuit. Even if the California problem were insoluble, restructuring will still substantially benefit the rest of the circuit, which in itself is a positive value. California's immense size is a difficult, but navigable issue that must carefully be considered in any effort to reconfigure the Ninth Circuit.

IV

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

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

the highly distinct areas scattered throughout the West, each with their own climates and cultures: there are the inter-mountain states, the Pacific Northwest states, the non-contiguous states and territories, as well as our California megastate. Each of the various restructuring provisions quite sensibly make use of these natural settings in effecting their restructuring.

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

I concede that there are judges on the Ninth Circuit Court of Appeals who believe the disadvantages of splitting the circuit outweigh the advantages. But as a member of that court, I must take issue with the innuendo that they represent an overwhelming majority. Some judges are neither for nor against restructuring: they decline to express any view, feeling the matter is entirely a legislative issue. And a great number of judges on our court do indeed favor some kind of restructuring, many strongly so. Perhaps our Chief Judge will make a good-faith effort to determine the breadth and scope of our judges' views on the issue, especially in light of the sincere new approaches made by both the House and the Senate. So far, she has neglected to do so, although I understand that the issue will come up at our informal retreat later this month.

Our circuit judges are not the only ones who may support a restructuring. Each of the five Supreme Court Justices who commented on the Ninth Circuit in letters to the White Commission "were of the opinion that it is time for a change." The Commission itself reported that, "[i]n general, the Justices expressed concern about the ability of judges on the Ninth Circuit Court of Appeals to keep abreast of the court's jurisprudence and about the risk of intra-circuit conflicts in a court with an output as large as that court's." An increasing number of district judges have expressed support for restructuring, as well, with many practitioners concurring. Still, some bar members do not seem to care who gets appointed to this large circuit--by the luck of the draw they can get a friendly panel, or if not, a randomly selected en banc panel can give them a second shot. In any event, I truly believe that support for a split is not so thin as many objectors suggest.

Finally, I would like specifically to respond to one of Chief Judge Schroeder's recent public statements on the issue of restructuring our circuit. In her most recent "State of the Circuit" speech, our Chief made the astonishing assertion that "split proposals must realistically be viewed as a threat to judicial independence." This is directly contrary to over a century of Congressional legislation of circuit structure--all of which is concededly within the legislature's purview--and cannot be true. Bills such as S. 562, H.R. 2723, and S. 2278, with many provisions directly responding to the concerns the Chief Judge has previously articulated, demonstrate the good-faith efforts made by the House and Senate reasonably to restructure the judicial goliath of the Ninth Circuit. Calling for a circuit split based on particular decisions is counterproductive and unacceptable. But so is attacking the integrity of our elected representatives when they make honest and fair proposals to divide our circuit.

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

After denying these concerns, our past official court position straddles the fence by arguing that we can alleviate problems by making changes at the margin. Chief Judge Schroeder and her predecessors have done a truly

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

Whatever mechanism you choose, ultimately Congress will restructure the Ninth Circuit. This task has been delayed far too long, and each day the problems get worse. I do not mean to imply that our circuit as a whole is beyond the breaking point. I want to emphasize that our Chief Judge and our Clerk of the Court are doing a marvelous job of administering this circuit. Instead, my focus is on where we go from here. If the Ninth Circuit Court of Appeals has not yet collapsed, it is certainly poised at the edge of a precipice. Only a restructuring can bring us back. And proposals such as S. 562, H.R. 2723, and S. 2278, with their commendable efforts at answering all major objections to past proposals, provides just the lifeline we need.

V

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

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

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Exhibit 1

The Thirteen Regional Circuits:

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

Exhibit 2

All Ninth Circuit Judges by Seniority

(as of April 7, 2004)

Judge Appointed by State City Status (Active/Senior)

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

48. [Kuhl] G.W. Bush California Pasadena Nominee
49. [Myers] G.W. Bush Idaho Boise Nominee
50. [Tashima Vacancy] G.W. Bush California --?-- Vacancy

SUMMARY: ACTIVE Judges 26
Nominees Pending + 2
Authorized Judgeships 28
Senior Judges 21
Tashima Vacancy + 1
TOTAL, including nominees and vacancy 50

* Judge Tashima has announced his election to senior status as of June 30, 2004.

Exhibit 3
Authorized Judgeships per Circuit
SOURCE: 28 U.S.C. § 44 (2003)

Exhibit 4

Total Judges per Circuit

(Authorized + Senior)

SOURCE: 28 U.S.C. § 44 (2003); Federal Judicial Center, <http://www.fjc.gov>. Note that the Ninth Circuit judge figures include the impending vacancy arising from Judge Tashima's election to senior status as of June 30, 2004.

Exhibit 5

Population by CircuitSOURCE: U.S. Census Bureau, Estimated 2003 Population,
<http://eire.census.gov/popest/data/states/tables/ST-EST2003-01.php>; U.S. Census Bureau, Census 2003 Estimates
for the Island Areas, www.census.gov/ipc/www/idbsum.html

Exhibit 6

Number of Appeals Filed per Circuit, 2003SOURCE: Ninth Circuit AIMS database, Fiscal Year 2003, October 1, 2002 to September 30, 2003; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2003 Annual Report of the Director, <http://www.uscourts.gov/judbus2003/contents.html>

Exhibit 7

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

SOURCE: 28 U.S.C. § 44 (2003); Federal Judicial Center, www.fjc.gov. Note that the Ninth Circuit judge figures include the impending vacancy arising from Judge Tashima's election to senior status as of June 30, 2004.

Exhibit 8

The Ninth Circuit has almost three times the average population of all other circuits.SOURCE: U.S. Census Bureau, Estimated July 1, 2003 Population, <http://eire.census.gov/popest/data/states/tables/ST-EST2003-01.php>; U.S. Census Bureau, Census 2003 Esimates for the Island Areas, www.census.gov/ipc/www/idbsum.html

Exhibit 9

The Eleventh Circuit was carved out of the old Fifth Circuit in 1981 largely because of size. Today's Ninth Circuit is over 96% of the size of the current Fifth and Eleventh combined!SOURCE: Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2003 Annual Report of the Director, <http://www.uscourts.gov/judbus2003/contents.html>

Exhibit 10

The Ninth Circuit has nearly triple the average number of appeals filed of all other circuits in 2003. SOURCE: Ninth Circuit AIMS database, Fiscal Year 2003, October 1, 2002 to September 30, 2003; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2003 Annual Report of the Director, <http://www.uscourts.gov/judbus2003/contents.html>

Exhibit 11 California alone accounts for more than two thirds of all appeals filed within the Ninth Circuit.

SOURCE: Ninth Circuit AIMS database, Fiscal Year 2003, October 1, 2002 to September 30, 2003.

Exhibit 12

All Circuits, Number of Judges by Circuit

Court	Headquarter City	Judgeships %	Senior Judges %	Total Judges* %
First	Boston, MA	6 3.6%	4 3.9%	10 3.7%
Second	New York, NY	13 7.8%	12 11.8%	25 9.3%
Third	Philadelphia, PA	14 8.4%	8 7.8%	22 8.2%
Fourth	Richmond, VA	15 9.0%	4 3.9%	19 7.1%
Fifth	New Orleans, LA	17 10.2%	4 3.9%	21 7.8%
Sixth	Cincinnati, OH	16 9.6%	14 13.7%	30 11.2%
Seventh	Chicago, IL	11 6.6%	5 4.9%	16 5.9%
Eighth	St. Louis, MO	11 6.6%	12 11.8%	23 8.6%
Ninth	San Francisco, CA	28 16.8%	21 20.6%	49 18.2%
Tenth	Denver, CO	12 7.2%	7 6.9%	19 7.1%
Eleventh	Atlanta, GA	12 7.2%	8 7.8%	20 7.4%
D.C.	Washington, DC	12 7.2%	3 2.9%	15 5.6%
Total		167 100%	102 100%	269 100%

* Total judges includes authorized judgeships and senior judges.

SOURCE: 28 U.S.C. § 44; Federal Judicial Center, <http://www.fjc.gov>

Exhibit 13
Judges, Population, and Caseload by State Within Ninth Circuit, 2003

State Current
Circuit Judgeships
% Judges
Population*
% Pop.
Appeals
% Appeals

Alaska	1	3.6%	648,818	1.1%	119	0.9%
Arizona	3	10.7%	5,580,811	9.7%	1,186	9.4%
California	14**	50.0%	35,484,453	61.8%	8,439	66.8%
Guam	0	0.0%	163,593	0.3%	32	0.3%
Hawaii	1	3.6%	1,257,608	2.2%	217	1.7%
Idaho	2**	7.1%	1,366,332	2.4%	168	1.3%
Montana	1	3.6%	917,621	1.6%	264	2.1%
Nevada	2	7.1%	2,241,154	3.9%	680	5.4%
N. Mariana Islands	0	0.0%	76,129	0.1%	22	0.2%
Oregon	2	7.1%	3,559,596	6.2%	559	4.4%
Washington	2	7.1%	6,131,445	10.7%	946	7.5%
TOTAL	28	100%	57,427,560	100%	12,632	100%

* All population figures were calculated using 2003 U.S. Census estimates.

** Includes one vacant judgeship.

SOURCE: 28 U.S.C. § 44; Ninth Circuit AIMS database, Fiscal Year 2003, October 1, 2002 to September 30, 2003; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2003 Annual Report of the Director, <http://www.uscourts.gov/judbus2003/contents.html>; U.S. Census Bureau, Estimated State Population July 1, 2003, <http://eire.census.gov/popest/data/states/tables/ST-EST2003-01res.pdf>; U.S. Census Bureau, 2003 Estimates for the Island Areas, <http://www.census.gov/ipc/www/idbsum.html>.

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Exhibit 14
The Circuits After the Restructuring Proposed by S. 2278

S. 2278 Exhibit 15
Judges for the "New" Ninth Circuit After S. 2278's Split
(as of April 7, 2004)

Judge Appointed by State City Status (Active/Senior)

1. Browning Kennedy California San Francisco Senior
2. Goodwin Nixon California Pasadena Senior
3. Wallace Nixon California San Diego Senior
4. Sneed Nixon California San Francisco Senior
5. Pregerson Carter California Woodland Hills ACTIVE
6. Alarcon Carter California Los Angeles Senior
7. Ferguson Carter California Santa Ana Senior
8. Nelson, D. Carter California Pasadena Senior
9. Boochever Carter California Pasadena Senior
10. Reinhardt Carter California Los Angeles ACTIVE
11. Hall Reagan California Pasadena Senior
12. Kozinski Reagan California Pasadena ACTIVE
13. Noonan Reagan California San Francisco Senior
14. Thompson Reagan California San Diego Senior
15. Fernandez G.H.W. Bush California Pasadena Senior
16. Rymer G.H.W. Bush California Pasadena ACTIVE
- *17. Tashima Clinton California Pasadena ACTIVE*
18. McKeown Clinton California San Diego ACTIVE
19. Wardlaw Clinton California Pasadena ACTIVE
20. Fletcher, W. Clinton California San Francisco ACTIVE
21. Fisher Clinton California Pasadena ACTIVE
22. Paez Clinton California Pasadena ACTIVE
23. Berzon Clinton California San Francisco ACTIVE
24. Clifton G.W. Bush Hawaii Honolulu ACTIVE
25. Callahan G.W. Bush California Sacramento ACTIVE
26. Bea G.W. Bush California San Francisco ACTIVE
27. [Kuhl] G.W. Bush California Pasadena Nominee
- *28. [Tashima Vacancy] G.W. Bush California --?-- Vacancy*
29. [Temp. vacancy]** - - - - Vacancy
30. [Future vacancy]*** - - - - Vacancy
31. [Future vacancy]*** - - - - Vacancy
32. [Future vacancy]*** - - - - Vacancy
33. [Future vacancy]*** - - - - Vacancy
34. [Future vacancy]*** - - - - Vacancy

SUMMARY: ACTIVE Judges 14
Nominees Pending + 1
Existing Judgeships 15
New Judgeships + 6
Authorized Judgeships 21
Senior Judges 12
Tashima Vacancy + 1
TOTAL 34

* Judge Tashima has announced his election to senior status as of June 30, 2004.

** Temporary judgeship not to be filled after 10 years

*** New judgeship created by S. 2278

Exhibit 16
Judges for the New Twelfth Circuit After S. 2278's Split
(as of April 7, 2004)

Judge Appointed by State City Status (Active/Senior)

1. Hug Carter Nevada Reno Senior
2. Schroeder Carter Arizona Phoenix ACTIVE
3. Canby Carter Arizona Phoenix Senior
4. Brunetti Reagan Nevada Reno Senior
5. Trott Reagan Idaho Boise ACTIVE
6. Nelson, T. G.H.W. Bush Idaho Boise Senior
7. Hawkins Clinton Arizona Phoenix ACTIVE
8. Thomas Clinton Montana Billings ACTIVE
9. Silverman Clinton Arizona Phoenix ACTIVE
10. Rawlinson Clinton Nevada Las Vegas ACTIVE
11. Bybee G.W. Bush Nevada Las Vegas ACTIVE
12. [Myers] G.W. Bush Idaho Boise Nominee

SUMMARY: ACTIVE Judges 7

Nominees Pending + 1

Existing Judgeships 8

New Judgeships + 0

Authorized Judgeships 8

Senior Judges + 4

TOTAL 12

S. 2278 Exhibit 17
Judges for the New Thirteenth Circuit After S. 2278's Split
(as of April 7, 2004)

Judge Appointed by State City Status (Active/Senior)

1. Skopil Carter Oregon Portland Senior
2. Fletcher, B. Carter Washington Seattle Senior
3. Farris Carter Washington Seattle Senior
4. Beezer Reagan Washington Seattle Senior
5. O'Scannlain Reagan Oregon Portland ACTIVE
6. Leavy Reagan Oregon Portland Senior
7. Kleinfeld G.H.W. Bush Alaska Fairbanks ACTIVE
8. Graber Clinton Oregon Portland ACTIVE
9. Gould Clinton Washington Seattle ACTIVE
10. Tallman Clinton Washington Seattle ACTIVE
11. [Future Vacancy]* - - - Vacancy

SUMMARY: ACTIVE Judges 5

Nominees Pending + 0

Existing Judges 5

New Judgeships + 1

Authorized Judgeships 6

Senior Judges + 5

TOTAL 11

* New judgeship created by S. 2278

Exhibit 18

S. 2278's Reorganization--Judges, Population, and Caseload by Circuit

Court Authorized Judges % Judges Pop.* % Pop. Appeals** % Appeals Appeals per Judgeship

First	6	3.6%	13,981,533	4.7%	1,844	3.0%	307
Second	13	7.8%	23,292,594	7.9%	6,359	10.5%	489
Third	14	8.4%	21,930,156	7.4%	3,957	6.5%	283
Fourth	15	9.0%	27,259,993	9.2%	4,887	8.1%	326
Fifth	17	10.2%	29,496,124	10.0%	8,613	14.2%	507
Sixth	16	9.6%	31,475,358	10.7%	4,964	8.2%	310
Seventh	11	6.7%	24,321,486	8.2%	3,517	5.8%	320
Eighth	11	6.7%	19,571,072	6.6%	3,190	5.3%	290
Ninth	28	16.8%	57,427,560	19.5%	12,632	20.8%	451
Tenth	12	7.2%	15,513,050	5.3%	2,540	4.2%	212
Eleventh	12	7.2%	30,204,535	10.2%	6,983	11.5%	582
D.C.	12	7.2%	563,384	0.2%	1,121	1.8%	93
Total	167	100%	295,036,845	100%	60,607	100%	321***
"New" Ninth****	21	12.1%	36,981,783	12.5%	8,710	14.4%	415
Twelfth****	8	4.8%	10,105,918	3.4%	2,298	3.8%	287
Thirteenth****	6	3.4%	10,339,859	3.5%	1,624	2.7%	271

* All population figures are based on U.S. Census 2003 estimates. The total U.S. population in 2003 (excluding Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands) was estimated at 290,809,777.

** Ninth Circuit caseload numbers come from our internal database, while other caseload numbers come from the Administrative Office of the United States Courts. All statistics cover the period from Oct. 1, 2002 to Sept. 30, 2003.

*** 321 represents the average number of appeals per authorized judgeship for all current circuits as they stand.

**** "New" Ninth, Twelfth, and Thirteenth Circuits based on alignments and additional judgeships as proposed by S. 2278. Percent judges for reconfigured circuits based on a total of 174 judges.

SOURCE: 28 U.S.C. § 44; Ninth Circuit AIMS database, Fiscal Year 2003, October 1, 2001 to September 30, 2002; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2003 Annual Report of the Director, <http://www.uscourts.gov/judbus2003/contents.html>; U.S. Census Bureau, States Ranked by Estimated July 1, 2003 Population, <http://eire.census.gov/popest/data/states/tables/ST-EST2003-01res.pdf>; U.S. Census Bureau, 2003 Estimates for the Island Areas, <http://www.census.gov/ipc/www/idbsum.html>.

S. 2278

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Exhibit 19
The Circuits After the Restructuring Proposed by H.R. 2723

H.R. 2723

Exhibit 20

Judges for the "New" Ninth Circuit After H.R. 2723's Split
(as of April 7, 2004)

Judge Appointed by State City Status (Active/Senior)

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

SUMMARY: ACTIVE Judges 18

Nominees Pending + 1

Existing Judgeships 19

New Judgeships + 7

Authorized Judgeships 26

Senior Judges 15

Tashima Vacancy + 1

TOTAL 42

* Judge Tashima has announced his election to senior status as of June 30, 2004.

** Temporary judgeship not to be filled after 10 years

*** New judgeship created on January 21, 2005

H.R. 2723

Exhibit 21
Judges for the New Twelfth Circuit After H.R. 2723's Split
(as of April 7, 2004)

Judge Appointed by State City Status (Active/Senior)

1. Skopil Carter Oregon Portland Senior
2. Fletcher, B. Carter Washington Seattle Senior
3. Farris Carter Washington Seattle Senior
4. Beezer Reagan Washington Seattle Senior
5. O'Scannlain Reagan Oregon Portland ACTIVE
6. Leavy Reagan Oregon Portland Senior
7. Trott Reagan Idaho Boise ACTIVE
8. Nelson, T. G.H.W. Bush Idaho Boise Senior
9. Kleinfeld G.H.W. Bush Alaska Fairbanks ACTIVE
10. Thomas Clinton Montana Billings ACTIVE
11. Graber Clinton Oregon Portland ACTIVE
12. Gould Clinton Washington Seattle ACTIVE
13. Tallman Clinton Washington Seattle ACTIVE
14. Clifton G.W. Bush Hawaii Honolulu ACTIVE
15. [Myers] G.W. Bush Idaho Boise Nominee

SUMMARY: ACTIVE Judges 8

Nominees Pending + 1

Existing Judgeships 9

New Judgeships + 0

Authorized Judgeships 9

Senior Judges + 6

TOTAL 15

H.R. 2723Exhibit 22

H.R. 2723's Reorganization--Judges, Population, and Caseload by Circuit

Court Authorized Judges % Judges Pop.* % Pop. Appeals** % Appeals Appeals per Judgeship

First 6 3.6% 13,981,533 4.7% 1,844 3.0% 307

Second 13 7.8% 23,292,594 7.9% 6,359 10.5% 489

Third 14 8.4% 21,930,156 7.4% 3,957 6.5% 283

Fourth 15 9.0% 27,259,993 9.2% 4,887 8.1% 326

Fifth 17 10.2% 29,496,124 10.0% 8,613 14.2% 507

Sixth 16 9.6% 31,475,358 10.7% 4,964 8.2% 310

Seventh 11 6.7% 24,321,486 8.2% 3,517 5.8% 320

Eighth 11 6.7% 19,571,072 6.6% 3,190 5.3% 290

Ninth 28 16.8% 57,427,560 19.5% 12,632 20.8% 451

Tenth 12 7.2% 15,513,050 5.3% 2,540 4.2% 212

Eleventh 12 7.2% 30,204,535 10.2% 6,983 11.5% 582

D.C. 12 7.2% 563,384 0.2% 1,121 1.8% 93

Total 167 100% 295,036,845 100% 60,607 100% 321***

"New" Ninth**** 26 14.9% 43,306,418 14.7% 10,305 17.0% 396

Twelfth**** 9 5.2% 14,121,142 4.8% 2,327 3.8% 259

* All population figures are based on U.S. Census 2003 estimates. The total U.S. population in 2003 (excluding Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands) was estimated at 290,809,777.

** Ninth Circuit caseload numbers come from our internal database, while other caseload numbers come from the Administrative Office of the United States Courts. All statistics cover the period from Oct. 1, 2002 to Sept. 30, 2003.

*** 321 represents the average number of appeals per authorized judgeship for all current circuits as they stand.

**** "New" Ninth and Twelfth Circuits based on alignments and additional judgeships as proposed by H.R. 2723.
Percent judges for reconfigured circuits based on a total of 174 judges.

SOURCE: 28 U.S.C. § 44; Ninth Circuit AIMS database, Fiscal Year 2003, October 1, 2001 to September 30, 2002; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2003 Annual Report of the Director, <http://www.uscourts.gov/judbus2003/contents.html>; U.S. Census Bureau, States Ranked by Estimated July 1, 2003 Population, <http://eire.census.gov/popest/data/states/tables/ST-EST2003-01res.pdf>; U.S. Census Bureau, 2003 Estimates for the Island Areas, <http://www.census.gov/ipc/www/idbsum.html>.

H.R. 2723

Exhibit 23
The Circuits After the Restructuring Proposed by S. 562

S. 562

Exhibit 24

Judges for the "New" Ninth Circuit After S. 562's Split
(as of April 7, 2004)

Judge Appointed by State City Status (Active/Senior)

1. Browning Kennedy California San Francisco Senior
2. Goodwin Nixon California Pasadena Senior
3. Wallace Nixon California San Diego Senior
4. Sneed Nixon California San Francisco Senior
5. Hug Carter Nevada Reno Senior
6. Pregerson Carter California Woodland Hills ACTIVE
7. Alarcon Carter California Los Angeles Senior
8. Ferguson Carter California Santa Ana Senior
9. Nelson, D. Carter California Pasadena Senior
10. Boochever Carter California Pasadena Senior
11. Reinhardt Carter California Los Angeles ACTIVE
12. Hall Reagan California Pasadena Senior
13. Brunetti Reagan Nevada Reno Senior
14. Kozinski Reagan California Pasadena ACTIVE
15. Noonan Reagan California San Francisco Senior
16. Thompson Reagan California San Diego Senior
17. Fernandez G.H.W. Bush California Pasadena Senior
18. Rymer G.H.W. Bush California Pasadena ACTIVE
- *19. Tashima Clinton California Pasadena ACTIVE*
20. McKeown Clinton California San Diego ACTIVE
21. Wardlaw Clinton California Pasadena ACTIVE
22. Fletcher, W. Clinton California San Francisco ACTIVE
23. Fisher Clinton California Pasadena ACTIVE
24. Paez Clinton California Pasadena ACTIVE
25. Berzon Clinton California San Francisco ACTIVE
26. Rawlinson Clinton Nevada Las Vegas ACTIVE
27. Bybee G.W. Bush Nevada Las Vegas ACTIVE
28. Callahan G.W. Bush California Sacramento ACTIVE
29. Bea G.W. Bush California San Francisco ACTIVE
30. [Kuhl] G.W. Bush California Pasadena Nominee
- *31. [Tashima vacancy] G.W. Bush California --?-- Vacancy*

SUMMARY: ACTIVE Judges 15

Nominees Pending + 1

Existing Judgeships 16

New Judgeships + 0

Authorized Judgeships 16

Senior Judges 14

Tashima Vacancy + 1

TOTAL 31

* Judge Tashima has announced his election to senior status as of June 30, 2004.

Exhibit 25

Judges for the New Twelfth Circuit After S. 562's Split
(as of April 7, 2004)

Judge Appointed by State City Status (Active/Senior)

1. Skopil Carter Oregon Portland Senior
2. Fletcher, B. Carter Washington Seattle Senior
3. Schroeder Carter Arizona Phoenix ACTIVE
4. Farris Carter Washington Seattle Senior
5. Canby Carter Arizona Phoenix Senior
6. Beezer Reagan Washington Seattle Senior
7. O'Scannlain Reagan Oregon Portland ACTIVE
8. Leavy Reagan Oregon Portland Senior
9. Trott Reagan Idaho Boise ACTIVE
10. Nelson, T. G.H.W. Bush Idaho Boise Senior
11. Kleinfeld G.H.W. Bush Alaska Fairbanks ACTIVE
12. Hawkins Clinton Arizona Phoenix ACTIVE
13. Thomas Clinton Montana Billings ACTIVE
14. Silverman Clinton Arizona Phoenix ACTIVE
15. Graber Clinton Oregon Portland ACTIVE
16. Gould Clinton Washington Seattle ACTIVE
17. Tallman Clinton Washington Seattle ACTIVE
18. Clifton G.W. Bush Hawaii Honolulu ACTIVE
19. [Myers] G.W. Bush Idaho Boise Nominee

SUMMARY: ACTIVE Judges 11

Nominees Pending + 1

Existing Judgeships 12

New Judgeships + 0

Authorized Judgeships 12

Senior Judges + 7

TOTAL 19

S. 562

Exhibit 26

S. 562's Reorganization--Judges, Population, and Caseload by Circuit

Court Authorized Judges % Judges Pop.* % Pop. Appeals** % Appeals Appeals per Judgeship

First 6 3.6% 13,981,533 4.7% 1,844 3.0% 307

Second 13 7.8% 23,292,594 7.9% 6,359 10.5% 489

Third 14 8.4% 21,930,156 7.4% 3,957 6.5% 283

Fourth 15 9.0% 27,259,993 9.2% 4,887 8.1% 326

Fifth 17 10.2% 29,496,124 10.0% 8,613 14.2% 507

Sixth 16 9.6% 31,475,358 10.7% 4,964 8.2% 310

Seventh 11 6.7% 24,321,486 8.2% 3,517 5.8% 320

Eighth 11 6.7% 19,571,072 6.6% 3,190 5.3% 290

Ninth 28 16.8% 57,427,560 19.5% 12,632 20.8% 451

Tenth 12 7.2% 15,513,050 5.3% 2,540 4.2% 212

Eleventh 12 7.2% 30,204,535 10.2% 6,983 11.5% 582

D.C. 12 7.2% 563,384 0.2% 1,121 1.8% 93

Total 167 100% 295,036,845 100% 60,607 100% 321***

"New" Ninth**** 16 (23) 9.6% (13.2%) 37,725,607 12.8% 9,119 15.0% 570 (396)

Twelfth**** 12 (12) 7.2% (6.9%) 19,701,953 6.7% 3,513 5.8% 293 (293)

* All population figures are based on U.S. Census 2003 estimates. The total U.S. population in 2003 (excluding Puerto Rico, the U.S. Virgin Islands, Guam, and the Northern Mariana Islands) was estimated at 290,809,777.

** Ninth Circuit caseload numbers come from our internal database, while other caseload numbers come from the Administrative Office of the United States Courts. All statistics cover the period from Oct. 1, 2002 to Sept. 30, 2003.

*** 321 represents the average number of appeals per authorized judgeship for all current circuits as they stand.

**** "New" Ninth and Twelfth Circuits based on alignments and additional judgeships as proposed by S. 562.

Numbers in parentheses show the result if S. 562 added seven new judges as S. 2278 and H.R. 2723 do, with resulting percentages based on a total of 174 judges.

SOURCE: 28 U.S.C. § 44; Ninth Circuit AIMS database, Fiscal Year 2003, October 1, 2001 to September 30, 2002; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2003 Annual Report of the Director, <http://www.uscourts.gov/judbus2003/contents.html>; U.S. Census Bureau, States Ranked by Estimated July 1, 2003 Population, <http://eire.census.gov/popest/data/states/tables/ST-EST2003-01res.pdf>; U.S. Census Bureau, 2003 Estimates for the Island Areas, <http://www.census.gov/ipc/www/idbsum.html>.