Testimony of

The Honorable Mary Schroeder

April 7, 2004

STATEMENT OF CHIEF JUDGE MARY M. SCHROEDER
TO THE SENATE JUDICIARY SUBCOMMITTEE ON COURTS
April 7, 2004
Re: S. 2278

Good morning. My name is Mary M. Schroeder, and I am the Chief Judge of the United States Court of Appeals for the Ninth Circuit. I am the chief executive officer of both the court of appeals and the Ninth Circuit Judicial Council, which governs the court of appeals, the district courts and the bankruptcy courts. My home chambers are in Phoenix, Arizona. I welcome the opportunity to appear before you even on very short notice.

Appearing with me today in opposition to the proposals to divide the circuit are two other judges with administrative experience. Senior Judge J. Clifford Wallace of San Diego, one of my distinguished predecessors as chief, and the Chief District Judge for the Western District of Washington, Jack Coughenour of Seattle. Judge Coughenour is currently the Chair of our Conference of Chief District Judges. Also present to provide us information is our superb Clerk of Court, Cathy Catterson.

I believe it is important at the outset that all of us understand at least three important points.

The first goes to cost. When we discuss any of the proposals before you, we are not just talking about splitting up the judges of the existing Court of Appeals into separate courts of appeals. We are actually talking about dividing the entire and well integrated administrative structure of the Ninth Circuit to create two or even three separate and largely duplicative administrative structures. This is costly and, I submit, wasteful. This is especially true when we face a budget crisis requiring us to lay off employees performing critical functions such as the supervision of probationers and preparation of sentencing reports.

The second point goes to geography. The Ninth Circuit includes California. Although there are nine states in the Ninth Circuit, more than two-thirds of the workload of the court of appeals is from California. There is no way to divide the circuit into multiple circuits of roughly proportionate size without dividing California. None of the proposals before you would do that, so like Goldilocks, we find that one is too big and another too small.

The third point goes to history. Over the course of the extremely colorful history of the west, certain ties have developed that should be respected in circuit alignment in order to provide for continuity and stability. Arizona, for example, may at one time have seen itself as a rocky mountain state, but the truth today is its economic and cultural ties are overwhelmingly closer to California than to Colorado or Wyoming. Another example is California and Nevada. Their bond is so great that they have joined in a compact to protect Lake Tahoe. Idaho and eastern Washington have essentially treated their district judges as interchangeable for years. The division proposed in S. 2278 would sever all these ties by dividing Arizona from California, California from Nevada and Idaho from Washington.

As chief, I am very proud of the manner in which we have been able to administer a rapidly growing caseload with innovative procedures possible only in a court with large judicial resources. Some examples:

? Our system of identifying issues and grouping cases is unique among the circuits and allows for efficient resolution of hundreds of cases at a time, once the central issue is decided by a panel.

? The staff attorneys' office, and in particular the Pro Se Unit,
efficiently processes approximately one-third of our cases each year
for cases in which jurisdictional problems dictate the result or in
which the decision is compelled by existing case law.

? The Bankruptcy Appellate Panel has successfully resolved a large number of bankruptcy appeals which would otherwise be decided by Circuit Judges.

? The mediation program, also unique in its breadth, resolves more than 800 appellate cases a year.

? Technology has dramatically changed court operations over the last few decades, particularly since the time when the Fifth Circuit split. Automated case management and issue tracking systems; computer aided legal research, electronic mail, videoconferencing, etc. have all permitted the court to function as if the judges were all in the same building.

Most important, the existence of a large circuit, with all circuit, district and bankruptcy judges bound by the same circuit law, gives us the flexibility to deal with the large concentrations of population and enormous empty spaces of

the west. A large circuit has served our citizens well by allowing us to move judges from one part of the circuit to another depending on where the needs are, as recently, for example, in the border districts of California and in the widely scattered population centers of Idaho.

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

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

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

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

The latest proposal, S. 2278, was introduced five days ago when I was hearing cases in Pasadena, and it took a day to travel here from the west coast. I have thus had only limited time to study it. If you have any questions I am unable to answer today, or if you would like a written follow up on any matter that arises during this hearing, I would be happy to provide it.

I am pleased to be here today with my colleague Diarmuid O'Scannlain, with whom I have appeared before, and with my colleague Richard Tallman, whose views appear to reflect those of our mutual mentor and esteemed colleague, the late great Eugene Wright of Seattle. (Judge Wallace and I never got him to see the light either.) We have had discussions within our court about this subject from time to time for several decades, but the great majority of our judges have consistently opposed division. I am advised that the chief bankruptcy judges oppose division as well.

The Chair of our conference of Chief District Judges, Judge Coughenour of Seattle, is here, and will share his trial court perspective with you.

Thank you for the privilege of appearing before you.