Testimony of

District Judge John Roll

U.S. District Court, District of Arizona

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Committee on the Judiciary
Subcommittee on Administrative Oversight and the Courts

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An Inevitable Solution to a Growing Problem"
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INTRODUCTION

I enthusiastically support S. 1845, which would divide the Ninth Circuit into two circuitsBa new Ninth Circuit consisting of California, Hawaii, Guam and the Mariana Islands and a new Twelfth Circuit consisting of the remaining seven states in the current Ninth Circuit, i.e. Alaska, Arizona, Idaho, Montana, Nevada, Oregon and Washington. No split of the Ninth Circuit short of dividing California in half and placing those halves in different circuits will accomplish near parity. S. 1845 is far better than the existing structure of the Ninth Circuit.

Congress is quite appropriately concerned with addressing the unchecked growth of one of the nation's 12 geographical circuits. I have served in the judiciary for the past 18 years; nearly 14 of those years have been as a district judge. I recognize and appreciate the importance of the judiciary being an independent and co-equal branch of government. S. 1845 is not an assault on judicial independence. I applaud Congress for exercising its Constitutionally-entrusted responsibility of creating such inferior courts "as the Congress may from time to time ordain and establish."

ISSUE BEFORE CONGRESS

The Ninth Circuit is dearly in need of at least 7 new judgeships. Accordingly, the question is not

whether to divide the Ninth Circuit or leave it unchanged. The choice is between compounding existing problems by adding yet another 7 judgeships to the Ninth Circuit or dividing the Ninth Circuit and adding new judgeships. House Judiciary Committee Chairman James Sensenbrenner's statements that no new judgeships should be created until the Ninth Circuit is split merely represent recognition that it would be unwise to add more judgeships to an already oversized circuit.

The Ninth Circuit's immense size is largely a result of 8 other states being joined to California with its population of 36 million. The western United States has experienced a population growth unlike that of any other area of the country and there is no reason to believe the growth will subside. The strain on the Ninth Circuit has only increased as states and territories have been added to its jurisdiction over the past century.

SIZE HAS CREATED INSURMOUNTABLE PROBLEMS

The Ninth Circuit is disproportionate to the rest of the federal circuits in virtually every respect. Despite the valiant efforts of the circuit judges of the Ninth Circuit and the circuit executive's office, the Ninth Circuit's overgrown size simply makes it impossible for it to function on a par with the other federal circuits.

For reasons described in more detail herein, the Ninth Circuit's size undermines the administration of justice. The late Chief Justice William H. Rehnquist expressed his concern that the size and poor functioning of the Ninth Circuit have caused an erosion of public confidence in the judiciary. One-half of the Associate Justices of the United States Supreme Court have publicly expressed concern regarding the functioning of the Ninth Circuit, as have many other knowledgeable individuals. The Department of Justice, which previously opposed a split, now favors a division of the Ninth Circuit. (See appendix A). The U.S. Judicial Conference, which has traditionally opposed any circuit split unless supported by the circuit judges of the affected circuit, recently declined to take a position regarding a split of the Ninth Circuit. This is a retreat from its 1995 opposition to a split. United States Senior District Judge William D. Browning, who served as one of the five members of the Commission on Structural Alternatives for the Federal Courts of Appeal ("White Commission") and is one of four surviving members, submitted a joint letter to Congress (signed also by former Chief Judge Robert C. Broomfield and me) in April 2004 in which he stated that if the option is between adding new judgeships to the Ninth Circuit and dividing the Ninth Circuit, he supports a circuit split.

Notwithstanding statements to the contrary, I am aware of no overwhelming opposition to a circuit split among Ninth Circuit district judges. The last circuit-wide survey of district judges regarding this issue occurred prior to the White Commission Report, which was issued in 1998. My perception is that there is much support for a split of the circuit among district judges, particularly among the judges of the proposed new Twelfth Circuit.

S. 1845 is much-needed remedial legislation.

STUDIES AND COMMISSIONS

Clearly, no further study of this matter can be justified.

In 1973, the Commission on Revision of the Federal Court Appellate System ("Hruska Commission"), after exhaustive study, recommended that both the Fifth and Ninth Circuits should be split. In 1980, the Fifth Circuit was split. The Ninth Circuit, of course, was not.

In 1998, the White Commission studied the need for dividing the Ninth Circuit and recommended that the Ninth Circuit be subdivided into three semi-autonomous divisions. This proposed solution constituted an extraordinary accommodation to keep the Ninth Circuit intact, creating a multi-tiered system unlike that of any other circuit. This recommendation was greeted

with disapproval by the Ninth Circuit.
After these two exhaustive, congressionally-authorized studies, the issues have been crystallized. No further study is needed.

IMPACT OF S. 1845 ON THE CURRENT NINTH CIRCUIT

Population

The Ninth Circuit now has a population of 58 million people. This represents 20 percent of the nation's population, even though the Ninth Circuit is but one of the 12 geographical circuits in the country. (Fig. 1).
S. 1845 would result in 37 million people (36 million from California) residing in the new Ninth Circuit and 21 million people residing in the new Twelfth Circuit. The population of the new Twelfth Circuit would approximate the populations for the Second, Third and Seventh Circuits and would exceed the populations in the First, Eighth, Tenth and D.C. Circuits. (Fig. 2).

Number of Active Judges

The 12 geographical circuit courts are authorized a total of 167 active circuit judges. The Ninth Circuit is authorized 28 of these judgeships, 11 more than the next largest circuit. (Fig. 3). However, the Judicial Conference has concluded that the Ninth Circuit is in need of 7 more active circuit judges. The Ninth Circuit also has 23 senior circuit judges, 110 authorized district judgeships, 50 senior district judges, 68 authorized bankruptcy judgeships and 94 authorized full-time magistrate judgeships. With a caseload that has increased 12 times faster than that of the average circuit over the past five years, the need for more judgeships is genuine. The addition of 7 more judgeships to the existing Ninth Circuit would result in the Ninth Circuit having 35 active circuit judges - more than twice as many as the next largest circuit (the Fifth Circuit) and, excluding the Ninth Circuit, nearly three times as many as the average of all other circuits.
The Ninth Circuit's disproportionate number of authorized judgeships (28 authorized active circuit judges and 23 senior circuit judges) results in nearly 20,000 possible three-judge panel combinations. The Ninth Circuit also frequently invites district judges, judges from other circuits, and a judge from the Court of International Trade to sit on three-judge panels. This enormous pool of judges creates the very realistic possibility of inconsistent results.
S. 1845 would result in the new Ninth Circuit having 22 active circuit judgeships (consisting of the existing 14 California and 1 Hawaii judgeships and 7 new judgeships). The next largest circuit for active judgeships would be the Fifth Circuit with 17. The new Twelfth Circuit would have 14 active circuit judgeships. (Fig. 4). This would place the new Twelfth Circuit tied for fifth among the 13 geographical circuits in number of authorized active circuit judgeships.

Number of cases

The combined number of filings in 2004 for all federal circuit courts was 63,634 and 14,842 of these filings, 23 percent, were in the Ninth Circuit. (Fig. 5). This represents 6,000 more filings than the next largest circuit.

S. 1845 would create a new Twelfth Circuit with a caseload comparable to or larger than all but 4 of the other Circuits. Under S. 1845, using statistics for the year 2004, the new Ninth Circuit would have had 10,652 cases filed for the year and the new Twelfth Circuit would have had 4,171 cases filed for the year. (Fig. 6).
The White Commission acknowledged in 1998 that Ninth Circuit judges do not have the time to

read all of the decisions issued by that court. Justice Anthony M. Kennedy, who sat on the Ninth Circuit before being appointed to the Supreme Court, wrote to the White Commission in 1998 that "I found I could not read all of the published dispositions of my own court. This in turn causes intra-circuit conflicts." In 2004, Ninth Circuit Judge Richard C. Tallman offered written testimony as follows:

As we struggle to keep pace with the thousands of dispositions, including hundreds of published opinions, and more than 1,000 petitions for rehearing filed by disappointed litigants urging us to rehear their case en banc or amend the panel's decision, I find that there are simply not enough hours in the day for even the most conscientious and hardworking judge to remain current.

Number of States

The current Ninth Circuit encompasses 9 states, 1 territory and 1 commonwealth. The average circuit, not counting the Ninth Circuit, consists of just over 4 states per circuit.

S. 1845 would result in a new Ninth Circuit consisting of 2 states, a territory and a commonwealth. The new Twelfth Circuit, with 7 states, would equal the number of states in the Eighth Circuit and have one more state than the Tenth Circuit. (Fig. 7).

Without California (and Hawaii), the caseloads of the Twelfth Circuit states would compare favorably to the caseloads of the Eighth and Tenth Circuit states.(Fig. 8).

PROBLEMS ENDEMIC TO THE SIZE OF THE EXISTING NINTH CIRCUIT

The disproportionately high population, caseload and number of judges in the Ninth Circuit have resulted in endemic, systemic, structural flaws in the Ninth Circuit's decisional process.

Decisional time

The true measure of the time that an appellate court takes to decide a case is the time between the filing of notice of appeal and the issuance of a disposition. By this standard, the Ninth Circuit is the second slowest circuit in the nation in deciding cases. Only the Sixth Circuit, which has operated under an extraordinary judgeship shortage, is slower.

En Banc Hearings in Federal Court

Although all federal appeals are initially heard by three-judge panels, a party may seek en banc review of a panel's decision. Until 1978, by statute every circuit's en banc hearings involved all active circuit judges participating. In 1978, Congress authorized circuit courts with more than 15 active circuit judges to hear cases en banc with fewer than all active circuit judges. In 1980, the Ninth Circuit became the first circuit, and to this day remains the only circuit, to opt for this "limited en banc" procedure. The Ninth Circuit chose to have only 11 of its 28 authorized active judges participate in limited en banc review of panel decisions. Recently, in the face of legislation to split the Ninth Circuit, the Ninth Circuit voted to increase the limited en banc panel from 11 to 15 judges.

Ninth Circuit's procedure - composition of limited en banc court

Currently, in the Ninth Circuit, only 11 of the 28 authorized active circuit judges sit en banc. The 11 judges consist of the chief judge of the Ninth Circuit and 10 other active circuit judges drawn randomly.

The active circuit judges who participate in the three-judge panel initially hearing the case may or may not be selected to sit en banc. It has happened that the 11-judge en banc court has included no member of the three-judge panel from which appeal en banc is being taken. In the

California gubernatorial recall election case, a unanimous three judge panel voted to enjoin the election from being held, but an 11-judge en banc court, which did not include any of the three panel judges, unanimously reversed the three-judge panel.

Beginning January 2006, the Ninth Circuit has chosen to increase the number of active circuit judges sitting on the limited en banc panel from 11 to 15. Ninth Circuit Chief Judge Mary M. Schroeder stated in a press release that this action "is intended to respond to criticism that we should have a majority of our active judges sit on each en banc." While this change will result in a majority of active circuit judges sitting on each en banc case, it will not result in a majority of the active circuit judges agreeing on a particular result. Close votes will be 8-7 and 9-6 rather than 6-5 and 7-4. A bare majority of active circuit judges will participate; nearly one-half of the court will still be denied participation in the actual decisions. Nothing short of full participation by all active circuit judges will cure this structural flaw.

It is most unfortunate that because the 7 states that would comprise the new Twelfth Circuit are currently tethered to California, those 7 states must have their en banc federal appeals reviewed by a fraction of all active circuit judges.

Large number of votes for rehearing en banc - Consequences

Although the limited en banc process in the Ninth Circuit results in only 11 active circuit judges (soon to be only 15) hearing cases en banc, a federal appellate rule requires that a majority of all active circuit judges vote to hear a given case en banc. This means that when the Ninth Circuit is at full strength, at least 15 active circuit judges must vote for rehearing en banc. Of course, besides the Ninth Circuit with its 28 active circuit judgeships, only the Sixth Circuit (with 16 active circuit judgeships) and the Fifth Circuit (with 17 active circuit judgeships) even have more than 15 active circuit judges on the entire court. In most circuits, no more than 6 or 7 votes are sufficient to obtain rehearing en banc. In the Ninth Circuit, from 2000 to June 2005, on at least 24 occasions 6 or more active Ninth Circuit judges voted for rehearing en banc but rehearing en banc was denied because less than a majority of Ninth Circuit active judges voted for rehearing en banc. (See appendix B).

The consequences of this high threshold for rehearing en banc have been shocking. Many of the most important cases heard by three-judge panels of the Ninth Circuit were never reheard en banc. These include cases involving the detention of prisoners at Guantanamo Bay, a state euthanasia law, and medical marijuana. Because of the Ninth Circuit's failure to hear these important cases en banc, the Supreme Court has become the de facto en banc court of the Ninth Circuit. In the past five years, 33 Ninth Circuit decisions decided by three-judge panels but never reheard en banc were reversed unanimously by the Supreme Court in written opinions. (See appendix C).

Close votes in En Banc Hearings

The Ninth Circuit's limited en banc procedure oftentimes results in very close votes. Because only 11 judges sit in the Ninth Circuit's abbreviated en banc system, only 6 judges are required to decide a case "en banc" for the court of 28. With the January 2006 increase to 15 judges, 8 judges will be able to speak for a court of 28.

In 1998, the White Commission wrote that "[v]ery few en banc decision are closely divided, so it is unlikely a full-court en banc would produce different results." This is no longer true. From 1999 through June 2005, 38 of 114 Ninth Circuit limited en banc decisions were by 6-5 or 7-4 votes. (See appendix D). Ninth Circuit Judge Stephen Reinhardt, who opposes a split of the Ninth Circuit, has acknowledged that "[o]ccasionally, the en banc vote does not reflect the true sentiment of the majority of the court."

The Limited En Banc of the Ninth Circuit has been Roundly Criticized

The Ninth Circuit's unique (though authorized) limited en banc procedure has been singled out for criticism from knowledgeable sources. For example, Justice Sandra Day O'Connor, who serves as the Circuit Justice for the Ninth Circuit, wrote to the White Commission that the Ninth Circuit's limited en banc panels "cannot serve the purposes of en banc hearings as effectively as do the en banc panels consisting of all active judges that are used in the other circuits." Justice Antonin Scalia, in his correspondence to the White Commission, pointed to the "incomplete and random nature of [the Ninth Circuit's] en banc panel . . . ." The late Chief Justice Rehnquist wrote to the White Commission that "the en banc review process in a court so large is problematic." Former Chief Judge Richard A. Posner of the Seventh Circuit has described the Ninth Circuit's limited en banc process as a "bobtailed en banc procedure."

The current Ninth Circuit limited en banc procedure that allows 6 judges (or 8 in 2006) to speak for a court of 28 active judges and bind 9 states, a territory and a commonwealth should be simply unacceptable.

S. 1845 Solves the Limited En Banc Dilemma for 7 States

S. 1845 would result in a new Twelfth Circuit with 14 active circuit judges. This would permit a circuit encompassing Alaska, Arizona, Idaho, Montana, Nevada, Oregon and Washington to have traditional full en banc hearings, as enjoyed by every other circuit but the current Ninth Circuit. Whether the new Ninth Circuit created by S 1845, with its 22 active circuit judges, would wish to continue with the current Ninth Circuit's limited en banc practice or convene with a full en banc court would affect two states, not nine.

The Current Ninth Circuit is Under-Represented in Judicial Matters

Each circuit is represented in the U.S. Judicial Conference by the circuit's chief judge and a district judge from the circuit. Normally, all circuits are represented on certain Judicial Conference committees, including committees on Codes of Conduct, Court Administration and Case Management, Judicial Resources, and Security and Facilities. The Judicial Conference is also responsible for approving the recommendations of advisory committees on rules of civil, criminal, appellate, and bankruptcy procedure.

Although one-fifth of the nation lives within the Ninth Circuit and the Ninth Circuit hears almost one-fourth of all federal appeals, the nine states of the Ninth Circuit have only two representatives to the Judicial Conference committeeB"the principal policy-making body for the federal court system." This woefully under-represents the judiciary of the western United States on committees that assign priorities and recommend and implement changes to the business of the federal courts.

By creating two circuits from the current Ninth Circuit, S. 1845 would double the current Ninth Circuit's representation on the Judicial Conference.

S. 1845 IS THE SOLUTION

S. 1845 is an entirely appropriate form of split. It does not result in an even split of cases and population and judges. No such split is possible without dividing California. However, S.1845 would result in a modest return to regional circuit courts. The mega-circuit experiment, despite the best efforts and good faith of the judges and executive staff of the Ninth Circuit, does not serve well the inhabitants of one-fifth of the United States.

To demand a perfectly even division of the Ninth Circuit is to require something of the Ninth Circuit not found in the other federal circuits. No two circuits are identical. However, the federal circuits are regional courts. The split proposed by S. 1845 would result in a Twelfth Circuit that

would parallel other circuits in the most important respectsBpopulation, caseload, number of judges, and, most importantly, quality of justice.

COST

In light of the overwhelming evidence that the quality of justice for nine states depends upon a split of the Ninth Circuit, it would seem unnecessary to dwell on whether the cost of such a split is affordable. It would seem that justice could not afford anything less than a circuit split. However, it has been suggested that the immediate cost of a split of the Ninth Circuit is $100 to $125 million for a new circuit headquarters in Phoenix.

However, closer analysis shows that either the Sandra Day O'Connor U. S. Courthouse at 401 W. Washington ("401") or the 230 N. 1st Avenue U.S. Courthouse ("230"), have adequate space to serve as a Circuit Headquarters in Phoenix for the midterm.

As reflected in the attached materials, 401 can initially house a new Twelfth Circuit headquarters at a cost of approximately $5,821,282.76 and 230 can initially house the headquarters at a cost of $9,683,597.29. Attached to my written testimony are executive summaries, courthouse floor plans and conceptual estimates developed by HBJL Collaborative, LLC ("HBJL") (see appendix E) and a letter from former Chief Judge Robert C. Broomfield. (See appendix F). Judge Broomfield concurs with HBJL's conclusion that adequate space exists at both 401 and 230. Judge Broomfield's evaluation of the HBJL analysis is deserving of great weight because of his extraordinary credentials both as a district judge and as an individual with expansive knowledge of building and space requirements for federal courthouses.

Judge Broomfield has been a judge for almost 35 years, 14 2 on the Superior Court of Arizona in Maricopa County and nearly 20 2 years on the U.S. District Court in Arizona. While serving on the Superior Court (then one of the nation's largest general jurisdiction trial courts), Judge Broomfield was its presiding judge for over 11 years. On the U.S. District Court, he served as chief judge for over 5 years. He has been involved in the planning, design, and oversight of the construction of several state and federal courthouses.

Judge Broomfield served on the Space and Facilities Committee of the U.S. Judicial Conference from 1987-95 and served as chair from 1989-95. During his chairmanship, the Judicial Conference directed that the committee be combined with the then-Committee on Security, which resulted in a new Committee on Security and Facilities ("Space and Facilities"). Recently, the Judicial Conference split that committee into their original committees. The U.S. Courts Design Guide was formulated during his tenure on the Space and Facilities Committee.

In addition, in 1997 Judge Broomfield was appointed to the Judiciary's Budget Committee and chaired its Economy Subcommittee for several years. As members of this subcommittee know, the Budget Committee interrelates with the Appropriations Committees of the Senate and the House. The Economy Subcommittee seeks better and more economical ways of carrying out the constitutional and statutory obligations of the judiciary and its component parts.

As the HBJL attachments and Judge Broomfield's letter reflect, a Twelfth Circuit headquarters can be attained in Phoenix now without a new circuit headquarters building.

CONCLUSION

There is no other circuit that rivals the Ninth Circuit in population, caseload, number of states or number of judges. These have contributed to numerous obstacles to the administration of justice in the Ninth Circuit. One structural flaw arising from the enormous caseload is the limited en banc procedure--impacting 9 states and one-fifth of the nation's population. I respectfully urge you to proceed with S. 1845. It is time.

Thank you for the privilege of appearing before you.

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NINTH CIRCUITCRECENT UNSUCCESSFUL VOTES FOR REHEARING EN BANCC2000BJUNE 2005

Introduction

All United States Courts of Appeals cases are initially decided by three-judge panels. 28 U.S.C. ' 46(b). A party seeking to obtain a rehearing of a panel=s ruling may ask for a rehearing en banc, i.e., by the entire circuit court.

Whether a party is successful in obtaining a rehearing en banc depends upon whether a majority of a circuit=s active circuit judges vote for rehearing en banc.

Because the Ninth Circuit has 28 active circuit judges, at least 15 active circuit judges must vote for rehearing en banc before an en banc rehearing will be held. Since all circuits have far fewer

active circuit judges than the Ninth Circuit, in those circuits far fewer votes are required for rehearing en banc. For example, of the 13 federal courts of appeals, more than half of the circuits require no more than 7 votes to rehear a matter en banc. In fact, though the Ninth Circuit requires 15 judges to vote for rehearing en banc, only two other circuits even have more than 15 active circuit judges sitting on the entire court (the Fifth Circuit has 17 active circuit judges and the Sixth Circuit has 16 active circuit judges).

In the White Commission Report at the end of 1998, supporters of keeping the circuit in its current size argued that the Aen banc process is efficient and effective.@ (White Commission Report, at 35.)

The list below consists of citations to 24 Ninth Circuit cases, ruled upon since the White Commission Report in December 1998, in which rehearing en banc was requested and at least 6 active Ninth Circuit Judges voted for rehearing en banc. In each of the 24 cases, because the requisite 15 votes for rehearing were not cast, the panel=s decision remained intact. Many of these cases involved policy determinations of national importance.

At least 12 votes unsuccessfully cast for rehearing en banc:

Nunes v. Ashcroft, 375 F.3d 810, 817B18 (9th Cir. 2004). Judge Reinhardt wrote in dissent from denial of rehearing en banc: AOccasionally, however, our en banc system does not work perfectly, see, e.g., Calderon v. Thompson, 523 U.S. 538, 118 S. Ct. 1489, 140 L. Ed.2d 728 (1998), and, occasionally, the en banc vote does not reflect the true sentiment of the majority of the court.@

At least 11 votes unsuccessfully cast for rehearing en banc:

Mukhtar v. California State University, Hayward, 319 F.3d 1073, 1075 (9th Cir. 2003) (dissent from denial of rehearing en banc).

Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1110, 1112 (9th Cir.) (dissent from denial of rehearing en banc), cert. denied, 540 U.S. 983 (2003).

Spears v. Stewart, 283 F.3d 992, 1005 (9th Cir.) (dissent from denial of rehearing en banc), cert. denied, 537 U.S. 977 and 537 U.S. 995 (2002).

At least 9 votes unsuccessfully cast for rehearing en banc:

Williams v. Woodford, 396 F. 3d 1059 (9th Cir. 2005) (dissent from denial of rehearing en banc).

Newdow v. U.S. Congress, 328 F.3d 466, 471 (9th Cir. 2003) (dissent from denial of rehearing en banc), rev=d, 124 S. Ct. 2301 (2004) (Pledge of Allegiance case).

United States v. Recio, 270 F.3d 845, 846 (9th Cir. 2001) (dissent from denial of rehearing en banc), rev=d sub nom. United States v. Jimenez Recio, 537 U.S. 270 (2003).

At least 8 votes unsuccessfully cast for rehearing en banc:

United States v. Patterson, 406 F.3d 1095 (9th Cir. 2005) (dissent from denial of rehearing en banc).

Ileto v. Glock, Inc., 370 F.3d 860, 861 (9th Cir. 2004) (products liability against Glock for crimes committed with manufactured firearms).

Belmontes v. Woodford, 359 F.3d 1079, 1080 (9th Cir. 2004) (dissent from denial of rehearing en banc after a panel, in a 2B1 decision, reversed a death penalty sentence based upon alleged misinstruction).

Abovian v. I.N.S., 257 F.3d 971, 971 (9th Cir. 2001) (dissent from denial of rehearing en banc).

Kleve v. Hill, 202 F.3d 1155, 1155 (9th Cir. 2000) (dissent from denial of rehearing en banc), vacated by 531 U.S. 1108, remanded to 243 F.3d 1149 (9th Cir. 2001).

At lest 7 votes unsuccessfully cast for rehearing en banc:

S. Or. Barter Fair v. Jackson County, Or., 401 F.3d 1124 (9th Cir. 2005) (dissent from denial of rehearing en banc).

Farrakhan v. Washington, 359 F.3d 1116, 1116 (9th Cir.) (dissent from denial of rehearing en banc) (panel reinstated lawsuit brought by Washington state felons alleging violation of the Voting Rights Act), cert. denied, 125 S. Ct. 477 (2004).

Mena v. City of Simi Valley, 354 F.3d 1015, 1015 (9th Cir.) (dissent from denial of rehearing en banc), cert. granted, 124 S. Ct. 2842 (2004).

Vasquez-Lopez v. Ashcroft, 343 F.3d 961, 963 (9th Cir. 2003) (dissent from denial of rehearing en banc).

At least 6 votes unsuccessfully cast for rehearing en banc:

Elvig v. Calvin Presbyterian Church, 397 F.3d 790 (9th Cir. 2005) (dissent from denial of rehearing en bac).

Providence Health Plan v. McDowell, 385 F.3d 1168 (9th Cir. 2004) (dissent from denial of rehearing en banc).

Doe v. Tenet, 353 F.3d 1141, 1142 (9th Cir.) (dissent from denial of rehearing en banc) (panel ruled that informants could sue the CIA for failure to provide benefits allegedly promised; dissenters stated that lawsuit violated contract and could expose national secrets), cert. granted, 124 S. Ct. 2908 (2004).

Haugen v. Brosseau, 351 F.3d 372, 375 (9th Cir. 2003) (dissent from denial of rehearing en banc), rev=d, 125 S. Ct. 596 (2004).

Silveira v. Lockyer, 328 F.3d 567, 568 (9th Cir.) (dissent from denial of rehearing en banc) (panel ruled that right to bear arms is a collective, not an individual, right), cert. denied, 540 U.S. 1046 (2003).

United States v. Sigmond Ballesteros, 309 F.3d 545, 545 (9th Cir. 2002) (dissent from denial of rehearing en banc) (panel ruled that Border Patrol stop was impermissible; dissenters stated that founded suspicion existed for stop and that panel=s ruling impinges upon government=s ability to patrol borders).

Anderson v. Calderon, 276 F.3d 483, 483 (9th Cir. 2001) (dissent from denial of rehearing en banc), cert. denied sub nom. Anderson v. Davis, 534 U.S. 1119 (2002).

KDM ex rel. WJM v. Reedsport School Dist., 210 F.3d 1098, 1099 (9th Cir.) (dissent from denial of rehearing en banc) (panel ruled that Oregon regulation permitting IDEA services to be offered to private school student only in a Areligiously neutral setting@ did not violate student=s rights), cert denied, 531 U.S. 1010 (2000).

Appendix C

NINTH CIRCUIT CASES NOT HEARD EN BANC BUT UNANIMOUSLY REVERSED BY SUPREME COURT OPINION SINCE THE OCTOBER 2000 SUPREME COURT TERM

Banaitis v. Commissioner, 340 F.3d 1074 (9th Cir. 2003), rev=d sub nom. Commissioner v. Banks, 543 U.S. , 2005 WL 123825 (Jan. 24, 2005)

Alford v. Haner, 333 F.3d 972 (9th Cir. 2003), rev=d sub nom. Devenpeck v. Alford, 125 S. Ct. 588 (2004).

KP Permanent Make Up, Inc. v. Lasting Impression I, Inc., 328 F.3d 1061 (9th Cir. 2003), vacated by 125 S. Ct. 542 (2004).

Roe v. City of San Diego, 356 F.3d 1108 (9th Cir.), rev=d, 125 S. Ct. 521 (2004).

Newdow v. U. S. Congress, 292 F.3d 597 (9th Cir. 2002), amended by 321 F.3d 772 (2003), rev=d, 124 S. Ct. 2301 (2004).

United States v. Dominguez Benitez, 310 F.3d 1221 (9th Cir. 2002), rev=d, 124 S. Ct. 2333 (2004).

Public Citizen v. Dep=t of Transp., 316 F.3d 1002 (9th Cir. 2003), rev=d, 541 U.S. 752 (2004).

McNeil v. Middleton, 344 F.3d 988 (9th Cir. 2003), rev=d, 541 U.S. 433 (2004).

United States v. Flores-Montano, 282 F.3d 699 (9th Cir. 2003), rev=d, 541 U.S. 149 (2004).
United States v. Galletti, 314 F.3d 336 (9th Cir. 2002), rev=d, 541 U.S. 114 (2004).
United States Postal Serv. v. Flamingo Indus., 302 F.3d 985 (9th Cir. 2002), rev=d, 540 U.S. 736 (2004).
Raytheon Co. v. Hernandez, 292 F.3d 1030 (9th Cir. 2002), rev=d, 540 U.S. 44 (2003).
United States v. Banks, 282 F.3d 699 (9th Cir. 2002), rev=d, 540 U.S. 31 (2003).
Yarborough v. Gentry, 320 F.3d 891 (9th Cir. 2003), rev=d, 540 U.S. 1 (2003).

Dastar Corp. v. Twentieth Century Fox Film Corp., 34 Fed. App. 312 (9th Cir. 2002), rev=d, 539 U.S. 23 (2003).
Black & Decker Disability Plan v. Nord, 296 F.3d 823 (9th Cir. 2001), rev=d, 538 U.S. 822 (2003).
Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of Bishop Colony, 291 F.3d 549 (9th Cir. 2002), rev=d, 538 U.S. 701 (2003).
City of Los Angeles v. David, 307 F.3d 1143 (9th Cir. 2002), rev=d per curiam, 538 U.S. 715 (2003).
Holley v. Crank, 258 F.3d 1127 (9th Cir. 2001), vacated sub nom. Meyer v. Holley, 537 U.S. 280 (2003).
Visciotti v. Woodford, 288 F.3d 1097 (9th Cir.), rev=d, 537 U.S. 19 (2002).
Packer v. Hill, 291 F.3d 569 (9th Cir.), rev=d sub nom. Early v. Packer, 537 U.S. 3 (2002).
United States v. Ruiz, 241 F.3d 1157 (9th Cir. 2001), rev=d, 536 U.S. 622 (2002).
Echazabal v. Chevron USA, Inc., 226 F.3d 1063 (9th Cir. 2000), rev=d, 536 U.S. 73 (2002).
Rucker v. Davis, 237 F.3d 1113 (9th Cir. 2001), rev=d sub nom. Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002).
United States v. Arvizu, 232 F.3d 1241 (9th Cir. 2000), rev=d, 534 U.S. 266 (2002).
United States v. Knights, 219 F.3d 1138 (9th Cir. 2000), rev=d, 534 U.S. 112 (2001).
Andrews v. TRW, Inc., 225 F.3d 1063 (9th Cir. 2000), rev=d, 534 U.S. 19 (2001).
Bradshaw v. G & G Fire Sprinklers, 204 F.3d 941 (9th Cir. 1998), rev'd sub nom. Lujan v. G & G Fire Sprinklers, 532 U.S. 189 (2001).
Central Green Co. v. United States, 177 F.3d 384 (9th Cir. 1999), rev'd, 531 U.S. 425 (2001).
Clark County Sch. Dist. v. Breeden, 232 F.3d 893 (9th Cir. 2000), rev'd per curiam, 532 U.S. 268 (2001).

Nevada v. Hicks, 196 F.3d 1020 (9th Cir. 2000), rev'd, 533 U.S. 353 (2001).
Shaw v. Murphy, 195 F.3d 1121 (9th Cir. 1999), rev'd, 532 U.S. 223 (2001).
United States v. Oakland Cannabis Buyers' Coop., 190 F.3d 1109 (9th Cir. 1999), rev'd, 532 U.S. 483 (2001).

Appendix D

NINTH CIRCUIT EN BANC VOTESC1999B2005

Introduction

United States Courts of Appeals cases are initially heard by three-judge panels. 28 U.S.C. ' 46(b). A party wishing to appeal from the ruling of such a panel may seek rehearing en banc. Id. at ' 46(c). Traditionally, a rehearing en banc involves a rehearing with all active circuit judges in a circuit sitting together. Id.

To accommodate the largest circuits, Congress enacted legislation that permits circuits with more than 15 active circuit judges to conduct limited en banc hearings. Id.; Pub. L. No. 95 486, ' 6, 92 Stat. 1633 (1978). These are hearings in which only a designated number of active circuit judges participate in the rehearing en banc, representing the entire court.

Only three circuits qualify for use of the limited en banc procedure, the Fifth (17 active circuit judges), the Sixth (16 active circuit judges), and the Ninth (28 active circuit judges). Only the Ninth Circuit has opted to utilize the limited en banc procedure. U.S. Ct. App. 9th Cir. Rule 35 3, 28 U.S.C. Under the Ninth Circuit=s rule, 10 active circuit judges and the chief judge sit Aen banc.@ Id.

In the White Commission Report in December 1998, supporters of keeping the Ninth Circuit in its current size argued that en banc votes are seldom close:

Supporters of the court as currently structured say that its en banc process is efficient and effective. They note that very few en banc decisions are closely divided, so it is unlikely a full-court en banc would produce different results.

(White Commission Report, at 35.)

The following list of all of the Ninth Circuit=s en banc decisions between 1999 and 2005, decided since the White Commission Report was issued, shows that exactly one-third (38 of 114) of en banc decisions involved votes of 6B5 or 7B4.

Skokomish Indian Tribe v. United States, 401 F.3d 506 (9th Cir. 2005) (6-5 vote).
United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) (7-4 vote).
Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881 (9th Cir. 2005) (7-4 vote).
S.E.C. V. Gemstar-TV Guide Int'l, Inc., 402 F.3d 881 (9th Cir. 2005) (10-1 vote).
Barapind v. Enomoto, 400 F.3d 744 (9th Cir. 2005) (6-5 vote).
Hayes v. Brown, 399 F.3d 972 (9th Cir. 2005) (7-4 vote).
Gator.Com Corp. v. L.L. Bean, Inc., 398 F.3d 1125 (9th Cir. 2005) (8-3 vote).
Smith v. City of Hemet, 394 F.3d 689 (9th Cir. 2005) (8-3 vote).
Humanitarian Law Project v. United States Dept. of Justice, 393 F.3d 902 (9th Cir. 2004) (11B0 vote).
Pincay v. Andrews, 389 F.3d 853 (9th Cir. 2004) (8B3 vote).
Gilbertson v. Albright, 381 F.3d 965 (9th Cir. 2004) (11B0 vote).
United States v. Kincade, 379 F.3d 813 (9th Cir. 2004) (6-5 vote).
Chein v. Shumsky, 373 F.3d 978 (9th Cir. 2004) (6B5 vote).
United States v. Crawford, 372 F.3d 1048 (9th Cir. 2004) (8B3 vote).
United States v. Iniguez, 368 F.3d 1113 (9th Cir. 2004) (11B0 vote).
United States v. Doe, 366 F.3d 1069 (9th Cir. 2004) (11B0 vote).

United States v. Hovsepian, 359 F.3d 1144 (9th Cir. 2004) (11B0 vote).
Cooper v. Woodford, 358 F.3d 1117 (9th Cir. 20040) (7B2B2 vote).
Ellis v. United States Dist. Court for W. Dist. of Wash. (Tacoma), 356 F.3d 1198 (9th Cir. 2004) (7B2B2 vote).
Li v. Ashcroft, 356 F.3d 1153 (9th Cir. 2004) (11B0 vote).
Wilderness Society v. United States Fish & Wildlife Serv., 353 F.3d 1051 (9th Cir. 2003) (11B0 vote).
Welch v. Carey, 350 F.3d 1079 (9th Cir. 2003) (11B0 vote).
Payton v. Woodford, 346 F.3d 1204 (9th Cir. 2003) (6B5 vote).
E.E.O.C. v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) (8B3 vote).
Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003) (11B0 vote).
Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003) (8B3 vote).
Kyocera Corp. v. Prudential Bache Trade Servs., Inc., 341 F.3d 987 (9th Cir. 2003) (11B0 vote).
United States v. Chase, 340 F.3d 978 (9th Cir. 2003) (11B0 vote).
Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003) (11B0 vote).
Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003) (11B0 vote).
United States v. Cabaccang, 332 F.3d 622 (9th Cir. 2003) (6B5 vote).
Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003) (6B5 vote).
United States v. Reyna Tapia, 328 F.3d 1114 (9th Cir. 2003) (11B0 vote).
Navajo Nation v. Dept. of Health & Human Servs., 325 F.3d 1133 (9th Cir. 2003) (11B0 vote).
Peterson v. Lampert, 319 F.3d 1153 (9th Cir. 2003) (11B0 vote).
Ramirez Alejandre v. Ashcroft, 319 F.3d 365 (9th Cir. 2003) (6B5 vote).
Miranda v. Clark County, 319 F.3d 465 (9th Cir. 2003) (7B4 vote).
United States v. Severino, 316 F.3d 939 (9th Cir. 2003) (7B4 vote).
Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (7B4 vote).
Valerio v. Crawford, 306 F.3d 742 (9th Cir. 2002) (7B4 vote).
Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002) (7B4 vote).
Payton v. Woodford, 299 F.3d 815 (9th Cir. 2002) (6B5 vote).
Allen v. Lewis, 295 F.3d 1046 (9th Cir. 2002) (11B0 vote).
Paulson v. City of San Diego, 294 F.3d 1124 (9th Cir. 2002) (7B4 vote).
Sistrunk v. Armenakis, 292 F.3d 669 (9th Cir. 2002) (11B0 vote).
United States v. Corona-Sanchez, 291 F.3d 1201 (9th Cir. 2002) (7B4 vote).
Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002) (6B5 vote).
Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (6B5 vote).
United Food & Commercial Workers Union Local 1036 v. NLRB, 284 F.3d 1099 (9th Cir. 2002) (11B0 vote).
Robinson v. Solano County, 278 F.3d 1007 (9th Cir. 2002) (11B0 vote).
United States v. Matthews, 278 F.3d 880 (9th Cir. 2002) (11B0 vote).
United States v. Buckland, 289 F.3d 558, 573 (9th Cir. 2002) (7B4 vote).
Socop Gonzalez v. I.N.S., 272 F.3d 1176 (9th Cir. 2001) (9B2 vote).
Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001) (7B4 vote).
Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001) (7B4 vote).
Idaho v. Horiuchi, 253 F.3d 359 (9th Cir. 2001) (6B5 vote).
Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863 (9th Cir. 2001) (8B3 vote).
United States v. Velarde Gomez, 269 F.3d 1023 (9th Cir. 2001) (8B3 vote).

United States v. Orso, 266 F.3d 1030 (9th Cir. 2001) (11B0 vote).
Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001) (8B3 vote).
Devereaux v. Abbey, 263 F.3d 1070 (9th Cir. 2001) (8B3 vote).
United States v. Ruiz, 257 F.3d 1030 (9th Cir. 2001) (11B0 vote).
United States v. Johnson, 256 F.3d 895 (9th Cir. 2001) (6B5 vote).
Green v. City of Tucson, 255 F.3d 1086 (9th Cir. 2001) (11B0 vote).
United States v. Barrios Gutierrez, 255 F.3d 1024 (9th Cir. 2001) (8B3 vote).
Andreiu v. Ashcroft, 253 F.3d 477 (9th Cir. 2001) (11B0 vote).
Cramer v. Consol. Freightways, Inc., 255 F.3d 683 (9th Cir. 2001) (10B1 vote).
United States v. Sesma Hernandez, 253 F.3d 403 (9th Cir. 2001) (11B0 vote).
United States v. Enas, 255 F.3d 662 (9th Cir. 2001) (11B0 vote).
United States v. Arlt, 252 F.3d 1032 (9th Cir. 2001) (11B0 vote).
John v. United States, 247 F.3d 1032 (9th Cir. 2001) (8B3 vote).
United States v. Rivera Sanchez, 247 F.3d 905 (9th Cir. 2001) (11B0 vote).
Gentala v. City of Tucson, 244 F.3d 1065 (9th Cir. 2001) (8B3 vote).
Daviton v. Columbia/HCA Healthcare Corp., 241 F.3d 1131 (9th Cir. 2001) (11B0 vote).
Rucker v. Davis, 237 F.3d 1113 (9th Cir. 2001) (7B4 vote).
Whalem/Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000) (11B0 vote).
Catholic Soc. Servs., Inc. v. I.N.S., 232 F.3d 1139 (9th Cir. 2000) (6B5 vote).
United States v. Hayes, 231 F.3d 663 (9th Cir. 2000) (7B4 vote).
United States v. Gracidas Ulibarry, 231 F.3d 1188 (9th Cir. 2000) (11B0 vote).
Ass=n of Mexican American Educators v. California, 231 F.3d 572 (9th Cir. 2000) (7B4 vote).
Barnett v. U.S. Air, Inc., 228 F.3d 1105 (9th Cir. 2000) (8B3 vote).
United States v. Working, 224 F.3d 1093 (9th Cir. 2000) (9B2 vote).
Dubria v. Smith, 224 F.3d 995 (9th Cir. 2000) (10B1 vote).
Bins v. Exxon Co., 220 F.3d 1042 (9th Cir. 2000) (8B3 vote).
Wetzel v. Lou Ehlers Cadillac, 222 F.3d 643 (9th Cir. 2000) (11B0 vote).
Gorbach v. Reno, 219 F.3d 1087 (9th Cir. 2000) (11B0 vote).
Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000) (11B0 vote).
United States v. Banuelos Rodriguez, 215 F.3d 969 (9th Cir. 2000) (10B1 vote).
United States v. Montero Camargo, 208 F.3d 1122 (9th Cir. 2000) (11B0 vote).
United States v. Lombera Camorlinga, 206 F.3d 882 (9th Cir. 2000) (7B4 vote).

Burlington N. Santa Fe Ry. Co. v. Int=l Bhd. of Teamsters Local 174, 203 F.3d 703 (9th Cir. 2000) (11B0 vote).
Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (9B2 vote).
Lopez v. Thompson, 202 F.3d 1110 (9th Cir. 2000) (9B2 vote).
Gruntz v. County of Los Angeles, 202 F.3d 1074 (9th Cir. 2000) (11B0 vote).
Hodgers Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999) (11B0 vote).
McDowell v. Calderon, 197 F.3d 1253 (9th Cir. 1999) (11B0 vote).
Sanders v. Union Pacific R.R. Co., 193 F.3d 1080 (9th Cir. 1999) (11B0 vote).
Lambright v. Stewart, 191 F.3d 1181 (9th Cir. 1999) (10B1 vote).
United States v. Kaluna, 192 F.3d 1188 (9th Cir. 1999) (7B4 vote).
WMX Technologies, Inc. v. Miller, 197 F.3d 367 (9th Cir. 1999) (11B0 vote).
Mauro v. Arpaio, 188 F.3d 1054 (9th Cir. 1999) (7B4 vote).
Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999) (8B3 vote).

Taylor v. United States, 181 F.3d 1017 (9th Cir. 1999) (6B5 vote).
Balint v. Carson City, 180 F.3d 1047 (9th Cir. 1999) (7B4 vote).
Hose v. I.N.S., 180 F.3d 992 (9th Cir. 1999) (11B0 vote).
United States v. Garrett, 179 F.3d 1143 (9th Cir. 1999) (11B0 vote).
Borja v. I.N.S., 175 F.3d 732 (9th Cir. 1999) (9B2 vote).
Briones v. I.N.S., 175 F.3d 727 (9th Cir. 1999) (10B1 vote).
Kearney v. Standard Ins. Co., 175 F.3d 1084 (9th Cir. 1999) (6B5 vote).
United States v. Barron, 172 F.3d 1153 (9th Cir. 1999) (7B4 vote).
United States v. Qualls, 172 F.3d 1136 (9th Cir. 1999) (7B4 vote).
United States v. James, 169 F.3d 1210 (9th Cir. 1999) (10B1 vote).
Thomas v. Anchorage Equal Rights Com=n, 220 F.3d 1134 (9th Cir. 1999) (10B1 vote).
United States v. Foster, 165 F.3d 689 (9th Cir. 1999) (11B0 vote).

Appendix E

United States District Court
District of Arizona
Sandra Day O'Connor United States Courthouse
Phoenix, Arizona 85003

Chambers of
Robert C. Broomfield
Senior United States District Judge November 4, 2005

The Honorable Jeff Sessions
Chairman
Subcommittee on Administrative Oversight
and The Courts
United States Senate
335 Russell Senate Office Building
Washington, D.C. 205l0

Dear Mr. Chairman:

Thank you for permitting me to present my views on S.1845 and S.1296, the bills to split the current Ninth Circuit into two new circuits. I would have preferred to appear personally but I begin a first degree murder trial on October 25, 2005, followed by my regular sitting on the FISA court on November 7, 2005.

Over the years I have opposed a split of the Ninth Circuit but within the last year, I have altered that view which, for reasons of time and space, I will not detail. The time for a split has come. I would be happy to articulate these reasons if that is thought necessary or appropriate. Accordingly, I will confine my remarks to issues of the cost of such a split which I understand have been raised by others.

In l987 the Chief Justice and the U. S. Judicial Conference created the Space and Facilities Committee: a new committee to deal with the issues of facilities' needs for the Judiciary. As a first order of business the committee sought a long range plan from each of the regional Circuits, and from each of the 94 Districts. Contemporaneously, the committee began the creation of a set of equal standards for all federal courts to guide them in building or renovating courthouses across the country. The
U. S. Courts Design Guide, as these standards were called, was an exhaustive document which took several years to develop through a subcommittee and was adopted by the U. S. Judicial Conference in March, l992. It has been amended and improved upon on several occasions over the course of time. It guides the development of

new and renovated facilities and formulates a basis upon which GSA and the Congress can rely in determining whether these facilities should be constructed.

Now to space availability and costs for a new Twelfth Circuit. Eventually, in the mid or long term, depending on whether a secondary headquarters is established, a separate courthouse for a new Twelfth Circuit headquarters in Phoenix will be necessary. Should Congress split the current Ninth Circuit, I believe that there is presently sufficient room in either the
U. S. Courthouse and Federal Building at 230 North First Avenue in Phoenix (230) or the Sandra Day O'Connor U. S. Courthouse at 40l West Washington in Phoenix (401), or both. The Bankruptcy Court would remain in 230 and the District Court in 401 while other federal agencies in the selected facility would need to be relocated to other federally owned or leased space. These affected agencies use typical commercial office space not unique to courthouses. Although I believe it would be unnecessary, the new twelfth Circuit could, alternatively, occupy space in both 230 and 401. Further, if a secondary headquarters were created for the new circuit in Seattle this would remove any doubt about whether the new twelfth circuit could initially be housed in existing facilities in Phoenix and Seattle with no immediate need for a new circuit courthouse in Phoenix. The current Ninth Circuit operations structure in San Francisco and Pasadena is but one example of such dual locations. Further, if deemed appropriate, the court could be authorized to sit in other locations, such as Las Vegas or Portland, which would maximize the use of existing space.

I understand that it is asserted that a proposed location of the new Twelfth Circuit in Phoenix (without a secondary headquarters) would require 88,338 usable square feet of space. However, I believe that a more appropriate application of the Design Guide to a proposed new l4 judge circuit court and its ancillary component units would require 65,276 square feet. While the difference between these two numbers is not substantial, the availability of space in the two existing Phoenix courthouses at this lesser figure would make for an easier fit for the new circuit court in either location. Further, I note that H.R. 3l25 provides for 9 judges in the new twelfth circuit. Obviously if the initial court size were less

than l4 judges, then the space requirement in either building would be lessened. As you can see there are a variety of options which allow for an easier transition to a new twelfth circuit operation.

Attached is a detailed study by HBJL Collaborative, LLC which provides four alternative proposals for the location of the new circuit court in the 230 and 401 courthouses. The proposed alternatives cannot be absolutely precise in their application without a long range plan as I noted above. However, it is sufficient to say that initially the new circuit and its component units could be formed and housed in either of these two existing courthouses, a combination of them, or in a 60/40 (or other) combination with the Nakamura Courthouse in Seattle. As reflected in the study, the cost of these alternatives range from $5.8 to $9.7 million dollars. These cost estimates include the cost of relocating these other federal agencies from these existing courthouses to new locations. The annual rent paid by these agencies to GSA (and appropriated by Congress) would essentially remain the same as it currently is as GSA bases rent on commercially equivalent rates.

While I do not believe it would initially be necessary, it is possible to locate the new circuit, in part, in each of the two buildings. The fact of the existence of two fully usable courthouses within five blocks of one another in downtown Phoenix provides the flexibility necessary to permit the new court to operate, including its headquarters functions of Clerk of the Court, Circuit Executive's Office, Law Library and Staff Attorneys' Office. Finally, as noted, a secondary headquarters in Seattle and/or a lesser number of judges simply extends the time within which an eventual new circuit courthouse will become necessary.

Growth in the West including the new Ninth and Twelfth Circuits will continue. The time for a split has come. Initially it will fit in Phoenix or, in combination, with Seattle.

Yours very truly,

Robert C. Broomfield

RCB:lp

Judge Broomfield's background may provide some basis to evaluate his views. He has been a judge for almost 35 years, l4 l/2 on the Superior Court of Arizona in Maricopa County and close to 20 l/2 on the U. S. District Court in Arizona. While serving on the Superior Court, (then the 8th or 9th largest general jurisdiction trial court in the country), he served as its Presiding Judge for ll l/2 years. On the U. S. District Court he served as Chief Judge for over 5 years. He has

been involved in the planning, design and the oversight of the construction of several courthouses on both the state and federal sides.

Judge Broomfield served on the Committee on Space and Facilities of the U. S. Judicial Conference for 8 years, 6 as its chairman. During his chairmanship, the Judicial Conference directed that the committee be combined with the then Committee on Security which resulted in a new Committee on Security and Facilities. Recently, the Conference split that committee into their original committees.

Judge Broomfield has been a member of the Judiciary's Committee on the Budget since l997 and has chaired its Economy Subcommittee for some years. As you are aware, the Budget Committee interrelates with the Appropriations Committees of the Senate and the House. The Economy Subcommittee is responsible to interact with other committees of the Conference and court units in seeking better and more economical ways of carrying out the constitutional and statutory obligations of the judiciary and its component parts.