Testimony of

Mr. William Neukom

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Mr. Chairman and members of the Committee, my name is William H. Neukom. Iam currently a partner and the Chair of Preston Gates & Ellis LLP, a law firm with its headquarters in Seattle, Washington. Prior to rejoining the Preston Gates firm in 2002, 1 was General Counsel for Microsoft Corporation for seventeen years. I appear as a witness before you today in my individual capacity and speak based on my nearly forty years of experience as an attorney. These are my views and should not be considered the views of my law firm or of Microsoft Corporation. I am also the President-Elect of the American Bar Association and am authorized to remind you of its opposition to restructuring of the Ninth circuit.'

'The Association's position is set forth in a resolution of the ABA House of Delegates adopted in August of 1999.

I have followed the debate about restructuring or dividing the U.S. Court of Appeals for the Ninth Circuit for many years both out of professional interest -because it is a court in which my clients or the company that Iworked for have had many important cases -and out of a broader interest in the health, integrity and effective functioning of our federal courts. My experience with the federal courts is not limited to the Ninth Circuit and its district courts. Iam also familiar with or have practiced before other federal district and appellate courts and a number of international tribunals.

Based on all of my experience, I come before you today to state my strong opposition to splitting the Ninth Circuit -whether through the current proposal, S. 1845, or through any of the many similar proposals that have been offered over the years. I firmly believe that the proposals that have been made to reconfigure the Ninth Circuit over the years -including S.1845 -are not an inevitable or even a desirable solution to a problem, but are instead a misguided, shortsighted, and costly response in search of a problem.

Before Iaddress three of the particular reasons I have for opposing a division of the Ninth Circuit, Iwould note that others, including the current, past, and future Chief Judges of the Circuit have articulated thoroughly both the strengths of the Ninth Circuit today, especially its innovative efforts to improve the delivery of judicial services, and the shortcomings of the proposals to divide the Court. As these Judges and others have explained, nothing has changed since the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by former Associate Supreme Court Justice Byron White, concluded in 1998, "[tlhere is no persuasive evidence that the Ninth Circuit . . . is not working effectively, or that creating new circuits will improve the administration of justice . ..."2 These compelling views from an independent Commission and from the Judges of the Court belie the notion that splitting the Court is either inevitable or a solution to a growing problem.

While Iagree fully with these Judges and the White Commission, let me address three specific reasons why I believe that dividing the current Ninth Circuit into two or even three smaller circuits is unlikely to serve either the interests of the many businesses and corporations that are so

Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report

important to the economy of the West or the broader administration of justice.
First, quite simply, there is a significant advantage to the Court's current structure from a business perspective -an economy of scale that would be lost if the current Court were divided. A ruling from the Ninth Circuit, as it is currently constituted, on an issue that affects businesses establishes one standard of federal law for the western states. A single federal appellate court for the West Coast minimizes the risk that the law of intellectual property, maritime trade, labor relations, banking or other business matters will be different in San Diego and Seattle.
This is not an abstract advantage. In my years at Microsoft, we worked extensively with technology companies and intellectual property issues around the globe. A significant part of our work, of course, involved transactions with companies in California's Silicon Valley. The fact that one federal court of appeals announced the rules of federal law for both Seattle and Silicon Valley eliminated an element of uncertainty and potential conflict in our work with companies up and down the West Coast. Certainty
(1998) at 29 (the "White Commission Report").
and predictability in the law are critical elements of a business climate that supports innovation and economic strength. The current configuration of the Ninth Circuit provides on important aspect of that certainty and predictability that would be lost if the Court were divided and a different federal law for intellectual property rights or other business regulation governed in Seattle and in Silicon Valley.
A practical illustration of the advantages of a single western circuit would be the intellectual property rights litigation over the past 30 years between Microsoft based in Seattle and' companies such as Apple Computer and Sun Microsystems based in Silicon Valley. While this litigation proceeded before trial courts in the Northern District of California, we were reassured by the fact that the district court there would apply'the same interpretations of copyright law that a district court in Seattle would apply because they are both part of a single federal circuit. Likewise, any ruling by a trial court in San Francisco or San Jose would be reviewed by the same circuit that would review a ruling from Seattle. There was no need to consider either the potential costs of litigation over the appropriate forum for the trial of the case or any related issues of divergent federal law.
It also was reassuring that any interpretation of the law by the trial court eventually would be reviewed by Judges of the larger Ninth Circuit who possess considerable sophistication and experience in copyright matters because of the very breadth of the Circuit's case load. In a range of similar situations, differences between companies from California's Silicon Valley and the Northwest's Silicon Forest were simpler and easier to resolve, even when they did not go to court, because the law of intellectual property rights and other disciplines was the same in both places as a consequence of having a single federal circuit for the West. From a business perspective, this strength of the current Court should not be lightly discarded.
The advantages of the current Court are by no means limited to business conducted within the Circuit. Indeed, one of the greatest advantages for west coast businesses of a single west coast federal court of appeals is that a single circuit interprets federal law that affects trade with our international partners around the Pacific Rim. Again, this uniformity and predictability serves business interests better than a multiplicity of west coast federal courts of appeals would. The White Commission in its Final Report recognized this point explicitly --and contrasted the uniformity of federal law in the West with its more fractured
status elsewhere:
Maintaining the court of appeals for the Ninth Circuit as currently aligned respects the character

of the West as a distinct region. Having a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with other nations on the Pacific Rim is a strength of the circuit that should be maintained. The Atlantic seaboard and Gulf Coast are governed by law determined by courts of appeals in six separate circuits, which gives rise to complaints about intercircuit conflicts from practitioners in the maritime bar, who regularly bemoan the differences in interpretation of federal law in circuits from Maine to ex as.^

While the White Commission focused particularly on maritime law, in my experience their point applies equally to many other areas of federal law that benefit from having a single circuit court of appeals for our region.

In fact, the current Ninth Circuit's very size and diversity ensures a kind of neutrality that protects against even the perception of any "home town" bias, a reassuring feature of the current Court to almost any large corporation. If the Circuit were split, these advantages would disappear and, over time, the law in the new circuits would diverge; they would tend to acquire a more local character; and businesses would incur the added costs of both staying abreast of these developments and adjusting their practices in the different cities and states now served by the Ninth Circuit. This too is not an abstract;concern. While each federal district court may reflect some aspects of local character and practice, the role of the circuit

courts has always been viewed as at least regional if not national. This larger perspective is one of the unique strengths of our federal courts of appeal's. Circuit judges in each circuit come from a number of states and from many different backgrounds. Their diverse perspectives are brought to bear and reflected in the jurisprudence of the circuit over time. Dividing the Ninth Circuit as proposed in S.1845 would undercut this important source of strength by isolating California and Hawaii in a single circuit with the attendant loss of richness of judicial perspective that presently exists. This loss cuts both ways: division of the Ninth Circuit would deprive California and Hawaii of the diversity that the current circuit brings to those states as much as it would deprive the other states of the perspectives that California and Hawaii judges afford. The risk to business is that the new circuits would both become more provincial and afford businesses less of the institutional neutrality that the current court offers.

White Commission Report at 49-50.

Based on my experience, I believe many attorneys who work for corporations that do business around the world would actually support efforts to consolidate the federal judiciary, especially at the appellate level, rather than further balkanize it. As the Europeans are discovering, there are great economies and synergies in consolidating legal and economic regimes. In every area, we see globalization of regulation and government shrinking the world to the point that physical geography has become almost irrelevant. Dividing the Ninth Circuit intoseveral smaller circuits at this point in history runs counter to these strong and accelerating trends. Breaking up the Ninth Circuit is unlikely to serve the long-term best interest of the business community as we move forward in a global economy.

Let me summarize this point: while neither I nor my clients have always agreed with all of the individual decisions of the Ninth Circuit, I support and appreciate the fact that my business and corporate clients can look to a single appellate court to interpret and apply federal law in the western states and up and down the American length of the Pacific Rim. Dividing the Ninth Circuit as proposed in S.1845 and similar bills would undermine this significant business

advantage.
Second, the very size of the current Ninth Circuit has, by necessity, led it to innovate and adapt in ways that are important to businesses around the west, innovations that could well disappear if the Court were' divided. As a former general counsel to a large corporation, Ican assure you that size is not inherently a disadvantage. While size can lead to complacency, bureaucracy, and rigidity, it can also provide a spur to innovation and opportunities for leadership. Based on my experience, I believe the Ninth Circuit has made size its friend and used it to pioneer new and important techniques for the delivery of judicial services by our federal courts. or example, the Court has grappled with ensuring consistency in its case law by using technology and implementing a case-monitoring and issue-spotting system that alerts the Judges to cases raising similar issues before they are decided so decisions can be harmonized. The Court has also engaged technology to its advantage for teleconferencing among Judges, communications between judicial chambers that are geographically disparate, and hearings in some cases where attorneys and Judges cannot easily appear in the same place. All of these efforts have reduced significantly the burdens of travel on Judges and attorneys that is sometimes offered as a reason to divide the Court. In addition, the Court has taken innovative steps in other areas to enhance its efficiency including
the creation of an appellate commissioner to resolve certain routine motions and other matters and an active and highly-regarded appellate mediation progiam that resolves about a thousand cases each year. Of course, these programs -especially the strong appellate mediation program -save businesses time and money. In a divided and smaller circuit, the resources to support these and other innovations would be scarce and many of them might wither to the detriment of judicial effectiveness and efficiency.
Let me mention one specific and innovative program to highlight this point. The Ninth Circuit was the first circuit to create a Bankruptcy Appellate Panel that now resolves some 500 bankruptcy appeals each year and reduces the case load facing the district and circuit courts. I mention this because as the bankruptcy judges who are members of this appellate panel explained in a letter to one of the members of this Committee in 2004, bankruptcy touches more American lives than any other federal law except the Federal Tax It is an important aspect of business and corporate law and it affects hundreds of thousands of individuals. The
4 Letter of May 10, 2004 from Bankruptcy Judge Perris to The Honorable Jeff Sessions and attachment thereto (Statement Opposing Division of the Ninth Circuit by the Judges of the Bankruptcy Appellate Panel)("BAP Statement Opposing Circuit Division").
availability of an experienced and highly-regarded Bankruptcy Appellate Panel in the Ninth Circuit contributes significantly to the predictability and certainty of the law in this important area. It also conserves both district court and circuit resources by resolving cases that would otherwise require the attention of these courts. As the Judges on this Panel have explained, historically they have handled approximately 60% of the bankruptcy appeals with the consent of the parties while the district courts have handled 40%. Of these appeals, only some 25% proceed to a second level of review before the Ninth Circuit. Significantly, appeals that go through the Bankruptcy Appellate Panel are much less likely to proceed to this second level of review than appeals that go through the district court^.^
As the members of the Bankruptcy Appellate Panel point out, the advantages they provide in the delivery of judicial services in this important area of business law would likely disappear if the Ninth Circuit were divided. The case loads of the smaller circuits, particularly any new circuits

that do not include California, would be unlikely to support such an institution and the smaller number of districts in either of the new circuits would make creation of such a panel difficult under the governing legal
BAP Statement Opposing Circuit Division at 3-5.

standards? Loss of this important and well-established innovation in the bankruptcy area would not serve the interests of individuals or businesses in the Ninth Circuit.
To summarize, the size of the current circuit confers positive advantages for innovation in the delivery of judicial services, advantages the Court has seized effectively in many areas.
Third, as a former corporate general counsel and as an attorney representing corporate clients over the years, Iam all too familiar with the tough decisions business managers regularly must make about allocating limited financial resources. The government certainly faces these same constraints, especially today. Icannot help but question the wisdom of spending scarce government funds to create the new bureaucracies and structures that additional circuits would require if the Ninth Circuit were divided. In the business world, companies routinely find themselves seeking to eliminate -rather than increase -this kind of duplication. My concern on this point is particularly acute because a decision to spend significant sums today to divide the circuit would surely soon appear
BAP Statement Opposing Circuit Division at 2-4.
shortsighted. In fact as soon as a division occurs, any new circuit that includes ~alifornia will be nearly as large as the current court in its number of Judges and its case load due to the size of the state and the volume of cases that come from it. In a few short years, because of continued growth in California, a new circuit that includes it would reach or exceed the current Court's size. Within a few more years, other circuits may also reach the same size thresholds, for example the Second and Fifth Circuits. We cannot afford, either financially or legally, to continually divide our federal circuits when they reach the size of the current Ninth Circuit. We must find ways to turn size to our advantage in the federal court system and the Ninth Circuit has been a pioneer in this area.
lndeed, it would be a far wiser investment of limited.federal resources over the long term to support the efforts of the current Ninth Circuit to confront and solve the challenges of its size rather than split the court in an ultimately fruitless effort to limit the size of our federal courts of appeals. The Ninth Circuit has made great strides in taking advantage of technology to improve its efficiency, consistency, and delivery of judicial services. Congress should support this and similar efforts with available funds rather than use limited federal dollars to divide the Court.
Finally, let me address very briefly three points that are frequently made in support of splitting the Circuit. First, one often hears that the Ninth Circuit is so large and issues so many opinions it is too difficult for lawyers to stay abreast of developments in the law. This point has some superficial appeal but no real merit. The number of opinions the Court issues is not actually a function of its size. In fact the smaller Eighth Circuit issues even more opinions per year andthe Seventh Circuit nearly as many. More importantly, almost no attorney's practice requires him or her to keep up with the law in all areas. Rather, we specialize and try to keep up to speed on the law in the specific areas of our practice. The fact that the Ninth Circuit may issue some 700 published opinions each year across the many areas of practice in which it hears cases means little as a practical matter.
Second, proponents of a split also often cite the current circuit's geography as a reason to divide it arguing that its size imposes unacceptable burdens on Judges and lawyers alike. This point too

has some superficial appeal -no one likes to travel and those of us who do would like to do so less. But dividing the Ninth Circuit will not resolve this problem. Whatever circuit they are in, Hawaii, Guam and the other Pacific Islands-and even Alaska -will still be many hours by air from circuit headquarters. Likewise, the new circuit proposed in S. 1845would still span some 4,000 miles from the Arizona border to Alaska and still require considerable travel by Judges and lawyers -and possibly even more complicated travel -than the current court with its headquarters in San Francisco.

Third, the long history of efforts to divide the Ninth Circuit is unfortunately replete with statements from different members of Congress at different times urging division of the Court because of a disagreement with the Court about a particular decision or series of decisions.' While I am confident that everyone here today would agree with the White Commission's statement that:

[tlhere is one principle that we regard as undebatable: It is
wrong to realign circuits (or not to realign them) or to restructure
courts (or to leave them alone because of particular judicial
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decisions or particular judges, the history of this issue makes any legislation focused solely on restructuring the Ninth Circuit politically suspect. Consequently, I believe

Recent examples of such statements include, among others, 149 Cong. Rec. H7087- 0, H7087 (July 17, 2003)(statement of Rep. Young), 149 Cong. Rec. S14547-03, S14560 (Nov. I2,2003) (statement of Sen. Santorum), 149 Cong. Rec. S3254-01, S3319 (Mar. 6, 2003)(statement of Sen. Murkowski), 149 Cong. Rec. S3074-01, S3075 (Mar. 4,2003)(same).

White Commission Report at 6.

the only way for Congress to address changes to the'structure or alignment of the federal courts of appeals and escape this unfortunate shadow is to address court structure comprehensively, thoroughly, and through an independent process. Looking forward ten, twenty, or even thirty years, it is likely that some changes will be needed to keep our federal appellate courts efficient and effective. Some of these may even involve realignment of current circuit boundaries. As I have said, these changes may ultimately prove to be more about consolidation than division. But carefully exploring what those changes might be in a rapidly changing world may well be worth the Committee's time and attention. Continuing to focus narrowly and repeatedly on proposals to divide the Ninth Circuit, however, is a tainted and unnecessary approach that the Committee should reject once and for all.

In sum, everyone in business is familiar with the maxim "ifit ain't broke, don't fix it." For all of the reasons discussed above and those articulated so well by others including the overwhelming majority of the Ninth Circuit's active and senior Judges, I believe this maxim should guide the Committee and the Congress in its deliberations about the future of the Ninth Circuit. The current Court is not broken -far from it. The Court is a leader in the innovative and effective delivery of justice. It serves its lawyers, businesses, and other constituents well. I urge you to oppose any legislation that would divide the Court. Thank you for your consideration of my views.