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Written Testimony of
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United States Court of Appeals
for the Ninth Circuit

I thank the Subcommittee on Privacy, Technology and the Law for the opportunity to testify on the use of technology in the Ninth Circuit and proposed legislation to divide the Circuit. My name is Sidney R. Thomas. I am privileged to serve as Chief Judge of the Ninth Circuit Court of Appeals, with chambers in Billings, Montana. The views I express are my own.

TECHNOLOGY AND INNOVATIVE JUDICIAL ADMINISTRATION IN THE NINTH CIRCUIT

The Ninth Circuit leads the judiciary in technology and innovative case management. The Circuit is regarded as a model in judicial administration by local and national court administrators. The Ninth Circuit has adopted a regional approach to the utilization of staff, resources, and consolidation long practiced in private industry by corporate and multinational organizations. The Circuit is very well administered, demonstrating the benefits of economies of scale, critical mass of resources, and consolidation of services.

The Court of Appeals

Technological Advancements

The Ninth Circuit Court of Appeals has long been on the forefront of technological advances within the judiciary. In the early 1980's, far before widespread commercial use, then Chief Judge Browning deployed the first electronic mail system in the Court of Appeals in order to promote better and faster communications. Technical innovations in the Circuit have continued since that time. A few examples:

- **Electronic Docketing and Case Management Systems.** The Circuit helped develop and implement early electronic docketing systems, enabling the electronic filing of briefs and excerpts of record, and providing attorneys, parties and the public continuous access to the court and to case materials. The Ninth and Second Circuits were the first appellate courts to pilot NextGen, the latest version of the Judiciary's case management software, in order to dramatically simplify and improve the filing process.

- **Custom Application Development to Improve Case Management**. The Circuit's technical staff have developed custom software to extend and enhance the capabilities of the case management and electronic filing system provided by the Administrative Office of the United States Courts. These custom applications:

    - Electronically compile briefs, excerpts of record, and other filings in a form easily accessible by judges on mobile devices and computers.

    - Randomly assign cases to argument panels based on priority, age, hearing location, district of origin, recusals, and a variety of other constraints.

    - Maintain the inventory of cases pending in the court in order to manage case flow, linking cases together by related issues to ensure that panels are working as efficiently as possible.

- **The Future of Electronic Docketing and Case Management.** Recognizing that the evolution of technology will continue to outpace the Judiciary's ability to innovate, the Circuit is independently engaging with a federally-funded research and development center to develop a strategic vision for the "Circuit Court of the Future" and a plan for embracing new technology to maximize our operational efficiency.

- **Video-conferencing.** We began establishing a video-conference network in 1998. That network has allowed us to avoid significant travel expenses by having judges participate in administrative meetings by video. We have also employed video on a selective basis for oral argument when a judge or an attorney cannot travel.

- **Oral Argument Streaming.** Since 1996, the Ninth Circuit has allowed the media to video and audio record oral arguments, subject to certain technical restrictions. Since then, cameras have been allowed in innumerable Ninth Circuit appellate proceedings. Some of these cases drew great public interest and were watched by millions of viewers nationally and even internationally. In December 2013, the Court began video streaming oral arguments of en banc cases. In January 2014, the Court commenced live audio streaming of all arguments. In April 1015, we began live video streaming of all oral arguments. Currently, we are the only circuit to live broadcast every appellate oral argument.

- **Video and Audio Argument Archiving.** In 2008, we made digital audio recordings available to the public via our court website. In 2010, we commenced video recording of all en banc oral arguments, making those video files available to the public. In 2015, we began archiving all video recordings of oral arguments.

  We currently have 4,041 videos posted. Our archived videos have been viewed 1,314,146 times. The highest number of connections to live streaming on our website was 137,300. An archived audio recording of that argument was listened to an additional 138,615 times. A case concerning prosecutorial misconduct, *Baca v. Adams*, has been viewed 37,600 times. *Peruta v. San Diego*, a Second Amendment case, has been viewed 21,951 times. Between live streaming viewers and those who accessed archival video, the oral argument in *United States v. Bonds* was watched by over 19,000 viewers. We have received numerous expressions of thanks from the public, law schools, the bar, and media for establishing video access to our oral arguments.

- **Cloud Computing.** For the last five years, the Circuit has been the leading advocate for a Judiciary-wide strategy to embrace cloud computing. We were the first court to transition key workflows to commercial cloud providers, realizing significant cost savings and reliability over internally hosted options.

- **Website.** In addition to access to oral arguments, we maintain a robust website that provides public access to all aspects of the court and the Circuit, including calendars, opinions, memorandum dispositions, rules, and legal guides. For high profile cases, we offer individual "Case of Interest" web pages providing hyperlinks to briefs, orders, and other documents. These pages have proven highly effective in keeping the media and public informed of the progress of important cases.

Case Processing

The Court of Appeals has been innovative in its case processing techniques. The present structure is designed to efficiently resolve administrative questions that need not be decided by judges, and to present questions that require judicial resolution in the most effective manner. These administrative efficiencies are unique to the Ninth Circuit and are only available because we have been able to aggregate our resources. To take a few examples:

- **Case tracking and batching.** Because we have the collective resources to do it, the Ninth Circuit is the only Circuit to profile and inventory each case when briefed. These case profiles allow us to track issues and cases. Cases involving similar questions are grouped together for oral argument to promote consistent treatment. Cases are also stayed pending resolution of dispositive issues in published opinions. This process allows us to resolve dozens of cases that were dependent on the outcome of the issue when a lead case is decided in a precedential opinion. Case and issue tracking also promote uniformity in Ninth Circuit case law.

- **Staff Attorneys.** The staff attorneys are a critical component in the resolution of a large volume of appeals – assisting to resolve well over half the appeals filed in the Circuit.

    - **Habeas appeals.** Last year, the staff attorneys presented 1,452 habeas petitioners' requests for a Certificate of Appealability. Panels denied 94% of the requests, terminating 1,349 appeals at that early, pre-briefing stage.

- **Merits screening cases.** Last year, staff attorneys presented 2,365 appeals on the merits to screening panels, resulting in the resolution of 2,286 appeals. This figures includes 1,677 merits screening cases, 647 second or successive habeas petition applications, and 44 substantive dispositive motions.

- **Motions.** Last year, staff motions attorneys disposed of 5,127 motions through clerk orders that would otherwise be handled by judges; 3,647 of those orders resulted in case terminations. Judicial motions panels resolved 3,206 motions.

- **Pro Se Unit.** Almost 50% of total appeals in the Ninth Circuit are filed by pro se litigants. Last year, for example, there were 5,454 pro se appeals filed in the Ninth Circuit. These appeals are processed by a special Pro Se Unit in the Ninth Circuit staff attorneys office. The vast majority of these appeals are then resolved by presentation to screening panels made up of Article III judges. Very few of these cases are referred to judges' chambers for consideration by oral argument panels. The significance of this assistance is underscored when we consider that approximately 20% of the pro se volume consists of immigration cases.

  Last year, the Pro Se Unit of the staff attorneys office reviewed most of the 5,454 pro se appeals for jurisdictional issues and was responsible for issuing orders in nearly 1,800 of those pro se appeals, many of them dispositive.

  In addition, when pro se cases are not deemed suitable for resolution through motions or screening panels, the court instead appoints pro bono counsel before sending the case forward to a merits panel. Our very popular pro bono program guarantees argument to volunteer counsel and is coordinated by the Pro Se Unit staff working through private attorneys and law school clinics throughout the Circuit.

- **Immigration cases.** Our Court of Appeals staff resources are particularly well suited to handling immigration cases. A careful examination of immigration cases indicates that the most effective method of managing them is through intensive staff review, prior to judicial involvement.

  Immigration relief is procedurally complex. Many petitioners fail to comply with procedural requirements. Many others file petitions over which the court of appeals lacks jurisdiction. In fact, our current statistics show that 65% of the fully-briefed immigration petitions for review are resolved through the staff screening process rather than on oral argument calendars.

  When all immigration petitions for review are considered collectively, only 12% end up being presented to oral argument panels. Of the 3,274 immigration petitions for review resolved last year, 1,896 were resolved on procedural grounds, 337 by summary disposition judge order, 688 by judicial screening panels, and 394 by oral argument panels.

- **Results.** To put this into perspective, in an average year, over 60% of the filed cases are terminated through staff assistance before they reach a merits panel. Of the remaining merits terminations, 40% of the cases are resolved by judicial screening panels deciding the cases based on staff presentations. Taking this all together, the Circuit staff provides the primary assistance in the resolution of 80% of appeals; the remaining 20% were resolved by judges and their chambers staff on oral argument calendars. This efficiency allows judges to focus on the cases that deserve the most attention on the merits, rather than wasting time on straightforward, frivolous, or procedurally barred appeals.

- **Appellate Commissioner.** Another significant innovation in the Ninth Circuit was the creation of the Appellate Commissioner position in 1994 to relieve circuit judges and district judges of a large volume of properly delegable judicial tasks. The delegation of those

tasks to a magistrate-level officer at the appellate level has brought consistency and speed to the resolution of administrative and procedural matters, has contributed to efficient case management, and has been well received by the bench and bar. No other circuit has an Appellate Commissioner.

The Appellate Commissioner rules on a wide variety of nondispositive motions; manages the selection, training, and compensation of appellate counsel appointed under the Criminal Justice Act, and acts as special master for the court, conducting hearings and preparing orders and reports and recommendations in attorney disciplinary matters, applications for fee awards in civil appeals, requests by criminal defendants for self-representation on appeal, and contempt enforcement proceedings brought by the National Labor Relations Board.

The Appellate Commissioner also conducts case management conferences in complex criminal appeals, setting customized briefing schedules and budgeting Criminal Justice Act funds. All orders issued by the Appellate Commissioner are subject to reconsideration by the court.

The Appellate Commissioner has relieves district judges of fact-finding tasks that many circuit courts now remand to district judges. The appellate commissioner determines the amount of fees to be awarded in civil appeals when the court has concluded that a party is entitled to a fee award, and the appellate commissioner conducts disciplinary hearings pursuant to Federal Rule of Appellate Procedure 46(b) and issues reports and recommendations when the court has issued an order to show cause why an attorney should not be suspended or disbarred. Because the Appellate Commissioner is familiar with appellate practice, the fact-finding is tailored to the specific needs of the circuit court.

In 2016, the Appellate Commissioner performed the following tasks, all of which had previously been performed by Article III judges:

- Issued 3,767 orders on non-dispositive motions

- Resolved 1,738 payment applications by counsel under the Criminal Justice Act

- Issued 62 attorney fee award orders in civil appeals referred by the Court

- Issued 27 Reports and Recommendations in attorney discipline, self-representation, and contempt matters referred by the Court

The Ninth Circuit was able to create the Appellate Commissioner position by reconfiguring its staff resources and employing efficiency measures precisely because of the economies of scale available in a large circuit.

- **Circuit Mediator.** The Ninth Circuit Mediator's office has been a remarkable success story. Last year, the Circuit Mediator's office resolved 1,135 appeals–approximately the same total case resolution of some of the smaller circuits. In 2015, the office settled 1,405 cases. No other circuit even comes close in terms of productivity through mediation. Our productivity is attributable to the flexible resources we can devote to hiring mediators and less to duplicative overhead. A mediator's office needs critical mass to achieve success.

  When a case is settled through mediation, the parties achieve a finality that is often not possible through resolution by panel adjudication, which may result in reversal or remand for further proceedings. Complete resolution through settlement thus saves work for the district courts and administrative agencies. Mediators also have the ability to bring non-parties to the table to effect a global settlement of all issues pertaining to a controversy.

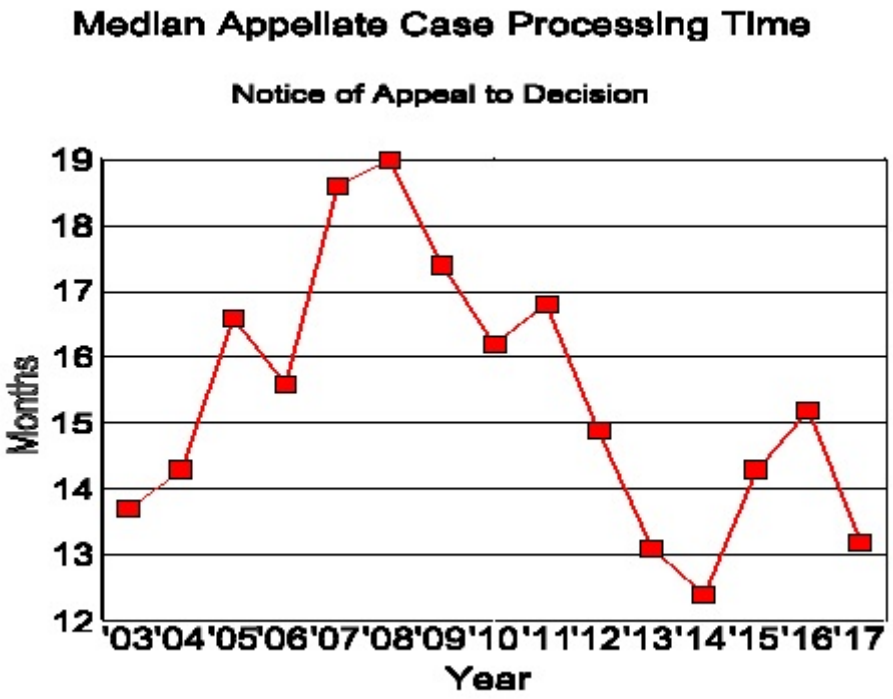
Many of the civil cases the mediators settle are either interlocutory appeals or cases with related state court actions. Settlement through mediation resolves all related pending litigation and often multiple appeals at the same time.

In addition, the mediators have assisted in organizing and managing complex and voluminous related appeals. For example, hundreds of administrative petitions for review were filed challenging decisions of the Federal Energy Regulatory Commission as a result of the California energy crisis. The Circuit Mediator organized the presentation of the petitions to the assigned argument panel in a way that would maximize the possibility of settlement. Over a decade, these settlement efforts have resulted in refunds of $8.6 billion.

- **Bankruptcy Appellate Panel.** The size of the Ninth Circuit enables it to provide the space, information technology, and administrative services to support the Ninth Circuit Bankruptcy Appellate Panel. The BAP, at a minimal cost, resolved 482 appeals last year, producing decisions that contributed significantly to the development of uniform bankruptcy law within the Circuit. In addition to reducing the district court workload, the BAP reduces the workload of the Court of Appeals because the rate of secondary bankruptcy appeals from BAP decisions is consistently less than the rate from district courts. BAP judges are sitting bankruptcy judges who cannot hear cases arising from their own districts. The number of districts in the Circuit provide a sufficient pool of volunteer bankruptcy judges to hear cases from all districts without running afoul of the conflict prohibition. All of these benefits would likely be lost in a Circuit split.

- **Net Results.** The net result of these processes and innovations is that the Circuit is equipped to deal with a high volume of cases, including temporary surges in filings. As I will discuss in more depth later, one of the most significant challenges we faced was the enormous increase in immigration filings when the Department of Justice decided to eliminate the administrative backlog of 56,000 cases before the Board of Immigration Appeals. As a result, the BIA issued tens of thousands

of decisions in a matter of months. Our immigration caseload increased 582.7% from 2001 to 2005 (from 955 cases to 6,520). During that same period, our court's non-immigration caseloads have actually decreased 0.2% (from 9,713 cases to 9,692). We effectively took on the entire work of another Circuit during this time period. However, with our innovative case processing methods, we were able to address the increase. Although our case processing times temporarily skyrocketed, we have significantly reduced them. The attached graph shows the improvement.



From our high median processing time at the peak of the immigration onslaught to the present, we have reduced case processing time by 30%. In the last six months alone, our median case processing time has improved by 12.5% to 13.3 months.

- **Circuit comparison.** In comparison, no other circuit has an Appellate Commissioner, no other circuit has the staff resources for case tracking, no circuit has a mediation program that even comes close to the size of our Mediation Unit, few circuits have a Bankruptcy Appellate Panel, and no circuit has a staff attorneys office to match the size and flexibility of the Ninth Circuit Court of Appeals.

District and Bankruptcy Courts

Because of aggregation of resources, the Circuit has been able to provide substantial assistance to the Circuit's district courts, bankruptcy courts, and pretrial/probation services. We have 15 district and 15 bankruptcy courts. The Ninth Circuit as a whole has 165 district judges, 134 magistrate judges, 78 bankruptcy judges, and 1,055 pre-trial/probation officers. This critical mass of judges and officers provides the Ninth Circuit the flexibility and ability to allocate resources in the most effective and efficient manner to address district and bankruptcy court needs. In addition, the current structure of the Ninth Circuit allows the aggregation of resources available to the districts, which facilitates the effective and efficient delivery of justice.

Allow me to provide a few examples.

- **Assignment of Intra-Circuit Visiting Judges to Districts in Need.** The size of the Ninth Circuit allows the Chief Judge to deploy visiting judges to overloaded districts quickly, in order to meet caseload demands. Experience has shown that sudden caseload increase is often caused by temporary events other than expected caseload growth. For example, the Department of Justice's Operation Streamline, commenced in 2005, put tremendous pressure on the courts in Arizona, placing in a state of judicial emergency. Many criminal prosecutions were in danger of being lost because the trials could not be held within the time frame required by the Speedy Trial Act. Because of the size of the Circuit, the Chief Circuit Judge and the Chief District Judge of Arizona were able to devise a plan to designate visiting judges to Arizona quickly to provide coverage for the increased filings.

In fact, since 1999,we have made almost 200 intra-circuit visiting judge designations to Arizona, most of which involve multiple case assignments. We also dispatched eight circuit mediators to Arizona during its period of judicial emergency, resulting in the settlement of 88 cases. As a result of these efforts, we were able to abate the state of judicial emergency.

We faced a similar situation in 2004 when Judge Unpingco's term as Chief Judge of the District of Guam expired before a new chief judge was confirmed. The Circuit was able to provide intra-circuit judges for two weeks of every month until a new Chief Judge was confirmed in late 2006.

In addition to Arizona and Guam, we have assisted virtually every district at one time or another. We have provided substantial assistance in a variety of initiatives to the significantly overburdened Eastern District of California. The District of Idaho has suffered from a judge shortage, which is exacerbated by its geographic challenges. Since 1999, we have made 300 visiting judge designations to Idaho, many on extremely short notice. The Southern District of California has experienced border-related spikes in its caseload over the years. Since 1999, we have made 81 separate intra-circuit visiting judge designations to the Southern District. When the District of Montana was down to a single active judge, we flew in judges from all over the Circuit to assist.

We accomplished these results only through the aggregation of judicial resources throughout the Circuit. Because the assignments were intra-circuit, they could be accomplished quickly. If a hearing needed to be covered on short notice, we could find a judge to do it.

In addition to the district court designations, the bankruptcy courts also benefit from intra-circuit designations. Bankruptcy filings fluctuate much more than the district courts. When filings spike, as they have periodically over recent decades, we have responded by designating bankruptcy judges from Alaska, Montana, Nevada, Oregon, and Washington to assist the bankruptcy courts in California

and other courts throughout the circuit, including Guam and the Northern Mariana Islands. These designated judges were able to adjudicate approximately 1,200 California bankruptcy cases.

In contrast, out-of-circuit assignment of visiting judges is a more complex and slower process. In order to obtain a visiting judge from outside the Circuit, a request is made to the national Inter-Circuit Assignment Committee, the Chief Judges of both affected Circuits are consulted, and the visiting judge assignment is ultimately approved by the Chief Justice of the United States Supreme Court. This process depends on the availability of all the consulted parties and can take a month or more to complete.

In addition, the assignment of out-of-circuit visiting judges necessarily means that the assigned judges will not have familiarity with Ninth Circuit law, whereas judges assigned from within the Circuit will already know it.

- **Bankruptcy Courts Contribute to Innovation.** Bankruptcy courts in the Ninth Circuit are instrumental in conceiving, developing, testing, and piloting new software enhancements that have revolutionized the filing and storage of bankruptcy documents, public access to bankruptcy information, the ability of bankruptcy participants with and without legal representation to effectively participate in the bankruptcy system, the collection of fees, and the practice of law in federal courts. In addition to facilitating public access to the courts, these innovations have created efficiencies that enabled bankruptcy courts throughout the nation to reduce staffing and other costs even as caseloads dramatically increased.

  The core of the revolution has been the judiciary's Case Management and Electronic Case Files system. District and bankruptcy courts in the Ninth Circuit pioneered the original version of our system, and three Ninth Circuit bankruptcy courts are pilot courts for the next generation of the system.

Several Ninth Circuit courts have created software programs that work in conjunction with the core system. These program assist debtors without legal counsel to prepare and electronically file their documents; facilitate electronic filing of bankruptcy documents and data by attorneys; save postage, supplies, and staffing costs through electronic notification by courts; ensure sound financial management by providing the means to capture over-the-counter fee receipt information into case records and financial systems; and provide ways for the courts to automate the scheduling and management of court hearings, and the issuance of tentative rulings and minute orders.

The Ninth Circuit bankruptcy courts frequently utilize telephone and video hearings to allow participants in remote areas to attend without traveling long distances. The Ninth Circuit bankruptcy courts have also been on the leading edge of customer service innovations, such as help centers staffed by law clerks, court staff, and volunteer attorneys to assist pro se debtors, and online chat services to answer questions and provide procedural guidance to court users.

- **Cost Savings.** The centralized management of the Ninth Circuit has resulted in considerable cost savings. Here are a few examples:

  - **Capital Case Management.** The provision of legal representation in capital cases has been a significant expense to the judiciary. In response, the Circuit mandated capital case defense budgeting and have created a committee of district judges to review the budgets. The committee has done remarkable work in analyzing capital case budgets, saving millions of dollars. Small circuits do not have the critical mass of judges to serve these functions.

  - **Space and Facilities Planning.** The architects and professional space planners in our Ninth Circuit Office of the Circuit Executive work with the courts on courthouse construction and renovation projects. Their first-hand knowledge, born of personal relationships and frequent contact,

allows them to leverage expertise and space to better ensure efficient and less costly projects throughout the Circuit.

The Ninth Circuit Executive's office has aggressively identified and reduced federal space needs, resulting in significant savings in rent. The Judicial Conference of the United States Space Reduction Program calls for reducing space by 3%, and freezing the existing net space footprint.

As of now, the Ninth Circuit leads the nation in space reduction. In fiscal year 2014, the Ninth Circuit published a formal Circuit Space and Rent Management Plan consisting of multiple space reduction projects submitted by the districts. Since that time, the Ninth Circuit Executive's office has been working with the Circuit, district courts, bankruptcy courts, and probation/pretrial offices to execute these projects. The Circuit's space reduction plan includes projects totaling square footage sufficient to exceed the Circuit's official space reduction target of 225,000 square feet, which must be completed by fiscal year 2018. The Circuit has made tremendous progress towards the space reduction goal and has released nearly 200,000 square feet to date. Additional space reduction projects totaling 70,000 square feet are now in progress. Thus far, the completed Ninth Circuit space reduction projects have led to a rent cost avoidance of approximately $8 million per year. These space reductions and concomitant savings are possible only because we have been able to aggregate our resources.

- **Case Managing Attorneys.** The Ninth Circuit Case Managing Attorneys assist judges and Criminal Justice Act panel lawyers with budgeting and obtaining resources on criminal cases. They also track and maintain budgeting data in a database. Until recently, there was no central way to track budgeting data. The Case Managing Attorneys built a case budgeting database prototype and sought funding from the Ninth Circuit and

Defender Services Office of the Administrative Office of the United States Courts to develop the product.

When budgeting a case, CJA lawyers will work with their Circuit Case Managing Attorney to complete a budgeting form. The process helps the lawyer assess case costs and think about shared resources, such as the use of paralegals, investigators and experts. Additionally, discovery organization issues are identified and resolved with proposed solutions in the budget. The long term vision of the new system is to provide a mechanism in which the judges can compare and contrast budgets electronically, and Circuit Case Managing Attorneys can analyze historical budgets or service provider rates in an automated fashion. The system will facilitate the data driven decision making process. The Case Managing Attorney system has improved the quality of representation while lowering the cost to taxpayers.

- **Managing Library Resources.** Consolidating resources has enabled the most efficient use of library resources. The cost of maintaining library assets becomes challenging as prices continue to rise. For example, from Fiscal Year 2009 to Fiscal Year 2016, library subscription prices have increased approximately 31%. In Fiscal Year 2009, the Ninth Circuit spent $6.4 million on subscriptions. Those same subscriptions would cost $8.4 million this year. While the cost of subscriptions continues to increase, available funding has decreased. In fact, we received 30% less money for library subscriptions this year than we did seven years ago. Maintaining centralized library services allows us to keep these costs at a minimum. In addition, centralized library services allows us to take advantage of scaled volume pricing for electronic services, such as Westlaw and Lexis.

- **Information Technology.** In the field of information technology, the Circuit has taken a sophisticated, comprehensive approach to information technology initiatives, resulting in significant cost savings.

    - **Cybersecurity.** The Office of the Circuit Executive has created a cybersecurity team that is cybersecurity guidance and resources to the courts within the Ninth Circuit, many of which could not afford to invest in such resources. Having centralized IT security experts on staff to support all court units with the Ninth Circuit ensures the security of a significant number of the courts' public websites by assisting with remediation and prevention from cybersecurity threats.

    - **Technology Awareness Training.** The Office of Circuit Executive coordinates meetings of judges to address long and short term technology goals of the Circuit, technology awareness training for judges in the areas of security, and the efficient use of current technology. Circuit IT staff organize conferences with court technology professionals, to promote national solutions, and provide guidance and coordination among Ninth Circuit courts. The OCE IT staff act as a resource to courts with limited IT staffs. The Circuit hosts an annual Technology Users Group Conference that includes Ninth Circuit judges, IT managers, and court unit executives and is well attended by judges and staff from other circuits and the Administrative Office of the United States Courts.

    - **District Initiatives.** The Circuit has encouraged the district and bankruptcy courts to develop applications that can be used circuit-wide. The results have been impressive. To provide just a few examples:

        - **Nevada.** The District of Nevada developed an electronic Criminal Justice Act attorney voucher system. The Circuit promoted the system for use throughout the Circuit, and it was eventually adopted as a national

program. It has resulted in significant cost savings and allowed cross-district fee audits.

Nevada has enhanced access to justice through the use of video displays of court schedules in public hallways. The District piloted an on-line Juror Questionnaire system for the Circuit's Jury Trial Improvement Committee, which interfaces with the national jury management system.

The District has realized costs savings through the implementation of local programs and systems related to electronic docketing, attorney registration management, check writing, procurement and budgeting, finance, and inventory management. Computer virtualization has saved power, hardware costs, and operating system license fees.

- **Eastern District of California.** The Eastern District has developed a number of technological solutions that benefit the court and other stakeholders. A few examples are: (a) the creation of a misdemeanor processing website; (b) an electronic warrant request and signature system that allows efficient submission and consideration of warrant requests; (c) an e-filing system for prisoner civil rights cases, which dramatically decreases the time spent by prison and court personnel; and (d) a system of automated judgment forms to promote consistency and accuracy in final criminal judgments.

  The Eastern District has also placed kiosk computers in their lobbies, allowing probation clients who do not have access to a computer to complete monthly supervision reports. Encouraging their clients to complete reports using the kiosks reduces time spent processing paper submissions.

- **Hawaii.** The District of Hawaii's consolidated District Court and Probation Office IT team created a web application used by probation and pretrial officers. This application was developed to allow officers to enroll their clients, schedule automated text messages of scheduled drug tests, and handle responses back from clients confirming receipt. It tracks responses and drug test attendance , as well as coordinating data collection and storage. The District has also developed an application allowing pre-trial and probation officers to communicate with clients who speak limited English.

- **Western District of Washington.** The District Court for the Western District of Washington has developed several technological enhancements, a few of which include: (1) automation of its alternative dispute resolution (ADR) process via a SharePoint workflow to improve work processes; (2) a standard interpreter voucher that improves accuracy and speeds up payment processing; (3) implementation of prisoner e-filing for all state institutions in Washington in partnership with Eastern Washington; (4) electronic tracking of IT purchase requirements; and (5) development of Sharepoint document libraries for chambers.

- **Northern District of California.** The District Court for the Northern District of California has many locally developed applications, examples including a sophisticated automated document tool that provides automatic and time-saving functionality for work on court documents related to cases on CM/ECF. The Bankruptcy Court developed an electronic transfer of unclaimed funds program that eliminates the need for manual checks, allows for electronic document upload and produces a customized report.

- **Arizona**. The District of Arizona has initiated a prisoner e-filing program to reduce significantly the costs and labor associated with processing prisoner litigation. The District has initiated the use of electronic exhibits for trials and hearings. The Bankruptcy Court has developed calendar software that automates hearing scheduling and order processing. The system is now used by 25 other bankruptcy courts. The Probation Office has developed a private videoconferencing system to facilitate pre-sentence interviews with inmates and to provide secure communications between attorneys and clients. It has paid enormous dividends in saving time and money, and enhancing safety.

  Recently, by means of an Intergovernmental Agreement with the Phoenix Police Department the Office implemented network access through a federal judiciary Internet gateway to Phoenix PD's records system. This access consists of connecting to Phoenix PD's internal network by means of an AO supported on-demand VPN tunnel, and utilizing virtual desktop sessions to access Phoenix PD's client-server based RMS system. This system provides instant access to Phoenix PD's records at no cost to the court, versus having to deal with the time and effort involve with sending fax requests to Phoenix PD for arrest report information.

  Similarly, the District of Arizona Probation and Pretrial Services Offices, through a Memorandum of Understanding with Maricopa County Sheriff's Office, have query access to IBM's Coplink law enforcement intelligence/query system, which provides access to law enforcement history data contributed by many local law enforcement agencies including the police departments of Phoenix, Tucson, Mesa, Glendale, and other municipalities, as well as MCSO.

- **Southern District of California.** The Southern District of California has developed a system allowing the transfer of files from bankruptcy lawyer's software directly into the docket, reducing redundant data entry for the law office and improving quality control in the clerk's office. The Southern District developed financial receipt software, which is used by 80 of the 90 bankruptcy courts. The Pretrial Services Office has automated its bail reports to more effectively and efficiently transmit bail information to the courts.

- **Oregon.** The Bankruptcy Court for the District of Oregon has implemented a number of technological innovations, including: (1) automated messaging reminders to debtors of upcoming payments; (2) an electronic fee payment system; (3) automated notice system; (4) digital audio recordings of court proceedings; and (5) electronic Proofs of Claim and Financial Certification.

  The Probation Office for the District of Oregon implemented a Field Safety App, which increases officer safety and efficiency when working with clients during field visits. Safety features allow the officer to notify a supervisor when the officer has entered and expects to leave a client's home, so that the supervisor can confirm that the officer has arrived safely from a home visit. The app's mapping, odometer, and reporting features minimize the time officers take to submit required forms and create chronological records of client contacts.

- **Central District of California.** The Central District has developed an automated travel record system that saves time and money. The District has also created a program that allows courtroom staff to submit daily juror attendance electronically for payment processing, eliminating paper forms and reports.

- **Idaho**. The District of Idaho has been a leader in technology in the courtroom. The Probation and Pretrial Services Office for the District of Idaho has leveraged technology to overcome large geographical distances, using an information technology strategy that is designed to support full functionality away from the office while ensuring continuity of operations capability.

- **Montana.** The Bankruptcy Court in the District of Montana has been a leader in conducting bankruptcy hearings by video, allowing witnesses, parties, and attorneys to participate from across the state. The use of video has saved substantial time and money to the parties and the court.

In sum, both in Court of Appeals, as well as in the District and Bankruptcy Courts, the Ninth Circuit is very well administered, demonstrating the benefits of economies of scale, critical mass of resources, and consolidation of services. The current structure of the Ninth Circuit allows efficient delivery of services to all the districts within the Ninth in a cost-effective manner.

NINTH CIRCUIT INITIATIVES

The Circuit is constantly examining ways to improve performance, deliver better justice, and bring the courts closer to the communities. A consolidated circuit allows many circuit, district, bankruptcy, and magistrate judges to bring their experiences and expertise to bear on important issues. Here are a few current Circuit-wide initiatives:

- **Shared Administrative Services.** Circuit Judge N. R. Smith is leading a task force to identify areas where the Circuit can save money and improve service, including shared services in the district and bankruptcy courts, pre-trial/probation services, and Federal Defender Offices.

- **Prisoner Pro Se Litigants/Prisoner Litigation Summit.** Pro se litigation represents a substantial portion of the caseload in the district courts and in the Court of Appeals. Fifty percent of the appeals are filed by pro se

litigants, over 5,000 cases last year. A full 32% of the total cases filed in the district courts are pro se. Approximately 40% of pro se appeals, or about 2,200 cases per year, come from prisoner pro litigants. Of the pro se civil cases filed in district court, 64% are prisoner pro se petitions.

- **The Prisoner Litigation Summit.** In November 2015, we convened a prisoner litigation summit, bringing together judges, pro se law clerks, federal and state corrections officers, civil rights attorneys, state deputy attorney generals, and academics. The focus of the summit was to identify the root causes of prisoner litigation, administrative burdens in processing prisoner cases, and potential solutions so that the underlying issues could be resolved within the prisons rather than the federal courts. The summit was an enormous success, identifying a number of measures that could be taken to reduce litigation and improve administration. State task forces were established to implement the suggestions, where appropriate for their detention facilities.

- **Non-prisoner Pro Se Litigation.** The Circuit has initiated a variety of technological and other measure to reduce the toll of non-prisoner pro se litigation, such as electronic self-representation programs and self-help centers. A new Circuit initiative is planned to coordinate these efforts.

- **Jury Trial Improvements.** The Circuit's Jury Trial Improvement Committee has issued a model jury plan and best practices report, which includes recommendations designed to improve jurors' experiences in the court system. The Committee will hold its second summit for judges and court staff in April 2018.

- **Criminal Justice Act Committee.** The Ninth Circuit Judicial Council was the first in the nation to require capital case budgeting. It was instrumental, with the support of the district courts and the Circuit Executive's office, in the Administrative Office's national adoption of the District of Nevada's eVoucher system, which allows payment vouchers to be submitted electronically to the courts for review and approval.

- **Civics and Community Outreach.**

  - **Civics.** The Circuit has been extremely active in civics education. For many years, the Ninth Circuit Courts and Community Committee was the only circuit-level committee dedicated solely to civics education, community outreach, and media relations. The committee includes circuit, district, bankruptcy, and magistrate judges. Its accomplishments include:

    - An annual civics education essay and video contest that draws more than 1,000 entries from students circuit-wide.

    - An ongoing series of regional workshops to educate the media and provide an opportunity for reporters covering the judiciary to interact with judges outside the courtroom.

    - A quarterly newsletter circulated to judges and court staff that publicizes successful civics education and community outreach programs.

  - **The Justice Anthony M. Kennedy Learning Center.** The Circuit has provided space and staffing for the Justice Anthony M. Kennedy Library and Learning Center in Sacramento as the lynchpin of circuit-wide civics and public education efforts. The Center's programs are enhanced by its website at http://www.klc.ca9.uscourts.gov. At the recent Ninth Circuit Conference, we brought in experts from around the country to identify the best methods of improving civics education. The result will be a circuit-wide identification of resources and a plan of action for each district.

  - **Oral Arguments in Communities.** In order to bring the Court closer to communities and law schools, the Circuit has emphasized special court sittings in numerous locations around the Circuit. We have held arguments in Tucson; Phoenix; San Diego; Boise; Pocatello, Idaho; Hailey, Idaho; Billings, Montana; Missoula, Montana; Bozeman, Montana; Las Vegas; Reno; Sacramento; Berkeley; Palo Alto; Eugene, Oregon; Spokane, Washington; and Fairbanks, Alaska.

- **Continuing Legal Education.** We work with law schools, United States Attorneys, Federal Public and Community Defenders, state bar associations, and others to ensure that we are offering substantive CLE programs that meet the needs of local legal communities. Five programs held last year focused on immigration and habeas law. We have three scheduled this Fall in the Pacific Northwest, focusing on appellate advocacy. These day-long programs are co-sponsored by local, state, and federal bar associations, featuring our judges and staff. Materials and video recordings are made available on our website and many are live-streamed.

- **Judicial Wellness.** The Circuit has been a leader in establishing programs for judicial wellness, as well as developing processes for identification and resolution of potential disability issues.

- **Fairness.** The Circuit's Fairness Committee, along with the United States Sentencing Commission, has engaged in an extensive examination of potential implicit bias and methods of reducing it.

In summary, the Circuit continues to focus on improving judicial administration, relying on the wealth of knowledge and experience to be found among the bench and bar from throughout the Circuit.

DISADVANTAGES OF PROPOSED DIVISION OF THE NINTH CIRCUIT

Legislation has been introduced that would divide the Ninth Circuit, using various configurations. I oppose division of the Ninth Circuit. Circuit division would have a devastating effect on the administration of justice in the western United States. A circuit split would increase delay, reduce access to justice, and waste taxpayer dollars. Critical programs and innovations would be lost, replaced by unnecessary duplication of administration. Division would not bring justice closer to the people; it would increase the barriers between the public and the courts.

Any division will create unnecessary administrative duplication. Because budgets are caseload-driven, the creation of a new circuit would not mean that more money will be available. On the contrary, existing resources would be

divided. The result would be unnecessary replication of functions (such as case management, procurement, computer operations) which are, by their nature, more efficiently done on a large scale. Unnecessary and wasteful duplication of core services means less money available for functions which have greatly enhanced judicial efficiency.

As I have discussed, the Ninth Circuit is very well administered, demonstrating the benefits of economies of scale, critical mass of resources, and consolidation of services. The current structure of the Ninth Circuit allows efficient delivery of services to all the districts within the Ninth in a cost-effective manner. Division would destroy the efficiency and effectiveness of the present system.

On the Court of Appeals side, we would lose a significant amount of our collective resources. To provide a few examples:

- **Staff Attorneys.** Because of the increased cost of duplicating resources and reduced budgets, we estimate a net loss of one-third of our staff attorneys. This loss would hit particularly hard in the area of pro se litigation management, which involves nearly 50% of our appellate caseload.

- **Appellate Commissioner.** No other Circuit has an Appellate Commissioner because no other Circuit has the resources for it. Division would mean elimination of this position and the attendant resource saving.

- **Circuit Mediator.** The loss of a critical mass of mediators means significantly reduced services. Thus, fewer cases will be resolved through alternative dispute resolution.

- **Case Tracking and Batching.** No other Circuit has the resources for issue tracking and case batching. Thus, this ability to streamline the resolution of cases raising similar issues and avoid conflicts would be lost.

- **Administrative Support.** The Clerk's and Circuit Executive's offices handle a variety of administrative tasks that fall to judges in smaller Circuits, allowing judges to spend more to work on appeals rather than on administrative matters.

- **Net Result.** In terms of appellate caseloads, rather than increasing operational capacity, splitting the Circuit would have a devastating effect on the judiciary's ability to manage the caseload of the western United States. The region covered by our court handles roughly 11,000 cases per year. A circuit split would not reduce caseload; it would only divide it. The only way to handle a caseload of that size is through effective use of court management techniques, made possible by a consolidation of resources, resulting in an economy of scale.

  The present structure is designed to efficiently resolve questions that need not be decided by judges, and to present questions that require judicial resolution in the most effective manner. These administrative efficiencies are unique to the Ninth Circuit and are only available because we have been able to aggregate our resources. Division would deprive the resulting circuit courts of these resources, leading to judges wasting time on matters that could be resolved without expending valuable judicial resources.

  No other circuit has an Appellate Commissioner, no other circuit has the staff resources for case tracking, no circuit has a mediation program that even comes close to the size of our Mediation Unit, few circuits have a Bankruptcy Appellate Panel, and no circuit has a staff attorneys office to match the size and resulting flexibility of ours.

  Because allocation of funding in the judiciary is formula-driven, we know what resources would be available to the two new circuits resulting from circuit division by an examination of what similarly sized circuits can afford at present. Circuit division would reduce or eliminate these essential resources.

The inevitable result will be inefficiency, waste of judicial time, loss of services, and substantially increased delay. A division of the Circuit will mean an overall dilution of resources, leaving far fewer staff resources available to handle these cases, specifically the non-oral argument calendar appeals, which account for 80% of the region's work. Moreover, core functions will be replicated, and additional management positions required, while the "new" Ninth will be forced to lay off a substantial number of valuable staff. Thus, there will be far fewer staff available for case processing. A new Circuit would not have the resources to replicate the current successful Ninth Circuit case processing mechanisms.

Further, case processing would be delayed while the new Circuit would go through the process of being built from scratch, including the necessary costly and time-consuming construction of new courthouses and related facilities. Delay will inevitably increase, and increase substantially.

On the district court side, significant resources would be lost. To provide a few examples:

- **Visiting Judges.** The ability to provide visiting district and bankruptcy judges to districts in need would be substantially impaired. Cross-circuit designations do not work well. The machinery for inter-circuit visiting judge designation is complex and time-consuming. This impairment would significantly reduce the Circuit's ability to respond to emergency needs, such as those faced by Arizona, Montana, Southern California, Eastern California, and Guam. In addition, out-of-circuit judges also have the disadvantage of not knowing Circuit law.

- **Cost Savings and Service.** The advantage of having a mechanism for collective examination of capital case budgeting would be reduced due to lack of judicial resources. Our ability to plan for space and to reduce our space footprint would be impaired because of lack of staffing resources. Each district would have far less support in information technology, human resources, and disability issues.

While the loss of the programs and efficiencies would be deeply regrettable, that loss makes even less sense when those resources would be diverted to unnecessarily replicating fixed assets, such as buildings, libraries, and technical infrastructure. The size and resources of the Ninth Circuit are advantages and not impediments. This result should not be surprising, as the benefits and efficiencies of consolidation are well understood in the private sector. Splitting the Circuit would not just lose these advantages, it would delay our administration of justice immeasurably for years to come.

There are other significant disadvantages to a circuit split. To name a few:

- **Courthouse Construction Costs**. The problem of escalating rent is one of the most serious issues facing the judiciary. The rent paid to the General Services Administration constitutes over 20% of the judiciary's budget. In fiscal year 2016, the Ninth Circuit paid $242,733,228 in rent to GSA. We estimate our Fiscal 2017 rent will be $257,818,286. The current split proposals would compound that problem by forcing the construction of expensive, unneeded buildings, while reducing the staff available to monitor expenditures.
  Current split proposals would require the unnecessary construction of new courthouse space. The proposed legislation calls for a new circuit headquarters in Phoenix and space for holding oral arguments in Las Vegas, Portland, Missoula, and Anchorage. We would need to construct a new courthouse in Phoenix, renovate our current courthouse in Seattle, and construct new facilities for holding hearings in Las Vegas, Missoula, and Anchorage.

  Based on current courthouse construction benchmarks, the estimated current cost of construction of a new Phoenix headquarters would be $136,333,000, assuming the building could be constructed as an annex to the Sandra Day O'Connor U.S. Courthouse. This is based on the following fairly modest assumptions: (a) en banc courtroom @ 3000 square feet; (b) two panel courtrooms @ 1800 square feet each; (c) eight resident judge chambers; (d) twenty-two visiting judge chambers; and (e) 25 new parking spaces. Staffing and judge numbers were projected out for 10 years, resulting in an estimate of 110,000 required usable square feet, which is the equivalent of

179,000 gross square feet, not including parking. No costs for site acquisition are included in this estimate.

If the new circuit headquarters were located in Seattle, the Ninth Circuit's Nakamura Courthouse would need to be renovated at a significant cost to house the full court requirements. The overall requirements would be similar to those in Phoenix. This option would require that other federal tenants on three floors of the building be relocated and those floors renovated to house the staff functions of the new circuit. In addition, this courthouse requires several important infrastructure projects that have been deferred for many years, including a modernization of the frequently failing elevators, and a replacement of the exterior cladding, which is nearing the end of its functional life span. The cost of this option, including the costs incurred by the government for relocating the federal agencies out of the courthouse, is estimated at $54,755,060. This cost includes $19,337,455 for the renovation of the interior spaces and $35,417,605 for the critical infrastructure work."

For new courthouse construction, GSA assumes occupancy then years from the start of design. Both of these circuit headquarters solutions would require the new circuit to acquire temporary space for the first few years, which are not included in the foregoing estimates.

The various split proposals also include spaces for holding court in Las Vegas, Portland, Missoula, and Anchorage, in addition to the potential headquarters locations in Phoenix or Seattle. Of these locations, only Portland has dedicated Court of Appeals facilities. Although the new circuit may be able to borrow space from the district or bankruptcy courts in the other locations for occasional proceedings, permanent accommodations may be required depending on the frequency of use and the ability of the other courts to accommodate the appellate calendar. It is likely that in at least some of these other locations, new space would have to be acquired, similar to the space we currently lease in Honolulu for holding oral arguments. This would require approximately 3,000 usable square feet in each location, which translates into approximately 4,000

rentable square feet. The current benchmark costs for construction of a new courtroom range between $1.5 million and $2.5 million in each location, depending on the locality and whether the courtroom would be in federal or leased space. The visiting judge chambers and staff spaces would incur additional construction costs. The rental costs for these facilities would range from $80,000 to $120,000 a year per location. However, the small caseload indicates that these new facilities would only be used for three or four weeks per year. Despite that fact, the locations would have to be staffed and secured, requiring personnel. The government would be paying employees to staff empty courthouses, built at significant government expense.

- **Library Expenses**. Not only is unnecessary duplication a problem, but the cost of maintaining assets continues to increase, as I have previously discussed. With a circuit split, the core library would have to be replicated, with duplication of the rising subscription cost. In addition, our library is spending more and more money for online database subscriptions. Many of these subscriptions have scaled pricing that benefits a larger circuit. In other words, circuit division would cause more unnecessary library expense for online database subscriptions. The initial subscript cost associated with establishing a new circuit library are estimated to be between $700,000 and $750,000, with recurring annual costs of between $450,000 and $500,000 dollars.

- **Cost of New Judgeships.** The Administrative Office of the United States Courts estimates that the cost of creating a new circuit judgeship is $1,147,561 the first year, with recurring annual costs of $1,052,232. The Congressional Research Service estimates that the average length of active service is 14.1 years.[1] Of course, the cost continues through the term of senior judge service. Of the senior circuit judges in the Ninth Circuit who left service in the past 20 years, the average length of total service was 25.6 years. The current average length of service for Ninth Circuit senior judges who are still

[1] Barry J. McMillion, *U.S. Circuit and District Court Judges: Profiles of Select Characteristics* (Aug. 1, 2017), p. 12.

serving is 31.2 years. The median length of service for those judges, who still continue to serve is 31 years at present. Thus, if one take the lower total service time of 25.6 years, the total undiscounted cost of a circuit judgeship is $28,176,770. If we use the current average length of service for senior Ninth Circuit judges still continuing in service, the total undiscounted cost would be $33,942,125 per judgeship.

- **Video Capability.** The estimated total for addition video-conference and streaming capability to a Circuit is $349,000.

- **Judicial Resources.** Judicial resources would be duplicated as well. As it stands, administrative tasks are shared among the judges. Creation of one or more new circuits would force judges in all of the reconfigured circuits to assume greater administrative loads.

- **Overall Budgetary Considerations.** We are in a period of static to modest budget increases, with operation by continuing resolution the new normal for budgeting. During the last several years, the entire judiciary has prepared contingency plans involving significant personnel layoffs and other cost-saving measures. Fortunately, most of those measures have not had to be implemented. Given recent budgetary history, it would be unrealistic for the judiciary to plan for substantial budgetary increases, especially given the other important budgetary demands. Unless there is some unforseen change in the near term, the judiciary must plan to administer justice in the most efficient manner possible within its budgetary means. Thus, we cannot expect the new circuits to receive sustained substantial new revenue, and imposing the burden of funding this colossal undertaking on the judiciary at this juncture would have devastating ripple effects.

  Further, merely increasing the judiciary budget to add operating revenue will not solve the problem. As the Subcommittee is undoubtedly aware, the judiciary budget is prepared and allocated based on formulas that are, in great measure, caseload driven. Thus, circuit division will not necessarily mean greater funding for the federal courts in the reconfigured Ninth Circuit; it will essentially take existing funding and divide it. Any additional funding will be

allocated to all circuits based on the formula. Therefore, it would take a substantial multiple of any dollars added to the judiciary budget to produce an amount equal to the bottom line of any circuit's budget. The alternative would be to take money from other circuits. This remedy might be required on the basis of the revised formulas for new circuits, but it would have an unfair and disastrous effect on other circuits that are currently experiencing severe budget crises of their own.

- **Loss of Uniformity of Law.** Splitting the Ninth Circuit would disrupt the uniform application of law in many important areas of law. Some examples:

  - **Border Enforcement.** The Mexican border in the Ninth Circuit runs from Arizona to California. This has posed venue issues when aliens travel throughout the Sonoran desert. See, e.g., *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1061 (9th Cir. 2000). However, at present, uniform law applies. If the Circuit were divided, different law would apply to aliens apprehended in Arizona and California, compounding the problem of establishing proper venue and applicable law.

  - **Technology and Intellectual Property.** The Ninth Circuit covers a wide swath of technology companies--from biotechnology, digital and wireless in the southern end of the Circuit to a broad array of technology-related companies in Silicon Valley, San Francisco, Portland, the silicon forest in the Seattle area and other technology centers, including those in Idaho, Nevada and Arizona. It is important to have consistency in intellectual property and related areas for this burgeoning area of the law. The current structure of the Ninth Circuit promotes uniformity and predictability for high tech businesses,

not only from within the Circuit,[2] but between businesses on the West Coast and international partners.[3]

- **Entertainment law.** A similar problem with uniformity could occur with entertainment law.[4]

- **Lake Tahoe.** A bi-state compact between California and Nevada created the Tahoe Regional Planning Agency in 1969 to govern land and water use within the Lake Tahoe region.[5] If these two states belonged to separate federal circuits, each circuit would have equal power and binding force over the regional agency, with potentially inconsistent results not only

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[2] *See, e.g.*, *Facebook, Inc. v. Pacific Northwest Software, Inc.*, 640 F.3d 1034 (9th Cir. 011) (enforcing settlement agreement and confidentiality agreement between parties headquartered in California and in Washington); *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115 (9th Cir. 1999) (vacating and remanding a preliminary injunction order between companies headquartered in California and in Washington); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994) (resolving dispute related to a licensing agreement and potential infringement in California and in Washington); *see also Berry v. Dillon*, 291 Fed. App'x 792 (9th Cir. 2008) (resolving copyright dispute between companies in Hawaii and California); *Nintendo of Am., Inc. v. Brown*, 94 F.3d 652 (9th Cir. 1996) (unpublished decision) (resolving an infringement dispute initially in the District of Arizona between a company headquartered in Washington and an individual proprietor located outside Washington).

[3] *Examining the Proposal to Restructure the Ninth Circuit: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of William H. Neukom, Partner, Preston Gates & Ellis, LLP).

[4] *Academy of Mot. Picture Arts & Sciences v. GoDaddy.com, Inc.*, 2015 WL 12684340 (C.D. Cal. April 10, 2015) (resolving a dispute related to unfair competition, trademark, and other issues between companies headquartered in California and in Arizona).

[5] TAHOE REGIONAL PLANNING AGENCY: ABOUT TPRA, http://www.trpa.org/about-trpa/ (last visited March 10, 2017).

for the promulgation of local environmental policy, but also in the context of urban planning and commercial enterprise.[6] It would also create the danger of needless litigation over venue. The Tahoe Regional Planning Agency has been involved in litigation before the Ninth Circuit for more than fifty years and that litigation continues unabated.[7]

- **Land management (national forests).** Dividing the Ninth Circuit would also have negative impacts on the uniformity of federal law concerning land and resource management in the West. As one example, many national forests and other land management units span state boundaries within our circuit. Dividing the Ninth Circuit along these state lines would have the effect of putting certain national forests — and their previously uniform forest management plans and policies — under two different sets of circuit law.

  The Wallowa-Whitman National Forest, for example, spans Oregon and Idaho, while the Colville National Forests spans land in Idaho and Washington.

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[6] *See, e.g.*, *Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency*, 24 F. Supp. 2d 1062 (1998); *California v. Tahoe Reg'l Planning Agency*, 516 F.2d 215, 220 (9th Cir. 1975) (affirming denial of a preliminary injunction to halt construction of two hotel-casinos in the Lake Tahoe Basin); *League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 507 F.2d 517, 519 (1974) (holding that the Congressionally-sanctioned bi-state compact is a matter of federal law with attendant federal subject matter jurisdiction), *cert. denied*, 420 U.S. 974 (1975).

[7] *Sierra Club v. Tahoe Reg'l Planning Agency*, 840 F.3d 1106 (9th Cir. 2016) (holding that the planning agency's environmental impact statement for the regional plan update sufficiently addressed significant environmental impacts); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331 (9th Cir. 1990) (dismissing some claims as unripe and holding that property owners had a claim for reimbursement).

The Rogue River-Siskiyou and Klamath National Forests both span California and Oregon, and the Umatilla National Forest spans Washington and Oregon.[8]

Cases challenging Forest Plans or other forest-level management directives on these National Forests have previously been brought in the Ninth Circuit, and our circuit has built a significant body of law around this type of federal land management question.[9] All of the proposed circuit splits would divide several of these national forests into two different circuits, threatening the uniform application of law to national forests that are statutorily required[10] to be managed as cohesive units under forest-level management plans.

- **Fisheries.** A circuit division would be disruptive to the uniform application of law in cases involving maritime law and fisheries. Fisheries and management zones transcend state lines. For example, the Pacific groundfish fishery "extends 200 miles into the Pacific Ocean, along the coasts of California, Oregon, and Washington, and includes more than 90 species of fish that dwell near the sea floor."[11] Similarly, the Klamath Management Zone reaches from Humbug Mountain, Oregon, to

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[8] US FOREST SERVICE: FIND NATIONAL FORESTS AND GRASSLANDS, https://www.fs.fed.us/recreation/map/finder.shtml (last modified March 28, 2013.

[9] *E.g.*, *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545 (9th Cir. 2009) (challenge by an environmental organization to an element of the forest plan for the Siskiyou National Forest); *Oregon Nat. Res. Council Fund v. Goodman*, 505 F.3d 884, 887 (9th Cir. 2007) (challenge by an environmental organization to a ski area expansion as inconsistent with the Rogue River National Forest Land and Resource Management Plan).

[10] 16 U.S.C. § 1604.

[11] *Pacific Dawn LLC v. Pritzker*, 831 F.3d 1166, 1170 (9th Cir. 2016) (upholding the National Marine Fisheries Service's calculation of shares of the total allowable catch of Pacific whiting in the Pacific groundfish fishery).

Horse Mountain, California, to take into account the migration pattern of the Klamath chinook and their growth to maturity off the coasts of Oregon and California.[12]

Decades of litigation regarding tribal rights to salmon fisheries in the Northwest, for instance, have involved the states of Washington, Oregon, and Idaho, as well as Native Americans from each of these states.[13] The resulting management agreements between the states and tribes[14] depend on the uniform application of this existing body of law across the Columbia River basin, which would be threatened by a circuit split.

Moreover, relevant administrative bodies have jurisdiction over multiples states because "management of fishery resources from the national or regional perspective is important to sound conservation practices."[15]

In the Magnuson-Stevens Fishery Conservation and Management Act, Congress established a national program for the conservation of fishery resources, which included

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[12] *Oregon Trollers Ass'n v. Gutierrez*, 452 F.3d 1104, 1121 (9th Cir. 2006).

[13] *See United States v. Confederated Tribes of Colville Indian Reservation*, 606 F.3d 698, 705 (9th Cir. 2010).

[14] *E.g.*, 2008-2017 *United States v. Oregon* Management Agreement (May 2008), *available at* http://www.westcoast.fisheries.noaa.gov/publications/fishery_management/salmon_steelhead/sr--079.2008-2017.usvor.management.agreement_042908.pdf.

[15] *Id.* (citing S. Commerce Comm. Rep. No. 94–416 (1975), *reprinted in A Legislative History of the Fishery Conservation and Management Act of 1976* at 684 (1976)).

establishing "Regional Fishery Management Councils" to create, monitor, and review fishery management plans.[16]

The Pacific Fishery Management Council has jurisdiction over the 317,690 square mile exclusive economic zone off of Washington, Oregon, and California. The Council manages fisheries for 119 species and consists of voting representatives from Oregon, Washington, California, and Idaho.[17]

The West Coast Region of the National Oceanic and Atmospheric Administration Fisheries also manages fisheries in Washington, Oregon, California, and Idaho.[18] Splitting the Ninth Circuit would mean these zones would fall into different circuits.

- **State law.** Most of the states that form the Ninth Circuit have the same jurisprudential state law roots: the Field Code. California adopted the Field Code in 1850, followed by Oregon and Washington in 1854; Nevada in 1861; and Arizona, Idaho, and Montana in 1864. In addition, all the other Ninth Circuit states have adopted significant aspects of California law, and rely on California judicial construction. Most of the states within the Ninth Circuit jurisdiction also have adopted similar uniform laws, such as the Unfair Trade Practices Act, and rely on state judicial construction of those laws.

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[16] *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1058 (9th Cir. 2005) (citing 16 U.S.C. § 1801(b)(4), (5)).

[17] PACIFIC FISHERY MANAGEMENT COUNCIL: WHO WE ARE AND WHAT WE DO, http://www.pcouncil.org/ (last visited March 10, 2017).

[18] NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION: NOAA FISHERIES WEST COAST REGION: ABOUT US, http://www.westcoast.fisheries.noaa.gov/about_us/index.html (last visited March 10, 2017).

- **Loss of Contact with Community.** In the Ninth Circuit, we have taken access and transparency very seriously and have invested substantial resources in making sure that we keep a close connection to the public. Division of the Circuit would substantially handicap these efforts because the resulting split circuits would not have the resources to accomplish these important goals.

THE FLAWED ARGUMENTS FOR CIRCUIT DIVISION

Despite the advantages of the present structure and the significant disadvantages of imposing a circuit split at this time, some critics have persisted in their view that the Circuit should be divided. When the arguments are examined closely, they are not persuasive. Indeed, most of the arguments are based on faulty factual premises.

- **Reversal Rates.** Proponents of a circuit split often cite the Ninth Circuit reversal rate before the Supreme Court as a rationale for a circuit split. There is no evidence that either the structure or size of the Ninth Circuit has any effect on reversal rate, nor any evidence that circuit size has an impact. There are a number of points to made:

  - **No Correlation with Administrative Performance.** First, reversal rates have nothing to do with circuit administrative performance. The question of how a court would decide the merits of a handful of cases is not reflective of court administration. It is not a proper measure, under any circumstances, of whether a circuit should be structurally divided.

  - **Small sample size**. When the subject of reversal rates is discussed, the underlying assumption is that reversal rates are a measure of "outlier" courts. This assumption ignores the fact that the Supreme Court grants certiorari in a tiny fraction of cases, generally around 1.5% of the cases in which relief is sought. For example, in the 2016 Term, the Court granted certiorari in eight Ninth Circuit cases. In the 2015 Term, the Court granted certiorari in eleven Ninth Circuit cases. When compared with filings, that means the Supreme Court is granting certiorari in less that .008% of cases.

- **Overall High Total Reversal Rate For All Circuits.** Focus on specific reversal rates also ignores the fact that the Supreme Court is not conducting a random sample of cases in selecting cases to hear. The vast majority of the cases heard by the Supreme Court are reversed. For example, in the 2016 Term, the Supreme Court's total reversal rate was 79%. During the past five terms, the Supreme Court has reversed 72.4% of all cases it decided.

- **The Ninth Circuit is not the Most Reversed.** The record must be corrected. In recent years, the reversal rate of the Ninth Circuit has not deviated much from the rest of the circuits. It is not the most reversed circuit. Indeed, during the entire Roberts era, the most reversed circuit is the Sixth Circuit, not the Ninth. In the last five years, the Ninth has ranked 4th in reversal rates; in the last 10 years, 3rd.[19] In fact, the Ninth Circuit has not been the most reversed circuit in many years. Here are the facts for the recent terms[20]:

Term	Most Reversed Circuit(s)	Ninth Circuit
2016	3rd, 7th, 8th, 10th	5th most
2015	11th	2nd most
2014	2nd, 3rd,7th, 11th	11th most
2013	3rd, 8th	3rd most
2012	1st, 6th, 8th, 11th	4th most (tied w/5th)
2011	2nd, 6th	4th most
2010	6th	3rd most
2009	6th	8th most
2008	4th, 6th, 7th, 8th, 10th, D.C., Fed.	7th most

[19] http://www.scotusblog.com/reference/stat-pack/. The Scotusblog statistics vary somewhat from the statistics maintained by the Ninth Circuit Library because of the method of counting reversals. However, because the Scotusblog analysis is the same across circuits, those figures have been utilized here.

[20] *Id.*

2007	10th	2nd most (tied w/5th)
2006	3rd, 5th	3rd most
2005	1st, 3rd, 6th, D.C., Fed.	7th most
2004	1st, 2nd, 10th	4th most

Thus, although reversal rates have nothing to do with administrative performance, the Ninth is not the most reversed circuit.

- **Other metrics: Certiorari Grant Rate.** The Ninth Circuit's performance in the Supreme Court grant of certiorari on the merits is lower than most other circuits. In the last year, the Ninth Circuit's grant rate was 2.6%, the 8th lowest of the circuits. The average grant rate for all circuits was 2.9%, with the median being 3.4%.

- **Other metrics: District Court Reversals.** One illuminating statistic is the reversal rates of the circuits vis-a-vis the district courts. One would expect a so-called "outlier" circuit to reverse district courts more than other circuits. Once again, the Ninth Circuit's reversal rate is consistent with the national average. In the last 12 months, the Ninth Circuit reversed the district courts in 10.1% of cases, compared to the national average of 9.6%. It was comfortably in the middle of the circuit range.

- **Judicial Independence.** Further, deciding to establish circuit boundaries on the basis of judicial opinions strikes at the heart of judicial independence. As the Commission on Structural Alternatives for the Federal Courts of Appeal, more popularly known as the "White Commission," wrote forcefully:

> There is one principle that we regard as undebatable. It is wrong to realign circuits (or not realign them) and to restructure (or leave them alone) because of particular judicial decisions or particular judges. This rule must be

> faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.
>
> Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report*, (1998), p. 6.

- **Delay.** Proponents of a split contend that the Ninth Circuit should be divided because case processing time is too slow. Proponents of a split assume, without explaining, that any division of the Ninth Circuit will improve case processing time. They offer no data to support this conclusion. For the reasons already discussed, the opposite is true. Circuit division will increase, not decrease, delay.

  - **Consistent with Other Circuits.** The appellate case processing times in the Ninth Circuit are not out of line with other circuits. The latest figures from the Administrative Office for the 12 month period ending June, 2017, show a median appellate case processing time of 13.3 months from the filing of Notice of Appeal to decision. The First Circuit had a median processing time of 12 months, and the D.C. Circuit had a median processing time of 11.4 months. What is noteworthy about those statistics is that it demonstrates that processing time is not related to circuit size, but the First and the D.C. Circuits have the smallest aggregate caseload. Indeed, during several years, the smallest circuits have had longer processing times than the Ninth. Over time, the Circuit's median case processing times are within a few months of the smallest circuits, and often better.

  - **Consistent with state courts.** The Ninth Circuit's case processing times are relatively comparable to those of the state courts within its jurisdiction. For example, the Alaska Supreme Court processes 50% of its cases within 19 months; 75% within 23 months; and 90% within 29.8 months.[21] The California Courts of Appeal report a

[21] *Alaska Court System Annual Report FY 2016*, table 1.06, page 77.

median case processing time of 518 days.[22] The Montana Supreme Court reports a median case processing time of 369 days.[23] The Arizona Court of Appeals sets a benchmark of 375 days for processing a criminal appeal and 400 days to process a civil appeal.[24] If discretionary review is granted, the Arizona Supreme Court sets a benchmark of an additional 150 days for criminal and civil cases.[25] The benchmark for capital cases is 1,000 days.[26] Thus, the current Ninth Circuit median processing time of 13.3 months is not out of line in comparison with state appellate systems.

- **Other Metrics.** When one examines the data, a more complete picture forms. The Ninth Circuit is the one of the fastest Circuits in deciding cases from the time of oral argument to decision (1.1 months) and in resolving cases from the time of submission on the briefs to decision (0.2 months). And, in total time from filing in the district court to resolution on appeal, the Ninth is not, and has not been, the slowest Circuit

- **Response to Cases Requiring Expedited Treatment.** Our Circuit has a good record in responding to cases requiring expedited treatment, including election litigation and other time-sensitive matters. We have been able to accelerate the process when needed to provide timely hearings and decisions.

- **Initiatives for Improvement.** We recently launched an initiative to resolve pending civil cases more quickly and are confident that we should be current on those cases in the near future. Our statistics

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[22] Judicial Council of California, *2016 Court Statistics Report: Statewide Caseload Trends*, p. 28.

[23] *Letter Report from Montana Supreme Court Clerk*, March 2, 2017.

[24] http://www.azcourts.gov/performancemeasures/Time-to-Disposition

[25] *Id.*

[26] *Id.*

show we are terminating cases at a faster rate than they are being filed. Our year- to-date numbers show that we have terminated 598 cases more than were filed. Indeed, the statistics show that, from December 2016, to the latest figures in June 2017, our median appellate case processing time has been reduced by 12.5% in the last six months alone.

- **Delay Causes.**

  - **Causes of Delay are not Structural.** Historically, the causes of case processing delay are not structural, but due to external factors. The statistics show that, nationwide, when a court has 20% or more of its judgeships vacant, it will experience case delay. That was certainly true for the Ninth Circuit in the late 1990s, when one third of its judgeships were vacant. It has been true for other circuits in recent years. When vacant judgeships go unfilled, the result in delay in case processing. Neither structure nor circuit size has anything to do with it.

  - **Current Delay - Immigration Case Surge in early 2000's.** The source of any current delay is reasonably easy to discern. As I previously discussed, when Attorney General Ashcroft made the decision to eliminate the backlog of 56,000 cases in the Board of Immigration Appeals, the BIA issued tens of thousands of quick decisions in a matter of months. This action effectively resulted in a transfer of the BIA backlog to the federal appellate courts. Fifty percent of those appeals went to the Ninth Circuit. Our immigration caseload increased 582.7% from 2001 to 2005 (from 955 in 2001 cases to 6,520). During that same period, our court's non-immigration caseloads have actually decreased 0.2% (from 9,713 cases to 9,692).

The following numbers illustrate the point:

Fiscal Year	Immigration Appeals	Non-Immigration Appeals
2001	955	9,713
2002	2,662	8,975
2003	4,191	8,919
2004	5,361	9,692
2005	6,520	9,692
2006	6,040	8,596

The significance of the increase in immigration filings from 955 to 6,520 in 2005 is demonstrated by the fact that only two other circuits during this period of time, the Fifth and the Eleventh, had total case filings of over 5,000. In other words, the Ninth Circuit assumed an additional workload that was the equivalent of an entire other circuit.

Despite experiencing a more than 500% growth in immigration cases and a 50% increase in overall caseload, the Ninth Circuit held its ground in case processing time during this period. Thanks to the court management techniques described above, the Ninth Circuit has been able to absorb the enormous spike in immigration cases without losing ground. Statistics from the early years of the immigration onslaught show that we were reducing delay, despite enormous case increases. We would now be well within the national average for case processing, but for the increase in the immigration docket.

The simple fact is that, were it not for the unprecedented increase in immigration cases due to the flood of BIA appeals, we would be current. Immigration cases pose unique case processing demands. The government has frequently asked for a stay of proceedings. In the first wave of cases, because of the volume, the government was unable to provide a record on appeal for more than a year after the case was resolved at the

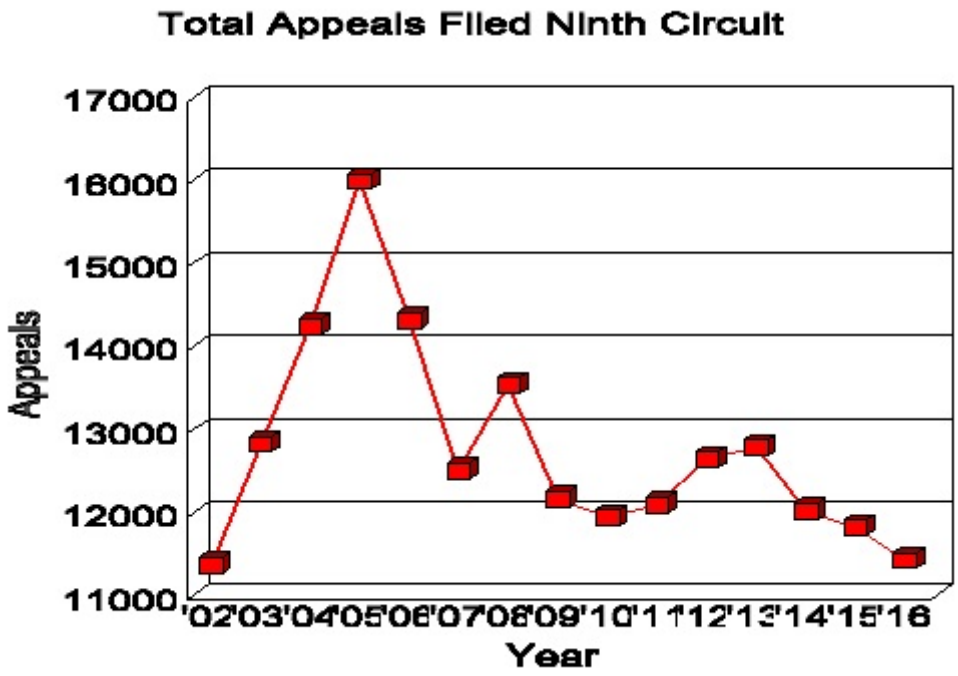
administrative level. In recent years, the government has requested stays of appellate review so that it could analyze the exercise of prosecutorial discretion. These litigation decisions, not the structure of the Circuit or our own case processing techniques, result in delay. Unfortunately, those party-induced delays negatively impact statistics, even though entirely out of the Ninth Circuit's control. Dividing the Circuit would not produce a different result.

Every year since 2001, the court has continued to experience immigration filings that were at least three times higher than the 2001 base of 955 cases, although immigration filings have decreased from the 2007 high, as illustrated by the following chart:

Fiscal Year	Immigration Appeals	Non-Immigration Appeals
2007	4,485	8,064
2008	4,567	8,826
2009	3,385	8,884
2010	3,175	8,899
2011	2,972	9,286
2012	3,517	9,331
2013	3,894	9,105
2014	2,998	9,069
2015	3,452	8,446
2016	3,066	8,422

In short, the spike caused by the increase in administrative immigration appeals has slowed and 80% of those cases can be handled by case screening and other case processing techniques. Thus, in the long term, the immigration caseload issue is solvable in the Ninth Circuit, but only if the case processing resources remain available.

The following chart illustrates the case growth and decline sparked by immigration cases.



From our high median processing time at the peak of the immigration onslaught to the present, we have reduced case processing time by 30%, demonstrating not only the impact of the surge, but the results of effective case management.

- **Time Extensions as a Cause for Delay.** The Ninth Circuit has been one of the more generous Circuits in affording the parties time extensions for briefing. Although this provides the parties in a particular case with the time they want, it adversely affects our statistics. The current statistics show that the median time from the filing of notice of appeal to filing of the final brief in the Ninth Circuit is 8.9 months. The national median is 5.8 months. In other words, if the Ninth Circuit were more parsimonious about granting extensions, even to the point of the national median, our statistical case processing time would decrease significantly. In fact, given the current statistics, if we reduced the time to the national median, we would reduce our overall case processing time by 23%. There are often good reasons

for attorneys seeking extensions, and we value our relationship with the bar. Nonetheless, we have been reviewing our extension practices and tightening them up where appropriate. That effort should produce an overall reduction in case processing time in the near future. However, again, the point is that the delay associated with extension is not related to circuit structure.

- **Stipulated Stays.** A similar factor is delay caused by stipulated stays. A recent review of our older cases revealed that virtually all of them had been stayed by stipulation of the parties due to external factors, such as pending bankruptcies, resolution of companion litigation, certification of questions to state courts, and settlement negotiations. We have been reviewing the appropriateness of these stays, but the delay caused by them has nothing to do with appellate caseload or circuit structure.

- **Delay is not Related to Circuit Size.** Finally, in looking across circuits in terms of delay causation, case processing delay is not related to caseload, or size of circuit. The White Commission studied the subject of delay thoroughly in 1998 and concluded that circuit size was not a critical factor in appellate delay.[27]

  Current statistics bear out the truth of the White Commission's conclusion. If size were correlated to delay, one would expect case processing times would correspond to size. They do not. Currently, the next slowest circuits are the smaller circuits, not the next larger circuits. Case processing times have varied widely among the circuits over time, in ways unrelated to docket size.

- **Appellate Caseloads are Decreasing.** Although those who advocate a split argue that the Circuit is overburdened, in fact, appellate caseloads are decreasing. From the high of over 16,000 filings in 2005, case filing has decreased by over 29% to 11,405 filings today. The caseload trends do not support a conclusion that the Ninth Circuit is increasingly overburdened.

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

- **The Problem with Current Measurement.** The case processing statistic upon which split advocates rely is somewhat misleading. The Administrative Office of the United States Court statistic is based on median case processing times based on terminated cases. It does not measure pending cases. Therefore, if a circuit is making progress in tackling a backlog, ironically, the statistic looks worse because it only measures cases at their finality.

- **Circuit Division Would Not Improve Case Processing Time.** The more important question is whether a circuit division would improve case processing time. It decidedly would not.

    - **Loss of Case Management Innovations.** As I have discussed previously, the case management innovations would be lost, or substantially reduced, in a circuit division. Staff reduction would force a corresponding reduction in our ability to address pro se cases, almost half of the appellate caseload. The loss of administrative support would force judges to assume more administrative tasks, reducing time to spend on deciding cases.

    - **Time in Establishment of a New Circuit.** Further, there would be a substantial loss of time in setting up a new circuit staff and in constructing and moving into new facilities, creating an initial backlog of cases that would be difficult to redress.

    - **Circuit Division does not Eliminate Caseload Issues.** Circuit division does not eliminate caseload; it merely reallocates it. The cases still need to be decided. In this regard, the division of the Fifth Circuit is instructive. According to Professors Deborah Barrow and Thomas Walter, who conducted the seminal study of the division of the Fifth Circuit, the division was never envisioned to provide a permanent solution to the problem of high caseload; rather, it was intended to be a "stop-gap" remedy, rather than a long-term solution. As they put it: "Repeated reliance on realignment as a response to

increases in caseload will only result in ever-smaller circuits, inevitably leading to the dangers of excessive parochialism . . . ."[28]

- **Summary.** In sum, the Ninth Circuit is uniquely suited to deal with a large case volume. The current case mix in the Ninth Circuit is best addressed by retaining a strong, coordinated, central staff that can help perform essential case triage and resolve the vast majority of appeals. Circuit division would increase, not decrease, delay.

- **En Banc Process.** Proponents of a circuit split cite the Ninth Circuit's limited en banc procedure as a rationale for circuit division. However, a close examination will dispel the notion that circuit division is justified in order to guarantee a full court en banc hearing.

  - **Small Number of Cases.** En banc activity involves an extraordinarily small number of cases. Out of the 11,798 cases terminated in the Ninth Circuit during 2016, only 19 (or 0.26%) were reheard en banc. This experience is consistent with the practices of other circuits. Of 39,792 cases terminated nationally within the same period, only a total of 38 (or 0.09%) were heard en banc. A court should not be divided on the basis of the procedure it employs in handling 19 cases, 0.26% of total filings.

  - **Criteria for a Successful Limited En Banc Process.** In my view, for a limited en banc court to be successful, it should satisfy three criteria: (a) it should be sufficiently representative of the Court; (b) its decisions should be accepted as authoritative; and (c) its size should promote effective en banc deliberation. The current Ninth Circuit en banc court meets all of these criteria.

    - **Sufficiently Representative.** The argument that the en banc process does not involve a majority of the Court is misplaced.

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[28] Deborah Barrow and Thomas Walter, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* 248 (Yale University Press, 1988).

- **Full Court Decides Whether to Rehear En Banc.** Although ten judges are ultimately drawn to serve on a Ninth Circuit en banc court with the Chief Judge, it is the full court that decides whether to take a case en banc. By statute, 28 U.S.C. § 46(c), a majority of the non-recused active judges must vote in favor of en banc rehearing to take a case en banc. Moreover, any active or senior judge may call for en banc rehearing, and all may participate in the exchange of often extensive views that precedes the vote.

- **Full Court Rehearing.** The Ninth Circuit rules allow the convening of a full court en banc, with all of the active judges and eligible senior judges participating. In other words, a judge or a party may request that the full court rehear the case. We have had a few requests over the years, but the court has never voted to rehear a case en banc before the full court. This statistic is a testament to the success of the limited en banc court model. Nevertheless, there is an opportunity under the rules to rehear cases before the full court.

- **Academic Studies Support the Representativeness of the Limited En Banc Process.** When the limited en banc court concept was introduced and authorized by Congress, the Court undertook an inquiry as to the optimal mathematical size, using probability theory, of the appropriate size of a limited en banc court. The result was between 9 and 13, and the Court chose 11 as the number.

  Years later, in response to questions about representativeness raised during the White Commission hearings, the Ninth Circuit formed an Evaluation Committee to examine more closely some of the issues raised, including the limited en banc procedure. To answer the questions relating to en banc procedures, the

Evaluation Committee consulted with a number of outside academic experts.

One of the experts consulted was Professor D.H. Kaye of the College of Law, Arizona State University, a noted expert in the field of law and statistics, who conducted a statistical analysis of the size of the limited en banc court in relation to the full court–then consisting of 28 active judges. Professor Kaye calculated the probability that the outcome of the limited en banc court vote would be the same as that of a court of 28. He posited a binary issue (judges would vote either to affirm or to reverse), and he considered the possible divisions among 28 judges. He found that expanding the en banc court would result in only a trivial gain in the degree by which an en banc court decision would represent the views of all judges of the court.

The Evaluation Committee also met with a number of other scholars to discuss this issue, including Professor Linda Cohen, Department of Economics, University of California, Irvine; Professor John Ferejohn, Hoover Institute, Stanford University; Professor Louis Kornhauser, New York University School of Law; Professor Matt McCubbins, Department of Political Science, University of California, San Diego; and Professor Roger Noll, Department of Economics, Stanford University. These scholars consulted by the Committee confirmed the import of the calculations done by Professor Kaye in concluding that the eleven-judge en banc panel is effective in providing a representative en banc court.

To supplement the analysis by Professor Kaye and the other consultants, the Evaluation Committee requested Professor Arthur Hellman of the University of Pittsburgh School of Law to conduct an empirical study of actual en

banc outcomes. His conclusion was that the evidence strongly indicates that in a substantial majority of en banc cases the limited en banc court has reached the same result that a majority of active judges would have reached. He also concluded that in the few cases in doubt, expanding the limited en banc court would have added to the judges' burdens without enhancing the "representativeness" of the outcome.

He observed:

> It is true that enlarging the size of the en banc court would make it more "representative" in an abstract sense. But the more important question is whether it would produce decisions, with majority, concurring and dissenting opinions, that better represent the views of the court's active judges. Probability analysis and empirical data both indicate that the gains would at best be marginal.

- **Experimentation with Larger Size.** In addition, the Court engaged in an experimental increase in the size of the en banc court from 11 to 15 judges. The experiment was to last two years. It was abandoned after a year because neither the bench nor the bar found the 15 judge en banc court to be an improvement over the 11 judge court.

- **Few Decisions are by Close Vote.** Finally, in practice, very few of the decisions made by the limited en banc court involved close votes. In 2016, 84% of the cases were decided by margins of 7-4 or greater; 74% by margins of 8-3 or greater; 47% of the decisions were unanimous. Only 16% of the decisions involved a 6-5 vote.

- **Summary.** In sum, both as a theoretical and practical matter, the limited en banc court has proven to be sufficiently representative to serve as a proxy for a full court en banc procedure, and there are mechanisms in place to allow for a full court rehearing if necessary.

- **Authoritative Decisions.** One of the important aspects of a limited en banc court scheme is that its decisions be accepted as authoritative. That concern has not proven to be an issue with the Ninth Circuit limited en banc process. The decisions of the en banc court have been respected as authoritative, and the Court has consistently rebuffed efforts to revisit an issue decided by an en banc court.

- **Sufficiently Deliberative.** One of the most important elements in any group decision-making process is the quality of deliberations. The Ninth Circuit has found that an 11-judge panel is small enough to permit healthy and robust en banc deliberations. As I mentioned previously, the Court undertook an experiment with an increased en banc size of 15 judges. The Court concluded then that the addition of four additional judges diminished the quality of the deliberative process, and that any advantages in the perceived increase in representativeness were more than offset by the loss of effective deliberation. In addition, oral arguments were not as productive because there were too many judges seeking to ask questions. It was an instructive, but failed, experiment. The current size promotes effective deliberation.

- **The Function of the En Banc Process in Modifying Opinions.** We have a very active en banc process, but much of it is not reflected in calls, votes, or hearings. Often, a judge will ask the three judge panel to modify its opinion to satisfy the judge's concerns. This process avoids an en banc call and resolves issues that give rise to a judge's concern.

- **A Circuit Split Would Not Enhance the En Banc Process.** Leaving aside the questions of the present system, the question remains whether a circuit division improve the en banc process. Again, the answer is negative.

    - **No Proposal Would Eliminate the Limited En Banc System.** None of the proposals to split the Ninth Circuit will eliminate the limited en banc court. All proposals allocate 19-25 judges to the "new" Ninth Circuit, far too many for a permanent full court en banc panel. So, to the extent that the limited en banc procedure is viewed as problematic, the proposals do not address it.

    - **The Number of Cases Heard En Banc Would Not Increase.** The argument that the Ninth Circuit should hear more cases en banc, and does not do so because of the limited en banc process is belied by the statistics. The Ninth Circuit hears far more cases en banc than any other circuit. The following chart illustrates the point:

        <u>En Banc Hearings: All Circuits (2016)</u>

District of Columbia	1
First Circuit	0
Second Circuit	0
Third Circuit	4
Fourth Circuit	1
Fifth Circuit	4
Sixth Circuit	3
Seventh Circuit	4
Eighth Circuit	1
Ninth Circuit	19
Tenth Circuit	0
Eleventh Circuit	1

The experience of smaller circuits also discounts the theory, propounded by split proponents, that division of the Circuit will increase the number of en banc hearings. In fact, the general experience of smaller circuits is that those circuits have very few en banc hearings.

- **A Minority of Judges Already Establishes Circuit Precedent.** The objection raised by some that a minority of the Court could determine the outcome of an en banc case neglects the well over 99% of the cases decided by the Ninth Circuit – and all the circuit courts for that matter – are decided by three judge panels, in which the votes of two judges bind the entire Circuit. If a visiting judge is on the three judge panel, then circuit precedent can be established by a single Ninth Circuit judge, along with a visiting judge to form the majority opinion.

- **Summary.** When all factors are considered, the limited en banc court is a valuable tool. Rehearing a case en banc uses up significant circuit resources. It is a time and energy consuming process. Having too many judges can interfere with the deliberative process; limiting the panel number to eleven strikes an appropriate balance between the number required for legitimacy and representativeness and the number required for effective deliberations. It also strikes the proper balance of resources needed to resolve en banc-worthy issues. The limited en banc panel has rarely, if ever, reversed the decision of a prior en banc panel. Indeed, it is rarely requested to do so. There is no compelling evidence that the decisions of the limited en banc panel are not accepted as the binding decisions of the Court.

For all of these reasons, the limited en banc system employed by the Ninth Circuit does not justify a circuit division. It involves a minute number of cases and functions effectively in dealing with them. The t limited en banc process has been effective and efficient. When viewed carefully, the concerns raised about the process are unwarranted and certainly do not justify a circuit split.

- **Number of Opinions.** Split proponents have expressed concern is that the Ninth Circuit judges cannot keep up with circuit law because there are too many opinions issued.

  - **Numerous Avenues of Information.** The Ninth Circuit has numerous mechanisms to keep its judges informed, including pre-publication summaries of decisions, and daily decision updates.

  - **Other Circuits Consistently Publish More Precedential Opinions than the Ninth Circuit.** More importantly, the Ninth Circuit is not the largest producer of opinions. The statistics show that both the Seventh and Eighth Circuits consistently produce more published opinions than the Ninth Circuit. If division of a circuit is justified on this basis, other circuits will have to be divided.

    The following chart contains data from 2016 and shows that the Ninth Circuit does not produce an inordinate number of circuit opinions relative to other circuits, and that the number of opinions produced is not a function of court size:

Number of Published Opinions/Circuit: 2016

Circuit	Number of Opinions	Authorized Judgeships	# of Opinions per Auth. Jdshp
Seventh Circuit	624	11	56.7
Eighth Circuit	547	11	49.7
Ninth Circuit	451	29	15.5
Fifth Circuit	362	16	22.6
First Circuit	326	6	54.3
Sixth Circuit	285	13	21.9
Tenth Circuit	230	12	19.1
D.C. Circuit	211	11	19.1
Eleventh Circuit	206	17	12.1
Second Circuit	203	14	14.5
Fourth Circuit	176	12	14.6
Third Circuit	159	12	13.2

The chart suggests that there is no relationship between the number of judges in a circuit and the number or rate of opinions produced.

- **Issuance of a Higher Number of Opinions is an Asset to the Development of Circuit Law.** A high volume of circuit opinions is an asset to circuit administration because precedential opinions settle circuit law. This is of great assistance to district judges, as former Chief Judge John Coughenour of Washington testified to Congress several years ago. Indeed, when a court does not have a large body of case law, the inevitable result is instability and unpredictability. Courts are forced to search the law of other circuits for guidance, knowing full well that the case authority is not controlling. In a large court, the parties know that the panels are bound by circuit law.

- **Case Conflict.** Proponents of a circuit split sometimes contend that the size of the Ninth Circuit produces case conflict. However, there is no credible evidence that the Ninth Circuit experiences this phenomenon more than other circuits.

  - **Academic Studies Conclude that Conflict is not a Problem.** All academic studies of the Ninth Circuit have concluded that conflict in panel decisions is not a significant problem. In *Restructuring Justice* (Cornell University Press, 1990), Professor Arthur Hellman published a collection of articles analyzing the Ninth Circuit and commenting on the future of the judiciary. Professor Hellman's empirical study found that the feared inconsistency in the decisions of a large court simply has not materialized. Professor Daniel J. Meador described Professor Hellman's study as "the most thoroughgoing, scholarly attempt that has yet been made . . . on the issue," and concluded that it "goes far toward rebutting the assumption that such a large appellate court, sitting in randomly assigned three-judge panels, will inevitably generate and uneven body of case law."

  - **Evaluation Committee Concluded that Conflict is Not a Problem.** The Ninth Circuit Evaluation Committee studied this issue in detail. The Committee sought information from those who are in the best position to know if conflicts exist – the members of the Ninth Circuit

legal community. The Committee circulated a memorandum to all Ninth Circuit district judges, magistrate judges and bankruptcy judges, lawyer representatives, senior advisory board members, all law school deans within the Ninth Circuit, and other members of the academic community asking to bring to the court's attention examples of possible conflicts involving unpublished memorandum dispositions. A response form was established to permit responses to be sent to the court's website. Only a handful of responses were received, and none revealed conflicts between unpublished and published dispositions. After reviewing these responses and all of the other available data, the Evaluation Committee concluded that there was no credible evidence that the Ninth Circuit experienced case conflicts in a greater proportion than circuits.

- **The Circuit Uses Multiple Tools to Prevent Case Conflict.** The Ninth Circuit takes the possibility of case conflict extremely seriously. We have employed a number of techniques to avoid case conflicts.

  - **Case Profiles and Issue Tracking System.** As previously discussed, the Ninth Circuit uses a case tracking system that identifies issues involved in each appeal. A case profile is prepared for each case prior to its transmittal to a panel listing all potential cases that might have a bearing on the case. The Case Management Unit of the Clerk's office tracks cases by issue and maintains extensive records to alert panels of pending decisions that may affect the outcome of cases.

  - **Pre-Publication Report.** Prior to the issuance of the opinion, each judge on the Court receives a pre-publication report that summarizes the holding and also identifies each case that the tracking system indicates may be affected by the opinion. This has proven extremely effective in assuring consistency.

  - **En Banc Process.** We have an extensive en banc process in which off-panel judges raise questions about published opinions. This process often results in the modification of the opinions without the necessity of rehearing en banc. The

parties also participate in the process by filing petitions for rehearing en banc, which are reviewed by each chambers.

- **Staff Review.** Through the case profile and case management process, staff identifies conflicts, or potential conflicts. Each quarter, the Clerk's office prepares a report on areas of the law that need resolution by precedential opinion. This report assists in identifying potential conflicts in non-precedential decisions that could be resolved by issuance of a published precedential opinion.

- **Review by Circuit Judges.** A number of Circuit Judges pay very close attention to potential case conflicts. They are quick to identify potential problems and either suggest alternative drafts or resolution through the en banc process.

- **Opportunity for Parties to Identify Conflicts.** By circuit rule, we have allowed parties to call conflicts between published and non-published cases to our attention in petitions for rehearing or requests for publication. In only a handful of cases have panels found true conflicts.

- **Opportunities for District Judges to Alert the Court of Appeals of Conflicts.** Ninth Circuit General Order 12.10 provides a mechanism for district, bankruptcy, and magistrate judges to communicate to the Court of Appeals if they notice case conflict.

- **Case Conflict Shift.** To the extent conflicts arise, splitting the Circuit merely shifts them from intra- to inter-circuit, adding new burdens to the Supreme Court that could otherwise have been worked out at the court of appeals level.

- **Geographic Size.** The proponents of a circuit split occasionally argue that the Circuit is simply too large geographically.

  - **The Circuit has been the Same Size for the Last 60 Years.** The Ninth Circuit has been the same geographic size since 1948 when the Territory of Alaska was added to the Ninth Circuit. Act of June 25, 1948, 62 Stat 869. It is difficult to discern why, after half a century, geography would suddenly become a problem. After all, travel and communications have improved significantly since President Truman was in office.

  - **Splitting would not Significantly Reduce Size.** The proposed legislation would not alter any perceived problems associated with geographic size.

    For example, H.R. 196 and S. 295 would only shift approximately 10% of the total land mass, leaving nearly 90% of the land mass to the new Twelfth Circuit.

    The following chart illustrates the point:

New 9th	Land Mass (Sq. Miles)	New 12th	Land Mass (Sq. Miles)
California	155,959	Alaska	571,951
Hawaii	6,223	Montana	145,552
Guam	210	Arizona	113,635
CMNI	179	Nevada	109,826
		Oregon	95,997
		Idaho	82,747
		Washington	66,544
Total	162,771		1,186,252
Percent	12.06%		87.9%

S. 276 would suffer from the same infirmity, as demonstrated by the following chart:

New 9th	Land Mass (Sq. Miles)	New 12th	Land Mass (Sq. Miles)
California	155,959	Alaska	571,951
Hawaii	6,223	Montana	145,552
Guam	210	Arizona	113,635
CMNI	179	Nevada	109,826
Oregon	95,997	Idaho	82,747
		Washington	66,544
Total	258,768		1,090,225
Percent	19.2%		80.8%

And the same would be true of H.R. 250, as illustrated by the following chart:

New 9th	Land Mass (Sq. Miles)	New 12th	Land Mass (Sq. Miles)
California	155,959	Alaska	571,951
Hawaii	6,223	Montana	145,552
Guam	210	Arizona	113,635
CMNI	179	Nevada	109,826
Oregon	95,997	Idaho	82,747
Washington	66,544		
Total	325,312		1,023,711
Percent	24.1%		75.9%

- **Circuit Division Is Not Part of the "Natural Evolution" of the Federal Judiciary.** Proponents of splitting the Ninth Circuit occasionally speak of circuit division as part of the "natural evolution" of the federal judiciary, as though the judiciary was a biological organism. This is a mis-reading of the history of the federal judiciary and should not be a guide to future design of our judicial system.

  The history of the federal circuits does not show a consistent pattern of caseload growth, followed by division. Certainly, circuit division has occurred. However, the history of our judiciary often shows consolidation, with states being added to circuits.

  The history of the Fifth and Eleventh Circuits provides a good example. During the early history of the area, the states were grouped into a number of different circuit combinations. By 1842, the area comprising what is now the Fifth and Eleventh Circuits was divided into four different circuits. Finally, in 1866, the four circuits were combined into one.

  The Ninth Circuit's "evolution" was not a pattern of growth and division. Rather, it evolved as a series of additions. California was designated a separate circuit in 1855. Oregon and Nevada were added to the Circuit in 1866. Montana, Washington, Idaho and Oregon were added in 1891. The Territories of Alaska and Hawaii became part of the Circuit in 1900. Arizona became part of the Ninth Circuit in 1913. Guam joined the Ninth Circuit in 1951, and the Commonwealth of the Northern Mariana Islands followed in 1977.

  Thus, history does not support the thesis that division is an inevitable part of the "evolution" of the federal judiciary. To the contrary, history reflects a varied pattern of restructuring and circuit consolidation. True circuit division has been relatively rare.

  The more important question is how we should approach the future. If we assume, as the proponents of a split do, that federal caseload will continue to grow, then what is the long term solution? If we adopt the theory of the split proponents, growth would require continuing division of circuits, increasing inter-circuit conflicts. Adoption of this theory would lead to what former

Chief Judge J. Clifford Wallace termed the "balkanization of federal law." It would promote what Judge John Minor Wisdom called "excessive parochialism." It would also lead to gross inefficiencies and duplication.

- **Caseload Is Not Correlated With Population Growth.** Split proponents occasionally attempt to justify structural division of the Ninth Circuit by predicting that population growth throughout the region will cause increased appellate caseloads, and that division is the only means of accommodating the uniform increase in appellate filings. This argument is based on a faulty premise. In fact, there is no correlation between population growth and federal appellate filings. If there were such a correlation, we would expect to see an increase in caseload that corresponded with population growth, but that has not happened.

  For example, from 2005 to the present, the Ninth Circuit's appellate caseload decreased from 16,101 to 11,405 – a decrease of 29.2%. During the same period, the Ninth Circuit's population increased by 12.1%, from 58,526,722 million people to 65,614,931.[29] During the same period, Alaska's appellate caseload decreased 36.1%, while its population increased 1.4%.

  When one examines the appellate caseload by district of origin, it quickly becomes apparent that population growth has no correction with appellate caseload growth. For example, in the last five years, Arizona's appellate caseload has decreased 15.5%, from 831 appeals to 702 appeals. During the same period, its population increased 5.8% from 6,549,634 to 6,931,071.[30]

  In the modern era, there is no correlation between population growth and appellate filing increase. Rather, such factors as prosecutorial decisions, the economy, and number of administrative agency actions play a larger role.

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[29] United States Bureau of Censensus Annual Estimates of Resident Population; United States Census Bureau Table "Intercensal Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico; and United States Census Bureau's International Database.

[30] United States Bureau of Census Annual Estimates of Resident Population

The modern federal appellate caseload mix is best served by a flexible, responsive, and larger circuit court.

- **Collegiality.** Collegiality is often cited as a reason to create smaller circuits.

  - **The Ninth Circuit Enjoys a Collegial Atmosphere.** In many cases, judges on smaller circuits have enjoyed a strong rapport. This doesn't mean, however, that judges on a larger circuit cannot achieve a similar rapport. Indeed, as most judges on our Court have testified repeatedly, we enjoy a very collegial atmosphere on our Court, despite differences of opinion, and we work hard to maintain it.

  - **Collegiality is not a Function of Size.** When personal differences arise on a smaller court, a court may become rapidly dysfunctional. There are many historical examples of this phenomenon. A larger court is better able to absorb strong personality differences. A close working environment does not always produce collegiality.

  - **Frequent interchanges.** On our Court, we have daily substantive interchanges of opinions and ideas through e-mail, some of them quite spirited. We often sit together on en banc panels. We have frequent contact.

  - **There are Strong Agreements Between Judges.** One excellent measure of collegiality is the degree to which judges resolve differences. Well over 90% of our cases are decided by unanimous vote. Further, there has been an increasing trend on our Court for off-panel judges who have concerns about panel opinions being able to work out differences with the panel without proceeding to a vote on whether to rehear the case en banc.

  - **The Number of Judges is Smaller than Other Similar Organizations.** Nor, in context, is the Court of Appeals too large for normal collegial relations. It is much smaller than the size of most law schools and law firms, who function in a collegial fashion. At 29 authorized active judgeships, it is a small classroom sized number.

- **Circuit Division would not Promote Greater Collegiality.** Nor would a circuit division necessarily produce a closer working environment. The geography of the Ninth Circuit, regardless of how it might be divided, precludes daily person-to-person contact. A single judge located in Hawaii, Alaska, or Montana is not going to have daily face-to-face contact with other circuit judges, regardless of circuit configuration. In any circuit, for example, my chambers would not be located within driving distance of any other chambers. The daily in-person interaction between judges will not change with a circuit split. The primary contact of the judges in any circuit division would remain as it is now, primarily by e-mail and telephone. Personal contact would be limited to court meetings and oral arguments. The illusion of increasing personal contact is not a reason to divide the Circuit.

- **California Centric.** Some split proponents argue that California dominates circuit administration. The statistics and history show otherwise. Although California has 65% of the caseload, only 47% of the current circuit judges on the Court of Appeals are from California. Arizona averages 6.8% of the total appellate caseload, but comprises 13.6% of the judges. Of the last nine Chief Judges, only two have been from California. The rest have been from Arizona, Montana, Nevada, and Oregon.

- **Summary.** None of the critics of the Ninth Circuit have demonstrated how division would improve judicial administration. When the specific critiques are examined, none provides a justification for the drastic act of circuit division.

Analysis of Split Alternatives

So, when should a circuit be divided? In my view, there are six important criteria for the creation of a new circuit: (1) the new circuit must have sufficient critical mass; (2) the division should allocate cases in approximately equal proportions; (3) the new circuit must have geographic coherence; (4) the new circuit should have jurisprudential coherence; (5) division should increase the efficiency of judicial administration; and (6) the division should be supported by a consensus of the affected court. None of the current proposals satisfy these criteria, nor has any prior proposal. Indeed, the sheer volume of potential circuit configurations proposed over the years illustrates the illogical contentions underlying any of the possible jigsaw puzzle Circuit configurations. Unlike the division of the Fifth Circuit, there is no logical dividing line that provides proportional caseload distribution without disrupting jurisprudential coherence.

All proposed divisions would create costly and duplicative administrative structures, and because budgets are driven by caseload, the new circuits would probably not be able to afford the administrative devices which have helped reduce delay in the Ninth Circuit Court of Appeals, such as a Bankruptcy Appellate Panel, the Pro Se Unit, the Mediation Unit, and an Appellate Commissioner. Essential case management functions of the clerk's office would have to be unnecessarily duplicated, further reducing available resources. Judges would have to assume additional administrative duties, further reducing the time spent deciding cases. All proposals would lack jurisprudence coherence, harming the uniform application of federal law. All proposals would significant reduce the ability of the Chief Judge to respond to judicial emergencies and would dramatically reduce the services available to the district courts, bankruptcy courts, and pre-trial/probation offices.

Finally, the Court has never endorsed a circuit split of any kind. As indicated by the letters attached as exhibits to this testimony, a vast majority of judges on the Court of Appeals oppose a split, as well as a majority of district, bankruptcy, and magistrate judges in the Circuit.

With those general observations in mind, let us examine a few of the proposals:

- **The Hruska Commission division.** The Hruska Commission studied potential divisions of the Fifth and the Ninth Circuit. It concluded that the only proportional way to divide the Ninth was to cut California in half, placing Northern California in one Circuit and Southern California in another. Dividing California in half would meet the criterion of proportionality and critical mass, but would lack jurisprudential coherence. This would pose a significant problem for California litigators and lawmakers, and the public. The constitutionality of state-wide initiatives, for example, could be tested in two circuits. Different legal standards and tests would likely apply to criminal procedure and state habeas criminal cases. Northern and Southern California might be subject to different environmental rules, and projects that overlapped the two circuits would be subject to different judicial adjudication.

- **The "Stringbean" Circuit.** There have been two proposed variants of the so-called "stringbean" Circuit.

    - **House Bill 196/ Senate Bill 295.** These bills would place Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington in a new circuit, with California, Hawaii, Guam and the Northern Mariana Islands remaining in the "new" Ninth. Although probably achieving a sufficient critical mass in each circuit, the case allocation would be disproportional, with only 33% of the caseload transferred to the new circuit. There are differences between the bills in terms of the number of judgeships. S. 295 would overburden the "new" Ninth with 377 cases per judgeship. H.R. 196 would significantly overburden the new Twelfth with 418 cases per judgeship.

      The "new" Ninth under either bill would still constitute the largest number of circuit judges in the nation, with 20 circuit judges in S. 295 and 25 in H.R. 196. Thus, to the extent that split proponents believe that a circuit that large creates problems, those issues would continue in the "new" Ninth, which would likely continue the limited en banc court procedure. Under either bill, the new Twelfth would be

significantly underfunded, given its low caseload, so that the many advantages of being in a larger circuit, including administrative support and mediation, would disappear. Judges would be burdened by more administrative tasks. The new Twelfth would not be able to deal effectively with caseload challenges in the districts because it would lack judicial resources to do so. There simply would not be enough visiting judges available within the new Twelfth Circuit to serve the needs of the districts.

Although the states would be contiguous, some geographic incoherence would exist because the major population centers would be at polar ends of the new circuit. There would be a disproportionate division of land mass, with only 12.06% being retained in the "new" Ninth, and 87.9% allocated to the new Twelfth.

The division would also cause disruption in the uniformity of law. The technology industries of Washington and Oregon would be separated from Silicon Valley. Lake Tahoe would be under the jurisdiction of two circuits. The Rogue River-Siskiyou and Klamath National Forests would under the jurisdiction of two circuits, as well as management of the Pacific groundfish fishery.

H. 196 and S. 295, with 5 additional judgeships would cost between $140,883,853 and $169,710,625 over the lifetime of the anticipated judges, with recurring costs each year beyond that of $1,052,232. Based on current courthouse construction benchmarks, the estimated current cost of construction of a new Phoenix headquarters would be $136,333,000. The cost of constructing new places for holding court in Las Vegas, Missoula, and Anchorage would be between $1.5 million and $2.5 million in each location, depending on the locality, and annual rental costs would range from $80,000 to $120,000 a year per location. The initial subscription costs associated with establishing a new circuit library are estimated to be between $700,000 and $750,000, with recurring annual costs of between $450,000 and $500,000 dollars. The estimated total for addition video-conference and streaming capability to a Circuit is $349,000.

- **The "Hopscotch" Circuit proposals.** Two variants of the so-called "Hopscotch" Circuits have been proposed. The term "hopscotch" has been used to describe these proposals because the Circuit boundaries would not be geographically contiguous–in other words, the Circuit would "hopscotch" over otherwise contiguous states.

  - **H.R. 250.** Under H.R. 250, the new Twelfth Circuit could consist of Alaska, Arizona, Idaho, Nevada and Montana, hopscotching over Washington and Oregon. This proposal lacks geographic coherence. Separating Alaska from its neighboring states would create the only circuit with non-contiguous states.

    The division would also cause disruption in the uniformity of law. Lake Tahoe would be under the jurisdiction of two circuits. The Rogue River-Siskiyou and Klamath National Forests would under the jurisdiction of two circuits, as well as management of the Pacific groundfish fishery. The Wallowa-Whitman and Colville National Forests would be under the jurisdiction of two circuits.

    Case allocation would be disproportional, with only 21% of the current caseload being allocated to the new Twelfth Circuit. The "new" Ninth would have 427 cases per judgeship. Geographic allocation would also be disproportionate, with the new Twelfth assuming 75.9% of the land mass, with 24.1% remaining with the "new" Ninth.

    H. 250, with 2 additional judgeships, would cost between $56,353,541 and $61,884,250 over the lifetime of the anticipated judges, with recurring costs each year beyond that of $1,052,232. The initial subscription costs associated with establishing a new circuit library are estimated to be between $700,000 and $750,000, with recurring annual costs of between $450,000 and $500,000 dollars. Based on current courthouse construction benchmarks, the estimated current cost of construction of a new Phoenix headquarters would be $136,333,000. The cost of constructing new places for holding court in Las Vegas, Missoula, and Anchorage would be between $1.5 million and $2.5 million in each location, depending on the locality

and annual rental costs would range from $80,000 to $120,000 a year per location. The estimated total for addition video-conference and streaming capability to a Circuit is $349,000.

Until a courthouse could be constructed, which likely take a decade years, Arizona lawyers would have to travel to Seattle for oral arguments, as opposed to Pasadena or San Francisco.

- **Senate Bill 276.** In the "hopscotch" variant of S. 276, the new Twelfth would consist of Alaska, Arizona, Idaho, Montana, Nevada, and Washington in a new circuit, hopscotching over Oregon with California, Hawaii, Oregon, Guam and the Northern Mariana Islands remaining in the "new" Ninth. It would suffer even more from disproportionality of case allocation, with 29% of the current caseload being allocated to the new Twelfth. There would be a disproportionate divison of land mass, with only 19.2% being retained in the "new" Ninth, and 80.8% allocated to the new Twelfth. The new Twelfth would suffer the same infirmities as with the other "stringbean" proposal, being underfunded and under served.

  The division would also disrupt the uniformity application of law. The technology industry in Washington would be separated from Silicon Valley. Lake Tahoe would be under the jurisdiction of two circuits. The Rogue River-Siskiyou and Klamath National Forests would under the jurisdiction of two circuits, as well as management of the Pacific groundfish fishery. The Wallowa-Whitman and Colville National Forests would be under the jurisdiction of two circuits.

  The initial subscription costs associated with establishing a new circuit library are estimated to be between $700,000 and $750,000, with recurring annual costs of between $450,000 and $500,000 dollars. Based on current courthouse construction benchmarks, the estimated current cost of construction of a new Phoenix headquarters would be $136,333,000. The cost of constructing new places for holding court in Las Vegas, Missoula, and Anchorage would be between $1.5 million and $2.5 million in each location, depending on the locality and annual rental costs would range from $80,000 to

$120,000 a year per location. The estimated total for addition video-conference and streaming capability to a Circuit is $349,000.

Until a courthouse could be constructed, which likely take a decade years, Arizona lawyers would have to travel to Seattle for oral arguments, as opposed to Pasadena or San Francisco.

- **Prior Legislation.** In a previous Congress, a third variant of the "Hopscotch" circuit was proposed, with Alaska, Washington, Oregon, Idaho, Montana, and Arizona constituting the new Twelfth, and California, Nevada, Hawaii, Guam and the Northern Mariana Islands remaining in the "new" Ninth. This proposal would leave Arizona isolated, with no contiguous states in the same circuit. This proposal lacks geographic coherence and would not promote the uniformity of federal law.

- **"Horsecollar" or California-only Circuit.** This proposal, which is contained in H. 1598, would place all states except for California in a new circuit. Although the caseload split would be more proportional than most proposals, it would suffer from most of the other problems attendant to the "stringbean" circuit. More importantly, it would create a one-state circuit, which has been repeatedly deemed undesirable.

  H. 1598 would create 17 new judgeships for the new 12th Circuit, and shift all of the current judges in the new Circuit to the old Ninth. In other words, it would leave every state in the Circuit, except California, without any circuit judges until they were confirmed. Case allocation would be disproportional, with the new circuit allocated 35% of the caseload, with the old Ninth retaining 65% of the current caseload.

  H. 1598, with 17 additional judgeships would cost between $479,005,098 and $577,016,125 over the lifetime of the anticipated judges, with recurring costs each year beyond that of $1,052,232. The initial subscription costs associated with establishing a new circuit library are estimated to be between $700,000 and $750,000, with recurring annual costs of between $450,000 and $500,000 dollars. Based on current courthouse construction benchmarks, the estimated current cost of construction of a new Phoenix

headquarters would be $136,333,000. The cost of constructing new places for holding court in Las Vegas, Missoula, and Anchorage would be between $1.5 million and $2.5 million in each location, depending on the locality and annual rental costs would range from $80,000 to $120,000 a year per location. The estimated total for addition video-conference and streaming capability to a Circuit is $349,000.

Until a courthouse could be constructed, which would take many years, Arizona lawyers would have to travel to Seattle for oral arguments, as opposed to Pasadena or San Francisco.

- **Northwest Circuit.** Another prior proposal consisted of placing the Northwest states (Alaska, Washington, Oregon, Idaho and Montana) in the new Twelfth, with California, Hawaii, Nevada, Arizona, Guam and the Northern Mariana Islands remaining in the "new" Ninth. Although this proposal would have geographic coherence, the new Twelfth would lack critical mass. There were only 1,947 appeals filed from the Northwest states in 2016. Only the First and the D.C. Circuits had fewer appeals. Thus, the few judicial and administrative resources for a Northwest Circuit would be highly dispersed.

  With only 17% of the Circuit work assigned to the Northwest, and 83% remaining with the "new" Ninth, the Northwest Circuit would lack proportionality of caseload, offering no improvements to the states remaining in the Ninth.

- **Three-Way Split.** One legislative proposal would split the Circuit into thirds: a Southern circuit encompassing the Central and Southern Districts of California; a Central circuit comprising Arizona, Nevada, Hawaii, Guam, the Northern Mariana Islands, and the Northern and Eastern Districts of California; and a Northwest circuit consisting of Alaska, Washington, Oregon, Idaho and Montana. The creation of three small circuits would be administratively inefficient and would divide California.

- **Pacific Rim Circuit.** One proposal which has not gained legislative currency would retain the existing Ninth Circuit, except for Arizona and Montana which would be made part of the Tenth Circuit. This proposal

would not address any of the concerns about the present Ninth Circuit structure, would unnecessarily disrupt the Tenth Circuit, and would radically alter the law applicable to Arizona and Montana.

- **White Commission.** The White Commission proposed retaining the Ninth Circuit, but dividing it into three judicial units operating separately. Thus, there would essentially be three mini-circuits, with their own case law and en banc system, coupled with a circuit-wide limited and full court en banc system. This would have all of the detriments of the three-way split, with the additional complication of a very complex en banc system that would significantly delay the resolution of cases.

- **Summary.** There are no circuit configurations that can deliver justice as well as the current structure of the Ninth Circuit. None of the split proposals satisfy the criteria of critical mass, proportionality, geographic coherence, jurisprudential coherence, and judicial efficiency. Each of proposals suffers from one or more extreme problems, and would diminish the effectiveness of judicial administration. In addition, the sheer number of different split configurations proposed demonstrates the quixotic, impractical dilemma posed by any plan to split the Ninth Circuit. Our circumstance is completely different from that faced by the Fifth Circuit, where there was a logical place of division and a unanimous court in favor of it.

CONCLUSION

The Ninth Circuit remains a leader in technology and case management innovations. Not only is there a lack of compelling empirical evidence demonstrating the need to undertake the drastic, expensive, and unwarranted breakup of a sixty year old circuit, there is compelling evidence that the best means of administering justice in the western United States is to leave the Ninth Circuit intact. A circuit split would increase delay, reduce access to justice, and waste taxpayer dollars. Critical programs and innovations would be lost, replaced by unnecessary bureaucratic duplication of administration. Division would not bring justice closer to the people; it would increase the barriers between the public and the courts. For these reasons, I oppose division of the Ninth Circuit.

I thank the Subcommittee for its consideration of my views.

United States Court of Appeals
for the Ninth Circuit

P.O. Box 31478
Billings, Montana 59107-1478

CHAMBERS OF
SIDNEY R. THOMAS
CHIEF JUDGE

July 27, 2017

TEL: (406) 373-3200
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The Honorable Chuck Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Diane Feinstein
Ranking Member
224 Dirksen Senate Office Building
Senate Committee on the Judiciary
Washington D.C.

Dear Chairman Grassley and Ranking Member Feinstein:

We, the undersigned United States Circuit Judges of the Ninth Circuit Court of Appeals express our opposition to the pending legislative proposals dividing the Ninth Circuit, including S. 276, S. 295, H.R. 196, H.R. 250, and H.R. 1598. In our view, division of the Ninth Circuit would be costly, inefficient, and would harm the administration of justice in the West.

Sincerely,

Sidney R. Thomas

Sidney R. Thomas
Chief Judge

/s Alfred T. Goodwin
Chief Judge Emeritus
Pasadena, California

/s J. Clifford Wallace
Chief Judge Emeritus
San Diego, California

/s Procter Hug, Jr.
Chief Judge Emeritus
Reno, Nevada

/s Mary M. Schroeder
Chief Judge Emeritus
Phoenix, Arizona

/s Alex Kozinski
Chief Judge Emeritus
Pasadena, California

/s Jerome Farris
Senior United States Circuit Judge
Seattle, Washington

/s Harry Pregerson
Senior United States Circuit Judge
Woodland Hills, California

/s Dorothy W. Nelson
Senior United States Circuit Judge
Pasadena, California

/s William C. Canby, Jr.
Senior United States Circuit Judge
Phoenix, Arizona

/s Stephen Reinhardt
United States Circuit Judge
Los Angeles, California

/s Michael Daly Hawkins
Senior United States Circuit Judge
Phoenix, Arizona

/s A. Wallace Tashima
Senior United States Circuit Judge
Pasadena, California

/s Susan P. Graber
United States Circuit Judge
Portland, Oregon

/s M. Margaret McKeown
United States Circuit Judge
San Diego, California

/s Kim McLane Wardlaw
United States Circuit Judge
Pasadena, California

/s William A. Fletcher
United States Circuit Judge
San Francisco, California

/s Raymond C. Fisher
Senior United States Circuit Judge
Pasadena, California

/s Ronald M. Gould
United States Circuit Judge
Seattle, Washington

/s Richard A. Paez
United States Circuit Judge
Pasadena, California

/s Johnnie B. Rawlinson
United States Circuit Judge
Las Vegas, Nevada

/s Jay S. Bybee
United States Circuit Judge
Las Vegas, Nevada

/s Carlos T. Bea
United States Circuit Judge
San Francisco, California

/s Mary H. Murguia
United States Circuit Judge
Phoenix, Arizona

/s Jacqueline H. Nguyen
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/s Andrew D. Hurwitz
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/s Michelle T. Friedland
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/s Marsha S. Berzon
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/s Richard R. Clifton
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/s Consuelo M. Callahan
United States Circuit Judge
Sacramento, California

/s Milan D. Smith, Jr.
Untied States Circuit Judge
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/s Morgan Christen
United States Circuit Judge
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/s Paul J. Watford
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CHAMBERS OF
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CHIEF JUDGE

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August 22, 2017

The Honorable Chuck Grassley
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Diane Feinstein
Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington D.C. 20510

Dear Chairman Grassley and Ranking Member Feinstein:

The undersigned district, bankruptcy, and magistrate judges of the Ninth Circuit Court of Appeals have authorized me to express their opposition to the pending legislative proposals dividing the Ninth Circuit, including S. 276, S. 295, H.R. 196, H.R. 250, and H.R. 1598. In our view, division of the Ninth Circuit would be costly, inefficient, and would harm the administration of justice in the West.

Sincerely,

Sidney R. Thomas
Chief Judge

/s Hon. Dana L. Christensen
Chief United States District Judge
District of Montana

/s Hon. Raner C. Collins
Chief United States District Judge
District of Arizona

/s Hon. Phyllis J. Hamilton
Chief United States District Judge
Northern District of California

/s Hon. Ramona V. Manglona
Chief United States District and
Bankruptcy Judge
District of Northern Mariana Islands

/s Hon. Ricardo S. Martinez
Chief United States District Judge
Western District of Washington

/s Hon. Barry Ted Moskowitz
Chief United States District Judge
Southern District of California

/s Hon. Gloria M. Navarro
Chief United States District Judge
District of Nevada

/s Hon. Lawrence J. O'Neill
Chief United States District Judge
Eastern District of California

/s Hon. Virginia A. Phillips
Chief United States District Judge
Central District of California

/s Hon. J. Michael Seabright
Chief United States District Judge
District of Hawaii

/s Hon. Frances Tydingo-Gatewood
Chief United States District and
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District of Guam

/s Hon. B. Lynn Winmill
Chief United States District Judge
District of Idaho

/s Hon. Meredith A. Jury
Chief Judge, Ninth Circuit
Bankruptcy Appellate Panel and
United States Bankruptcy Judge
Central District of California
(Riverside Division)

/s Hon. Bruce T. Beesley
Chief United States Bankruptcy Judge
District of Nevada

/s Hon. Sheri Blubond
Chief United States Bankruptcy Judge
Central District of California

/s Hon. Roger L. Efremsky
Chief United States Bankruptcy Judge
Northern District of California

/s Hon. Robert J. Farris
Chief United States Bankruptcy Judge
District of Hawaii

/s Hon. Bryan D. Lynch
Chief United States Bankruptcy Judge
Western District of Washington

/s Hon. Ronald H. Sargis
Chief United States Bankruptcy Judge
Eastern District of California

/s Hon. Laura S. Taylor
Chief United States Bankruptcy Judge
Southern District of California

/s Hon. Laurel D. Beeler
Chief United States Magistrate Judge
Northern District of California

/s Hon. Kevin Chang
Chief United States Magistrate Judge
District of Hawaii

/s Hon. James P. Donohue
Chief United States Magistrate Judge
Western District of Washington

/s Hon. John T. Johnston
Chief United States Magistrate Judge
District of Montana

/s Hon. Joaquin V. E. Manibusan, Jr.
Chief United States Magistrate Judge
District of Guam

/s Hon. Benjamin P. Hursh
Chief United States Bankruptcy Judge
District of Montana

/s Hon. Terry L. Myers
Chief United States Bankruptcy Judge
District of Idaho

/s Hon. Gary A. Spraker
Chief United States Bankruptcy Judge
District of Alaska

/s Hon. Stacie F. Beckerman
Chief United States Magistrate Judge
District of Oregon

/s Hon. Edmund F. Brennan
Chief United States Magistrate Judge
Eastern District of California

/s Hon. Mitchell D. Dembin
Chief United States Magistrate Judge
Southern District of California

/s Hon. George W. Foley, Jr.
Chief United States Magistrate Judge
District of Nevada

/s Hon. Heather L. Kennedy
Chief United States Magistrate Judge
District of the Northern Mariana
Islands

/s Hon. John V. Acosta
United States Magistrate Judge
District of Oregon

/s Hon. Jan M. Adler
United States Magistrate Judge
Southern District of California

/s Hon. Louise D. Adler
United States Bankruptcy Judge
Southern District of California

/s Hon. Ann L. Aiken
United States District Judge and
Chief Judge Emeritus
District of Oregon

/s Hon. Theodor C. Albert
United States Bankruptcy Judge
Central District of California
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/s Hon. Christopher M. Alson
United States Bankruptcy Judge
Western District of Washington

/s Hon. William Alsup
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/s Hon. Michael M. Anello
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Southern District of California

/s Hon. Cynthia Bashant
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/s Hon. Hannah L. Blumenstiel
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Northern District of California

/s Hon. Susan R. Bolton
Senior United States District Judge
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United States District Judge
District of Nevada

/s Hon. Leslie A. Bowman
United States Magistrate Judge
District of Arizona

/s/ Hon. Julia W. Brand
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Hon. Ruben B. Brooks
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/s Hon. Anna J. Brown
Senior United States District Judge
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Hon. Jill L. Burkhardt
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/s Hon. Cormac J. Carney
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/s Hon. David O. Carter
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/s Hon. Edward M. Chen
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/s Hon. Allison Claire
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/s/ Hon. Mark D. Clarke
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/s Hon. Scott C. Clarkson
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Central District of California
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/s Hon. William G. Cobb
United States Magistrate Judge
District of Nevada

/s Hon. Thomas M. Coffin
United States Magistrate Judge
District of Oregon

/s Hon. Valerie Cook
United States Magistrate Judge
District of Nevada

/s Hon. Jacqueline S. Corley
United States Magistrate Judge
Northern District of California

/s Hon. John C. Coughenour
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and Chief Judge Emeritus
Western District of Washington

/s Hon. Nathanael Cousins
United States Magistrate Judge
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/s Hon. Karen S. Crawford
United States Magistrate Judge
Southern District of California

/s Hon. J. Richard Creatura
United States Magistrate Judge
Western District of Washington

/s Hon. Candy W. Dale
United States Magistrate Judge
District of Idaho

/s Hon. Edward J. Davila
United States District Judge
Northern District of California

/s Hon. Carolyn R. Dimmick
Senior United States District Judge
Western District of Washington

/s Hon. James Donato
United States District Judge
Northern District of California

/s Hon. Thomas B. Donovan
United States Bankruptcy Judge
Central District of California
(Los Angeles Division)

/s Hon. Jennifer A. Dorsey
United States District Judge
District of Nevada

/s Hon. Dale A. Drozd
United States District Judge
Eastern District of California

/s Hon. Miranda Du
United States District Judge
District of Nevada

/s Hon. David K. Duncan
United States Magistrate Judge
District of Arizona

/s Hon. Morrison C. England, Jr.
United States District Judge
and Chief Judge Emeritus
Eastern District of California

/s Hon. William B. Enright
Senior United States District Judge
Southern District of California

/s Hon. David Alan Ezra
Senior United States District Judge
and Chief Judge Emeritus
District of Hawaii

/s Hon. Cam Ferenbach
United States Magistrate Judge
District of Nevada

/s Hon. Dale S. Fisher
United States District Judge
Central District of California

/s Hon. Beth L. Freeman
United States District Judge
Northern District of California

/s Hon. Theresa L. Fricke
United States Magistrate Judge
Western District of Washington

/s Hon. Lloyd D. George
Senior United States District Judge
and Chief Judge Emeritus
District of Nevada

/s Haywood S. Gilliam, Jr.
United States District Judge
Northern District of California

/s Hon. Helen W. Gillmor
Senior United States District Judge
and Chief Judge Emeritus
District of Hawaii

/s Hon. Andrew P. Gordon
United States District Judge
District of Nevada

/s Hon. Andrew J. Guilford
United States District Judge
Central District of California

/s Hon. M. Elaine Hammond
United States Bankruptcy Judge
Northern District of California

/s Hon. Terry J. Hatter, Jr.
Senior United States District Judge
and Chief Judge Emeritus
Central District of California

/s Hon. Thelton E. Henderson
Retired United States District Judge
and Chief Judge Emeritus
Northern District of California

/s Hon. Mary Jo Heston
United States Bankruptcy Judge
Western District of Washington

/s Hon. H. Russel Holland
Senior United States District Judge
District of Alaska

/s Hon. Mark D. Houle
United States Bankruptcy Judge
Central District of California
(Riverside Division)

/s Hon. John A. Houston
United States District Judge
Southern District of California

/s Hon. Marilyn L. Huff
Senior United States District Judge
and Chief Judge Emeritus
Southern District of California

/s Hon. Anthony W. Ishii
Senior United States District Judge
and Chief Judge Emeritus
Eastern District of California

/s Hon. Susan Y. Illston
Senior United States District Judge
Northern District of California

/s Hon. Maria-Elena James
United States Magistrate Judge
Northern District of California

/s Hon. Richard A. Jones
United States District Judge
District of Western Washington

/s Hon. Victoria S. Kaufman
United States Bankruptcy Judge
Central District of California
(San Fernando Valley Division)

/s Hon. Alan C. Kay
Senior United States District Judge
and Chief Judge Emeritus
District of Hawaii

/s Hon. Steve Kim
United States Magistrate Judge
Central District of California

/s Hon. Sandra R. Klein
United States Bankruptcy Judge
Central District of California
(Los Angeles Division)

/s Hon. Leslie E. Kobayashi
United States District Judge
District of Hawaii

/s Hon. Barry M. Kurren
United States Magistrate Judge
District of Hawaii

/s Hon. Robert N. Kwan
United States Bankruptcy Judge
Central District of California
(Los Angeles Division)

/s Hon. William Lafferty
United States Bankruptcy Judge
Northern District of California

/s Hon. Elizabeth D. Laporte
United States Magistrate Judge
Northern District of California

/s Hon. Robert S. Lasnik
Senior United States District Judge
and Chief Judge Emeritus
Western District of Washington

/s Hon. Louise A. LeMothe
United States Magistrate Judge
Central District of California

/s Hon. Ronald S. W. Lew
United States District Judge
Central District of California

/s Hon. Howard R. Lloyd
United States Magistrate Judge
Northern District of California

/s Hon. M. James Lorenz
Senior United States District Judge
Southern District of California

/s Hon. Jeremiah C. Lynch
United States Magistrate Judge
District of Montana

/s Hon. Barbara L. Major
United States Magistrate Judge
Southern District of California

/s Hon. Margaret M. Mann
United States Bankruptcy Judge
Southern District of California

/s Hon. Kenneth J. Mansfield
United States Magistrate Judge
District of Hawaii

/s Hon. Consuelo B. Marshall
Senior United States District Judge
Central District of California

/s Hon. Barbara A. McAuliffe
United States Magistrate Judge
Eastern District of California

/s Hon. Paula McCandlis
United States Magistrate Judge
Western District of Washington

/s Hon. John E. McDermott
United States Magistrate Judge
Central District of California

/s Hon. Howard D. McKibben
Senior United States District Judge
and Chief Judge Emeritus
District of Nevada

/s Hon. Jeffrey T. Miller
Senior United States District Judge
Southern District of California

/s Hon. Donald W. Molloy
Senior United States District Judge
and Chief Judge Emeritus
District of Montana

/s Hon. Susan Oki Mollway
Senior United States District Judge
and Chief Judge Emeritus
District of Hawaii

/s Hon. Dennis Montali
United States Bankruptcy Judge
Northern District of California

/s Hon. Brian Morris
United States District Judge
District of Montana

/s Hon. Kimberly J. Mueller
United States District Judge
Eastern District of California

/s Hon. Geraldine Mund
United States Bankruptcy Judge
Central District of California
(San Fernando Valley Division)

/s Hon. Charles Novack
United States Bankruptcy Judge
Northern District of California

/s Hon. Beverly Reid O'Connell
United States District Judge
Central District of California

/s Hon. William H. Orrick, III
United States District Judge
Northern District of California

/s Hon. Paul Papak
United States Magistrate Judge
District of Oregon

/s Hon. Marsha J. Pechman
Senior United States District Judge
and Chief Judge Emeritus
Western District of Washington

/s Hon. Dean D. Pregerson
Senior United States District Judge
Central District of California

/s Hon. Richard L. Pulisi
United States Magistrate Judge
District of Hawaii

/s Hon. Justin L. Quackenbush
Senior United States District Judge
and Chief Judge Emeritus
Eastern District of Washington

/s Hon. Manuel L. Real
United States District Judge
Central District of California

/s Hon. Robin L. Riblit
United States Bankruptcy Judge
Central District of California

/s Hon. James L. Robart
Senior United States District Judge
District of Western Washington

/s Hon. Ernest M. Robles
United States Bankruptcy Judge
Central District of California
(Los Angeles Division)

/s Yvonne Gonzalez Rogers
United States District Judge
Northern District of California

/s Hon. Alicia G. Rosenberg
United States Magistrate Judge
Central District of California

/s Hon. Barry Russell
United States Bankruptcy Judge
Central District of California
(Los Angeles Division)

/s Hon. Jolie A. Russo
United States Magistrate Judge
District of Oregon

/s Hon. Donna M. Ryu
United States Magistrate Judge
Northern District of California

/s Hon. Deborah J. Saltzman
United States Bankruptcy Judge
Central District of California
(Los Angeles & Northern Divisions)

/s Hon. Janis L. Sammartino
United States District Judge
Southern District of California

/s Hon. John W. Sedwick
Senior United States District Judge
District of Alaska

/s Hon. Richard Seeborg
United States District Judge
Northern District of California

/s Hon. James V. Selna
United States District Judge
Central District of California

/s Hon. Michael J. Seng
United States Magistrate Judge Eastern
District of California

/s Hon. Edward F. Shea
Senior United States District Judge
Eastern District of Washington

/s Hon. Roslyn O. Silver
Senior United States District Judge
and Chief Judge Emeritus
District of Arizona

/s Hon. Michael H. Simon
United States District Judge
District of Oregon

/s Hon. Bernard G. Skomal
United States Magistrate Judge
Southern District of California

/s Hon. Erithe A. Smith
United States Bankruptcy Judge
Central District of California
(Santa Ana Division)

/s Hon. Christina A. Snyder
Senior United States District Judge
Central District of California

Hon. Joseph C. Spero
United States Magistrate Judge
Northern District of California

/s Hon. Janice M. Stewart
United States Magistrate Judge
District of Oregon

/s Hon. Nita L. Stormes
United States Magistrate Judge
Southern District of California

/s Hon. Karen L. Strombom
United States Magistrate Judge
Western District of Washington

/s Hon. Patricia Sullivan
United States Magistrate Judge
District of Oregon

/s Hon. Mary Alice Theiler
United States Magistrate Judge
Western District of Washington

/s Hon. Jennifer L. Thurston
United States Magistrate Judge
Eastern District of California

/s Hon. Jon S. Tigar
United States District Judge
Northern District of California

/s Hon. Maureen A. Tighe
United States Bankruptcy Judge
Central District of California
(San Fernando Valley Division)

/s Hon. Brian A. Tsuchida
United States Magistrate Judge
Western District of Washington

/s Hon. Nandor J. Vadas
United States Magistrate Judge
Northern District of California

/s Hon. Mark S. Wallace
United States Bankruptcy Judge
Central District of California
(Santa Ana & Riverside Divisions)

/s Hon. Derrick K. Watson
United States District Judge
District of Hawaii

/s Hon. John L. Weinberg
United States Magistrate Judge
Western District of Washington

/s Hon. Kandis A. Westmore
United States Magistrate Judge
Northern District of California

/s Hon. Robert H. Whaley
Senior United States District Judge
and Chief Judge Emeritus
Eastern District of Washington

/s Hon. Thomas J. Whelan
Senior United States District Judge
Southern District of California

/s Hon. Claudia Wilken
Senior United States District Judge
and Chief Judge Emeritus
Northern District of California

/s Hon. Youlee Yim You
United States Magistrate Judge
District of Oregon

/s Hon. Frank R. Zapata
Senior District Judge
District of Arizona

/s Hon. Gregg W. Zive
United States Bankruptcy Judge
District of Nevada

/s Hon. Thomas S. Zilly
Senior District Judge
Western District of Washington

/s Hon. Vincent P. Zurzolo
United States Bankruptcy Judge
Central District of California
(Los Angeles Division)

United States Court of Appeals for the Ninth Circuit

Sources of New Appeals FY2016

Dist/Case Type	AK	AZ	CAC	CAE	CAN	CAS	GU	HI	ID	MT	NV	NMI	OR	WAE	WAW	TOTAL
CIVIL	30	222	839	198	450	170	1	56	42	71	205	3	179	45	231	2742
CRIMINAL	23	225	286	106	87	227	11	33	33	84	104	8	72	52	67	1418
BIA	1	205	1,771	2	318	222	6	31	15	1	137	9	46	1	241	3006
PRISONER	13	271	751	492	247	137	2	27	58	55	218	0	137	43	101	2552
ORI.Proc.	21	90	420	173	140	85	5	24	28	41	91	4	50	48	69	1289
BAP	0	4	51	7	13	5	0	0	3	0	10	0	10	0	2	105
Bnkrptcy-DC	2	13	51	7	16	6	0	3	4	4	9	0	5	2	9	131
BKB	0	0	2	0	0	0	0	0	0	0	2	0	0	0	0	4
TAX	0	6	24	0	16	2	0	0	0	2	1	0	1	1	4	57
MISC.Proc.	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1
TOTAL:	90	1,037	4,195	985	1,287	854	25	174	183	258	777	24	500	192	724	11305

The following pages compare caseloads resulting from reconfiguration of the Ninth Circuit and creation of a new 12th Circuit. The tables display source of new appeals using FY2016 numbers. The pie charts display the unequal division of workload and the adjoining text summarizes the caseload and distribution of judgeships.

Office of the Circuit Executive – Public Information
April 11, 2017

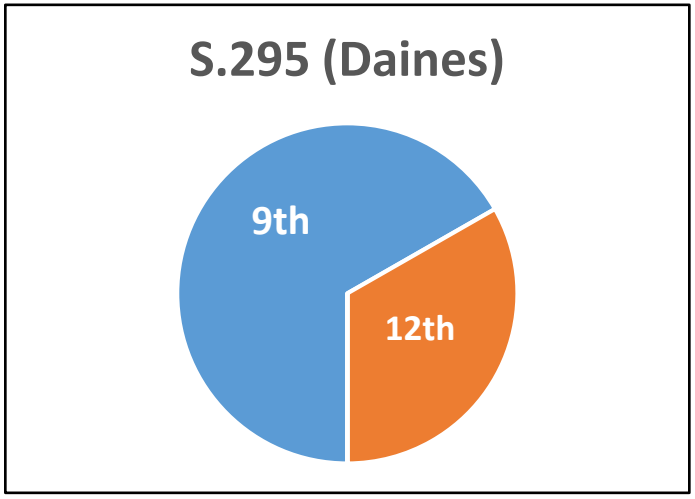
Senate Bill 295 (Daines)

9th Circuit

Dist/Case Type	CAC	CAE	CAN	CAS	GU	HI	NMI	TOTAL
CIVIL	839	198	450	170	1	56	3	1717
CRIMINAL (to include 9A)	286	106	87	227	11	33	8	758
BIA	1,771	2	318	222	6	31	9	2359
PRISONER	751	492	247	137	2	27	0	1656
ORI.Proc.	420	173	140	85	5	24	4	851
BAP	51	7	13	5	0	0	0	76
Bnkrptcy-DC	51	7	16	6	0	3	0	83
BKB	2	0	0	0	0	0	0	2
TAX	24	0	16	2	0	0	0	42
MISC.Proc.	0	0	0	0	0	0	0	0
TOTAL:	4,195	985	1,287	854	25	174	24	7,544

12th Circuit

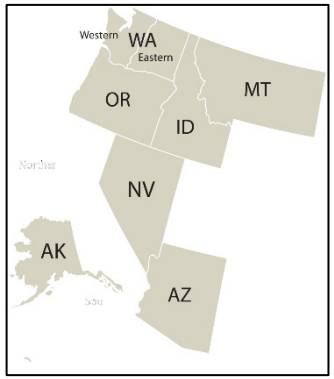
Dist/Case Type	AK	AZ	ID	MT	NV	OR	WAE	WAW	TOTAL
CIVIL	30	222	42	71	205	179	45	231	1,025
CRIMINAL	23	225	33	84	104	72	52	67	660
BIA	1	205	15	1	137	46	1	241	647
PRISONER	13	271	58	55	218	137	43	101	896
ORI.Proc.	21	90	28	41	91	50	48	69	438
BAP	0	4	3	0	10	10	0	2	29
Bnkrptcy-DC	2	13	4	4	9	5	2	9	48
BKB	0	0	0	0	2	0	0	0	2
TAX	0	6	0	2	1	1	1	4	15
MISC.Proc.	0	1	0	0	0	0	0	0	1
TOTAL:	90	1,037	183	258	777	500	192	724	3,761



Ninth Circuit

7,544 cases
67% of caseload

20 judgeships
377 cases per judgeship



Twelfth Circuit

3,761 cases
33% of caseload

14 judgeships
269 cases per judgeship

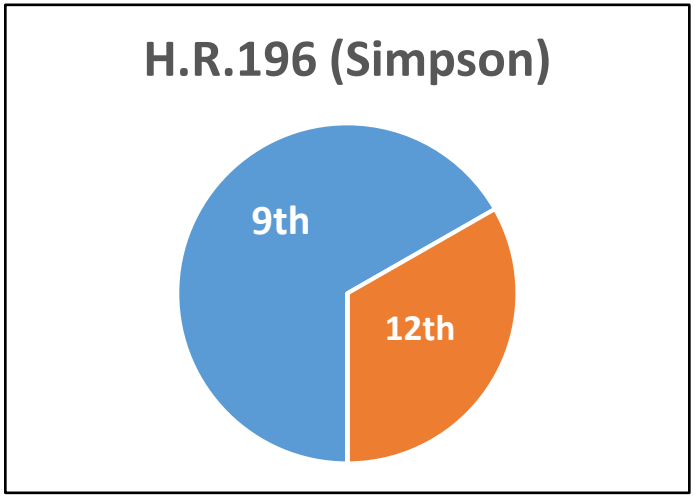
House Bill 196 (Simpson)

9th Circuit

Dist/Case Type	CAC	CAE	CAN	CAS	GU	HI	NMI	TOTAL
CIVIL	839	198	450	170	1	56	3	1717
CRIMINAL (to include 9A)	286	106	87	227	11	33	8	758
BIA	1,771	2	318	222	6	31	9	2359
PRISONER	751	492	247	137	2	27	0	1656
ORI.Proc.	420	173	140	85	5	24	4	851
BAP	51	7	13	5	0	0	0	76
Bnkrptcy-DC	51	7	16	6	0	3	0	83
BKB	2	0	0	0	0	0	0	2
TAX	24	0	16	2	0	0	0	42
MISC.Proc.	0	0	0	0	0	0	0	0
TOTAL:	4,195	985	1,287	854	25	174	24	7,544

12th Circuit

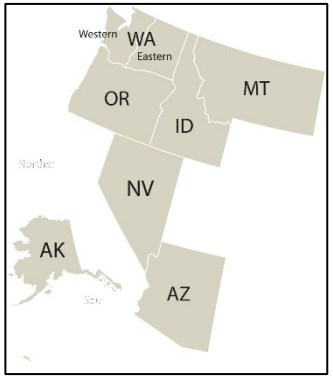
Dist/Case Type	AK	AZ	ID	MT	NV	OR	WAE	WAW	TOTAL
CIVIL	30	222	42	71	205	179	45	231	1,025
CRIMINAL	23	225	33	84	104	72	52	67	660
BIA	1	205	15	1	137	46	1	241	647
PRISONER	13	271	58	55	218	137	43	101	896
ORI.Proc.	21	90	28	41	91	50	48	69	438
BAP	0	4	3	0	10	10	0	2	29
Bnkrptcy-DC	2	13	4	4	9	5	2	9	48
BKB	0	0	0	0	2	0	0	0	2
TAX	0	6	0	2	1	1	1	4	15
MISC.Proc.	0	1	0	0	0	0	0	0	1
TOTAL:	90	1,037	183	258	777	500	192	724	3,761



Ninth Circuit

7,544 cases
67% of caseload

25 judgeships
302 cases per judgeship



Twelfth Circuit

3,761 cases
33% of caseload

9 judgeships
418 cases per judgeship

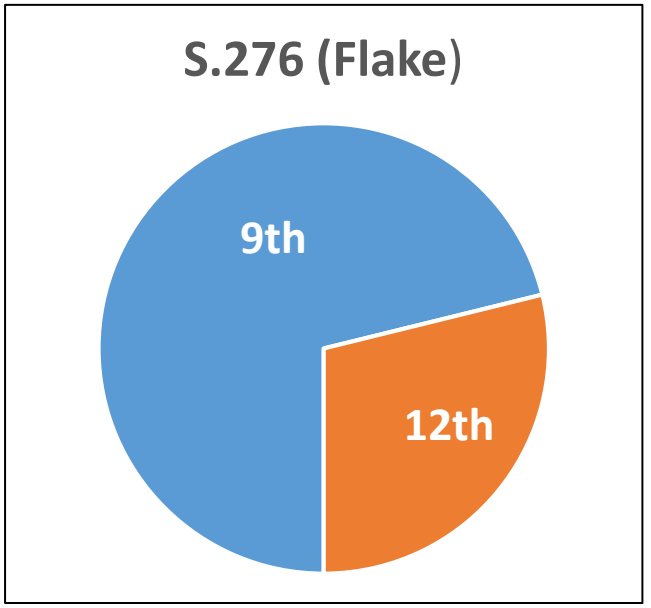
Senate Bill 276 (Flake)

9th Circuit

Dist/Case Type	CAC	CAE	CAN	CAS	GU	HI	NMI	OR	TOTAL
CIVIL	839	198	450	170	1	56	3	179	1,896
CRIMINAL	286	106	87	227	11	33	8	72	830
BIA	1,771	2	318	222	6	31	9	46	2,405
PRISONER	751	492	247	137	2	27	0	137	1,793
ORIG.Proc.	420	173	140	85	5	24	4	50	901
BAP	51	7	13	5	0	0	0	10	86
Bnkrptcy-DC	51	7	16	6	0	3	0	5	88
BKB	2	0	0	0	0	0	0	0	2
TAX	24	0	16	2	0	0	0	1	43
MISC.Proc.	0	0	0	0	0	0	0	0	0
TOTAL:	4,195	985	1,287	854	25	174	24	500	8,044

12th Circuit

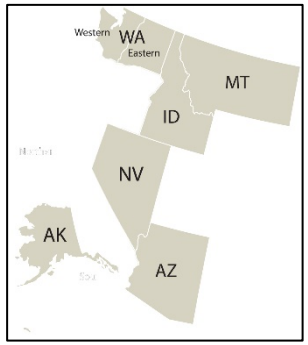
Dist/Case Type	AK	AZ	ID	MT	NV	WAE	WAW	TOTAL
CIVIL	30	222	42	71	205	45	231	846
CRIMINAL	23	225	33	84	104	52	67	588
BIA	1	205	15	1	137	1	241	601
PRISONER	13	271	58	55	218	43	101	759
ORI.Proc.	21	90	28	41	91	48	69	388
BAP	0	4	3	0	10	0	2	19
Bnkrptcy-DC	2	13	4	4	9	2	9	43
BKB	0	0	0	0	2	0	0	2
TAX	0	6	0	2	1	1	4	14
MISC.Proc.	0	1	0	0	0	0	0	1
TOTAL:	90	1,037	183	258	777	192	724	3,261



9th Circuit

8,044 cases
71% of caseload

19 judgeships
423 cases per judgeship



12th Circuit

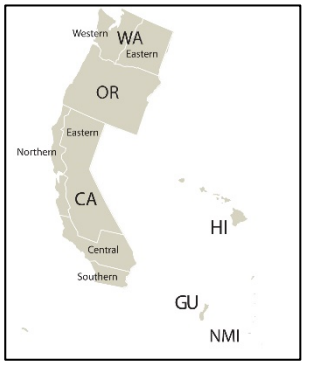
3,261 cases
29% of caseload

10 judgeships
326 cases per judgeship

House Bill 250 (Biggs)

9th Circuit

Dist/Case Type	CAC	CAE	CAN	CAS	GU	HI	NMI	OR	WAE	WAW	TOTAL
CIVIL	839	198	450	170	1	56	3	179	45	231	2,172
CRIMINAL	286	106	87	227	11	33	8	72	52	67	949
BIA	1,771	2	318	222	6	31	9	46	1	241	2,647
PRISONER	751	492	247	137	2	27	0	137	43	101	1,937
ORI.Proc.	420	173	140	85	5	24	4	50	48	69	1,018
BAP	51	7	13	5	0	0	0	10	0	2	88
Bnkrptcy-DC	51	7	16	6	0	3	0	5	2	9	99
BKB	2	0	0	0	0	0	0	0	0	0	2
TAX	24	0	16	2	0	0	0	1	1	4	48
MISC.Proc.	0	0	0	0	0	0	0	0	0	0	0
TOTAL:	4,195	985	1,287	854	25	174	24	500	192	724	8,960



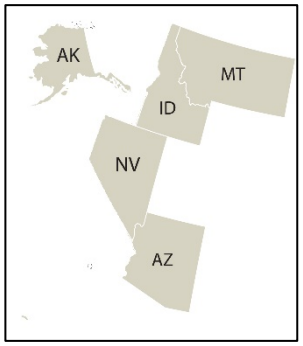
9th Circuit

8,960 cases
79% of caseload

21 judgeships
427 cases per judgeship

12th Circuit

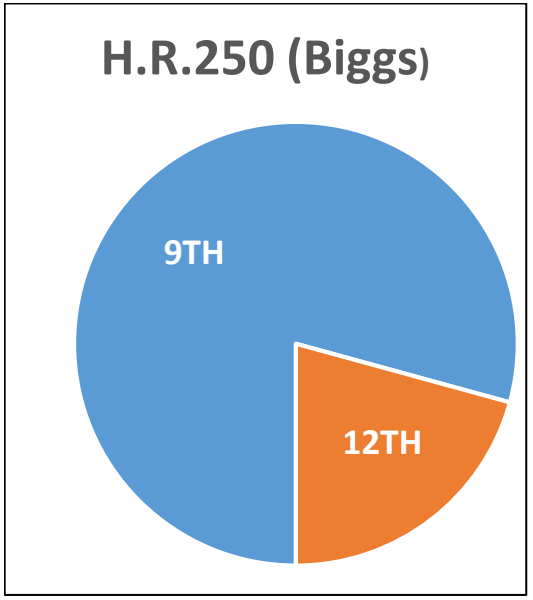
Dist/Case Type	AK	AZ	ID	MT	NV	TOTAL
CIVIL	30	222	42	71	205	570
CRIMINAL	23	225	33	84	104	469
BIA	1	205	15	1	137	359
PRISONER	13	271	58	55	218	615
ORI.Proc.	21	90	28	41	91	271
BAP	0	4	3	0	10	17
Bnkrptcy-DC	2	13	4	4	9	32
BKB	0	0	0	0	2	2
TAX	0	6	0	2	1	9
C.Proc.	0	1	0	0	0	1
TOTAL:	90	1,037	183	258	777	2,345



12th Circuit

2,345 cases
21% of caseload

10 judgeships
235 cases per judgeship



House Bill 1598 (Gohmert)

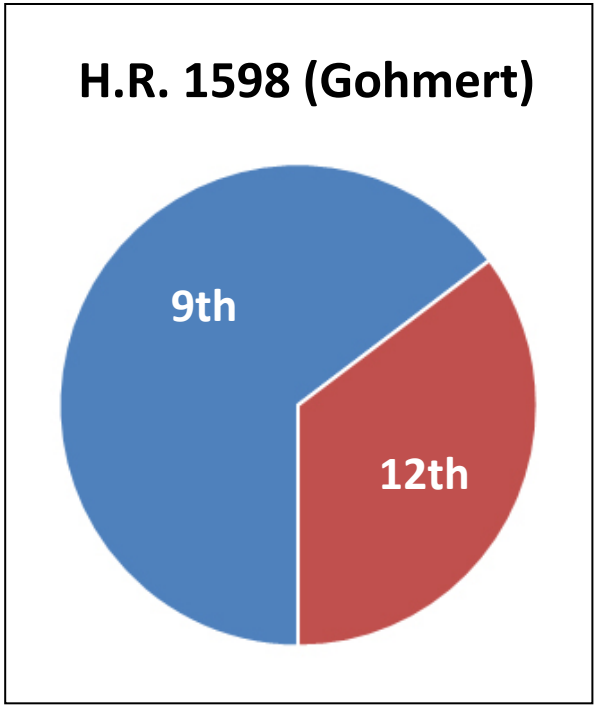
9th Circuit

Dist/Case Type	CAC	CAE	CAN	CAS	TOTAL
CIVIL	839	198	450	170	1,657
CRIMINAL	286	106	87	227	706
BIA	1,771	2	318	222	2,313
PRISONER	751	492	247	137	1,627
ORI.Proc.	420	173	140	85	818
BAP	51	7	13	5	76
Bnkrptcy-DC	51	7	16	6	80
BKB	2	0	0	0	2
TAX	24	0	16	2	42
MISC.Proc.	0	0	0	0	0
TOTAL:	4,195	985	1,287	854	7,321

9th Circuit

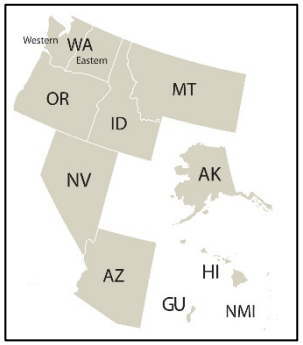
7,321 cases
65% of caseload

29 judgeships
252 cases per judgeship



12th Circuit

Dist/Case Type	AK	AZ	GU	HI	ID	MT	NV	NMI	OR	WAE	WAW	TOTAL
CIVIL	30	222	1	56	42	71	205	3	179	45	231	1,085
CRIMINAL	23	225	11	33	33	84	104	8	72	52	67	712
BIA	1	205	6	31	15	1	137	9	46	1	241	693
PRISONER	13	271	2	27	58	55	218	0	137	43	101	925
ORI.Proc.	21	90	5	24	28	41	91	4	50	48	69	471
BAP	0	4	0	0	3	0	10	0	10	0	2	29
Bnkrptcy-DC	2	13	0	3	4	4	9	0	5	2	9	51
BKB	0	0	0	0	0	0	2	0	0	0	0	2
TAX	0	6	0	0	0	2	1	0	1	1	4	15
MISC.Proc.	0	1	0	0	0	0	0	0	0	0	0	1
TOTAL:	90	1,037	25	174	183	258	777	24	500	192	724	3,984



12th Circuit

3,984 cases
35% of caseload

17 judgeships (all new)
234 cases per judgeship

OFFICE OF THE CIRCUIT EXECUTIVE

UNITED STATES COURTS FOR THE NINTH CIRCUIT

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TO: Hon. Sidney Thomas, *Chief Circuit Judge*

FROM: Cliff Harlan, *Assistant Circuit Executive for Space and Facilities*

DATE: April 12, 2017

RE: **Assumptions for Cost Estimates for New Circuit Headquarters**

The following memorandum summarizes the assumptions made when developing the housing requirements for a new twelfth circuit headquarters and when estimating the construction costs for those facilities.

For each different split proposal, the number of judges was calculated as the starting point for development of the housing program. Potential circuit headquarters options were developed for Phoenix and Seattle, except under the Biggs Bill, for which only Phoenix was considered a potential headquarters location.

For all options, it was assumed that current judges remain in the circuit where they are located at the time of the split. Replacement judges are named to the same state as their predecessor, with the exception of Judge McKeown's replacement, who it was assumed would go to Washington.

Because the construction of the new circuit headquarters would be a prospectus level project funded by congressional appropriation to GSA, the standard GSA rules regarding the calculation of future space needs were applied. For a typical new courthouse project, the program is based on occupancy projections ten years from the start of design. For this exercise, it was assumed that the start of design would be in FY 2018, so the future needs were projected through FY 2028. Per standard JCUS policies, when calculating the number of future judges, it was assumed that judges would take senior status when eligible. The only exception to standard policy was that rather than assuming all judges would retire at age 85, it was assumed for this exercise that only half of the eligible judges would choose to do so. No new judgeships were included for the twelfth circuit.

It was assumed that two panel courtrooms and one en banc courtroom would be sufficient for the new headquarters. This matches what currently exists at the Nakamura Courthouse.

For staff quantities, the numbers for staff attorneys, Circuit Executive's office, Circuit Library, Mediators, and BAP were based on the figures used in the 2004-05 split exercise. For the clerk's office, the previous staff projections were reduced by 25% from those numbers, in line with the changes to the work measurement formula that have been implemented since the previous split exercise.

The resulting judge and staff numbers were input into the Anycourt program which is used as the basis for any request for new space and which provides an allotment in accordance with the U.S. Courts Design Guide. This program indicated a total space requirement of between 98,000 and 111,000 square feet for the new circuit headquarters, depending on the headquarters location and the split division.

For Phoenix and Seattle, different housing solutions were proposed based on these space requirements. The cost of those housing solutions was then estimated on a very preliminary basis by GSA. The estimates were based solely on benchmark costs for new courthouse construction projects. These benchmarks are based on per square foot construction costs, so are better as a gauge of the order of magnitude of the cost rather than a firm estimate based on a specific scope of work. Note that for this exercise, GSA was only asked to price out a single option for each headquarters location. The Simpson bill was used as the basis for the square footage requirements. The other bills would yield slightly different construction numbers.

For Phoenix it was assumed that a new circuit headquarters building could be built as an Annex to the Sandra Day O'Connor Courthouse. There is an existing surface parking lot owned by the government adjacent to the courthouse that could accommodate the construction of five or six story building that could fully meet the housing requirement for the circuit headquarters. New construction is the only option that would allow the full consolidation of circuit staff and judges in a single location in Phoenix. GSA estimated the cost of the new building in Phoenix at $136M.

For Seattle it was assumed that the Nakamura Courthouse, which has about 120,000 square feet of usable space, could be renovated to serve as the new circuit headquarters. Currently about 40,000 square feet is held by FBI, Tax Court, and GSA on floors 1 through 3. This space would need to be vacated and renovated to accommodate the staff functions (Clerk's s, staff attorneys, CE office, mediators, BAP). The existing clerk's suite, mediator space, and some of the visiting chambers would be renovated to enable those spaces to house a larger number of visiting judges, as the existing visiting chambers would not be sufficient to accommodate the full complement of judges in the new circuit.

For the Nakamura renovations, the GSA presented the costs in several categories. The cost to move out FBI and Tax Court into new space was estimated at around $2M, The subsequent renovation of floors 1 through 3 for staff functions was estimated at $13.2M, and then the cost for the visiting judge chambers renovations was $4.1M. In addition to these costs that are directly tied to accommodating the new headquarters in Nakamura, there is a backlog of capital construction projects for that courthouse. These projects, which include the renovation of the exterior terra cotta and elevator modernization, among other items, total $35.4M. As GSA Region 10 has been unable to obtain congressional approval for these projects for many years, and because the renovation project would be an opportunity to address these long-running deficiencies, there would be an argument for seeking all the funds at once so that the building could be fully renovated in conjunction with the build out of the new circuit headquarters. However, these latter costs could ultimately be deferred until a future date.

Please let me know if you have any questions about these assumptions.