

The Case for Restructuring the Ninth Circuit: An Inevitable Response to an
Unavoidable Problem

Written Testimony of
DIARMUID F. O'SCANNLAIN
United States Circuit Judge
United States Court of Appeals for the Ninth Circuit
The Pioneer Courthouse
700 S.W. 6th Ave, Ste. 313
Portland, OR 97204
(503) 833-5380

United States Senate
Committee on the Judiciary
Subcommittee on Oversight, Agency Action, Federal Rights and Federal
Courts

Hearing on Oversight of the Structure of the Federal Courts

July 31, 2018

2:30pm

Good morning. My name is Diarmuid F. O'Scannlain, United States Circuit Judge for the Ninth Circuit with chambers in Portland, Oregon. I am honored that you invited me to participate in this hearing to discuss the case for restructuring the Ninth Circuit.

My testimony today is the latest of many in more than a decade and a half on the issue of whether to restructure the Ninth Circuit. Numerous bills reorganizing the Ninth Circuit have languished in past sessions of Congress, but I am pleased to see that six have been introduced or reintroduced this session alone, with an additional bill proposing further study. These efforts are laudable for recognizing and directly responding to the concerns of those who have opposed restructuring until now, and for replying with sensitivity to the concerns of judges on my court.

I should emphasize that I love serving on my court; I deeply appreciate my relationships with all 40 of my colleagues, soon to be 46 once the current vacancies are filled. And I commend my Chief Judge for his superb administration of this gigantic circuit. But personal preferences are not paramount when dealing with the all-important national policy for structuring the federal court system. I therefore remain steadfast in my belief that it is inevitable that Congress must restructure the Ninth Circuit, and any of the current proposals would go a long way to accomplishing that goal.

I

I have served as a federal appellate judge for three decades on what has long been the largest court of appeals in the federal system (now with forty judges and six vacant seats).¹ I have also written and spoken repeatedly on issues of judicial administration.² Therefore, I feel comfortable in sharing these perspectives on our

¹ I previously served as Administrative Judge for the Northern Unit of our Court, for two terms as a member of our Court's Executive Committee, and as Chairman of the International Judicial Relations Committee of the U.S. Judicial Conference.

² See, e.g., Diarmuid F. O'Scannlain, Address to the Wake Forest University School of Law Chapter of the Federalist Society, Is Now the Time To Split the Ninth Circuit? (Mar. 28, 2018); Statement of Diarmuid F. O'Scannlain, Hearing before Subcommittee on Privacy, Technology, and the Law, United States Senate, Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems (Aug. 24, 2017); Letter from Diarmuid F. O'Scannlain to Wash. State Bar Ass'n, Proposals to Restructure the U.S. Court of Appeals for the Ninth Circuit (May 12,

mutual challenge to address the federal judiciary’s 800-pound gorilla: the United States Court of Appeals and the fifteen District Courts which comprise the Ninth Judicial Circuit.

I am aware that I appear before you as a judge of one of the most scrutinized courts in this country.³ In many contexts, that attention is negative, and much of it

2017); Statement of Diarmuid F. O’Scannlain, Hearing before Subcommittee on Courts, Intellectual Property, and the Internet, United States House of Representatives, Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit (Mar. 16, 2017); Statement of Diarmuid F. O’Scannlain, Hearing before Committee on the Judiciary, United States Senate, Examining the Proposal to Restructure the Ninth Circuit (Sept. 20, 2006); Statement of Diarmuid F. O’Scannlain, Hearing before Subcommittee on Administrative Oversight and the Courts, United States Senate, Revisiting Proposals To Split the Ninth Circuit: An Inevitable Solution to a Growing Problem (Oct. 26, 2005); Diarmuid F. O’Scannlain, Ten Reasons Why the Ninth Circuit Should Be Split, 6(2) Engage 58 (2005); Statement of Diarmuid F. O’Scannlain, Hearing before Subcommittee on Administrative Oversight and the Courts, United States Senate, Improving the Administration of Justice: A Proposal To Split the Ninth Circuit (Apr. 7, 2004); Statement of Diarmuid F. O’Scannlain, Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property, United States House of Representatives, Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003 (Oct. 21, 2003); Statement of Diarmuid F. O’Scannlain, Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property, United States House of Representatives, Ninth Circuit Reorganization Act of 2001 (July 23, 2002); Statement of Diarmuid F. O’Scannlain, Hearing Before the Committee on the Judiciary, United States Senate, Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and S. 253, the Ninth Circuit Reorganization Act (July 16, 1999); Statement of Diarmuid F. O’Scannlain, Hearing Before the Committee on the Judiciary, United States House of Representatives, Oversight Hearing on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (July 22, 1999); Diarmuid F. O’Scannlain, Should the Ninth Circuit Be Saved?, 15 J. L. & Pol. 415 (1999); Diarmuid F. O’Scannlain, A Ninth Circuit Split Commission: Now What?, 57 Mont. L. Rev. 313 (1996); Diarmuid F. O’Scannlain, A Ninth Circuit Split Is Inevitable, But Not Imminent, 56 Ohio St. L. J. 947 (1995).

³ See, e.g., Mark Brnovich & Ilya Shapiro, Split Up the Ninth Circuit – but Not Because It’s Liberal, Wall Street Journal, Jan. 11, 2018; Jonathan Turley,

partisan. I must stress that, in my view, whether to restructure the Ninth Circuit should not be based on political ideology or party politics. I disassociate myself from arguments others might make that a restructuring is in order because of disagreement with Ninth Circuit decisions or their consequences. Restructuring proposals should be analyzed on grounds of effective judicial administration—grounds that remain unaffected by Supreme Court “batting averages” or public perception of our decisions.

Restructuring the circuit is the best way to cure the administrative ills affecting my court, an institution that has far exceeded reasonably manageable proportions. Nine states, eleven thousand annual case filings, forty-six judges, and sixty-five million people are too many for any non-discretionary appeals court to handle satisfactorily.⁴ The sheer magnitude of our court and its responsibilities negatively affects all aspects of our business, including our celerity, our consistency, and our clarity. Simply put, the size of the Ninth Circuit is out of sync with the rest of the Judicial Branch. It is time now to take the prudent, well-established course and restructure this circuit. Restructuring large circuits is the

There are good reasons to split the 9th Circuit, but Trump’s reason isn’t one, Hill, Apr. 27, 2017, <http://thehill.com/blogs/pundits-blog/the-judiciary/330911-there-may-be-a-time-to-split-the-9th-circuit-but-it-shouldnt>; Dan Springer, Ninth Circuit: Critics Want to Split up ‘Nutty’ Court that Will Hear Trump’s Travel Ban, Fox News, May 9, 2017, <http://www.foxnews.com/politics/2017/05/09/ninth-circuit-critics-want-to-split-up-nutty-court-that-will-hear-trumps-travel-ban.html>; Aric Jenkins, President Trump Is ‘Absolutely’ Considering Breaking Up the Ninth Circuit Court, Time, April 26, 2017; Leo A. Goodman, To split or not to split the US Ninth Circuit Court of Appeals: A simple statistical argument, counterargument, and critique, Journal of Statistical Planning and Inference, Volume 138, Issue 9, September 1, 2008; Frank Tamulonis III, Splitting the Ninth Circuit: An Administrative Necessity or Environmental Gerrymandering?, 112 Penn St. L. Rev. 859 (2008); John M. Roll, The 115 Year-Old Ninth circuit—Why a Split is Necessary and Inevitable, 7 Wyo. L. Rev. 109 (2007); Blaine Harden, O’Connor Bemoans Hill Rancor at Judges, Wash. Post, July 22, 2005, at A15; Bruce Ackerman, The Vote Must Go On, N.Y. Times, Sept. 17, 2003, at A27; Adam Liptak, Court That Ruled on Pledge Often Runs Afoul of Justices, N.Y. Times, June 30, 2002, at A1.

⁴ See Appendix, exs. 19, 24.

natural evolution of judicial organization. Restructuring has worked in the past.⁵ Restructuring will work again. For these reasons alone, I urge serious consideration of the proposed reforms.

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

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

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

II

When the circuit courts of appeals were created over one hundred years ago by the Evarts Act of 1891, there were nine regional circuits.⁶ Today, there are thirteen total circuits: twelve regional circuits, including the D.C. Circuit, and the Federal Circuit. For much of our country's history, each court of appeals had only three judges. Indeed, the First Circuit was still a three-judge court when I was in law school. Over time, in response to an explosion in appellate litigation, the circuits expanded as Congress added new judgeships.

At a certain point, larger circuits became unwieldy. Lawmakers recognized that adding new judges served only as a temporary anodyne rather than a permanent cure. Instead, Congress wisely restructured larger circuits. The District of Columbia Circuit can trace its origin as a separate circuit to a few years after the

⁵ To trace the numerous splits that have occurred within the circuits over the years, please see Appendix, ex. 1.

⁶ See Judiciary Act of 1891 (Evarts Act), ch. 517, 26 Stat. 826.

enactment of the Evarts Act.⁷ Congress transferred part of the Eighth Circuit into a new Tenth Circuit in 1929.⁸ Congress transferred part of the Fifth Circuit to form the Eleventh Circuit in 1980.⁹ Two years later, Congress created the Federal Circuit.¹⁰ And, in due course, I have absolutely no doubt that Congress will act upon the need to form a Twelfth—and even, perhaps, a Thirteenth—out of the current Ninth.

Congress formed each new circuit, at least in part, to respond to the very real problems posed by overburdened predecessor courts. That same rationale applies with special force to the Ninth Circuit, as many experts acknowledge. Twice Congress has established commissions to study the possibility of restructuring the Ninth Circuit—the Hruska Commission of 1973¹¹ and the White Commission of 1998¹²—and each time, the commission concluded that Ninth Circuit needed restructuring because of the unsustainable costs of its vast size. The problems first identified by these commissions nearly 45 years ago have not been alleviated through the decades of congressional inaction since.

⁷ The original name of the D.C. Circuit was the Court of Appeals for the District of Columbia. In 1934, it was renamed the United States Court of Appeals for the District of Columbia, before taking its present name in 1948. See generally, Jeffrey Brandon Morris, Calmly To Poise the Scales of Justice: A History of the Courts of the District of Columbia Circuit (2001).

⁸ See Act of Feb. 28, 1929, Pub. L. No. 840, 45 Stat. 1346.

⁹ See Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994.

¹⁰ See Federal Courts Improvement Act of 1982, Pub. L. 97-164, 96 Stat. 25.

¹¹ See Commission on the Revision of the Federal Court Appellate System, The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change, 62 F.R.D. 224, 228–29, 234–35 (Dec. 1973) [hereinafter “Hruska Commission Report”]. The report recommended that the then-Fifth and Ninth Circuits both be split; Congress did not implement either recommendation at the time. Later, the judges of the Fifth Circuit petitioned Congress to divide the circuit; Congress complied and on October 15, 1980, President Carter signed a bill to create the Eleventh Circuit out of three states from the former Fifth Circuit.

¹² See Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (Dec. 18, 1998) [hereinafter “White Commission Report”], available at <http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf>.

A

The extreme size of my court is undeniable. Whether one measures it by number of judges, by caseload, by population, or by geographic area, the Ninth Circuit is irreconcilable with our eleven other regional circuits.

1

The Ninth Circuit's official allocation is twenty-nine active judges—twelve more than the next-largest circuit, nearly five times as many as the smallest circuit (the First, with six), and more than the total number of judges, active and senior combined, on any other circuit.¹³ Currently, twenty-three of the Ninth Circuit's active seats are filled, and we have an additional seventeen senior judges, who are in no sense “retired,” with each generally hearing a substantial number of cases ranging from one-hundred percent to twenty-five percent of a regular active judge's load. All told, there are forty judges on our court today. And when the six existing vacancies are filled, we will shortly have forty-six.¹⁴

I should pause to put these figures in perspective. Including current vacancies, we have seventeen more judges than the next-largest circuit (the Sixth, with 29).¹⁵ Our 29 judicial seats are the same as the Fifth and Eleventh Circuits—which were divided due to their overwhelming size more than 30 years ago—combined.¹⁶ Indeed, there are more judges currently on the Ninth Circuit than there were in the entire federal circuit courts of appeals at their birth in 1891.¹⁷ And every time a judge takes senior status, we grow ever larger. There is at least one pending proposal to add five more seats to the Ninth Circuit,¹⁸ which would

¹³ See Appendix, exs. 3, 18.

¹⁴ See Appendix, ex. 24.

¹⁵ See Appendix, exs. 5, 18.

¹⁶ See Appendix, exs. 4, 18.

¹⁷ See Appendix, ex. 1.

¹⁸ See Press Release, Judicial Conference of the U.S., Judicial Conference Asks Congress to Create New Judgeships (Mar. 14, 2017), available at <http://www.uscourts.gov/news/2017/03/14/judicial-conference-asks-congress-create-new-judgeships>; Judicial Conference of the U.S., Table 1: Additional Judgeships or Conversion of Existing Judgeships Recommended by the Judicial

give us exactly double the number of authorized judges as the second-largest circuit.

2

Even with the exceptional profusion of judges on our circuit, we can hardly cover the immense breadth and scope of our circuit's caseload. During the twelve months ending March 31, 2018, 10,804 appeals were filed in the Ninth Circuit—over triple the average of other circuits, and 3,500 more cases than the next busiest circuit, the Fifth.¹⁹ The Ninth Circuit's caseload exceeds those of the First, Third, Seventh, Tenth, and D.C. Circuits, combined. Our backlog is even more staggering. Almost one third of all federal appeals pending at the start of the year were in the Ninth Circuit—a total of more than 11,500 cases.²⁰ No other circuit had more than 5,000 cases pending or roughly 12% of the total backlog.²¹ Although we have indeed innovated, and found ways to close the gap with our sister circuits, we are clearly still far behind. Our backlog is almost five times larger than the average circuit's.²²

3

By population, too, our circuit dwarfs all others. The Ninth Circuit's nine states and two territories range from the Rocky Mountains and the Great Plains to the Philippine Sea and the Rainforests of Kauai, from the Mexican Border and the Sonoran Desert to the Bering Strait and the Arctic Ocean. In this vast expanse live more than sixty-five million people—almost exactly one fifth of the entire population of the United States.²³ Indeed, there are nearly thirty million more people in the Ninth Circuit than in the next most populous circuit, the Eleventh.²⁴

Conference (2017), available at http://www.uscourts.gov/sites/default/files/2017_judicial_conference_judgeship_recommendations_0.pdf.

Five additional seats would give the Ninth Circuit 34 authorized judgeships compared to the 17 currently authorized for the Fifth Circuit.

¹⁹ See Appendix, exs. 10-11, 19.

²⁰ See Appendix, exs. 12, 14, 19.

²¹ See id.

²² See Appendix, exs. 13, 19.

²³ See Appendix, ex. 19.

²⁴ See Appendix, exs. 7, 19.

7

This gap between the Ninth Circuit and the next largest circuit has grown by more than two million people over the past decade. As a result, our population exceeds the next largest circuit's by more than the total number of people in each of the First (encompassing Boston), Second (encompassing New York), Third (encompassing Philadelphia and Pittsburgh), Seventh (encompassing Chicago and Indianapolis), Eighth (encompassing St. Louis, Kansas City, and Minneapolis/St. Paul), Tenth (encompassing Denver and Salt Lake City), and D.C. Circuits (encompassing, of course, Washington, D.C.).²⁵ Indeed, we are larger than the First, Second, Third, and D.C. Circuits, combined.

No matter what metric one uses, the Ninth Circuit overwhelms the federal judicial system. Compared to the other circuits, we employ more than twice the average number of judges, we handle more than three times the average number of appeals, and we contain nearly three times the average population. It makes very little sense to devise a system of twelve regional circuits so that they may efficiently and effectively respond to the unique needs of their surrounding territory, and then place one fifth of the people, one fifth of the appeals, and almost one fifth of the judges into just one of twelve regions. From any reasonable perspective, the Ninth Circuit already equals at least two circuits. The many important values that we seek to foster through our nation's system of smaller, regional circuits can find no home in a court so vast.

B

These striking numbers tell only a fraction of the story. I have concluded as a firsthand observer that our court's size negatively affects our ability as judges to do our jobs, and especially to develop an internally consistent body of federal law.

1

To start, the sheer number of judges on our court often means that we work “together” only nominally. All Ninth Circuit judges participate in numerous week-long sittings on regular appellate oral argument panels. Presuming one sits with no visiting judges—a mighty presumption in the Ninth Circuit, where we often enlist such extra-circuit help to deal with the overwhelming workload—an active Ninth Circuit judge may sit with fewer than twenty colleagues on three-judge panels over the course of a year. That is less than half of the total number of judges on my court. A senior judge, like myself, might sit with fewer than ten. Even during active status, it was not uncommon for me to go years without ever sitting with

²⁵ See id.

some of my colleagues. And the frequency with which any pair of judges hears multiple cases together is especially low. It should be no surprise that it becomes difficult to establish effective working relationships in discerning the law when we sit together so rarely.

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

2

The circuit's inordinate size also imposes significant burdens on our ability to maintain consistency and coherence in our law. As startling as it might seem, even our own judges have difficulty simply staying abreast of the circuit's ever-expanding caselaw. Our circuit routinely publishes more than 500 precedential opinions a year.²⁶ That means, in addition to handling his or her own share of our 11,000 new appeals and the nation's largest backlog, each judge is faced with the Sisyphean task of reading 10 new published opinions every week, just to keep up with what the rest of our court is doing. This does not even account for the thousands of additional non-precedential opinions issued by our court, much less our constant duty to stay abreast of the Supreme Court's annual docket, important developments in the laws of the nine states within our circuit, key changes in federal statutes or rules of procedure, and any relevant public and academic commentary.

Such a system affords hardly enough time for Ninth Circuit judges even to stay informed about developments in our law, let alone to ensure consistency in those developments. Although we have adopted the practice of circulating opinions to the entire court shortly before publication, this system affords each of

²⁶ See, e.g., U.S. Court of Appeals for the Ninth Circuit, Office of the Circuit Executive, 2016 Ninth Circuit Annual Report 45; U.S. Court of Appeals for the Ninth Circuit, Office of the Circuit Executive, 2015 Ninth Circuit Annual Report 59; U.S. Court of Appeals for the Ninth Circuit, Office of the Circuit Executive, 2014 Ninth Circuit Annual Report 55.

us only a small window—typically two days—to read those opinions and to raise any concerns before they are released to the public. If we had fewer judges (and fewer opinions to keep track of), three-judge panels could circulate opinions to the entire court well before publication. Earlier pre-circulation would afford the rest of the circuit a meaningful opportunity to review and to comment on developments in our law before they become public. This practice would both help avoid intra-circuit conflicts and foster greater awareness of the immense body of law created by our court daily.

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

3

Many point to the en banc process as a solution to some of these problems, but it is nothing more than a band-aid.

a

In every federal court of appeals, a judge may request further review of a three-judge panel decision when necessary to “secure or maintain uniformity of the court’s decisions,” or to address “a question of exceptional importance.”²⁷ Upon agreement of a majority of the circuit’s active judges, such a case will be reheard by the circuit “en banc.” This ostensibly affords the court, as a whole, an opportunity to correct errors in its caselaw or to reconcile conflicts. But only a small fraction of our published opinions can receive meaningful en banc consideration—let alone actual en banc review. In a typical year, only roughly 30

²⁷ Fed. R. App. P. 35(a).

of our cases will receive an en banc vote.²⁸ Usually, fewer than 20 will actually be reheard en banc.²⁹ And the number of our en banc cases has been dwindling even further in recent years. Such a small sliver of en banc review cannot meaningfully resolve the much deeper problems inherent in our ability to maintain the overall consistency of our law.

Some might mistake the relatively small number of en banc reviews for a sign that, despite our size, our law remains clear and consistent, thus necessitating little en banc action. In reality, this is yet another reflection of the practical constraints imposed by a court of our size. Our court regularly receives around 800 petitions for en banc review a year.³⁰ This means that, in addition to handling his or her own caseload, reviewing the more than 500 precedential opinions issued by our court, and staying abreast of important legal developments elsewhere, each judge will also have more than 15 new en banc petitions every week to consider. Identifying which of those 800 petitions merits further review is a labor-intensive task—not to mention the significant amount of work that must go into actually calling for an en banc vote in a given case. There are, alas, only so many hours in a day. It is not reasonable to expect our court—which already has the most active en banc practice in the country³¹—to engage in even more en banc reviews, simply to correct every error or inconsistency that might be identified in our law.

b

Moreover, due to its unwieldy size, the Ninth Circuit cannot even promise meaningful cohesion in a case that is reheard en banc. In every court of appeals but the Ninth Circuit, en banc rehearing is held by the full court—that is, every active judge will participate in the rehearing. Accordingly, in every other circuit, an en banc decision will reflect the full court’s views on the case and will thus speak definitively and authoritatively for the entire circuit. Because of its extraordinary size, however, the Ninth Circuit conducts only a “limited” en banc review in which a random selection of eleven active judges—in comparison to the

²⁸ 2016 Ninth Circuit Annual Report, supra note 26, at 45.

²⁹ Id.

³⁰ Id.

³¹ See Admin. Office of the U.S. Courts, U.S. Courts of Appeals Statistical Tables, tbl. B-10, <http://jnet.ao.dcn/resources/statistics/caseload-tables/appeals-caseload-tables>, for the twelve months ending March 31, 2018; 2016 Ninth Circuit Annual Report, supra note 26, at 45.

Court's twenty-nine active seats—participate.³² Because only six of the eleven judges are required to form a majority, our system potentially allows the “law of the circuit” to be made by roughly one-fifth of the court’s active judges. This presents the quite real possibility that some of the circuit’s most important or divisive issues will be decided by a substantial minority of judges, who do not represent the true views of our court. This is a concern that has been acknowledged even by past opponents of a Ninth Circuit restructuring.³³

Formally, we have a procedure through which even further review of a limited en banc decision can be reconsidered by all active judges.³⁴ But, tellingly, our court has never exercised such procedure and we have never endeavored to hear a case in which nearly thirty separate voices must be accommodated. Indeed, in 1980, Congress’s decision to split the then-Fifth Circuit was motivated in substantial part by similar concerns over its twenty-six-judge en banc procedures.³⁵ With three more judges in tow (and perhaps more to come), the Ninth Circuit faces the same problem today.

In sum, the Ninth Circuit’s unusual and diluted form of en banc review hardly promises to secure circuit uniformity on any consistent basis or to represent the full court’s consideration of our most important cases. It offers little promise to cure the threat of intra-circuit conflict that naturally inheres in a court of our size.

C

I am not alone in these conclusions. Several Supreme Court Justices have previously commented that the risk of intra-circuit conflicts is heightened in a court that publishes as many opinions as the Ninth.³⁶ Although I am not aware of any empirical studies on the issue, academic commentators have observed the same problem.³⁷ Further, after careful analysis, the White Commission concluded

³² See 2016 Ninth Circuit Annual Report, supra note 26, at 46.

³³ See, e.g., Feldman v. Ariz. Sec. of State’s Office, 841 F.3d 791, 792–93 (9th Cir. 2016) (Reinhardt, J., concurring in the grant of rehearing en banc).

³⁴ See Ninth Cir. R. 35-3.

³⁵ See Robert A. Ainsworth, Jr., Fifth Circuit Court of Appeals Reorganization Act of 1980, 1981 BYU L. Rev. 523, 526–27 (1981).

³⁶ See White Commission Report, supra note 12, at 38.

³⁷ See, e.g., Statement of Brian T. Fitzpatrick, Hearing on “Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit, U.S.

that circuit courts with too many judges lack the ability to render clear, timely, and uniform decisions, and as consistency in the law falters, predictability erodes as well. The Commission concluded that the Ninth Circuit could not function effectively with so many judges—and this was at a time when the Ninth Circuit routinely operated with significantly fewer judges than we have now.³⁸ The Commission also observed that district court judges expressed difficulty interpreting Ninth Circuit guidance and that a disproportionately large number of lawyers commented that difficulty discerning Ninth Circuit law due to conflicting precedents was a “large” or “grave” problem.³⁹ In other words, predictability is difficult enough with a court of our current size, and this fails to consider the impact of our large number of visiting district and out-of-circuit judges and the very real possibility that more judges will be added to our court in the future.⁴⁰

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

D

The Ninth Circuit’s size not only hinders judicial decisionmaking and legal clarity, but it also creates practical problems for our court and litigants. Because of the circuit’s extensive geographical reach, judges must travel on a regular basis from faraway places to attend court meetings and hearings. For example, in order to hear cases, my colleagues must fly many times a year from cities including Honolulu, Hawaii, Fairbanks, Alaska, and Billings, Montana to distant cities including Seattle, Washington and Pasadena, California. In addition, all judges must travel on a quarterly basis to attend court meetings and en banc panels generally held in San Francisco. A certain amount of travel is unavoidable, especially in any circuit that might contain our non-contiguous states of Alaska and Hawaii, and our Pacific island territories. But why should any single circuit

House of Representatives, Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, at 2 (Mar. 16, 2017).

³⁸ *Id.* at 30 (noting that the Ninth Circuit often operated with only 18 active judges and between 11 and 17 senior judges).

³⁹ *Id.* at 39–40.

⁴⁰ See *supra* note 18.

encompass close to forty percent of the total geographic area of this country when the remaining sixty percent is shared by eleven other regional circuits?⁴¹ Traveling across this much land mass not only wastes time, it costs a considerable amount of money.

Former Chief Judge Mary Schroeder, when testifying against a circuit split a number of years ago, quoted Judge Shirley Hufstedler, a former member of my court, saying, “You can’t legislate geography.”⁴² That might be a truism. What one can do, however, is to better account for geography when legislating.

III

The question then becomes how to split the circuit. Conventional wisdom suggests that any circuit should be composed of at least three states,⁴³ so our nine states and two territories offer a wealth of possibilities. I commend the current restructuring proposals for addressing substantially all of the arguments against previous efforts. All the bills seeking to relieve this unsustainable pressure on my court are most welcome. I have long felt that the 1973 Hruska Commission offered a sensible approach, which would have established a new Twelfth Circuit consisting of Arizona, Nevada, and the Southern and Central Districts of California. The Ninth Circuit would have retained the Eastern and Northern Districts of California, along with Alaska, Washington, Oregon, Idaho, Montana, Hawaii, and Guam.⁴⁴

I recognize that others have raised concerns over splitting one state across two circuits. Candidly, our present circuit is so large I think it could appropriately be divided into three circuits—a new California-based Ninth Circuit, a Twelfth

⁴¹ See U.S. Census Bureau, State Area Measurements and Internal Point Coordinates, <https://www.census.gov/geo/reference/state-area.html> (last visited June 4, 2018).

⁴² See Statement of Hon. Mary M. Schroeder, Hearing before Committee on the Judiciary, United States Senate, Examining the Proposal to Restructure the Ninth Circuit (Sept. 20, 2006).

⁴³ See Hruska Commission Report, 62 F.R.D. at 231.

⁴⁴ Of course, the Hruska Commission authored its report four years prior to the latest addition to our circuit: the District Court for the Northern Mariana Islands. See 48 U.S.C. § 1821; see also Appendix, exs. 22–23.

“Mountain” Circuit, and a Thirteenth “Pacific Northwest” Circuit—the configuration which actually passed the House in 2004 as an amendment to S. 878.

Nevertheless, I continue to welcome any bill that creates logical groupings of states, approaches parity, and prioritizes smaller decisionmaking units, and which in turn will foster greater consistency, increase accountability, improve responsiveness to regional concerns, and, perhaps, even boost collegiality among judges.

Among the current restructuring proposals, I most favor S. 276, introduced by Senator Flake. S. 276 would create a new Twelfth Circuit comprised of the States of Alaska, Arizona, Idaho, Montana, Nevada, and Washington. The “new” Ninth Circuit would contain California, Hawaii, Oregon, and the Pacific island territories of Guam and the Northern Mariana Islands.

Such a division stands apart from all but one of the other current proposals (H.R. 250), in that it allocates at least three states to each new circuit, in line with all other regional courts of appeals, except the D.C. Circuit. And in comparison to H.R. 250—which would keep Washington in the “new” Ninth Circuit, along with California, Oregon, and Hawaii—S. 276 provides somewhat greater parity between the proposed Ninth and Twelfth Circuits. S. 276 also offers the possibility of using the William K. Nakamura Courthouse in Seattle as a potential base for hearings, en banc proceedings, and general court operations in the Twelfth Circuit. Seattle would be the appropriate link between the new circuit and the States of Alaska, Idaho, Montana, and, of course, Washington.

Given the size of California, complete parity is virtually impossible, and there will always be one “largest” circuit.⁴⁵ But that does not mean we cannot improve the current situation. The new Ninth Circuit created by S. 276 would still remain the largest circuit in the country by judges, population, and case filings, but it would be significantly closer to the normal distribution. The two new circuits would have populations of approximately forty-five million and twenty million, respectively. The Twelfth Circuit would be in line with the average size of the smallest six circuits, and the new Ninth Circuit would be far closer to the sizes of

⁴⁵ Without dividing California, any reorganization plan will result in at least one circuit with a population over 39 million.

the next-largest four circuits, each of which has a population between thirty and thirty-six million.⁴⁶

The caseload of the newly created Twelfth Circuit would place it squarely within the normal operating range of the other existing circuits.⁴⁷ The Twelfth Circuit would still process as much or more litigation than the current First, Third, Seventh, Eighth, Tenth, and D.C. Circuits. Likewise, the per-judge workload in the Twelfth Circuit would still exceed three-quarters of current regional circuits.

Perhaps more importantly, the new Ninth would be significantly better off, with approximately 30% fewer appeals and population, and a more manageable geographical area to cover. I also commend S. 276 for keeping 19 of the 29 allotted judgeships in what would become the Ninth Circuit, in proportion with its caseload. The benefits of such a reorganization should be immediately apparent to all involved.

IV

Despite the seemingly obvious problems of a circuit so large, objections nevertheless remain. Alas, these arguments wither under even the slightest scrutiny. Upon closer inspection, opponents frequently complain of supposed “problems” caused by a Ninth Circuit restructuring, that, somehow, are seldom viewed as problems across the rest of the country’s courts. These arguments often amount to little more than a plea to keep the empire of the current Ninth Circuit intact, despite its obvious departure from the rest of our federal courts of appeals.

A

For example, one suggestion is that the Ninth Circuit should stay together to provide a consistent law for the West generally, and the Pacific Coast specifically.⁴⁸ This is a red herring. There is no “need” to preserve a single law

⁴⁶ See Appendix, ex. 21.

⁴⁷ See *id.*

⁴⁸ See, e.g., Statement of Hon. Sidney R. Thomas, Hearing before Subcommittee on Courts, Intellectual Property, and the Internet, United States House of Representatives, Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit, at 15–20 (Mar. 16, 2017); Statement of Hon. Carlos T. Bea, Hearing before Subcommittee on Courts, Intellectual Property, and

for the West or its coastal waters. The Atlantic Coast has five separate circuits, but freighters do not appear to collide more frequently off Long Island than off the San Francisco Bay because of uncertainties of maritime law back East. The same goes for the desire to adjudicate a cohesive “Law of the West.” There is no corresponding “Law of the South” or “Law of the Midwest” or “Law of the East.” In a system of regional circuits, there will always be divisions that cause neighboring states potentially to operate under different law. Yet, the presence of multiple circuits everywhere else in the country does not appear to have caused any serious problems—or at least is not viewed as such a concern as to merit the elimination of all circuit divides and the creation of one monolithic court of appeals. Rather, our long history demonstrates a commitment to the idea that smaller and more discrete decisionmaking units enhance our judicial system; in fact, the data seem to support that smaller units produce more consistent results.⁴⁹

We should not be treated differently based on the unfounded assumption that somehow the “West” is different than the rest of the country or the suggestion that our borders—and only our borders—were fixed inviolate in 1891.

B

Cost is perhaps the most common objection raised to a restructuring. Of course a restructuring would cost money, just as restructurings in the past cost money, as well. Yet cost is, likewise, no reason to maintain a flawed status quo.

First, complaints about cost often overstate the problem. For example, reducing the total size of the circuit would slash travel costs. No longer will judges from Montana and Alaska fly to Hawaii and California for oral argument; no longer will litigants from across the circuit all trek to California for en banc rehearings. Moreover, certain proposals, like S. 276, offer the ability to save costs by taking advantage of currently underused facilities. The Nakamura Courthouse in Seattle sits largely empty, with plenty of room for circuit operations or en banc

the Internet, United States House of Representatives, Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit, at 1 (Mar. 16, 2017).

⁴⁹ See, e.g., White Commission Report, supra note 12, at 39–40; Brian T. Fitzpatrick, It May Be Time to Downsize the 9th Circuit, Law360, July 31, 2017, <https://www.law360.com/articles/945136/it-may-be-time-to-downsize-the-9th-circuit>.

rehearings in a new Twelfth Circuit. Major cities like Seattle and Phoenix offer flexibility in determining where best to locate a new circuit headquarters.

More fundamentally, the fact that a much-needed restructuring may involve some initial expense should not mean that the restructuring itself should be disregarded. Split opponents like to argue that there are some cost savings from the “economy of scale” generated by our overly large circuit.⁵⁰ But such logic rejects the very idea of a system of regional circuit courts at all. Indeed, economies of scale can only fully be pursued by dismantling the entire regional circuit system and creating one overarching appellate court for the entire nation. Over time, perhaps that would save money. But even if that were true, I have not seen it seriously contended that these marginal cost savings justify the destruction of the many values that are fostered by more localized, regional circuits.

C

At bottom, restructuring opponents seem content to ignore the fact that there is nothing unusual, unprecedented, or undesirable about the occasional restructuring of our federal judicial circuits. Federal appellate courts have long evolved in response to natural population and docket growth. As courts grow ever larger, they must sometimes divide into smaller, more manageable judicial units. This is not partisan interventionism; it is a natural reaction to the changing circumstances of our nation. No circuit, not even mine, should resist the inevitable. My circuit is not an antique that, unlike all other circuits, is somehow untouchable. It should not be treated as such.

V

Unfortunately, the Ninth Circuit’s problems will not go away; rather, they continue to get worse. As our backlog and case-delay figures indicate, we are in desperate need of more judges to help manage our overwhelming caseload more efficiently. But with additional judges, the many problems inherent in managing a court of appeals of such magnitude will only deepen. And the population of our

⁵⁰ See, e.g., Statement of Hon. Alex Kozinski, Hearing before Subcommittee on Courts, Intellectual Property, and the Internet, United States House of Representatives, Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit (Mar. 16, 2017).

circuit is projected to continue to grow tremendously, and to continue to account for an even greater proportion of the overall nation.⁵¹

The question of whether to restructure the Ninth Circuit has spawned, both within and outside the court, decades of debate, discussion, reporting, and testifying. I submit, that debate has gone on too long. We judges need to get back to judging. I ask that you mandate some kind of restructuring now. The issue must be put to rest so that we can concentrate on our sworn duties and end the distractions caused by this ever-growing, increasingly politicized, administrative challenge.

I urge you to give serious consideration to the reasonable restructuring proposals before you, and any others that might be offered. While the bills before you differ in how precisely to divide the Circuit, any would constitute a welcome improvement to the present situation. Opponents of any restructuring should bear the burden of persuasion when they resist the inevitable and attempt to argue for simply retaining the status quo.

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

⁵¹ For example, the University of Virginia's Weldon Cooper Center for Public Service has projected that by 2040, the states within the current Ninth Circuit will have a combined population of more than 81 million, and account for more than 21% of the national population. See Univ. of Virginia, Weldon Cooper Ctr. for Pub. Serv., Demographics Res. Grp., National Population Projections, http://demographics.coopercenter.org/Demographics_2/files/2016/12/NationalProjections_ProjectedTotalPopulation_2020-2040_Updated06-2016.xls (last visited June 4, 2018).

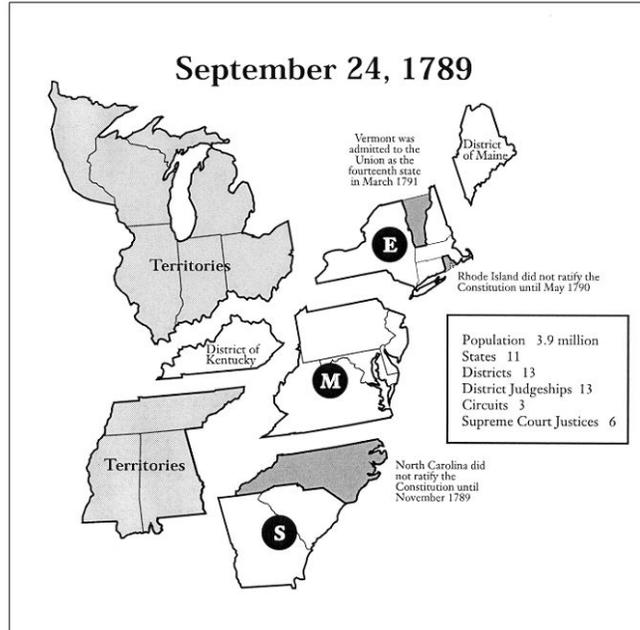
APPENDIX

- Exhibit 1 – The Evolution of the Circuits
- Exhibit 2 – Current Regional Circuits
- Exhibit 3 – Number of Authorized Judgeships by Circuit
- Exhibit 4 – Ninth Circuit Authorized Judgeships Versus Other Circuits’ Averages
- Exhibit 5 – Ninth Circuit Total Judges Versus Other Circuits
- Exhibit 6 – Ninth Circuit Total Judges Versus Other Circuits’ Average
- Exhibit 7 – Population by Circuit
- Exhibit 8 – Ninth Circuit Population Versus Other Circuits’ Average
- Exhibit 9 – Ninth Circuit Population Versus Fifth and Eleventh Combined
- Exhibit 10 – Number of Cases Initiated by Circuit
- Exhibit 11 – Ninth Circuit Caseload Versus Other Circuit’s Average
- Exhibit 12 – Number of Appeals Pending by Circuit
- Exhibit 13 – Ninth Circuit Appeals Pending Versus Other Circuits’ Average
- Exhibit 14 – Percentage of Total Pending Federal Appeals by Circuit
- Exhibit 15 – Ninth Circuit Median Disposition Time Versus Other Circuits’ Average
- Exhibit 16 – Number of States by Circuit
- Exhibit 17 – Ninth Circuit States Versus Other Circuits’ Average
- Exhibit 18 – Allocation of Total Judges by Circuit
- Exhibit 19 – Allocation of Population and Caseload by Circuit
- Exhibit 20 – Ninth Circuit Restructuring Bills in the 115th Congress
- Exhibit 21 – Comparison of S. 276 Proposal with Existing Circuits
- Exhibit 22 – 1973 Hruska Commission Proposed Split Map
- Exhibit 23 – Comparison of Hruska Commission Proposal with Existing Circuits
- Exhibit 24 – All Current Ninth Circuit Judges Listed by Seniority

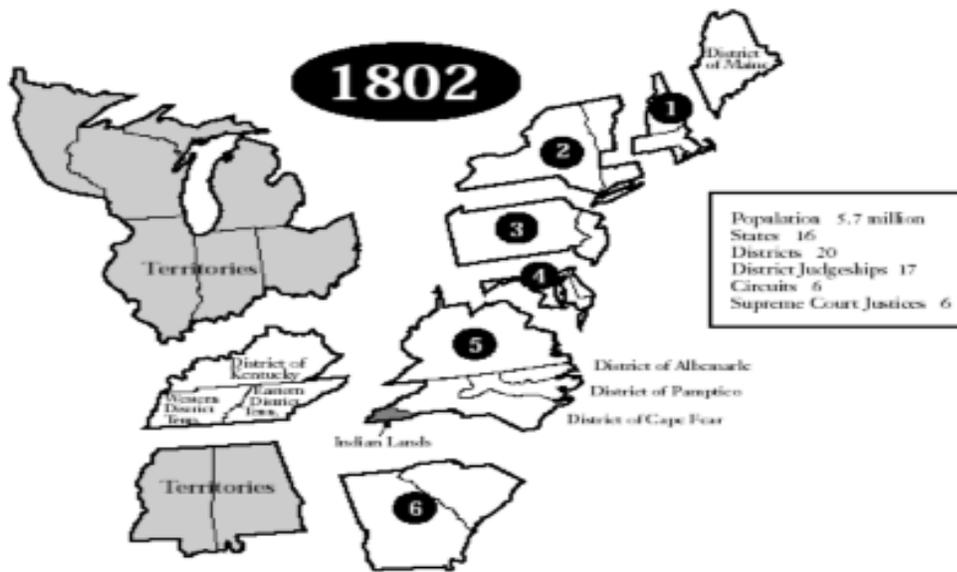
This page is intentionally left blank.

Exhibit 1

The Evolution of the Circuits

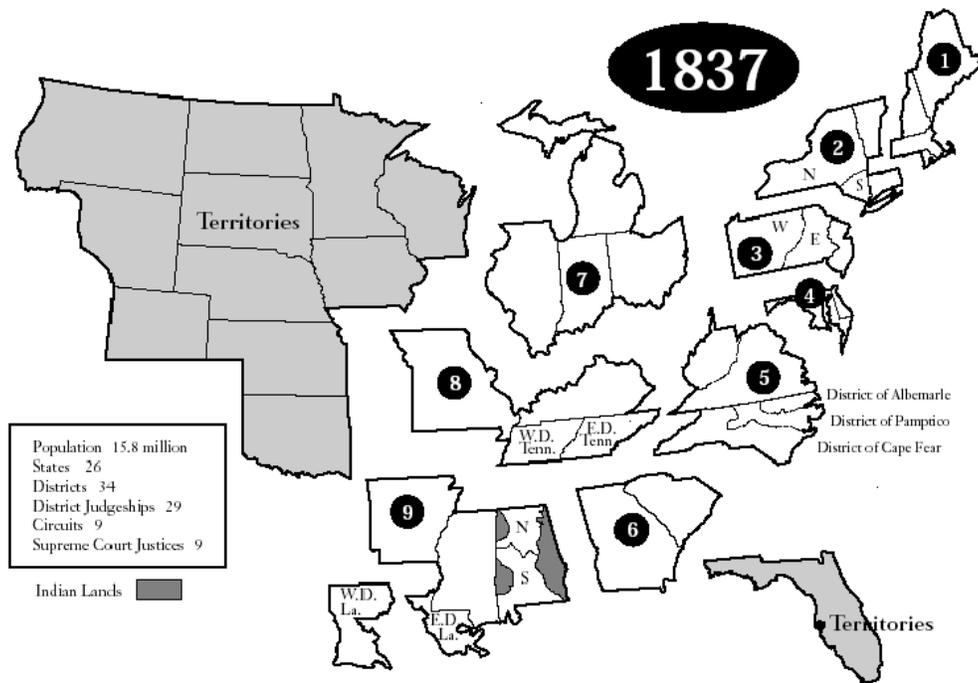


The Judiciary Act of 1789 created three circuits: the Eastern, Middle, and Southern

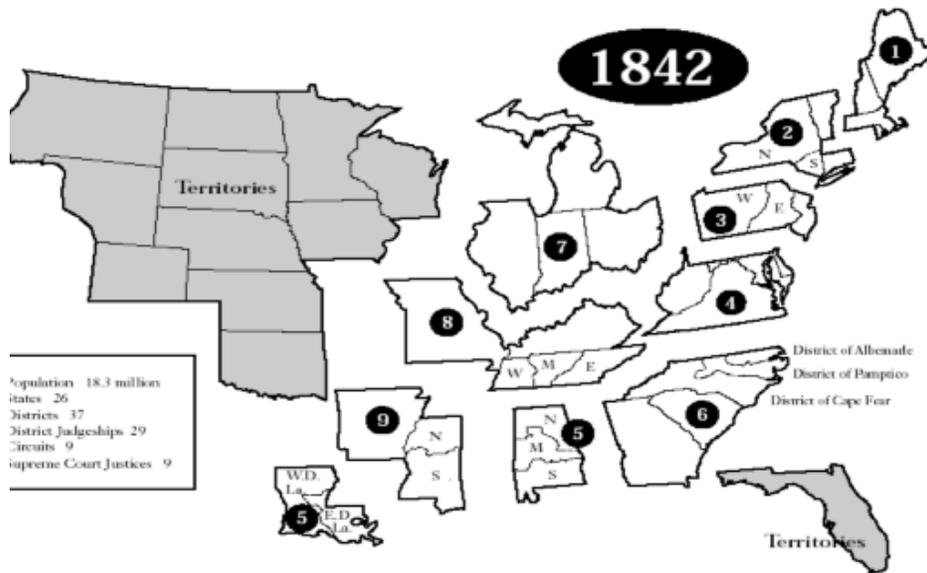


In 1802, three new circuits were created, bringing the total to six. The Eastern Circuit was divided into two circuits by separating New York, Vermont, and Connecticut from Massachusetts, New Hampshire, and Rhode Island. The Middle Circuit, which encompassed the Mid-Atlantic region from Pennsylvania to Virginia, was split into three.

Exhibit 1 (cont'd)

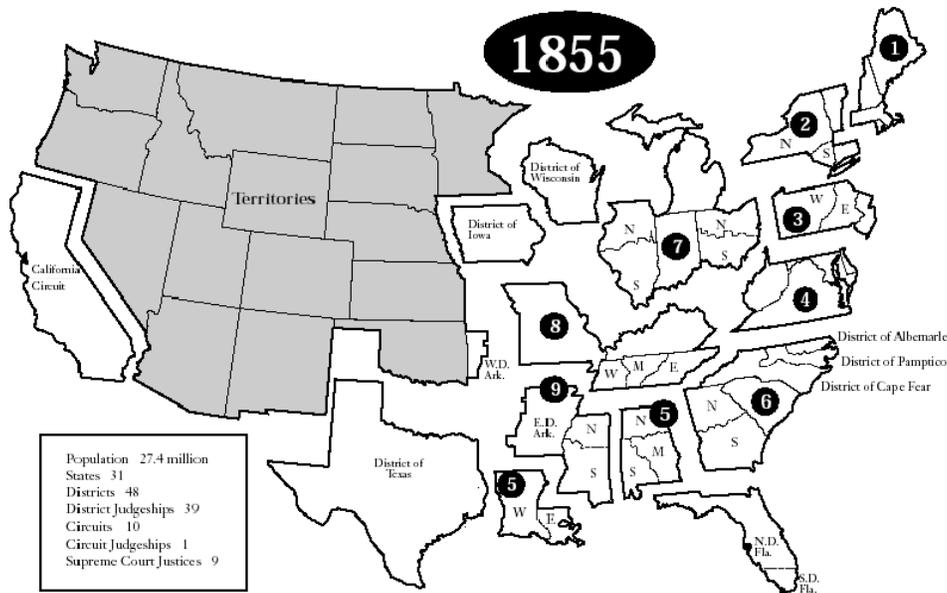


Between 1802 and 1837, three new circuits were created, bringing the total to nine.



In 1842, Congress split the four states of the then Ninth Circuit into two circuits and created the noncontiguous then Fifth Circuit comprised of Louisiana and Alabama

Exhibit 1 (cont'd)

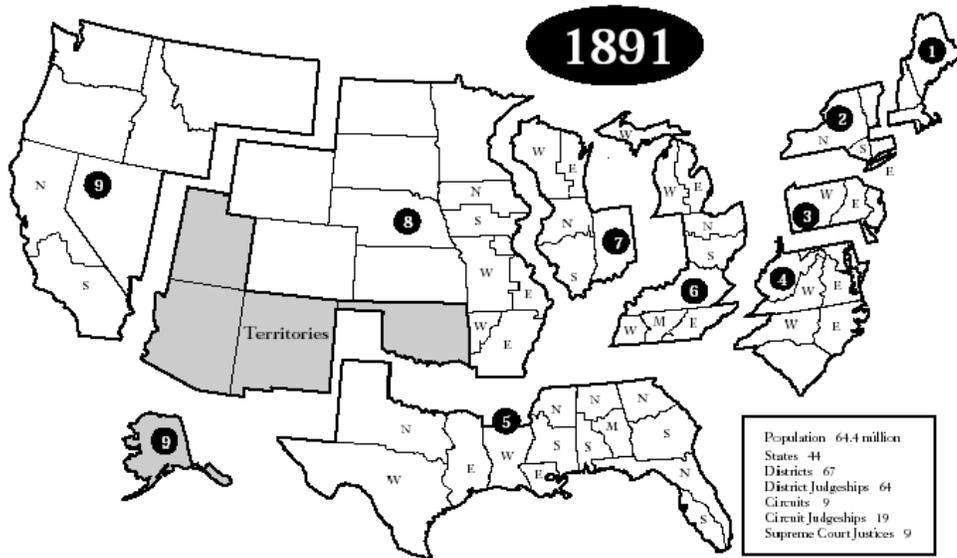


In 1855, Congress created a separate judicial circuit, “constituted in and for the state of California, to be known as the circuit court of the United States for the districts of California,” with the same jurisdiction as the numbered circuits.

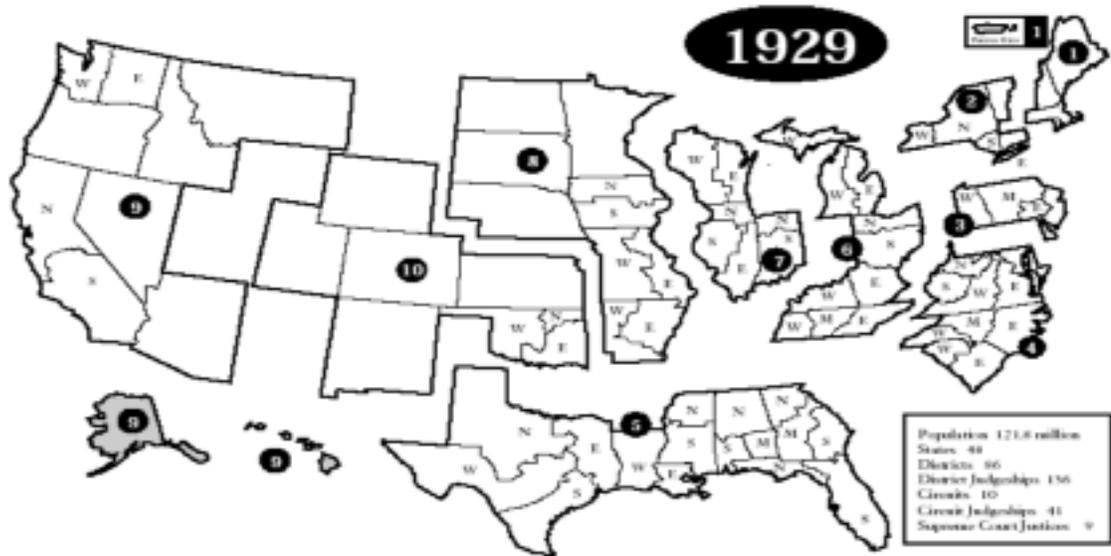


As the United States expanded westward, the nine circuits’ boundaries were realigned to reflect territorial gains and population shifts.

Exhibit 1 (Cont'd)



In 1891, the Evarts Act created the nine circuit courts of appeals.

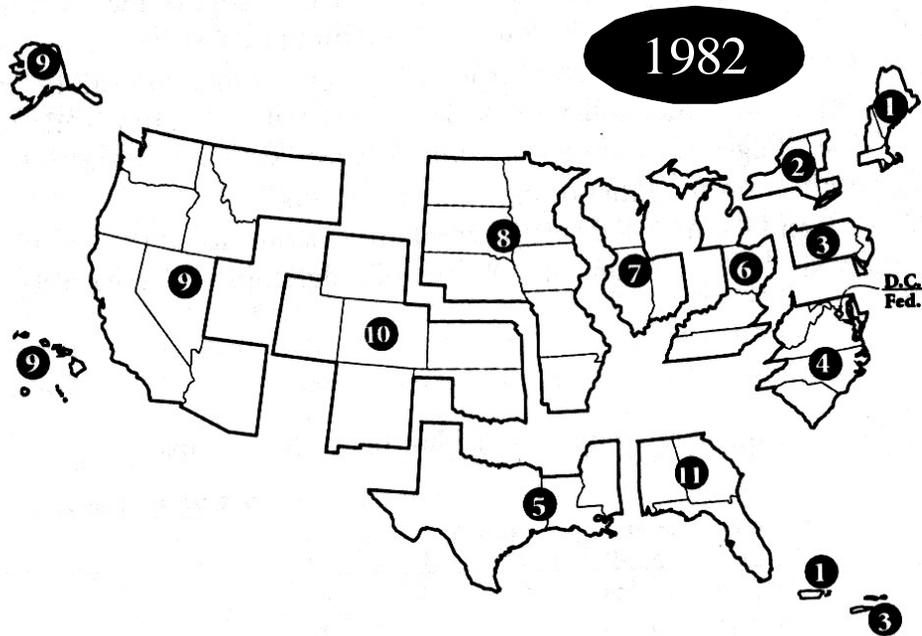


In 1929, the Tenth Circuit was created by splitting the Eighth Circuit in two.

Exhibit 1 (cont'd)



In 1948, the D.C. Circuit was formally recognized as a new and separate circuit.



In 1981, the Eleventh Circuit was created by splitting the Fifth Circuit in two. A year later, the Federal Circuit was created.

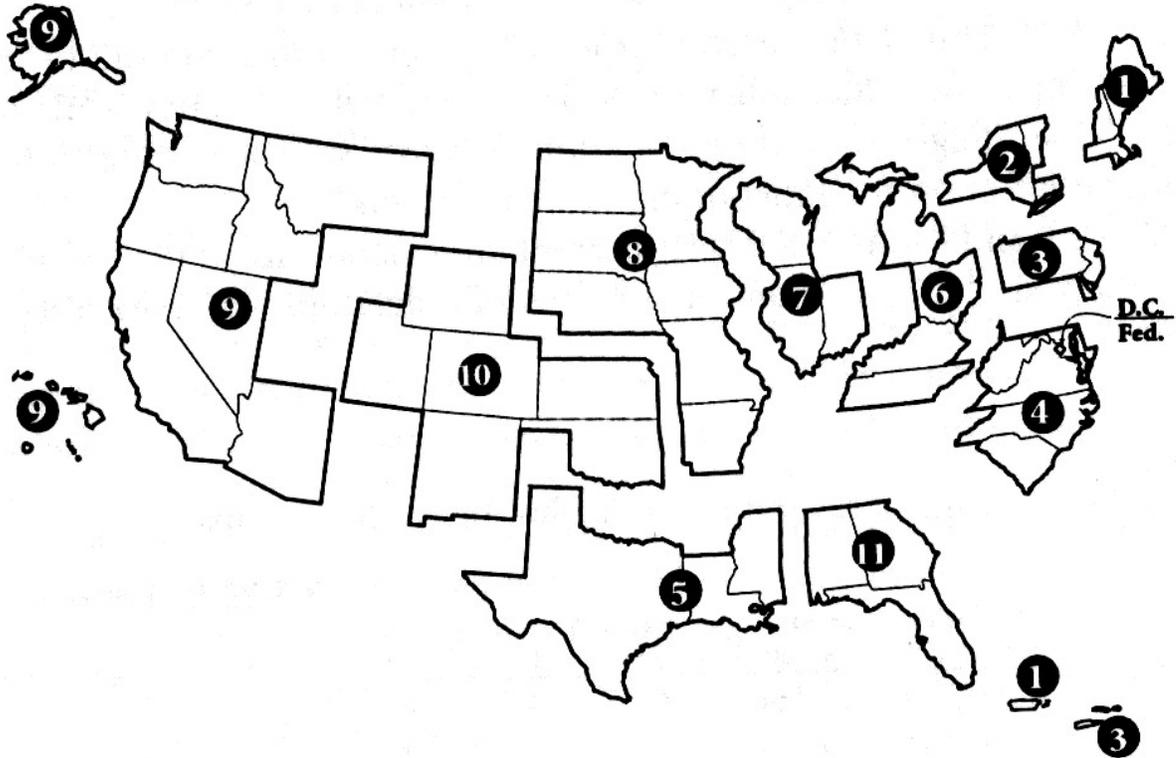
SOURCE: Russell R. Wheeler & Cynthia Harrison, Fed. Judicial Ctr., *Creating the Federal Judicial System* (2d ed. 1994).

This page is intentionally left blank.

Exhibit 2

The Twelve Regional Circuits Today

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

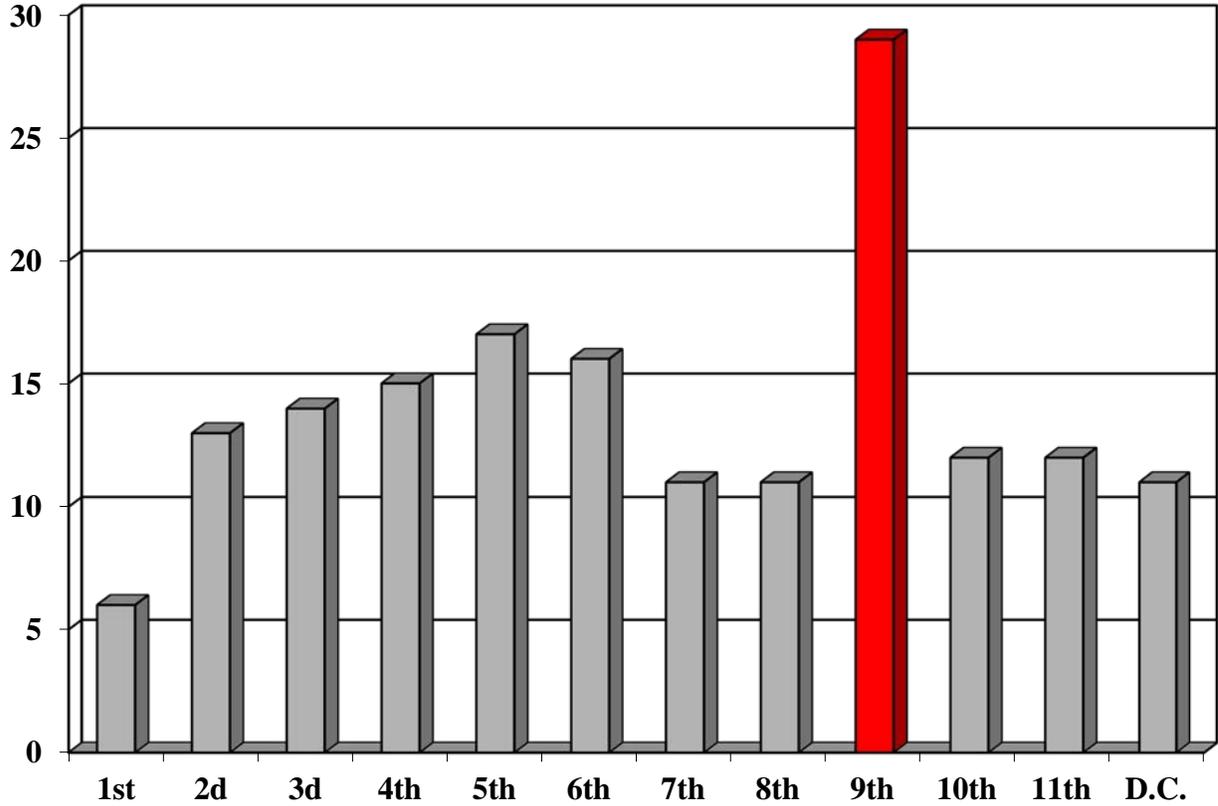


Changes since the Evarts Act of 1891:

- 1929 - Tenth Circuit carved out of Eighth Circuit
- 1948 - D.C. Circuit formally recognized as separate circuit
- 1981 - Eleventh Circuit carved out of Fifth Circuit
- 1982 - Federal Circuit created

Exhibit 3

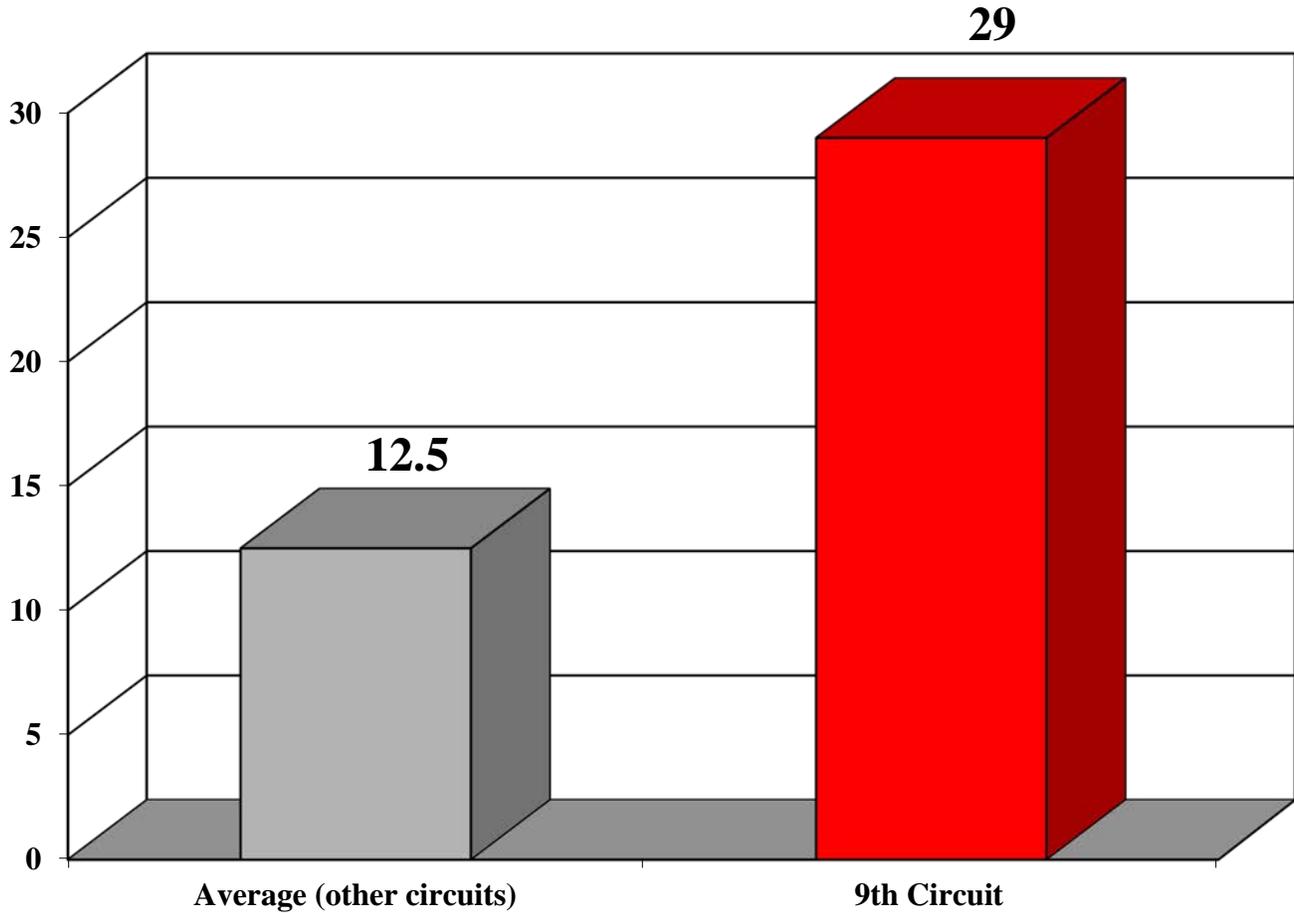
The Ninth Circuit has twelve more authorized judgeships than the next-largest circuit.



SOURCE: 28 U.S.C. § 44

Exhibit 4

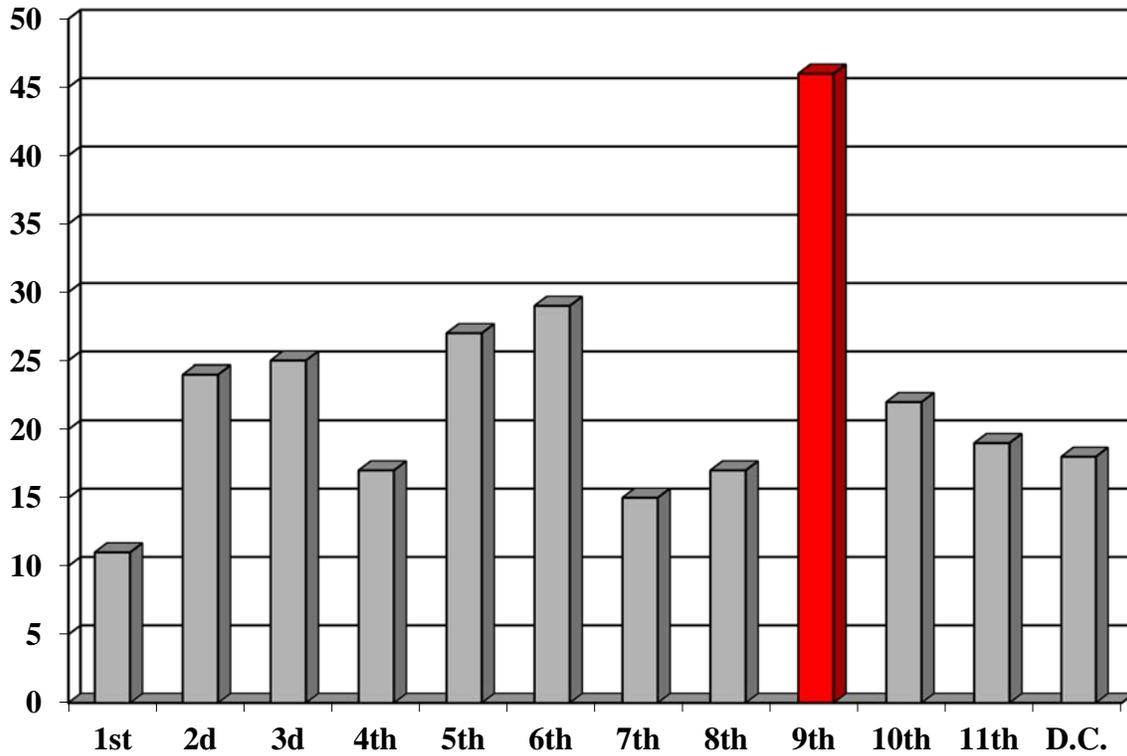
**The Ninth Circuit has more than double
the average number of authorized judgeships
of other circuits**



SOURCE: 28 U.S.C. § 44

Exhibit 5

The Ninth Circuit has seventeen more judges than the next-largest circuit.

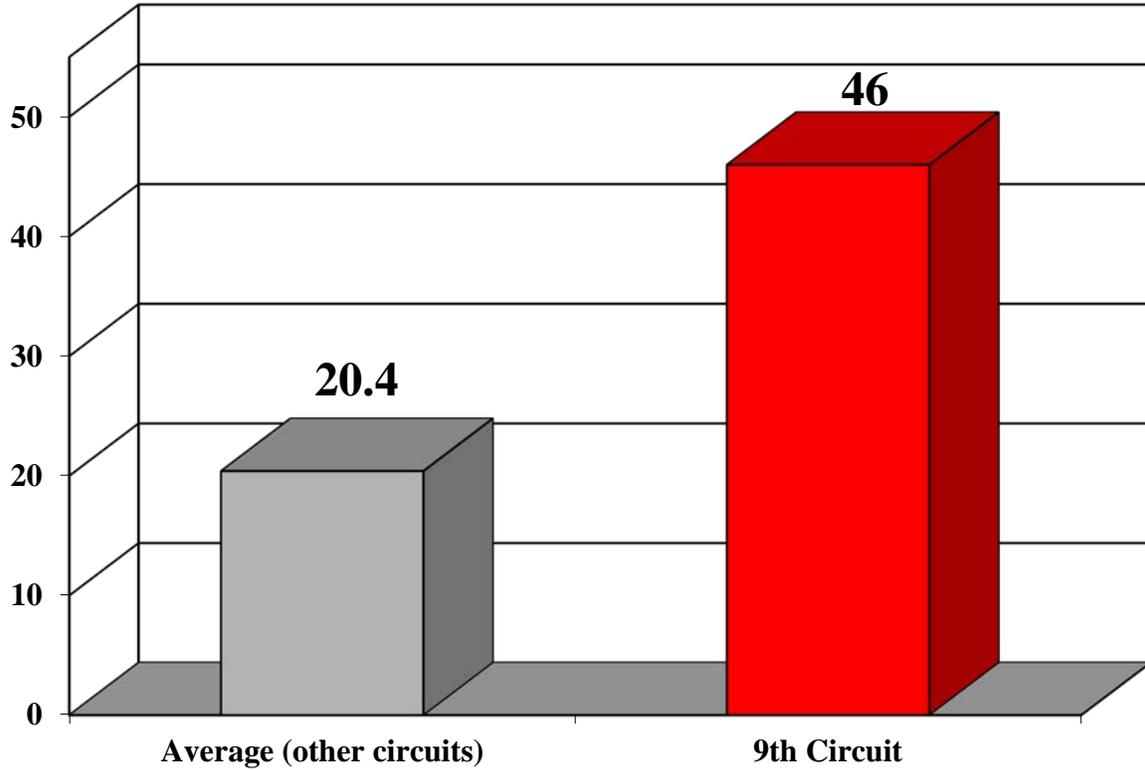


* Totals include all current judges plus vacancies

SOURCES: 28 U.S.C. § 44; Fed. Judicial Ctr., Biographical Directory of Article III Federal Judges, <https://www.fjc.gov/history/judges/search/advanced-search>

Exhibit 6

**The Ninth Circuit has more than double
the average number of judges.**

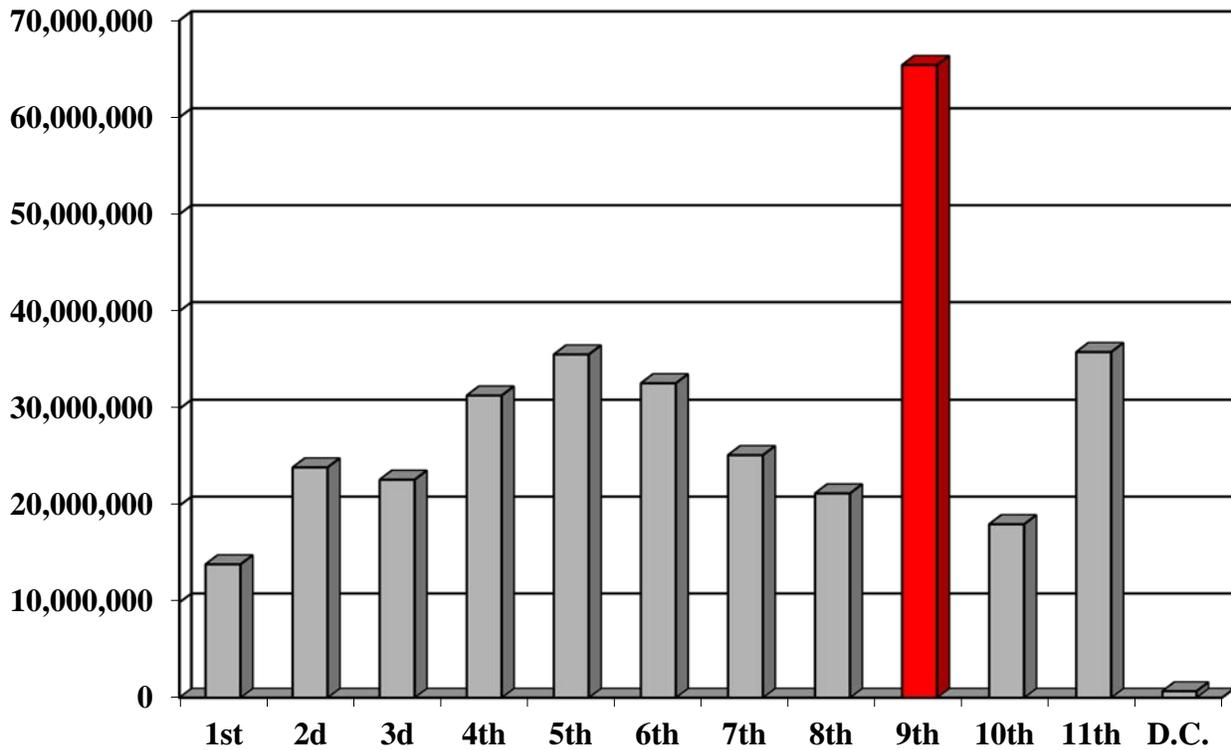


* Totals include all current judges plus vacancies

SOURCES: 28 U.S.C. § 44; Fed. Judicial Ctr., Biographical Directory of Article III Federal Judges, <https://www.fjc.gov/history/judges/search/advanced-search>

Exhibit 7

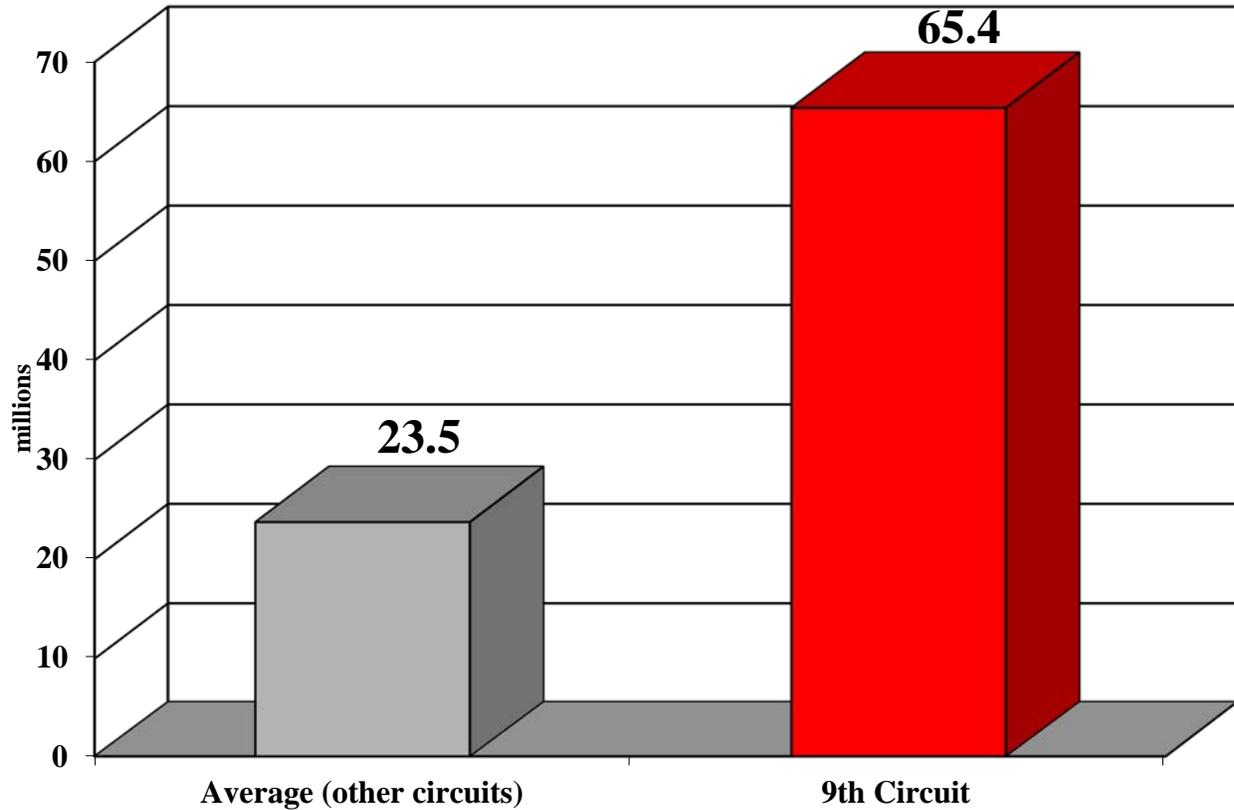
The Ninth Circuit’s population is almost 30 million more than the next-largest circuit.



SOURCE: U.S. Census Bureau, National Population Totals Tables: 2010–2016, tbl. 1 “Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016” (NST-EST2016-01) (Dec. 2016)

Exhibit 8

The Ninth Circuit has almost three times the average population of other circuits.

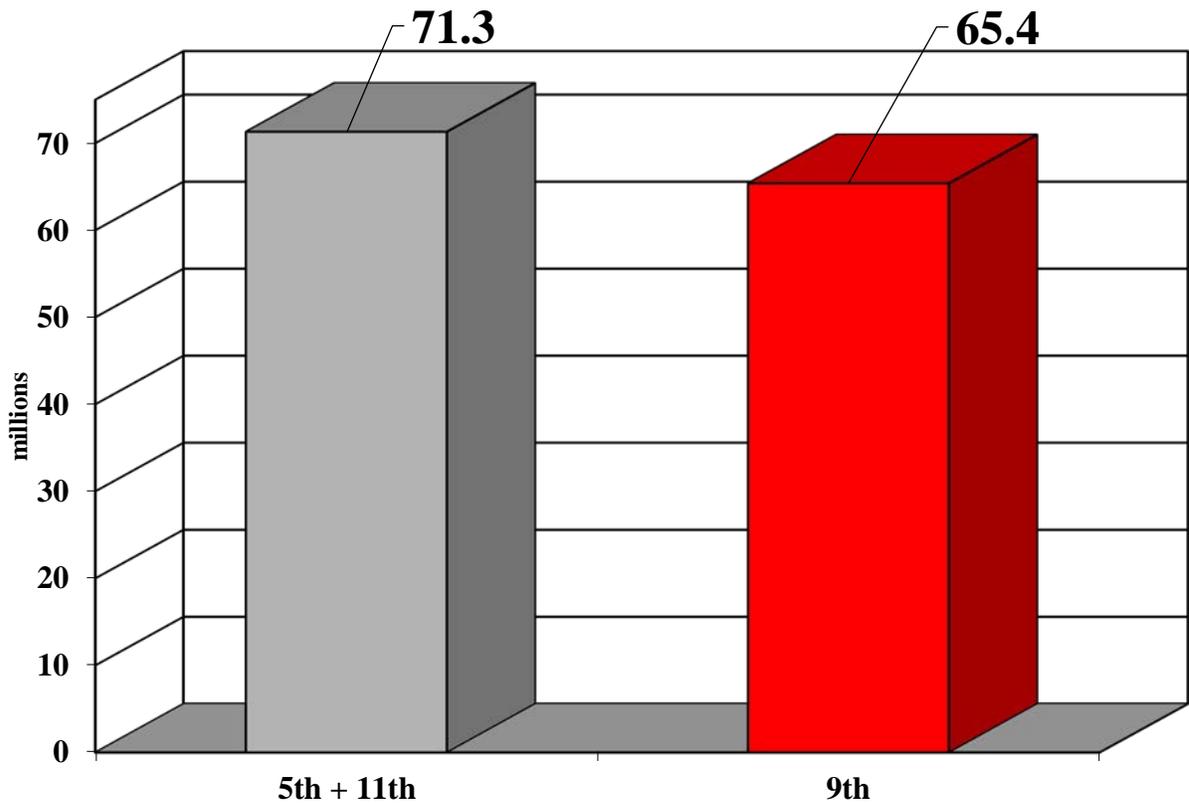


SOURCE: U.S. Census Bureau, National Population Totals Tables: 2010–2016, tbl. 1 “Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016” (NST-EST2016-01) (Dec. 2016)

Exhibit 9

The Eleventh Circuit was carved out of the old Fifth Circuit in 1981 largely because of size.

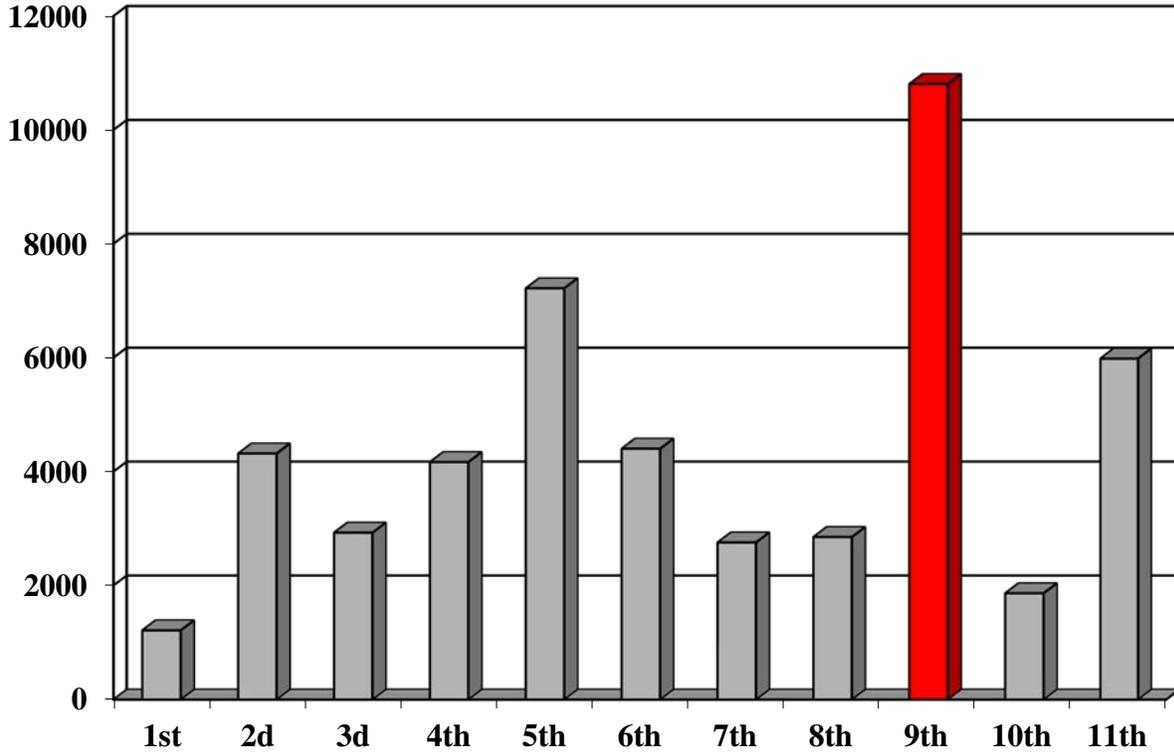
Today's Ninth Circuit has a population that is more than 90% of the size of the current Fifth and Eleventh Circuits combined.



SOURCE: U.S. Census Bureau, National Population Totals Tables: 2010–2016, tbl. 1 “Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016” (NST-EST2016-01) (Dec. 2016)

Exhibit 10

The Ninth Circuit had almost 4,000 more new filings in the past year* than the next-busiest circuit.

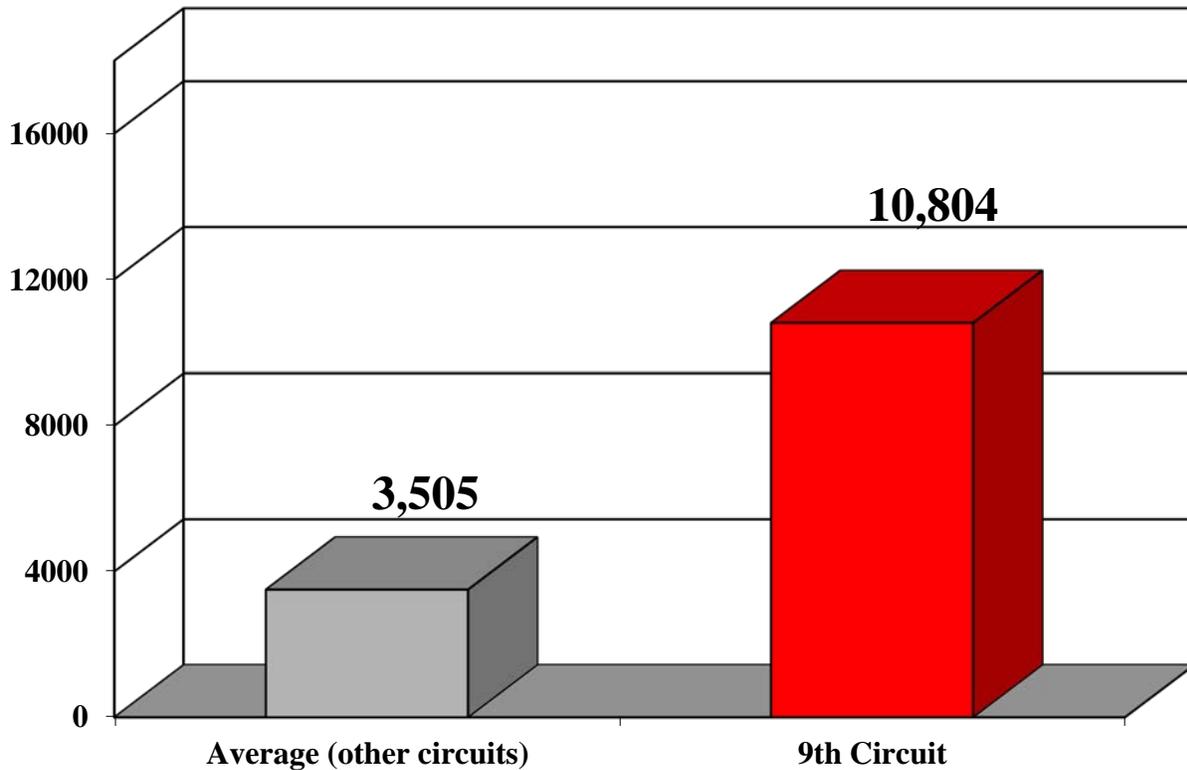


* Figures show number of new filings in the 12-month period ending March 31, 2018

SOURCE: Admin. Office of the U.S. Courts, U.S. Courts of Appeals Statistical Tables, tbl. B, <http://jnet.ao.dcn/resources/statistics/caseload-tables/appeals-caseload-tables>, for the twelve months ending March 31, 2018

Exhibit 11

The Ninth Circuit had more than triple the average number of cases opened in the past year.

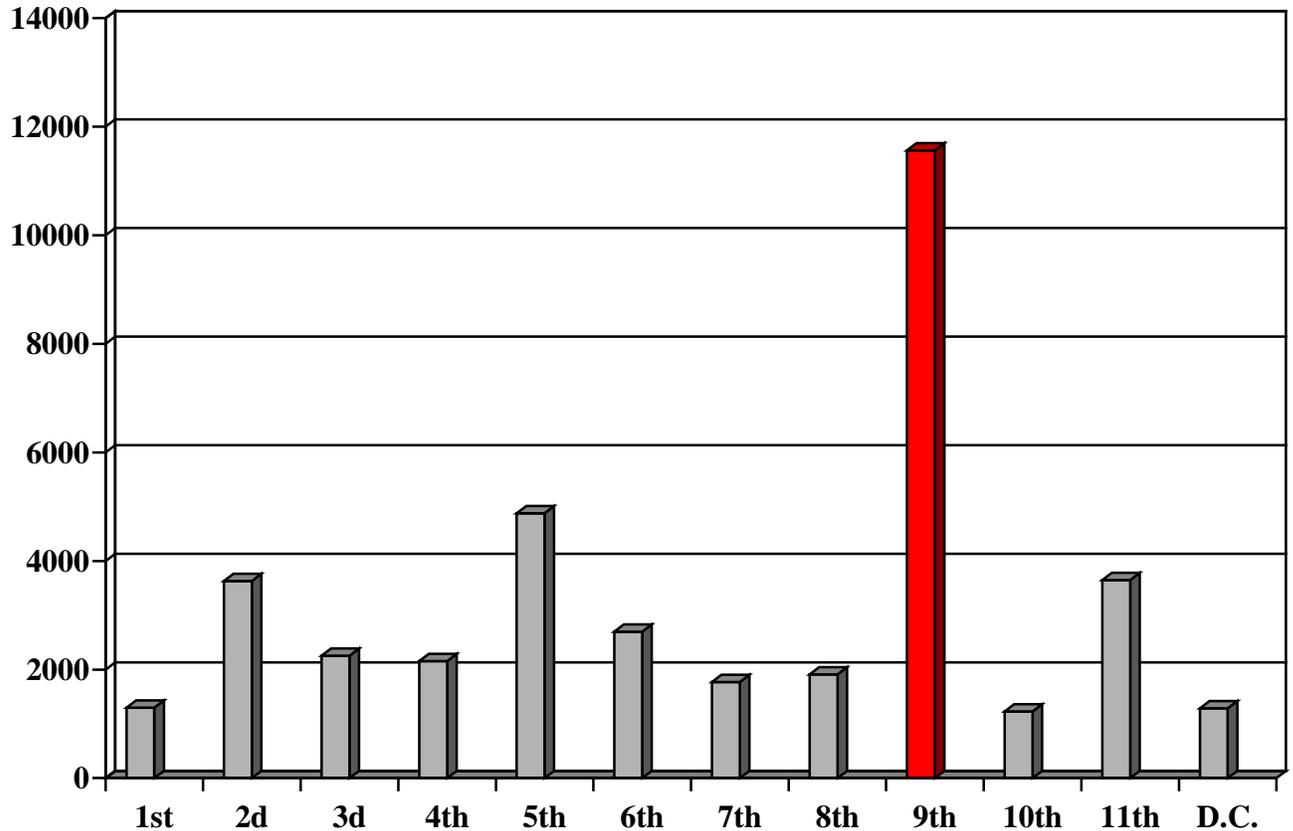


* Figures show number of new filings in the 12-month period ending March 31, 2018

SOURCE: Admin. Office of the U.S. Courts, U.S. Courts of Appeals Statistical Tables, tbl. B, <http://jnet.ao.dcn/resources/statistics/caseload-tables/appeals-caseload-tables>, for the twelve months ending March 31, 2018

Exhibit 12

The Ninth Circuit has the largest backlog in the country by almost 7,000 appeals.

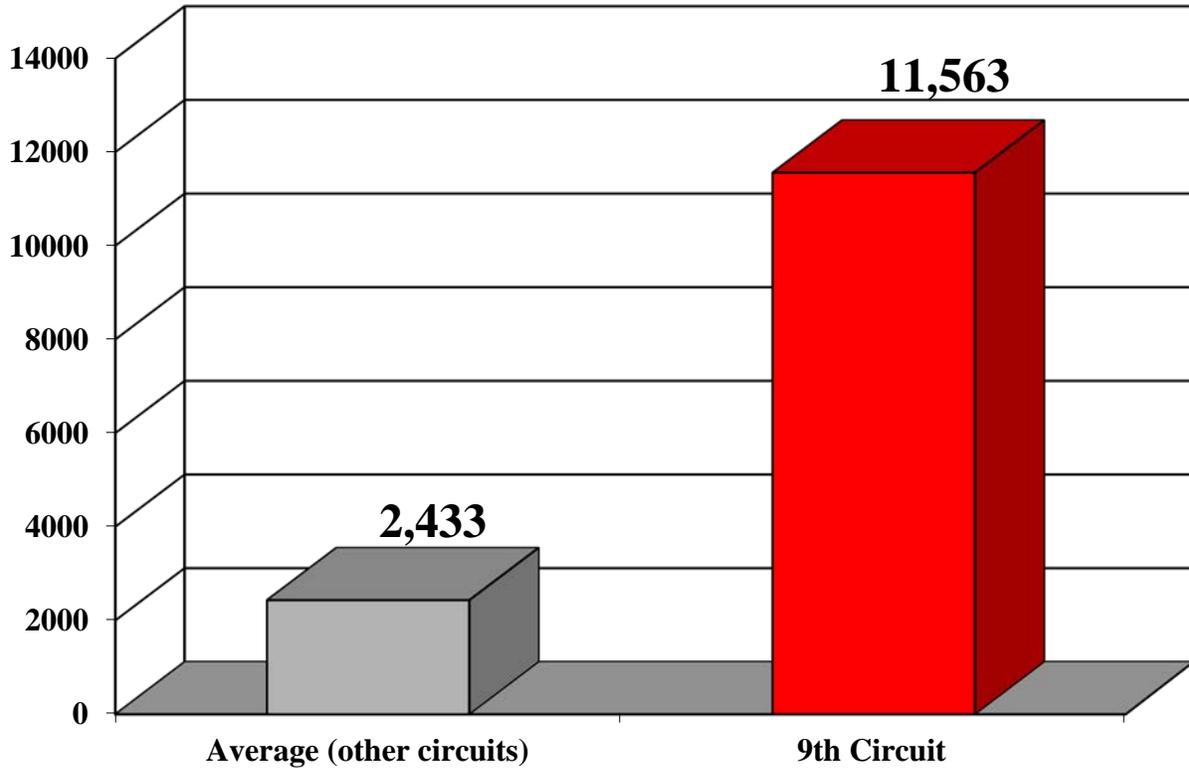


* Figures show number of cases pending as of March 31, 2018

SOURCE: Admin. Office of the U.S. Courts, U.S. Courts of Appeals Statistical Tables, tbl. B, <http://jnet.ao.dcn/resources/statistics/caseload-tables/appeals-caseload-tables>, for the twelve months ending March 31, 2018

Exhibit 13

The Ninth Circuit's backlog is more than four times larger than that of the average circuit.

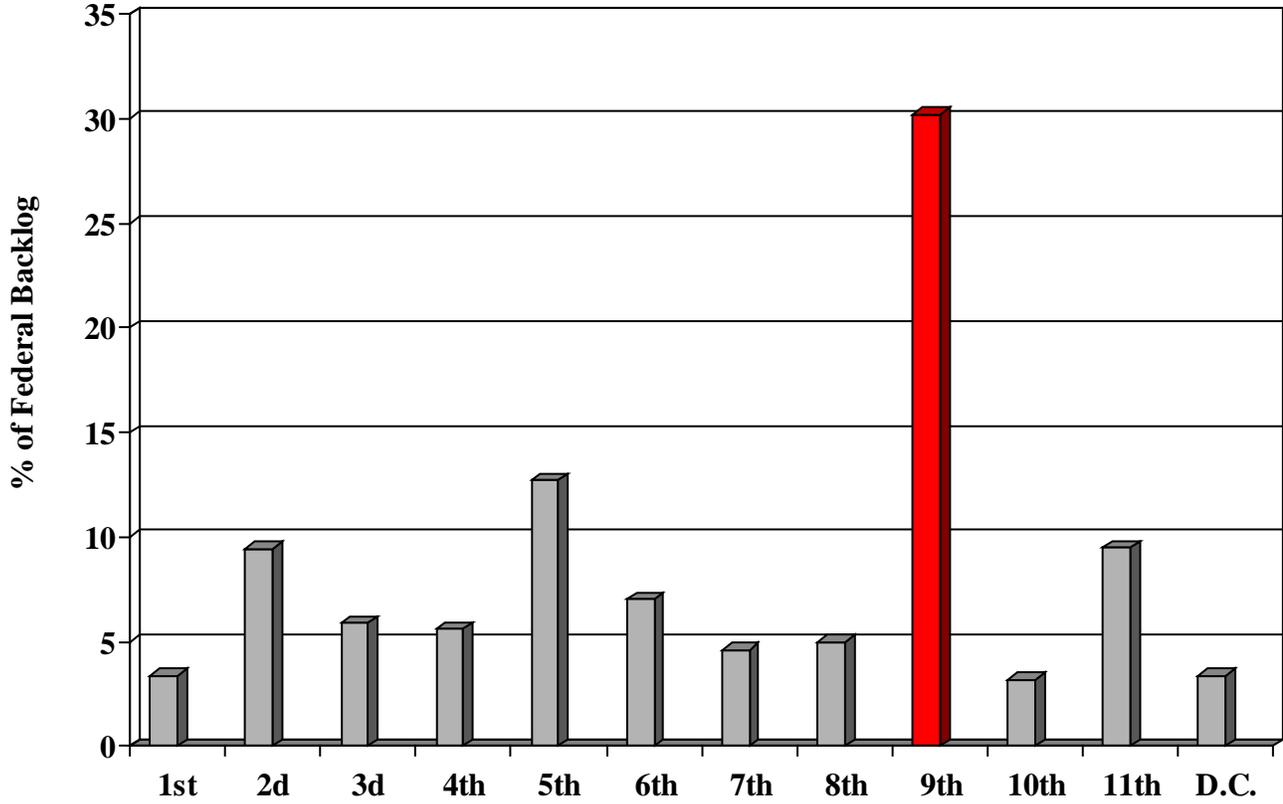


* Figures show number of cases pending as of March 31, 2018

SOURCE: Admin. Office of the U.S. Courts, U.S. Courts of Appeals Statistical Tables, tbl. B, <http://jnet.ao.dcn/resources/statistics/caseload-tables/appeals-caseload-tables>, for the twelve months ending March 31, 2018

Exhibit 14

The Ninth Circuit's backlog accounts for almost one-third of all pending federal appeals.

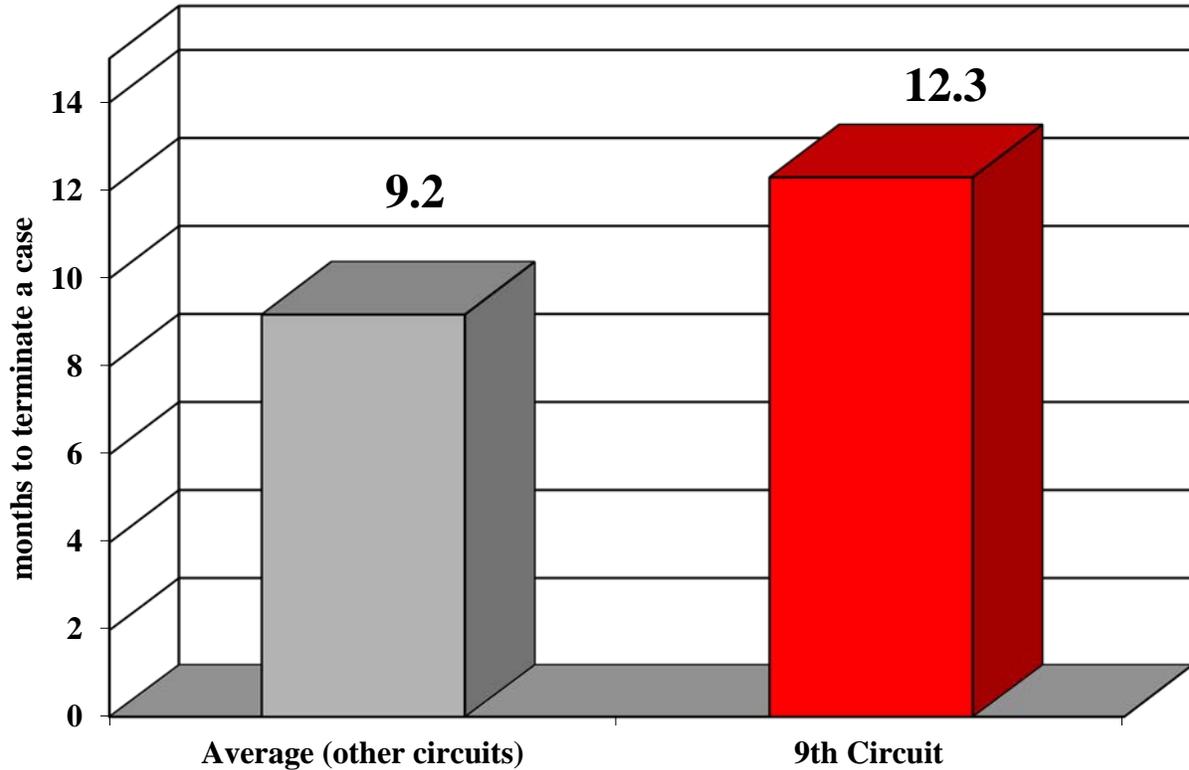


* Figures show percentage of total federal appeals pending as of March 31, 2018

SOURCE: Admin. Office of the U.S. Courts, U.S. Courts of Appeals Statistical Tables, tbl. B, <http://jnet.ao.dcn/resources/statistics/caseload-tables/appeals-caseload-tables>, for the twelve months ending March 31, 2018

Exhibit 15

The Ninth Circuit takes more than 30% longer to dispose of an appeal than the average of all other circuits.

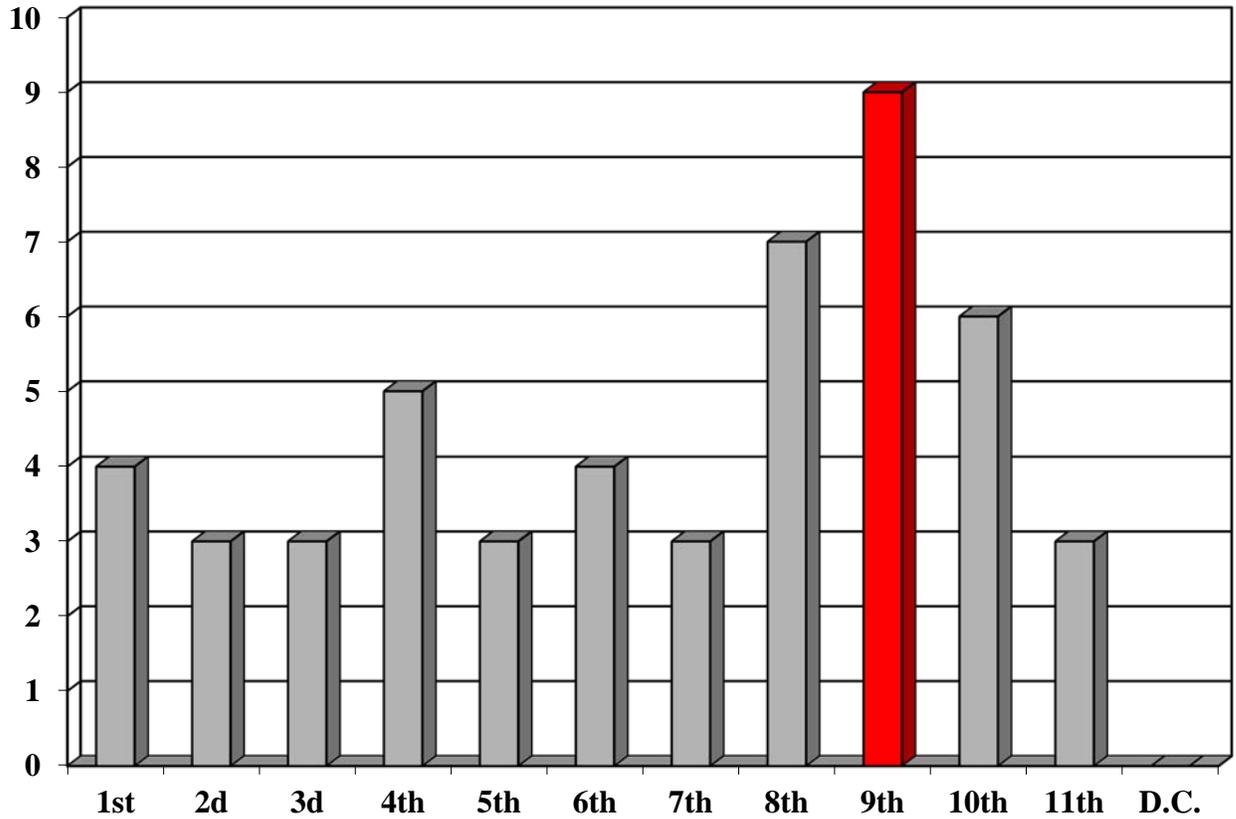


* Figures show median time, in months, from filing of notice of appeal to filing of final opinion or order, during the 12-month period ending March 31, 2018

SOURCE: Admin. Office of the U.S. Courts, U.S. Courts of Appeals Statistical Tables, tbl. B-4, <http://jnet.ao.dcn/resources/statistics/caseload-tables/appeals-caseload-tables>, for the twelve months ending March 31, 2018

Exhibit 16

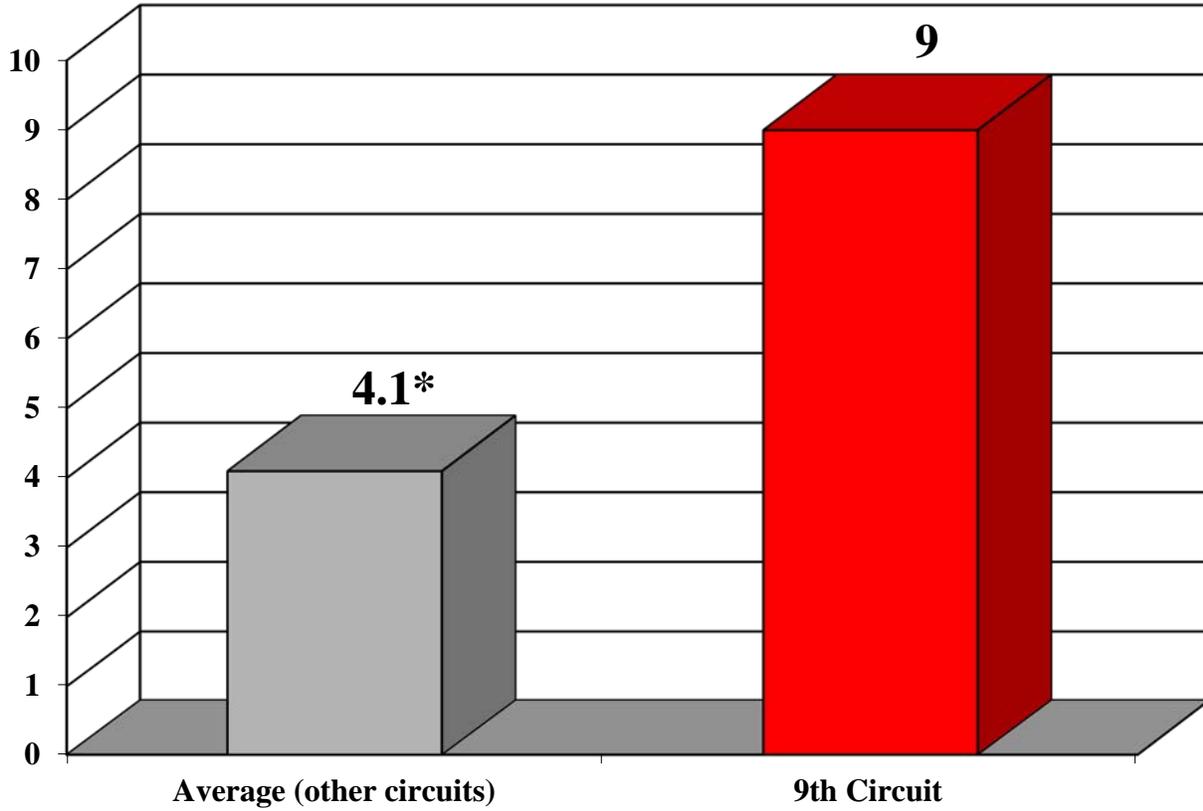
**The Ninth Circuit encompasses more states
than any other circuit.**



SOURCE: 28 U.S.C. § 41

Exhibit 17

The Ninth Circuit encompasses more than double the number of states of the average circuit.



* Shows average of all circuits not including Ninth Circuit or D.C. Circuit

SOURCE: 28 U.S.C. § 41

Exhibit 18

Total Judges by Circuit as of June 1, 2018

Court	Headquarters	Authorized Judgeships	%	Senior Judges*	%	Total Judges**	%
First	Boston, MA	6	3.6%	5	4.9%	11	4.1%
Second	New York, NY	13	7.8%	11	10.7%	24	8.9%
Third	Philadelphia, PA	14	8.4%	11	10.7%	25	9.3%
Fourth	Richmond, VA	15	9.0%	2	1.9%	17	6.3%
Fifth	New Orleans, LA	17	10.2%	10	9.7%	27	10.0%
Sixth	Cincinnati, OH	16	9.6%	13	12.6%	29	10.7%
Seventh	Chicago, IL	11	6.6%	4	3.9%	15	5.6%
Eighth	St. Louis, MO	11	6.6%	6	5.8%	17	6.3%
Ninth	San Francisco, CA	29	17.4%	17	16.5%	46	17.0%
Tenth	Denver, CO	12	7.2%	10	9.7%	22	8.1%
Eleventh	Atlanta, GA	12	7.2%	7	6.8%	19	7.0%
D.C.	Washington, DC	11	6.6%	7	6.8%	18	6.7%
Total		167		103		270	

* Current senior judges, as of June 1, 2018.

** Totals include all current judges plus vacancies, as of June 1, 2018.

SOURCES: 28 U.S.C. § 44; Fed. Judicial Ctr., Biographical Directory of Article III Federal Judges, <https://www.fjc.gov/history/judges/search/advanced-search>

Exhibit 19

**Population and Caseload by Circuit
as of March 31, 2018**

Circuit	Population (millions)	%	Annual Cases Filed*	%	Backlog**	%
First	13.95	4.27%	1,213	2.46%	1,299	3.39%
Second	23.95	7.33%	4,316	8.74%	3,631	9.47%
Third	22.68	6.95%	2,926	5.93%	2,254	5.88%
Fourth	31.37	9.61%	4,166	8.44%	2,157	5.63%
Fifth	35.53	10.88%	7,217	14.62%	4,879	12.73%
Sixth	32.63	9.99%	4,401	8.92%	2,698	7.04%
Seventh	25.21	7.72%	2,754	5.58%	1,771	4.62%
Eighth	21.27	6.51%	2,850	5.77%	1,912	4.99%
Ninth	65.40	20.03%	10,804	21.89%	11,563	30.17%
Tenth	18.09	5.54%	1,862	3.77%	1,230	3.21%
Eleventh	35.79	10.96%	5,982	12.12%	3,647	9.51%
D.C.	0.68	0.21%	872	1.77%	1,289	3.36%
Total	326,538,820		49,363		38,330	
Avg.***	23,740,009	7.27%	3,505	7.10%	2,433	6.35%

* Shows total number of appeals commenced in the 12 months ending March 31, 2018

** Shows number of cases pending as of March 31, 2018

*** Shows average of all other circuits not including the Ninth Circuit

SOURCES: U.S. Census Bureau, National Population Totals Tables: 2010–2016, tbl. 1 “Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016” (NST-EST2016-01) (Dec. 2016); Admin. Office of the U.S. Courts, U.S. Courts of Appeals Statistical Tables, tbl. B, <http://jnet.ao.dcn/resources/statistics/caseload-tables/appeals-caseload-tables>, for the twelve months ending March 31, 2018

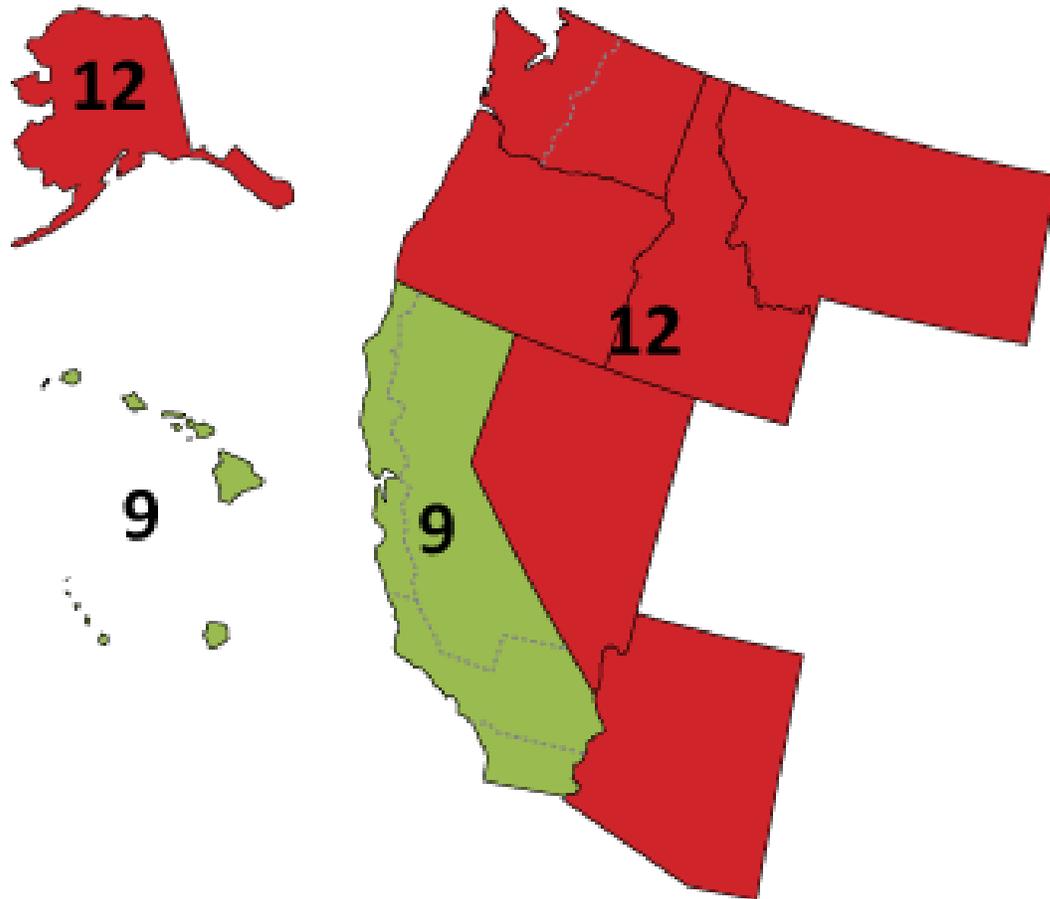
Exhibit 20

There are six pending bills in the 115th Congress that would restructure the Ninth Circuit and one study bill.

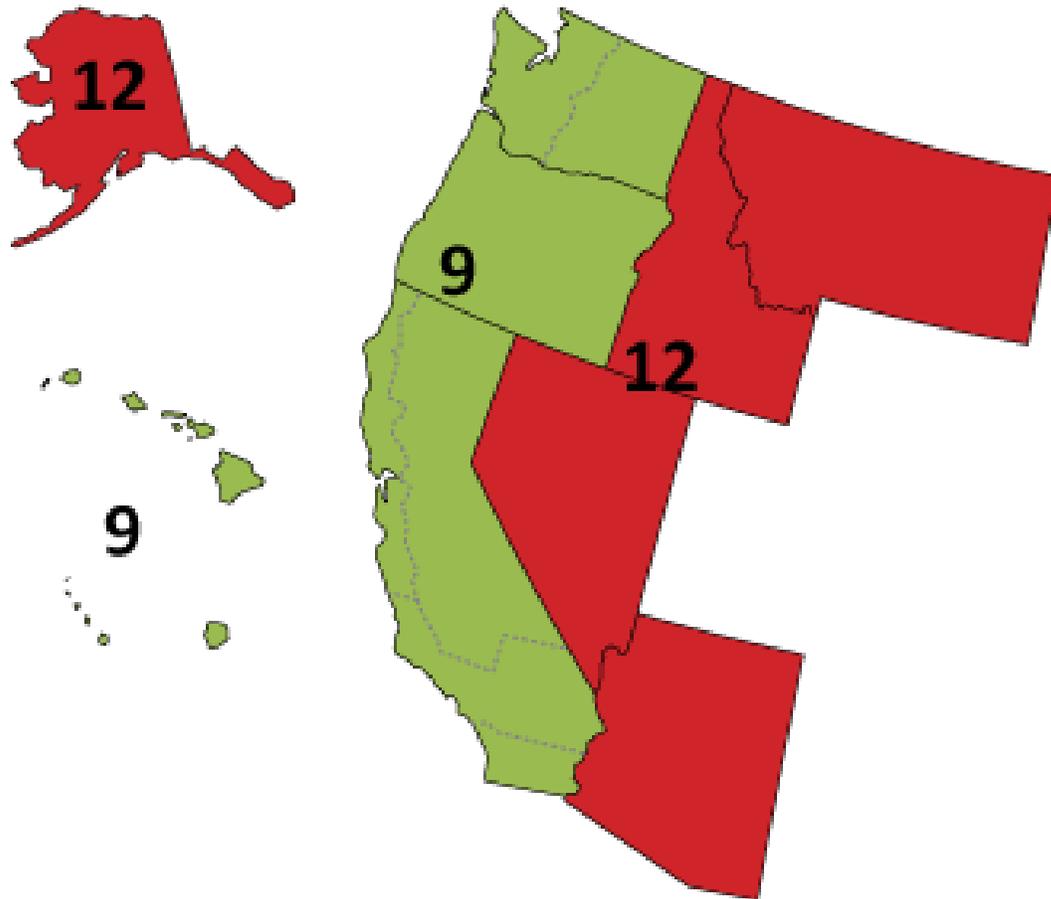
Bill	Sponsor
H.R. 196	Rep. Michael K. Simpson (ID) (+ 2 cosponsors)
H.R. 250	Rep. Andy Biggs (AZ) (+ 9 cosponsors)
H.R. 1598	Rep. Louie Gohmert (TX) (+ 1 cosponsor)
S. 276	Sen. Jeff Flake (AZ) (+ 2 cosponsors)
S. 295	Sen. Steve Daines (MT) (+ 2 cosponsors)
S. 296*	Sen. Dan Sullivan (AK) (+ 2 cosponsors)
S. 3259	Sen. Dan Sullivan (AK) (+ 5 cosponsors)

* S. 296 would not itself restructure the Ninth Circuit. It would establish a Commission on Structural Alternatives for the Federal Courts of Appeals. The Commission would “study the present division of the United States courts of appeals, with particular references to the United States Court of Appeals for the Ninth Circuit” and “submit to the President and Congress a report on the recommendations of the Commission with respect to changes in circuit boundaries or structure.”

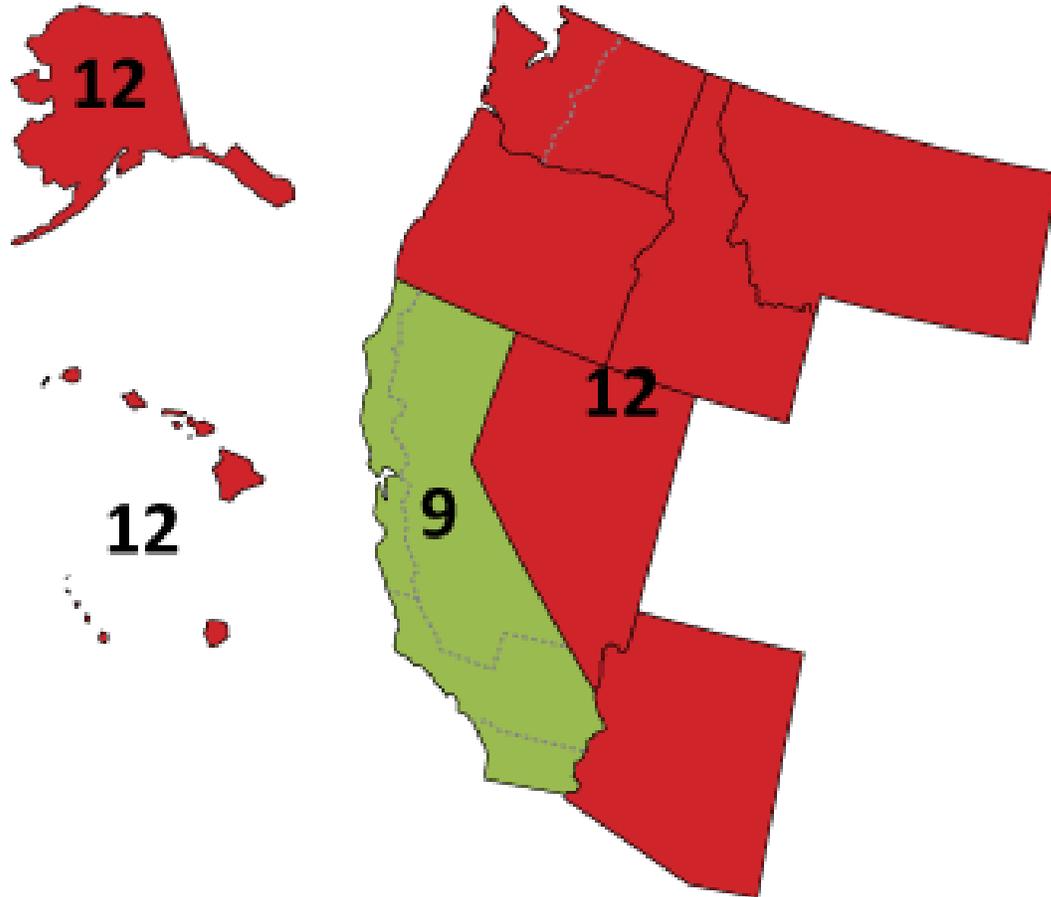
H.R. 196 Proposed Split Map (115th Congress)



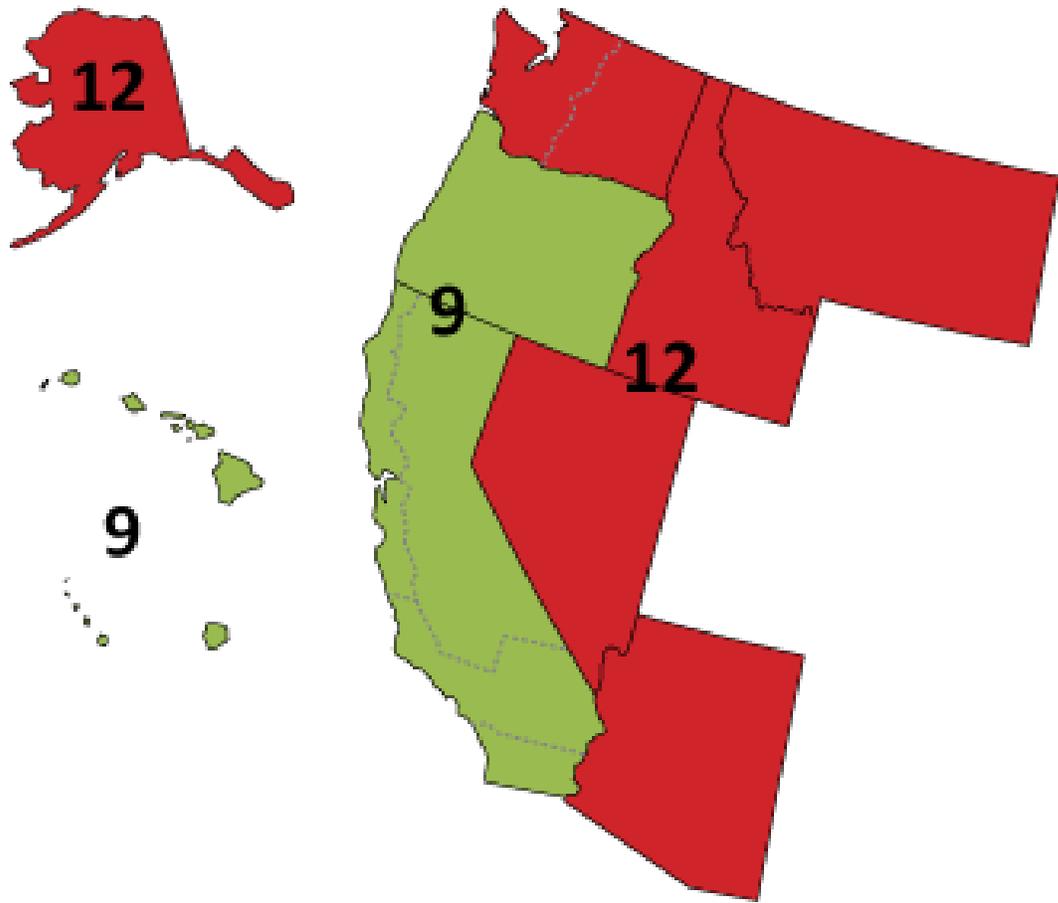
H.R. 250 Proposed Split Map (115th Congress)



H.R. 1598 Proposed Split Map (115th Congress)



**S. 276 Proposed Split Map
(115th Congress)**



**S. 295 & S. 3259 Proposed Split Map
(115th Congress)**

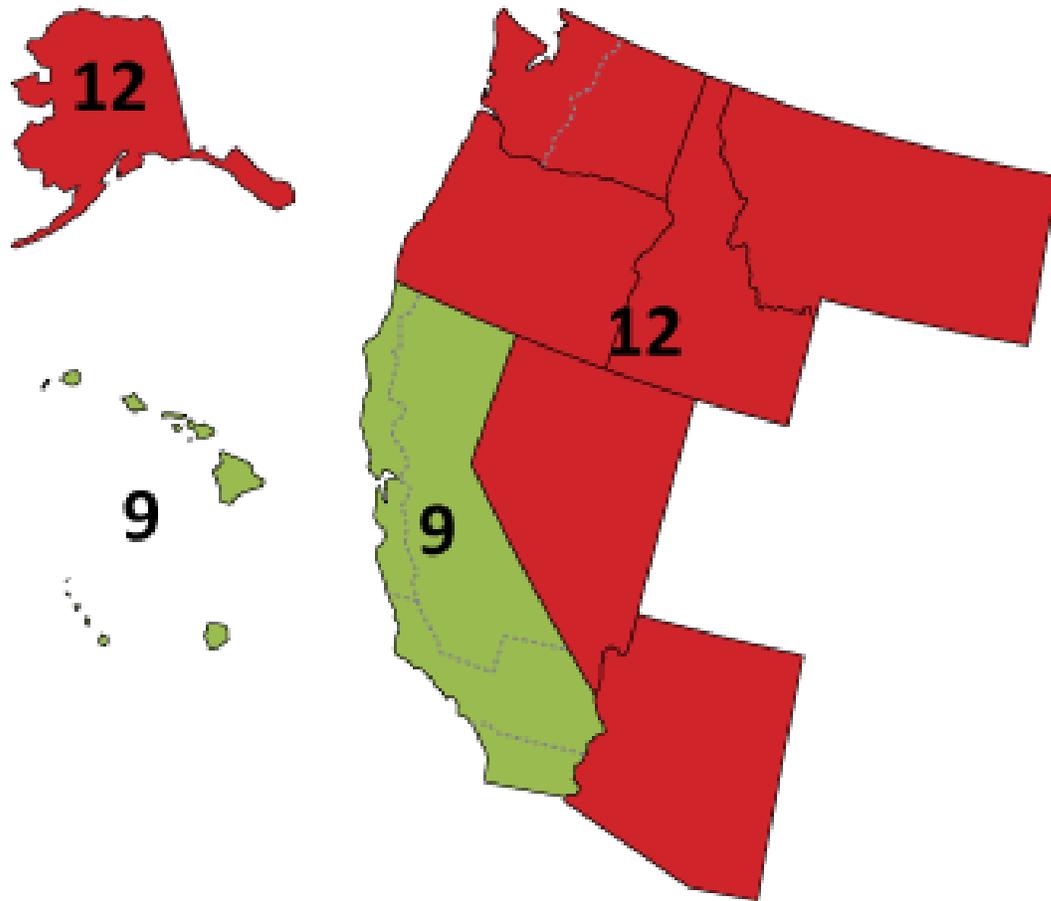


Exhibit 21

Comparison of S. 276 Proposal with Existing Circuits as of March 31, 2018

Circuit	Pop. (millions)	%	Judgeships	Circuit	Annual Cases	%
First	13.95	4.24%	6	First	1,213	2.5%
Second	24.06	7.31%	13	Second	4,316	8.7%
Third	22.77	6.92%	14	Third	2,926	5.9%
Fourth	31.64	9.61%	15	Fourth	4,166	8.4%
Fifth	35.97	10.92%	17	Fifth	7,217	14.6%
Sixth	32.79	9.96%	16	Sixth	4,401	8.9%
Seventh	25.26	7.67%	11	Seventh	2,754	5.6%
Eighth	21.39	6.50%	11	Eighth	2,850	5.8%
NEW 9th	45.32	13.76%	19	NEW 9th*	7,639*	15.5%
NEW 12th	20.93	6.36%	10	NEW 12th*	3,171*	6.4%
Tenth	18.22	5.53%	12	Tenth	1,862	3.8%
Eleventh	36.29	11.02%	12	Eleventh	5,982	12.1%
D.C.	0.69	0.21%	11	D.C.	872	1.8%
Total	329.27			Total	49,369	
Avg.**	23.91	7.26%	12.55	Avg.**	3,505	7.1%

* Caseload data for the proposed new circuits taken from internal data compiled by the Ninth Circuit Library. These numbers do not directly match the data published by the Administrative Office of the U.S. Courts for the current circuits.

** Shows average of all other circuits not including the Ninth Circuit

SOURCES: U.S. Census Bureau, National Population Totals Tables: 2010–2017, tbl. 1 “Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2017” (NST-EST2017-01) (Dec. 2017); Admin. Office of the U.S. Courts, U.S. Courts of Appeals Statistical Tables, tbl. B, <http://jnet.ao.dcn/resources/statistics/caseload-tables/appeals-caseload-tables>, for the twelve months ending March 31, 2018; Ninth Circuit Library Internal Data.

Exhibit 22

**1973 Hruska Commission Proposed Split Map
(93rd Congress)**

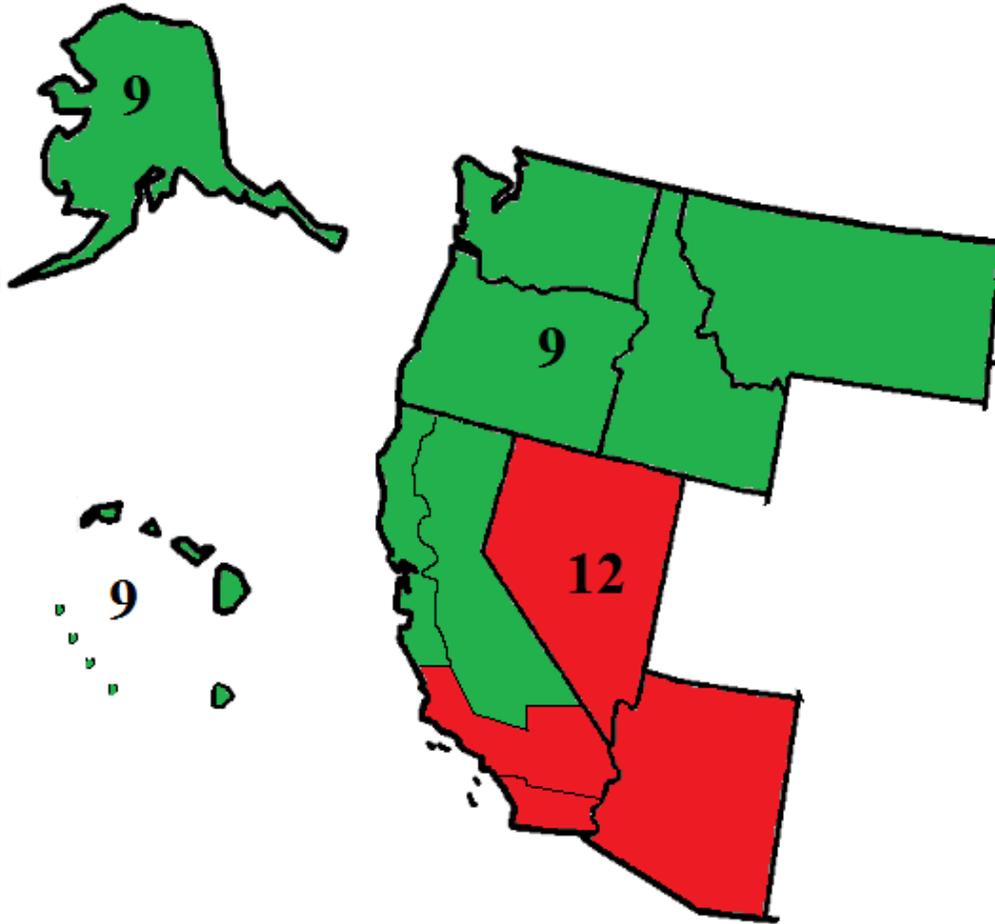


Exhibit 23

Comparison of Hruska Commission Proposal with Existing Circuits as of March 31, 2018

Circuit	Pop. (millions)	%	Judgeships	Circuit	Annual Cases	%
First	13.95	4.24%	6	First	1,213	2.5%
Second	24.06	7.31%	13	Second	4,316	8.8%
Third	22.77	6.92%	14	Third	2,926	5.9%
Fourth	31.64	9.61%	15	Fourth	4,166	8.5%
Fifth	35.97	10.92%	17	Fifth	7,217	14.7%
Sixth	32.79	9.96%	16	Sixth	4,401	8.9%
Seventh	25.26	7.67%	11	Seventh	2,754	5.6%
Eighth	21.39	6.50%	11	Eighth	2,850	5.8%
NEW 9th	33.14	10.06%	13	NEW 9th*	4,098*	8.3%
NEW 12th	33.10	10.05%	16	NEW 12th*	6,502*	13.2%
Tenth	18.22	5.53%	12	Tenth	1,862	3.8%
Eleventh	36.29	11.02%	12	Eleventh	5,982	12.2%
D.C.	0.69	0.21%	11	D.C.	872	1.8%
Total	329.27			Total	49,159	
Avg.**	23.91	7.26%	12.55	Avg.**	3,505	7.1%

* Caseload data for the proposed new circuits taken from internal data compiled by the Ninth Circuit Library. These numbers do not directly match the data published by the Administrative Office of the U.S. Courts for the current circuits. These numbers do not include appeals taken from the District Court for the Northern Mariana Islands, because that district was not accounted for in the Hruska Commission Report.

** Shows average of all other circuits not including the Ninth Circuit

SOURCES: U.S. Census Bureau, National Population Totals Tables: 2010–2017, tbl. 1 “Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2017” (NST-EST2017-01) (Dec. 2017); Admin. Office of the U.S. Courts, U.S. Courts of Appeals Statistical Tables, tbl. B, <http://jnet.ao.dcn/resources/statistics/caseload-tables/appeals-caseload-tables>, for the twelve months ending March 31, 2018; Ninth Circuit Library Internal Data.

Exhibit 24

**All Current Ninth Circuit Judges Listed by Seniority
as of July 31, 2018**

	Name	Initials	Status	Chambers	Appt. Date	Appointed By
1.	Sidney R. Thomas	SRT	Chief Judge	Billings	01/04/96	Clinton
2.	Alfred T. Goodwin	ATG	Senior Circuit Judge	Pasadena	11/30/71	Nixon
3.	J. Clifford Wallace	JCW	Senior Circuit Judge	San Diego	06/28/72	Nixon
4.	Mary M. Schroeder	MMS	Senior Circuit Judge	Phoenix	09/26/79	Carter
5.	Jerome Farris	JF	Senior Circuit Judge	Seattle	09/27/79	Carter
6.	Dorothy W. Nelson	DWN	Senior Circuit Judge	Pasadena	12/20/79	Carter
7.	William C. Canby, Jr.	WCC	Senior Circuit Judge	Phoenix	05/23/80	Carter
8.	Diarmuid F. O'Scannlain	DFO	Senior Circuit Judge	Portland	09/26/86	Reagan
9.	Edward Leavy	EL	Senior Circuit Judge	Portland	03/23/87	Reagan
10.	Stephen S. Trott	SST	Senior Circuit Judge	Boise	03/25/88	Reagan
11.	Ferdinand F. Fernandez	FFF	Senior Circuit Judge	Pasadena	05/22/89	Bush
12.	Andrew J. Kleinfeld	AJK	Senior Circuit Judge	Fairbanks	09/16/91	Bush
13.	Michael Daly Hawkins	MDH	Senior Circuit Judge	Phoenix	09/15/94	Clinton
14.	A. Wallace Tashima	AWT	Senior Circuit Judge	Pasadena	01/04/96	Clinton
15.	Barry G. Silverman	BGS	Senior Circuit Judge	Phoenix	02/04/98	Clinton
16.	Susan P. Graber	SPG	Circuit Judge	Portland	03/19/98	Clinton
17.	M. Margaret McKeown	MMM	Circuit Judge	San Diego	04/08/98	Clinton

	Name	Initials	Status	Chambers	Appt. Date	Appointed By
18.	Kim McLane Wardlaw	KMW	Circuit Judge	Pasadena	08/03/98	Clinton
19.	William A. Fletcher	WAF	Circuit Judge	San Francisco	10/09/98	Clinton
20.	Raymond C. Fisher	RCF	Senior Circuit Judge	Pasadena	10/12/99	Clinton
21.	Ronald M. Gould	RMG	Circuit Judge	Seattle	11/22/99	Clinton
22.	Richard A. Paez	RAP	Circuit Judge	Pasadena	03/14/00	Clinton
23.	Marsha S. Berzon	MSB	Circuit Judge	San Francisco	03/16/00	Clinton
24.	Richard C. Tallman	RCT	Senior Circuit Judge	Seattle	05/25/00	Clinton
25.	Johnnie B. Rawlinson	JBR	Circuit Judge	Las Vegas	07/26/00	Clinton
26.	Richard R. Clifton	RRC	Senior Circuit Judge	Honolulu	07/30/02	Bush
27.	Jay S. Bybee	JSB	Circuit Judge	Las Vegas	03/21/03	Bush
28.	Consuelo M. Callahan	CMC	Circuit Judge	Sacramento	05/28/03	Bush
29.	Carlos T. Bea	CTB	Circuit Judge	San Francisco	10/01/03	Bush
30.	Milan D. Smith, Jr.	MDS	Circuit Judge	El Segundo	05/18/06	Bush
31.	Sandra S. Ikuta	SSI	Circuit Judge	Pasadena	06/23/06	Bush
32.	N. Randy Smith*	NRS	Circuit Judge	Pocatello	03/19/07	Bush
33.	Mary H. Murguia	MHM	Circuit Judge	Phoenix	01/04/11	Obama
34.	Morgan Christen	MBC	Circuit Judge	Anchorage	01/11/12	Obama
35.	Jacqueline H. Nguyen	JHN	Circuit Judge	Pasadena	05/14/12	Obama
36.	Paul J. Watford	PJW	Circuit Judge	Pasadena	05/22/12	Obama
37.	Andrew D. Hurwitz	ADH	Circuit Judge	Phoenix	06/27/12	Obama
38.	John B. Owens	JBO	Circuit Judge	San Diego	04/02/14	Obama
39.	Michelle T. Friedland	MTF	Circuit Judge	San Francisco	04/29/14	Obama
40.	Mark J. Bennett	MJB	Circuit Judge	Honolulu	07/13/18	Trump
41.	VACANCY (Pregerson)					

	Name	Initials	Status	Chambers	Appt. Date	Appointed By
42.	VACANCY (Silverman)					
43.	VACANCY (O'Scannlain)					
44.	VACANCY (Kozinski)					
45.	VACANCY (Tallman)				07/13/2018 (nominated)	Trump Nominee Pending
46.	VACANCY (Reinhardt)					

SUMMARY:

Current Active Judges	23
Current Vacancies	<u>6</u>
Current Ninth Circuit Judgeships	29
Current Senior Judges	<u>17</u>
TOTAL, including vacancies	46

* Judge N. Randy Smith has announced his intention to elect senior status as of August 11, 2018. President Trump nominated a potential successor on May 10, 2018.

This page is intentionally left blank.