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Hearing
Bringing Justice Closer to the People:
Examining Ideas for Restructuring the Ninth Circuit

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Written Testimony of
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Good afternoon, Mr. Chairman and Committee members. 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. I thank the Judiciary Committee for the opportunity to testify. The views I express are my own.

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 bureaucratic 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.

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.

As to the broader question, 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. A close examination of the structural alternatives for the Ninth Circuit leads to the inevitable conclusion that no division is satisfactory nor can any division achieve those objectives.

Let me first address the significant damage to judicial administration that would be caused by a structural division of the Ninth Circuit. Next, I will respond to the flawed arguments that have been raised by supporters of a circuit split. Finally, I will address some of the split proposals in relation to the criteria I've described.

Negative Impact of a Circuit Split

1. Spitting the Circuit Would Result in Significantly Reduced Services to the Districts and Reduced Access to Justice

When circuit division is discussed, most of the focus is on the Court of Appeals. But the Court of Appeals is only one unit of the Ninth Circuit. The Circuit includes not only of the Court of Appeals, but district courts, bankruptcy courts, and pretrial/probation services. We have 14 district and bankruptcy courts. The Ninth Circuit as a whole has 164 district judges, 131 magistrate judges, 79 bankruptcy judges, and 119 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 case needs. In addition, the current structure of the Ninth Circuit allows the aggregation of resources available to the districts, which allows for effective and efficient delivery of justice.

Allow me to provide a few examples.

a. Assignment of 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 put tremendous pressure on the courts in Arizona. This situation was compounded by the murder of Chief Judge John Roll. As a result, the District of Arizona and the Ninth Circuit Judicial Council declared Arizona to be 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 Judge of the Circuit and the Chief District Judge of Arizona were able to devise a plan to designate visiting judges to

Arizona to provide coverage for the increased filings. In fact, since 1999, there have been 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 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 the near continuous service provided to Arizona and Guam, we have given substantial support to virtually every district at one time or another. We have given substantial assistance in a variety of initiatives to the Eastern District of California, which is significantly overburdened. Several years ago, 80 judges throughout the Circuit agree to assume responsibility for at least 15 cases, an effort that resolved more than 1,500 cases. The overwhelming caseload in the Eastern District continues to be of concern, and we are presently experimenting with additional ways to make visiting judge assignments to address it. 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've 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 contrast, inter-circuit assignment of visiting judges is a more complex and slower process. 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.

If the Ninth Circuit were divided, we simply would not have the judicial resources to be able to address the significant, fluctuating, and sometimes overwhelming caseload demands of the districts.

b. Cost Savings. The centralized management of the Ninth Circuit has resulted in considerable cost savings. For example, a significant expense to the judiciary is the defense of capital cases. We have been cognizant of this problem and have created a committee to review budgets for the prosecution of such cases. The district judges who have served on this committee have done remarkable work in analyzing capital case budgets. Their work has saved hundreds of thousands, if not millions, of dollars. These efforts would be significantly lost or reduced under a new division. There simply would not be a critical mass of judges to serve these functions in a small circuit.

Likewise, the two smaller circuits would have far fewer resources in space and facility planning. The architects and professional space planners in our Ninth Circuit Executive's office have saved taxpayers significant sums of money by using their personal understanding of the work of the courts to assist directly in the renovation and construction of courthouses. 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.

In addition, the Ninth Circuit Executive's office has aggressively identified and reduced federal space needs, resulting in significant savings in rent. Since fiscal year 2013, the Ninth Circuit has been diligently pursuing the goals of the Judicial Conference of the United States Space Reduction Program, which calls for each circuit to reduce its space inventory by 3%, and to freeze its existing space footprint by offsetting new space expansion projects within the Circuit with space releases elsewhere. 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 and the district courts 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 235,000 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 $7 million per year.

These space and facilities resources would not be available in a divided circuit.

In the field of information technology, the Circuit has taken a sophisticated, comprehensive approach to information technology initiatives, resulting in significant cost savings. For example, the Circuit promoted the District of Nevada's electronic Criminal Justice Act attorney voucher system, which has resulted in significant cost savings and allowed cross-district fee audits.

A divided circuit would also mean costly duplication of information technology infrastructure.

c. Service Delivery. The Ninth Circuit has also provided significant service delivery to the districts that would not be available if the Circuit were divided. For example, the Circuit is currently providing cybersecurity guidance and resources to the courts within the Ninth Circuit, many of which could not afford to invest in such resources.

The Circuit has also provided the districts with substantial human resources support, as well as advice on potential misconduct and disability issues. The Circuit has provided assistance with pro se litigation programs. Because of increased pressure from prisoner pro se litigation, the Circuit organized a circuit wide summit on prisoner litigation. The result has been the adoption of more efficient and effective ways of managing prisoner litigation and the strengthening of processes to solve the problems within the prisons, rather than in federal court.

2. Appellate Delay Would Increase Because Critical Case Management Programs Would Be Lost In A Circuit Split.

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 spending valuable judicial resources.

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:

- **Appellate Commissioner.** One 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.

  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 also relieved district judges of fact-finding tasks that many circuit courts now remand to district judges. For example, 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 ruling 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. This flexibility would not be available in two smaller circuits, and the significant advantages and efficiencies of the position would likely be eliminated.

- **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. The difference 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.

  Additionally, 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. As an example, a recent settlement resulted in the resolution of five different pending cases.

  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.

The Circuit Mediator's office and its success would be significantly reduced with a circuit division.

- **Staff Attorneys.** The staff attorneys are critical in the termination of a large volume of appeals – 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 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. The staff attorneys office would be considerably reduced in a smaller circuit.

  - **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 given the current case mix is multiplied

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 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.

- **Bankruptcy Appellate Panel.** The BAP resolved 482 appeals last year, and 472 cases in 2015. It likely would not exist in either circuit after a circuit division. Those cases would fall back on the district courts for resolution.

- **Case tracking and batching.** Because it has the resources to do it, the Ninth Circuit inventories each briefed appeal by issues. The Circuit then tracks the case and the issues. 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. It is not uncommon for a published decision to result in the immediate resolution of dozens of cases that were dependent on its outcome. This inventory and tracking system is unique to the Ninth Circuit and would not survive a circuit division given the significantly reduced staff resources.

Our 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.

To put this into perspective, in an average year, over 60% of the filed cases are terminated through staff efforts before they reach a merits panel; of the remaining merits terminations, 40% of the cases were resolved by judicial screening panels deciding the cases based on staff presentations. Taking this all together, the Circuit staff provided the primary assistance in the resolution of nearly 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 attention on the merits, rather than wasting time on frivolous or procedurally barred appeals.

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 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. Thus, 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 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. Absent significant budget increases, splitting the Circuit will take existing resources and divide them. 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. The new Twelfth will not have the resources to replicate the

current Ninth Circuit case processing mechanisms. Delay will inevitably increase, and increase substantially.

3. Splitting The Circuit Would Duplicate Overhead Costs.

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.

a. Courthouse Construction Costs. As the Committee well knows, 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 court 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 court 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 chambers; (d) twenty-two visiting 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 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. Portions of the court's existing spaces within the building would also have to be renovated to accommodate the needs of the new circuit. The cost of this option, including the costs incurred by the government for relocating the federal agencies out of the courthouse, are estimated at $54,755,060. (Of that figure, $19,337,455 is the renovation amount and $35,417,605 is the amount needed for delayed infrastructure capital projects).

Both of these circuit headquarters solutions would take several years to execute and would require the new circuit to acquire temporary space for the first few years. The cost figures above do not include the cost of temporary space.

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 other places of holding court, 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 at 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 chambers and staff spaces would incur additional construction costs. The rental costs for these facilities would range from $80,000 to $120,000 per 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.

b. Library expenses. Not only is unnecessary duplication a problem, but the cost of maintaining assets continues to increase. 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. Circuit division would exacerbate this problem. The core library will have to be replicated, with duplication of the rising subscription cost.

In addition, our library is spending more and more money on 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.

All of these fixed cost requirements will reduce the amount available to fund personnel, which in turn will reduce efficient circuit operation. The inevitable result is poorer judicial administration, increased cost, and substantially increased delay in case processing.

c. 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.

In addition, resolution of issues in a circuit means that judges need not revisit the issues. Reconfiguring the Ninth Circuit into two or more circuits would mean that the same issue would have to be analyzed and decided in both circuits, causing a net loss of judicial efficiency. This duplicative cost would extend beyond the judiciary to litigants as well, as private actors operating in multiple states would potentially have to litigate the same issues twice.

4. Overall Budgetary Considerations.

We are in a period of static to modest budget increases. We anticipate a continuing resolution for FY 2017 and perhaps for FY 2018. 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, not only can we not expect the new circuits to receive sustained substantial new revenue, but 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 Committee 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.

The fact of the matter is that the size and resources of the Ninth Circuit are an advantage and not an impediment. This should not be surprising, as it comports with every basic principle of consolidation adhered to religiously 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.

5. Loss of Uniformity of Law.

Splitting the Ninth Circuit would disrupt the uniform application of law in many important areas of law.

Some examples:

- **Technology:** 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,[1] but between businesses on the West Coast and international partners.[2]

- **Entertainment law:** A similar problem with uniformity could occur with entertainment law.[3]

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[1] *See, e.g.*, *Facebook, Inc. v. Pacific Northwest Software, Inc.*, 640 F.3d 1034 (9th Cir. 2011) (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).

[2] *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).

[3] *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

- **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.[4] 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 for the promulgation of local environmental policy, but also in the context of urban planning and commercial enterprise.[5] It would also create opportunity for needless litigation over venue. Regulation and the lack thereof has consistently served as the basis for litigation before the Ninth Circuit for more than fifty years and continues unabated.[6]

- **Land management (national forests):** Dividing the Ninth Circuit could 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

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California and in Arizona).

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

[5] *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).

[6] *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).

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. The Rogue River-Siskiyou and Klamath National Forests both span California and Oregon, and the Umatilla National Forest spans Washington and Oregon.[7] 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.[8] Any 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[9] to be managed as cohesive units under forest-level management plans.

- **Other resource management:** Many other resources are also managed across state boundaries within the Ninth Circuit. 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 tribes from each of these states.[10] The resulting management

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

[8] *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).

[9] 16 U.S.C. § 1604.

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

agreements between the states and tribes[11] depend on the uniform application of this existing body of law across the Columbia River basin, which would be threatened by a circuit split.

- **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."[12] Similarly, the Klamath Management Zone reaches from Humbug Mountain, Oregon, to 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.[13] 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."[14] In the Magnuson-Stevens Fishery Conservation and Management Act, Congress established a national program for the conservation of fishery resources, which included establishing "Regional Fishery Management Councils" to create, monitor, and review fishery

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[11] *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.

[12] *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).

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

[14] *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)).

management plans.[15] 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.[16] The West Coast Region of the National Oceanic and Atmospheric Administration Fisheries also manages fisheries in Washington, Oregon, California, and Idaho.[17] 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.

6. Loss of Contact with Community. The title of this hearing is appropriate: Bringing Justice Closer to the People. 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.

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

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

[17] 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).

a. Live-streaming and Archived Video of Oral Arguments. We are the only circuit to live broadcast appellate oral arguments. 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.

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 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 and archiving all 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. That case was later viewed in archive by an additional 138,615 viewers. 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, and the bar for establishing access to our oral arguments.

b. Other Technology. 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.

c. Civics. The Circuit has invested in the Anthony M. Kennedy Library and Learning Center in Sacramento as the lynchpin of circuit-wide civics and public education efforts. We recently launched a comprehensive civics website, and have initiated a circuit-wide initiative to bring the leaders in civics education together to develop a circuit-wide approach to civics education.

d. 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. To name but a few, 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. We have also held bench-bar meetings in all of the districts within the Circuit.

The efficient administration of resources makes these programs possible, especially developing emerging technologies and investment in public outreach and civics education. Duplicating costs and resources would undermine these programs. In short, dividing the circuit would bring justice farther away from the public, not closer.

7. Summary. In sum, circuit division would have devastating effects: increased delay, loss of administrative services, increased costs to the taxpayers, loss of critical uniformity of jurisprudence, and loss of public access to the federal appellate courts.

The Flawed Arguments for Division of the Circuit

Despite the advantages of the present structure and the significant disadvantages of imposing a circuit split at this time – given the growth of immigration cases and the budget crisis – 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.

1. Reversal Rates.

Proponents of a circuit split often cite the Ninth Circuit reversal rate as a rationale for a circuit split. There is no evidence that the either the structure or size of the Ninth Circuit has any effect on reversal rate, nor any evidence that circuit size has an impact.

First, reversal rates have nothing to do with circuit administrative performance. The Supreme Court may review anywhere between 13 and 25 cases a year out of the Ninth Circuit's 11,000 case filings. 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.

In addition, 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 fact, the Ninth Circuit has not been the most reversed circuit in many years. Here are the facts for the recent terms:

Term	Most Reversed Circuit(s)	Ninth Circuit
2015	11th	2nd most
2014	2nd, 3rd,7th, 11th	10th 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.	8th most
2007	10th	3rd most (tied w/5th)
2006	3rd, 5th	3rd most
2005	1st, 3rd, 6th, D.C., Fed.	7th most
2004	1st, 2nd, 10th	4th most
2003	5th, 11th, 10th, 2nd, Fed.	6th most
2002	5th, 4th, 8th, 10th	5th most

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

2. 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.

First, the case processing times in the Ninth Circuit are not widely out of line with other circuits. Over time, the Circuit's median case processing times are within a few months of the smallest circuits, and often better. The Ninth Circuit's case processing times are relatively comparable to those of the state courts within its jurisdiction. In addition, we have 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. Indeed, our statistics show we are terminating cases at a faster rate than they are being filed. From our high median processing time at the peak of the immigration onslaught, we reduced case processing time by 34.7% before our initiative to clear old cases caused a slight increase.

Second, 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 compared to the present filing number of 11,866, case filing has decreased by over 25%. The caseload trends do not support a conclusion that the Ninth Circuit is increasingly overburdened.

Third, the case processing statistic upon which split advocates rely is somewhat misleading. The Administrative Office 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. In short, the AO median time statistic for the Ninth Circuit recently increased precisely because the Ninth Circuit has been making progress in resolving old cases.

Fourth, in looking across circuits, case processing delay is not related to caseload, or size of circuit. The Commission on Structural Alternatives for the Federal Courts of Appeal, more popularly known as the "White Commission," studied the subject of delay thoroughly in 1998 and concluded that circuit size was not a critical factor in appellate delay.[18]

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

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 at the moment are not 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.

Indeed, 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.

The source of any current delay is reasonably easy to discern. 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 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 when 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. The point is that immigration delays have little to do with the processes that the Ninth Circuit employs, and have more to do with the litigation posture of the parties. Unfortunately, those decisions reflect poorly on the Ninth Circuit statistics, despite being entirely out of the Ninth Circuit's control. Dividing the Circuit would not produce a different result.

Since 2006, immigration filings have begun to decrease, 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, as indicated earlier, 80% of those cases can be handled at a staff level. Thus, we are steadily working toward resolution and, in the long term, the immigration caseload issue is solvable.

Fifth, 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 caseload growth; rather, it was intended to be a "stop-gap" remedy.

As they put it:

> Circuit division, then, cannot be considered a long-term solution. Even strong advocates realize that it is a stop-gap remedy. Charles Clark, for example, estimated that circuit division would confer its benefits for ten to fifteen years before caseload growth would once again outstrip court capacity. 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 about which John Wisdom so cogently warned. Sooner or later, those responsible for policies affecting the federal judiciary must confront the fundamental causes of caseload increase.[19]

In sum, although the volume of immigration cases will pose a challenge for the next several years, the Ninth Circuit is uniquely suited to deal with the volume.

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[19] 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).

The current case mix in the Ninth Circuit is best addressed by retaining a strong, coordinated, central staff that can perform essential case triage and resolve the vast majority of appeals. Dividing the Circuit will do nothing to address these external factors and will actually increase delays.

3. The 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.

As an initial matter, 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.

Nevertheless, 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.

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

First, although eleven judges are ultimately drawn to serve on a Ninth Circuit en banc court, 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.

Second, even after the limited en banc court acts, Circuit rules permit 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.

Third, 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 draw 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 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.

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.

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.

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.

b. 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.

c. 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 three 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.

In sum, the Ninth Circuit 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.

First, 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.

Second, 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:

En Banc Hearings: All Circuits (2016)

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.

In addition, to the extent that the split proponents worry that the Ninth Circuit does not rehear cases en banc often enough, Congress could simply reduce the requirement that a majority of the active, non-recused judges vote in favor of rehearing en banc by amending 28 U.S.C. § 46(c).

Third, the objection raised by some that a minority of the Court could determine the outcome of an en banc case neglects two significant facts: (1) 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; and (2) the Ninth Circuit allows for a full court en banc rehearing.

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.

4. Number of Opinions.

In the past, split proponents have expressed concern is that the Ninth Circuit judges cannot keep up with circuit law because there are too many opinions issued. However, the Ninth Circuit has numerous mechanisms to keep its judges informed, including pre-publication notice of decisions, and daily decision updates.

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 the 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. Further, 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 volume 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.

Finally, circuit division would create the need for multiple panels in each new circuit to revisit issues, creating an enormous waste of judicial resources.

5. 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.

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 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."

The Ninth Circuit Evaluation Committee studied this 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 conflict problems in a greater proportion than circuits.

The Ninth Circuit takes the possibility of case conflict extremely seriously. We have employed a number of techniques to avoid case conflicts.

First, as previously discussed, the Ninth Circuit uses a case tracking system that identifies issues involved in each appeal. An inventory sheet 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.

Second, prior to the issuance of the opinion, each judge on the Court receives a pre-publication report that describes 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.

Third, 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.

Fourth, 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.

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.

6. Circuit Division Is Not Justified By Geographic Size

The proponents of a circuit split occasionally argue that the Circuit is simply too large geographically. However, it has been the same 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.

In any case, 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 graph illustrates the point:

Proposed New 9th	Land Mass (Sq. Miles)	Proposed 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
% of Current Ninth	12.06%		87.9%

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

Proposed New 9th	Land Mass (Sq. Miles)	Proposed 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
% of Current Ninth	19.2%		80.8%

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

Proposed New 9th	Land Mass (Sq. Miles)	Proposed 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
% of Current Ninth	24.1%		75.9%

7. 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 it 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.

Likewise, 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 Cliff 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.

7. 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.

As already discussed, the Ninth Circuit's appellate caseload has actually decreased by 25% in the last ten years, while its aggregate population has increased. 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, although Montana's population increased by 9.4% in the last decade, its appellate caseload decreased by 45%. During the same period, Alaska's population increased by 9.8%, but its appellate caseload decreased by 34.3%. Oregon's population increased by 11.5%, but its appellate caseload decreased by 15.5%. Similarly, Washington's population increased by 14.4%, but its appellate caseload decreased by 13.2%.

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

8. Collegiality.

Collegiality is often cited as a reason to create smaller circuits. 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. In some ways, a larger court is better able to absorb strong personality differences. When personal differences arise on a smaller court, a court may become rapidly dysfunctional. There are many examples of this. My point is not to argue that a larger circuit is more, or less, collegial than a smaller circuit; only to point out that a close working environment does not always produce collegiality.

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. 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.

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 in person 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.

9. 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 radical remedy of circuit division.

Analysis of Split Alternatives

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 difficulty of dividing the Ninth Circuit. 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.

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

1. 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.

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

a. House Bill 196 (Simpson)/ Senate Bill 295 (Sullivan/Daines). 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 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 divison 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.

b. Senate Bill 276 (Flake). In the "stringbean" variant of S. 276, the new Twelfth would consist of Alaska, Arizona, Idaho, Montana, Nevada, and Washington in a new circuit, 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.

3. 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.

a. H.R. 250 (Biggs). 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. 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.

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.

b. Prior Legislation. In a previous Congress, a second 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.

4. 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 and no real prospect of faster decisions to the litigants in the Northwest.

5. "Horsecollar" or California-only Circuit. This proposal 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.

6. 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.

7. 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.

8. Summary. There are no circuit configurations that can deliver justice as well as the current structure of the Ninth Circuit. Each of them suffer from one or more extreme problems, and would diminish the effectiveness of judicial administration. In addition, the sheer number of different split configurations proposed shows the difficulty of splitting the Ninth Circuit in a logical way. 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

Not only is there a lack of compelling empirical evidence demonstrating the need to undertake the drastic solution of a circuit split, 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 Committee for its consideration of my views and those of my colleagues.