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Committee on the Judiciary

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Written Testimony of
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Sidney R. Thomas was nominated by President Clinton to serve as a judge on the Ninth Circuit Court of Appeals on July 19, 1995 and confirmed by the United States Senate on January 2, 1996. Judge Thomas serves as the En Banc Coordinator and Death Penalty Coordinator for the Circuit, and is a member of the Court's Executive Committee. He chairs the Ninth Circuit Committee on Automation and Technology. He previously served as Administrative Head of the Northern Unit of the Ninth Circuit and a member of the Judicial Council of the Ninth Circuit. His permanent chambers are in Billings, Montana.

Judge Thomas was born in Bozeman, Montana. He received his undergraduate education at Montana State University, and graduated with honors from the University of Montana School of Law in 1978. From 1978 until 1996, he was engaged in the private practice of law in Billings, Montana, with an emphasis on complex civil commercial litigation.

As a private practitioner, Judge Thomas was selected as one of the "Best Lawyers in America" and was included from the inception of the publication. He also maintained an "A V" rating by Martindale-Hubbell. For fifteen years, Judge Thomas was an Adjunct Instructor in Law at Rocky Mountain College. He received an honorary doctorate in law from Rocky Mountain College in 1998.

He is married to Martha Sheehy, a former President of the State Bar of Montana. She practices law in Billings. They have two children.

Good afternoon, Mr. Chairman and Committee members. My name is Sidney R. Thomas. I serve as a Circuit Judge on the Ninth Circuit Court of Appeals, with chambers in Billings, Montana. I presently serve as En Banc Coordinator and Death Penalty Coordinator for the Circuit. I also serve on the Executive Committee of the Circuit. I thank the Judiciary Committee for the opportunity to testify on S. 1845. The views I express are my own.

I oppose Senate Bill 1845. Circuit division would have a devastating effect on the administration of justice in the western United States. The region covered by the Ninth Circuit will not shrink if two circuits are carved out of it, nor will the total caseload decrease. The primary results will be the loss of critical programs and the creation of redundant infrastructures to process those cases, leading to increased delay and additional impediments to access to justice. The suggestion by supporters of S. 1845 that judicial administration would benefit from duplicating existing staff and structures is counterintuitive.

It's axiomatic in the business world that efficiency results from economies of scale. The same is true of the Ninth Circuit. The Circuit's recent experiences and administrative innovations prove the point. Instead of making the Ninth Circuit more like the smaller circuits, with the attendant restrictions and inefficiencies of having the same resources split into smaller parcels, the other circuits might benefit from some of the unique programs the Ninth Circuit has been able to implement.

First, I will 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 for a circuit split. Finally, I will highlight some of the specific problems with S. 1845.

Damage Caused by a Circuit Split

1. Critical Programs At The Forefront Of Modern Day Case Management Would Be Lost In A Circuit Split.

Rather than increasing our operational capacity, splitting the circuit would have a devastating effect on the judiciary's ability to manage the caseload of the western United States. As one circuit or two, the region covered by our court handles roughly 15,000 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.

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. 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 only available because we have been able to aggregate our resources. To take a few examples:

- **Appellate Commissioner.** Last year, the Appellate Commissioner resolved 1,125 Criminal Justice Act fee voucher matters that otherwise would have been handled by judges. He resolved 4,062 substantive motions previously heard by judges. This position would likely be eliminated in any division and most certainly would not be available to smaller units.

- **Circuit Mediator.** The Ninth Circuit Mediator's office has been a remarkable success story. In 2005, the Circuit Mediator resolved 993 appeals out of a total of 1047 cases referred to it – a 95% success rate. In 2004, the Circuit Mediator's office settled 881 appeals out of 977 cases referred, a 90% success rate. In contrast, the Sixth Circuit had a success rate of 42% and resolved far fewer cases on a comparative basis. The difference is attributable to our being able to devote more resources to hiring mediators and less to duplicative overhead. Most small circuits have only one mediator and settle relatively few cases. The settlement success rates are also lower. A mediator's office needs critical mass to achieve success. This critical mass has allowed our Mediator's office to succeed in resolving highly complex cases, in which settlement depends on the participation of non-parties, such as CERCLA cases. The Mediator's office has also had success in organizing complex litigation, such as the recent high number of petitions for review filed in connection with the California energy

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

- **Staff Attorneys.** The staff attorneys were critical in the termination of a large volume of appeals – well over half the appeals filed in the Circuit.

  - **Habeas appeals.** In 2005, the staff attorneys presented 1,292 habeas petitioners' requests for a Certificate of Appealability. Panels denied 90% of the requests, terminating 1,163 appeals at that stage. This result is consistent with previous years' experience. For example, in 2004, the staff attorneys presented 1,421 habeas petitioners' requests for a COA. Panels denied 89% of the requests, terminating 1,265 appeals.

  - **Merits screening cases.** In 2005, staff attorneys presented 2,130 appeals on the merits to screening panels, resulting in the resolution of 1,958 appeals. This result is consistent with prior years' experience. In 2004, staff attorneys presented 2,182 merits cases to screening panels, resulting in termination of another 2,029 appeals. Put in perspective, in its entirety, the First Circuit terminated 1,643 cases in 2004. The D.C. Circuit terminated a total of 1,155 cases. In 2005, they terminated 1,149 cases and 1,987 cases respectively. In comparison, during the month of July, 2006, the judges on the Ninth Circuit screening panel issued merits decisions in 512 cases based on staff presentations.

  - **Motions.** In 2005, staff motions attorneys disposed of 10,793 motions through clerk orders that would otherwise be handled by judges. This is also consistent with prior experience. In 2004, there were 10,948 motions resolved through clerk orders. In total, the staff attorneys processed more than 19,000 motions in 2005. Judicial screening panels resolved 5,834 motions; the Appellate Commissioner decided 2,296 motions, and the remainder were resolved by clerk orders. The staff attorneys office would be considerably reduced in a smaller circuit.

- **Pro Se Unit.** The Pro Se Unit of the staff attorneys office handled well over 6,000 pro se filings.

- **Bankruptcy Appellate Panel.** The BAP resolved almost 700 appeals last year. It would not exist after a circuit division. Those cases would fall back on the district courts for resolution. The loss of the BAP would come at a particularly disadvantageous time, as the courts struggle to interpret the extensive amendments to the Bankruptcy Code recently passed by Congress.

- **Case tracking and batching.** Because it has the resources to do it, the Ninth Circuit inventories each filed appeal for issues. The Circuit then tracks the case and the issue. 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 hundreds 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.

These administrative efficiencies are especially important given the case mix of the Ninth Circuit. More than 40% of total appeals in the Ninth Circuit are filed by *pro se* litigants. Last year, for example, there were 6,568 *pro se* appeals filed in the Ninth Circuit out of 15,317 total cases. 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 half of the *pro se* volume consists of immigration cases.

The vast majority of immigration cases, which account for almost all of the increased volume of the circuit in the last several years, are resolved through the staff process. In fact, our current statistics show that 80% of the immigration petitions for review are resolved through the staff screening process rather than on oral argument calendars.

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. The reason is that 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. Our current statistics indicate that well over 80% of the immigration petitions for review are resolved through centralized staff review. Less than 20% of the cases are ultimately presented to judges during the normal oral argument calendars. This statistic underscores the critical function of court staff in handling these cases.

To put this into total perspective, in an average year, approximately 50% of the filed cases are procedurally terminated through staff efforts before they reach a merits panel; of the remaining merits terminations, one-third 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 approximately 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 most important cases and not waste time on frivolous or procedurally barred appeals.

By 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, we can conclude that Circuit division would reduce or eliminate many of 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 less 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 will increase substantially.

2. Additional Benefits Of The Ninth Circuit's Aggregated Resources Would Be Lost.

Aside from those issues that are unique to the Court of Appeals, there are other, significant cost savings that would be lost were the Ninth Circuit divided. For example, one of the most expensive aspects of the judiciary budget is the payment for 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 enough of a critical mass of judges to serve these functions in a small circuit.

Likewise, the smaller circuits would have significantly fewer resources in space and facility planning. A division in the Ninth Circuit Executive's office has saved taxpayers significant sums of money by assisting in the construction of courthouses that are more efficient and less costly. An excellent example of their effective planning is the new district courthouse in Seattle, which utilizes courtroom space in an innovative and efficient manner. Two smaller circuits would not be able to maintain the planners of the Circuit Executive's office, who have been invaluable to smaller states like Montana and Idaho to assist in courthouse planning given those states' very unique needs.

Further, the large number of judges in the Ninth Circuit means that it is better able to handle the problems caused by persistent judicial vacancies or by judicial disability than a circuit with a small number of circuit judges. If a judge on a small court became temporarily or permanently disabled, it would have a much greater impact than a judge experiencing problems on a larger court. Likewise, if problems developed in the confirmation of a judge who was to serve on a smaller circuit, it would have a significant impact on the functioning of that circuit.

Another significant advantage of a large circuit is its ability to deploy visiting district judges to needed areas. Several years ago in my home state of Montana, for example, we experienced a judicial emergency because only one of Montana's three judgeships had been filled. To avoid dismissal of criminal cases for lack of a speedy trial, district judges were flown in from throughout the Ninth Circuit to try cases. Eventually, two more judges were confirmed and the crisis abated. This is a familiar story in our Circuit, and the judges of our Circuit have demonstrated a remarkable willingness to assist their colleagues during these critical times. When the border states experienced a significant spike in case volume, judges flew in from throughout the Circuit to assist. That is a luxury of a larger circuit – to be able to have the flexibility to reallocate judicial resources during times of need.

Much of this flexibility would be lost with circuit division. Although it is possible to share district judges across circuit lines, it is quite difficult in practice because of the administrative approvals required. Further, district judges are sometimes reluctant to sit in a different circuit because different circuit law applies. The net effect of circuit division will be to reduce significantly our ability to deploy district judges where needed. This will inevitably lead to demands for more judgeships, which may not be necessary in the long term.

3. Splitting The Circuit Would Duplicate Overhead Costs.

While the loss of the programs and efficiencies I have discussed would be deeply regrettable, it makes even less sense when those resources would be diverted to unnecessarily replicating fixed assets, such as buildings, libraries and technical infrastructure.

Construction cost and rent are significant cost issues. Circuit division will require the unnecessary construction of new courthouse space. S. 1845 calls for a circuit headquarters in Phoenix and places of holding court in Las Vegas, Portland, Seattle and Missoula. Though we have current space in Portland, Seattle, and possibly Las Vegas (using current facilities in the Foley Building, which currently houses the bankruptcy court), we would have to construct new facilities in Phoenix for a circuit headquarters and in Missoula, Montana.

The General Services Administration has estimated the current cost of construction of a new Phoenix headquarters to be $91,058,000, which does not

include the cost of acquiring approximately four acres of land. 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) nine visiting chambers; and (e) 30 parking spaces. Staffing and judge numbers were projected out approximately 20 years, resulting in an estimate of 120,000 required usable square feet, which is the equivalent of 179,105 gross square feet.

We estimate that the required space in Missoula, Montana, would be similar to the space we currently lease in Honolulu for holding oral arguments. Assuming that, approximately 3,000 usable square feet would be needed. This translates into approximately 4,000 rentable square feet. The current market in Missoula is approximately $20 per square foot for appropriate office space. This would cost approximately $80,000 in rent per year. However, the small caseload indicates that this new facility would only be used for three or four weeks per year. Despite that fact, the building would have to be staffed and secured, requiring personnel.

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.

Not only is unnecessary duplication a problem, but the cost of maintaining assets continues to increase. For example, from Fiscal Year 1999 to Fiscal Year 2006, library subscription prices have increased approximately 55%. In Fiscal Year 1999, the Ninth Circuit spent $6.4 million on subscriptions. Those same subscriptions would cost $9.9 million this year. While the cost of subscriptions continues to increase, available funding has decreased. We actually received less money for library subscriptions this year than we did seven years ago. Circuit division will exacerbate this problem. The core library will have to be replicated, with duplication of the rising subscription cost.

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 2000, the Ninth Circuit paid $146,000,000 in rent to GSA. By fiscal year 2005, that figure had grown to $212,800,000–an increase of 45.8%. S. 1845 would compound that problem by forcing the construction of expensive, unneeded buildings.

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.

4. The Inefficiencies Caused By The Proposed Split Could Not Come At A Worse Time In Terms Of Budgetary Considerations.

We are in a period of static to modest budget increases. 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 did not have 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 live within their present budgetary means, and to administer justice in the most efficient manner possible within those 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.

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. Circuit Division Will Actually Increase 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. In fact, for the reasons I have already discussed, the opposite is true. Circuit division will increase, not decrease delay.

First, historically, the causes of delay in case processes are not structural, but due to external factors. The Ninth Circuit, like many other circuits, has experienced increases in case processing time when there have been significant unfilled judicial vacancies. 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 1990's, when one-third of its judgeships were vacant. It has been true for the Sixth Circuit and the Second Circuit in recent years, when those courts experienced significant vacancies. Indeed, at the end of fiscal year 2005, the Sixth and the Ninth Circuits had the highest number of vacant judgeship months in

the nation. At the end of fiscal year 2005, the Sixth Circuit reported 40.5 vacant judgeship months. The Ninth Circuit had 45.0 vacant judgeship months.

The problem of judicial vacancy has been more pronounced in the Ninth Circuit than other circuits. In the more than 22 years since Congress authorized 28 judges for the Ninth Circuit, we have had a full complement of judges for only 23 months. Put another way, in the last 22 years, we have had a full complement of active judges only 8.5% of the time. The last time the Ninth Circuit had all of its judgeships filled was November, 1992–nearly 14 years ago.

Another historical factor that caused delay in the Ninth Circuit case processing time was the Loma Prieta earthquake of 1989, which forced the Circuit to move out of its San Francisco headquarters for seven years.

(a) Despite dramatic caseload Increases, the Ninth Circuit's backlog has not increased significantly, while other circuits' backlogs have grown

As I previously noted, the Ninth Circuit's backlog has not increased significantly over the past five years, even though its caseload has dramatically increased. In calendar year 2001, the median case processing time from filing of notice of appeal to disposition was 16.1 months. For the twelve month period ending in June, 2006, the median disposition time was 16.3 months. During that period, when the Ninth Circuit caseload was increasing by over 50%, median case processing time only increased 1.2%. The other circuit most affected by the deluge of immigration cases is the Second Circuit. From 2001 to June 2006, the Second Circuit's caseload increased 64.5%. During the same period, its median case processing time increased by 22.9%.

A comparison of the Ninth Circuit's performance with the performance of other circuits over the past five years shows that the Ninth Circuit is doing extremely well in case processing. Indeed, case processing time in other circuits has increased significantly, even without significant caseload increases.

The following table demonstrates the point:

Circuit	% Caseload Growth (2001-6/2006)	% Change in Median Case Processing Time (2001-6/2006)
Sixth	12.9%	- 9.9%
Eleventh	2.4%	- 6.8%
Ninth	52.3%	+ 1.2%
Third	30.0%	+ 4.2%
Eighth	12.7%	+ 8.0%
Seventh	10.3%	+ 9.9%
First	9.1%	+17.1%
Second	64.5%	+22.9%
Fourth	5.0%	+30.1%
Fifth	3.6%	+35.8%
D.C.	- 0.6%	+40.0%

During the first several years, the Ninth Circuit actually improved its case processing time, despite the increases in caseload, as illustrated by this table:

Changes in Filing and Delay (2001-2004)

Circuit	% Caseload Change	% Delay Change
11th Circuit	- 6.2%	- 16.2%
9th Circuit	+ 38.0%	- 11.4%
5th Circuit	- 1.5%	- 10.5%
8th Circuit	+ 2.2%	- 8.4%
10th Circuit	- 4.1%	0.0%
3rd Circuit	+ .3%	+ .9%
4th Circuit	- 6.5%	+ 4.2%
7th Circuit	- 2.3%	+ 6.2%
1st Circuit	- 2.2%	+ 6.7%
6th Circuit	- .2%	+ 9.8%
2nd Circuit	+ 55.1%	+ 29.9%
D.C. Circuit	- 0 .8%	+ 38.2%

Given these figures, one cannot say that the Ninth Circuit's case processing time justifies Circuit division. If anything, the data underscores the administrative advantages of the Ninth Circuit structure in case processing.

Perhaps the real questions are the goals in terms of case processing time, what structure best achieves them, and at what cost. For example, the difference between median case processing time for all circuits and the Ninth last year was approximately 4 months. If, by using management techniques, the Ninth Circuit could reduce total case processing time by 2.4 months in just two years, as it did between 2001 and 2004, is there a compelling reason to cause serious disruption in the federal courts with the hope of reducing total case processing time by a few more months? Or is it better to continue to improve effectiveness and efficiency within the current structure?

Dismantling the present Ninth Circuit, making wholesale personnel layoffs, and starting a new circuit from scratch cannot possibly reduce case processing time in the short term. The significant increases in delay would take many years to reverse, if ever.

(b) Delay is unrelated to the size of the circuit.

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

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.

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

Those insights proved true. The Fifth Circuit judges felt overworked with a caseload of 4,200 cases per year for 25 active judges (or 168 cases per judgeship). Id. at 233. In the 12 months ending June 2006, the combined filings of the Eleventh and Fifth Circuits were 16,751 (8,965 for the Fifth; 7,786 for the Eleventh), with 578 cases per authorized judgeship.

(c) Present delays have been caused by external factors such as the spike in immigration appeals.

Finally, a significant external factor causing case delay is an unexpected increase in appellate volume. The primary cause of our current backlog is the extraordinary increase in immigration appeals. The Circuit's immigration caseload increased 582.7% from 2001 to 2005 (from 955 cases to 6,520). The court's non-immigration caseloads have actually decreased during that period by .2% (from 9,713 cases to 9,692). This increase in immigration appeals stemmed from a decision of the Attorney General to eliminate the backlog of 56,000 cases waiting in the Board of Immigration Appeals, resulting in the resolution of tens of thousands of cases by the BIA in a matter of months. Over half the petitions for judicial review from those cases were venued in the Ninth Circuit.

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

The simple fact is that, but for the unprecedented increase in immigration cases due to the flood of BIA appeals, the Ninth Circuit would not have a backlog. As the caseload and backlog tables in part (a) of this section indicate, we have held our ground in case processing time while experiencing a more than 500% growth in immigration cases, and a 50% increase in overall caseload. 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. As the statistics from the early years of the immigration onslaught show–when we were reducing delay despite enormous case increases–we would be well within the national average for case processing, but for the increase in the immigration docket.

In fact, the Ninth Circuit is now starting to gain ground. Our most recent statistics showed that in two of the last four months, the number of cases terminated exceeded the number of cases filed. From historical experience, we know that this is a key indicator that the Circuit is beginning to reduce the backlog. If Congress were to restructure immigration appeals, our caseload would decrease 40% and the Circuit would rapidly become current in its workload.

In addition, the BIA has reported that it has reduced its backlog considerably, indicating that, while courts can expect continued volume for the next several years, the volume of immigration cases should decrease as the BIA becomes current in its case processing. Recent statistics bear this out. For the twelve month period ending June 2006, the total number of petitions for view of BIA decisions filed in the Ninth Circuit was 2% less than the number of petitions filed the previous twelve month period. Other factors, such as the implementation of the Real ID Act may also have an impact on decreasing immigration caseload.

It is important to note that, in the immigration context, delay has been furthered by the inability of the government to file the appeal record in a timely fashion. In thousands of cases, the government has requested open-ended extensions of time – for a year or more – so that it can prepare the administrative record. Although there is virtually nothing that the Ninth Circuit can do about this, short of granting the alien summary relief, that time increases and distorts the delay statistics for the Ninth Circuit. We have been working with the Department of Justice to resolve this problem through creation of electronic records and other means.

In addition to the surge in immigration cases, the federal judiciary has experienced an increase in criminal appeals as part of the fallout from the Supreme Court's decision in *Booker v. United States*, 453 U.S. 220 (2005). Having remained stable since 2002, criminal filings in the Ninth Circuit increased 28% in 2006. *Booker* and its progeny also caused a large number of cases to be stayed pending resolution of key *Booker* issues, increasing the Ninth Circuit's median case processing time. Due to the delays imposed by the court's review of the issues raised by *Booker*, the increase in median times for processing criminal appeals should return to normal after the law is settled.

Temporary spikes in caseload are nothing new. From time to time, our Circuit and others have experienced temporary increases due to particular circumstances. In addition to the immigration spike, the California energy crisis caused the filing of a large number of petitions for review from decisions of the Federal Energy Regulatory Commission. Temporary increases in caseload due to unique circumstances are to be expected. Administrative flexibility is the key to managing unexpected caseload increases. Large circuits have more flexibility to respond to a caseload crisis than small circuits do, because larger circuits have the resources to deal with the specialized needs posed by increase in case volume from specific sectors.

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. 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.

(d) The adjusted filings per panel in the Ninth Circuit is not significantly higher than circuits with comparable volumes

The Committee on Judicial Resources of the Judicial Conference of the United States, which is charged with evaluating requests for additional judgeships, recently promulgated its analysis of filings per authorized judgeship, adjusted for pro se filings. The results indicate that Ninth Circuit does not have a disproportionately higher number of filings per judicial panel.

The following table provides the Committee's analysis:

Circuit	Adjusted Filings Per Panel
Ninth	1,251
Eleventh	1,246
Second	1,226
Fifth	1,206
First	787
Sixth	719
Seventh	716
Third	705
Eighth	694
Tenth	510
D.C.	283

If caseload growth is the justification for circuit division, then three other circuits should be divided because their adjusted filings per panel are statistically indistinguishable from the Ninth's.

2. Circuit Division Would Only Barely Decrease The Geographic Size Of The Proposed Twelfth Circuit.

The proponents of a circuit split 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, S. 1845 would not alter any perceived problems associated with geographic size. It 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%

3. Circuit Division Would Actually Increase Travel Burdens.

As part of their argument concerning geographic size, proponents of a split argue that circuit division would decrease travel burdens on the judges in the new Twelfth. As an initial observation, although I am greatly affected by travel requirements, I do not believe that the personal comfort of judges should dictate circuit structure. Serving as a circuit court judge is a privilege.

Leaving the philosophic underpinnings aside, a closer examination of the data reveals that the travel burdens would actually increase under S. 1845 for the judges in the new Twelfth Circuit.

Here are the respective distances from the resident chambers of proposed Twelfth Circuit judges to the current circuit headquarters in San Francisco, compared to the proposed circuit headquarters in Phoenix:

City	Distance to San Francisco	Distance to Phoenix	Change
Seattle (5 judges)	810	1,470	+ 98.4%
Portland (4)	640	1,270	+ 81.48%
Boise (2)	650	980	+ 50.77%
Billings (1)	1,190	1,200	+ 0.8%
Las Vegas (2)	570	290	- 49.12%
Reno (2)	230	730	+217.39%
Fairbanks (1)	2,132	2,628	+ 23.26%

Thus, for fifteen of the judges in the new Twelfth, the travel distance to circuit headquarters would increase substantially–an average increase of 78.6%. For six judges, travel to circuit headquarters would decrease. For virtually all judges, the travel to places of sitting would increase.

The average time of air travel for judges within a Twelfth Circuit would also increase, as indicated by the following chart:

City	Shortest Air Time (in hours)		
	San Francisco	Phoenix	% Change
Seattle (5)	2	3	+50%
Portland (4)	1.5	2.5	+66.7%
Boise (2)	1.5	2	+33.3%
Billings (1)	4	3.5	-12.5%
Las Vegas (2)	1.4	1	-28.6%
Reno (2)	1	1.7	+70%
Fairbanks (1)	6.75	7.5	+11.1%
Average			+21.4%

Moving the circuit headquarters would also, on the whole, reduce the number of nonstop flights from the various judges' chambers to the circuit headquarters, as illustrated by the following chart:

City	Number of Nonstop Flights (avg. midweek day)		
	SFO/OAK	Phoenix	% Change
Seattle (5 judges)	17	8	-52.9%
Portland (4)	17	8	-52.9%
Boise (2)	5	2	-60.0%
Billings (1)	0	0	0.0%
Las Vegas (2)	20	19	- 5.0%
Reno (2)	7	12	+71.4%
Fairbanks (1)	0	0	0.0%
Average			-34.6%

In sum, under S. 1845, travel time to the circuit headquarters will increase and nonstop air travel options will decrease. The travel to new places of hearing will add additional travel burdens. For example, there are only two cities in which proposed Twelfth Circuit judges would reside with nonstop air service to Missoula, Montana: Billings and Boise. In addition, these figures only describe the travel of circuit judges. On average, the travel time of district judges, bankruptcy judges, magistrate judges, lawyer representatives, and others who attend meetings at the circuit headquarters will increase under S. 1845.

To be sure, these figures are extremely generalized. However, the data illustrates the point that circuit division will actually increase travel burdens on judges.

4. Other Circuits Produce More Opinions Than The Ninth Circuit.

Some outside observers and a small minority of judges on the Circuit have complained that the Circuit produces too many opinions, and that the judges of the Court cannot keep up with the state of the law. At the outset, I emphasize that the majority of the members of the Court do not share this view and are able to keep up with Circuit law.

More importantly, the Ninth Circuit is not the largest producers of opinions. The latest statistics show that both the Eighth Circuit and Seventh Circuits produced more opinions than the Ninth Circuit. This result is consistent with the experience of prior years. If division of a circuit is justified on this basis, other circuits will have to be divided.

The following chart shows that the Ninth Circuit does not produce an inordinate amount 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: 2005

Circuit	Number of Opinions	Authorized Judgeships	# of Opinions per Auth. Jdshp
Eighth Circuit	825	11	75.0
Seventh Circuit	608	11	55.2
Ninth Circuit	606	28	21.6
Sixth Circuit	434	16	27.1
First Circuit	417	6	69.5
Second Circuit	400	13	30.8
Tenth Circuit	393	12	32.7
Fifth Circuit	388	17	22.8
Third Circuit	330	14	23.6
Eleventh Circuit	250	12	20.8
D.C. Circuit	207	12	17.2
Fourth Circuit	205	15	13.7

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 this Committee 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. Population Growth Is Unrelated To The Number Of Appellate Filings.

One of the major arguments justifying structural division of the Ninth Circuit is that population growth throughout the region will cause increased appellate caseloads, and that division is the only means of accommodating the uniform increase in appellate filings. This argument is based on a faulty premise. In fact, there is no correlation between population growth and federal appellate filings. If there were such a correlation, we would expect to see an increase in caseload that corresponded with population growth, but that has not happened.

For example, Alaska's population grew 8.5% between 1991 and 2002. However, the number of appeals filed in the Ninth Circuit from Alaska actually *decreased* during the same period by 88.7%. Similarly, Oregon's population increased 17% between 1991 and 2002; its federal appellate caseload *decreased* during the same period by 13%. Indeed, if one examines Alaska, Washington, Oregon, Idaho, and Montana, collectively, the appellate caseload has been virtually flat for over a decade. From 1993 to 2002, while the aggregate population grew 17%, the total appellate caseload from the region *decreased* by 3.2%.

If one examines the data carefully, one can quickly discern that there is no independent justification for creating new federal circuit courts in the Western United States based on population projections or the intuitive notion that caseloads are uniformly increasing throughout the region. Rather, the data indicates that caseload spikes have been driven by unique circumstances that tend to be short-lived, such as the flood of immigration appeals. To address these problems, the best solution is a larger Circuit that has the flexibility to reallocate resources internally and the administrative mechanisms to efficiently process the caseload.

Further, S. 1845 does not proportionally divide the Circuit by population. The "new" Ninth would retain 65% of the present population and would still have more population within its boundaries than any other circuit.

6. Concerns About En Banc Procedure Are Unwarranted.

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.

First, S. 1845 will not eliminate the limited en banc court. Under S. 1845, the "new" Ninth will have 20 permanent judgeships and two temporary judgeships – 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, S. 1845 does not address it.

Second, this involves an extraordinarily small number of cases. Out of the 13,363 cases decided in the Ninth Circuit during 2005, only 16 (or 0.1%) were reheard en banc. This experience is consistent with the practices of other circuits. Of 21,759 cases decided nationally within the same period, only a total of 46 (or .2%) were heard en banc. The following chart for the time period:

En Banc Hearings: All Circuits (2005)

Second Circuit	0
Fourth Circuit	0
District of Columbia	1
Seventh Circuit	1
Third Circuit	2
Fifth Circuit	3
Tenth Circuit	3
Eleventh Circuit	3
Sixth Circuit	4
First Circuit	4
Eighth Circuit	9
Ninth Circuit	16

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.

Third, very few of the decisions made by the en banc panels involved close votes. Since 1996, almost 70% of the en banc cases were decided by margins of 8-3 or more. Forty-two percent of the cases were decided unanimously. Only 15% of the decisions – 20 in the last 9 years – involved a one vote margin.

Fourth, the worry that a minority of the Court could determine the outcome of an en banc case has been ameliorated by the Court's recent decision to increase the size of the limited en banc court to 15. In addition, that argument 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. As yet, there has not been an occasion in which a majority of the eligible judges has voted to rehear a case before the entire court.

Fifth, although fifteen judges are ultimately drawn to serve on a Ninth Circuit en banc court, the determination whether to take a case en banc remains with the full court. By statute (28 U.S.C. § 46(c)), a vote in favor of en banc rehearing by a majority of non-recused active judges is required 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 views – often extensive – that precedes the vote.

Sixth, the Court has taken concerns about the representative nature of the limited en banc panel seriously and studied the question. Prompted by issues raised during the White Commission hearings, the Ninth Circuit formed an Evaluation Committee to examine some of the issues raised more closely, 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 a full court of 28 judges. Professor Kaye calculated the probability that the outcome of the limited en banc court vote would be the same as that of a full 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 largest gain would occur when there were 28 active judges who divided 17 to 11 in their views as to whether

the panel opinion was correct. Yet even in that situation, if the limited en banc court were expanded to 13, the gain in accuracy of "representativeness" would be only 3.5 cases per hundred, and only 7 cases per hundred if the limited en banc court were expanded to 15.

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, CA. These scholars consulted by the Committee confirmed the import of the calculations done by Professor Kaye in concluding that the former eleven-judge draw was effective in providing a representative en banc court. The current fifteen-judge draw has only improved representation.

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.

Seventh, 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 or fifteen 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.

Eighth, 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).

Finally, although the tradition in this country has been for en banc courts to consist of all active judges on a court, other judicial systems use an en banc system similar to the Ninth Circuit's. For example, the British courts have long since moved away from that model. The House of Lords ordinarily sits in panels of five, but particularly important cases (including cases in which the overruling of a prior House of Lords decision is considered) are heard by panels of seven, rather than the full compliment of law lords. In the Israeli judiciary, the Chief Justice designates how the size of the panel.

For all of these reasons, the limited en banc system employed by the Ninth Circuit does not justify a circuit division.

7. There Is No Evidence That Case Conflict Is A Greater Problem In The Ninth Circuit.

Proponents of a circuit split 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 inevitable 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 to 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 Web site. 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 that of other 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 I have 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 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. (Next year, by national rule, parties may cite non-published cases in initial briefing.) In only a handful of cases have panels found true conflicts.

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

8. Contrary to Conventional Wisdom, Other Circuits Are Reversed More Frequently Than The Ninth Circuit.

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 structure of the Ninth Circuit has any effect on reversal rate, nor any evidence that circuit size has an impact.

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. In the 2005-2006 term, the national reversal rate was 73%; the reversal rate for the Ninth Circuit was 83%. The Ninth Circuit was not the most reversed Circuit, as illustrated by the following table:

Circuit	Reversal Rate (2005-06)
D.C. Circuit	100%
First Circuit	100%
Third Circuit	100%
Seventh Circuit	100%
Second Circuit	86%
Ninth Circuit	83%
Eleventh Circuit	80%

Sixth Circuit	71%
Fifth Circuit	67%
Fourth Circuit	60%
Eighth Circuit	33%
Tenth Circuit	25%

In sum, during the 2005-06 Term, five circuits were reversed more often than the Ninth Circuit; six circuits were reversed less often. In the 2004-05 term, the national reversal rate was 73%; the Ninth's was 84%. Three circuits–the First, Second, and Tenth–had higher reversal rates that Term. The statistics for the last few Terms demonstrate that the Ninth Circuit's reversal rate does not differ significantly from other circuits:

Term	Total Average Reversal Rate	Ninth Circuit Reversal Rate
2003-04	77%	76%
2002-03	73%	75%
2001-02	75%	76%
2000-01	63%	71%

Even in the Term most cited by critics, the 1995-1996 Term in which a large percentage of Ninth Circuit cases were reversed, four other circuits had a higher percentage of cases reversed: the First, Second, Seventh, D.C., and Federal Circuits.

In addition, Supreme Court review affects only a handful of cases. For example, in the 12 months ending September 30, 2004, the Ninth Circuit had 12,151 appeals filed. In the same period, there were 1,462 petitions for a writ of certiorari filed seeking Supreme Court review of Ninth Circuit decisions. The Supreme Court granted 25 of those petitions, or 1.7% of total petitions sought. The Court reversed the Ninth Circuit in 19 cases. Supreme Court reversals affect a minuscule number of cases, and cannot serve as a meaningful point of evaluation of judicial administration. Thus, the Supreme Court reversal is not particularly instructive concerning structural division of a circuit court.

9. Circuit Division is not Part of the Natural Evolution of the Federal Judiciary.

Proponents of splitting the Ninth Circuit often 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 intelligent 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. How would the Supreme Court and litigants deal with thirty or forty circuit courts? 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.

The more sensible long term approach is to examine circuit consolidation, rather than division.

10. Ninth Circuit Judges Enjoy a Collegial Atmosphere.

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.

Some proponents of a split have argued that the judges on our Court do not sit in panels as often as these observers believe they should. However, a careful look at other circuits should show that this is an exaggerated problem. For example, the Eleventh Circuit, which was touted as a model to the Committee, employs a large number of visiting judges. Indeed, 66% of the published opinions of the Eleventh Circuit involved a visiting judge on the panel. In contrast, only 33% of the published opinions of the Ninth Circuit involved a visiting judge. This is not to criticize the practice of the Eleventh Circuit, by any means. However, the point is that paring the size of a circuit does not necessarily mean that judges will be sitting with each other more often. Indeed, as caseload increases, more visiting judges will be required, and the so-called collegiality created by frequency of sitting will be diminished.

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 the 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. During 2003, there were thirteen en banc calls or potential en banc calls that did not result in a ballot because the panel agreed to amend its opinion. This amounted to almost a quarter of the en banc calls. Given the frequency of communication and the internal indicia of collegiality, additional panel sittings would not materially improve our understanding of each other, at least in my opinion.

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.

11. Technology Has Permitted The Ninth Circuit To Forge Connections With The Community.

Loss of connection with localities has been cited as a reason to divide the Circuit. Coming from a less populated state, I feel strongly that a court must have a strong connection with the community it serves. Part of the premise for change is that smaller circuits would promote that. However, attorneys in states like Montana are unlikely to feel a significantly more intimate connection with a circuit whose headquarters is in Seattle or Las Vegas or Phoenix, as opposed to a circuit headquartered in San Francisco. Likewise, no circuit division would place all circuit judges in an intimate environment; they would still maintain chambers hundreds or thousands of miles apart.

The best method of establishing and maintaining a sense of community is through the use of technology and through continued contact between the circuit and

community it serves. To that end, we have made enormous strides over the past several years. Ninth Circuit opinions are immediately posted on the Circuit's website, which contains an enormous amount of useful information. Digitized audio files of Ninth Circuit arguments are available on the website the day after argument. The Clerk's office has made briefs, orders, and audiofiles of cases in which the public has expressed an interest immediately available via the internet. Video argument will soon be available to litigants who cannot afford to travel in person for oral argument. Many of these advances were hastened as a result of conferences between the bench and bar of the states in the Ninth Circuit. Technology allows the Circuit to stay in close contact with the community it serves. However, technology is not always cheap. Because the Ninth Circuit has pooled resources, it can continue to improve the service it provides to litigants and the public. However, the resources for doing so would be seriously diminished in a small circuit.

12. 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 S. 1845

In my view, there are six important criterion 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. In previous testimony, I have detailed how various proposals to divide the Ninth Circuit fail to satisfy the criteria.

Without belaboring all of the factors, the division proposed by S. 1845 fails to satisfy many of the import factors. Let me discuss a few.

1. Proportionality. S. 1845 does not divide cases equally among the resulting circuits. Indeed, the only proposal that has been forwarded in the past that achieves rough proportionality is the Hruska Commission proposal which would divide California and place the Northern and Eastern Districts of California into a

circuit along with the Northwestern states (Alaska, Washington, Oregon, Idaho, and Montana), and place the Central and Southern Districts of California into a circuit with the Southwestern states (Nevada and Arizona) and the Pacific jurisdictions (Hawaii and the territories). That proposal, however, suffers from fatal jurisprudential flaws by dividing California into two circuits.

S. 1845 would place 72% of the circuit's caseload (11,583 cases as of calendar year 2005) into the "new" Ninth Circuit, while placing 28% (4,426 cases) into the new Twelfth. However, although being allocated 72% of the total work, the "new" Ninth would only receive 59% of the permanent judgeships (61% if the two temporary judgeships are included). The case allocation per authorized judgeship (using calendar 2005 figures) would be as follows:

"New" Ninth Circuit	526 cases/judgeship
Twelfth Circuit	316 cases/judgeship

However, allocation of cases per judgeship does not tell the real story. The "new" Ninth would start with seven vacant judgeships. The Twelfth would have one vacant judgeship, and presently has two vacancies. The immediate real world impact on the "new" Ninth would be much more dramatic:

"New" Ninth Circuit	772 cases/filled judgeship
Twelfth	402 cases/filled judgeship

The allocation of complex cases is also imbalanced. Seventy percent of present and future capital cases would be allocated to the "new" Ninth Circuit.

Under S. 1845, the "new" Ninth would still have the largest caseload in the country, but the resources available to it to manage the caseload would be diminished significantly.

2. Geographic coherence. The split proposed in S. 1845 lacks geographic coherence. As indicated by my previous analysis of travel, it would place the circuit headquarters for the Twelfth Circuit farther away from most of the affected states. A circuit reaching to the Arctic Circle administered out of the Sonoran desert does not make much sense. Travel would be more complicated for both lawyers and

judges in the new Twelfth Circuit.

3. Jurisprudential coherence. Any division will disrupt Ninth Circuit jurisprudence. The present configuration promotes judicial coherence by developing consistent federal law in areas affecting business in the West: admiralty, timber, Native American rights, and intellectual property – just to name a few.

A good example of how jurisprudential coherence would be impaired under S. 1845 is the governance of Lake Tahoe. Lake Tahoe straddles the California/Nevada border with approximately two-thirds of the watershed area located in California and one-third in Nevada. To provide for coherent development and administration of the lake, California, Nevada, and Congress created an interstate compact in 1969 to develop a consolidated regional administration of the largest alpine lake in North America. To date, all federal appeals concerning Lake Tahoe have been venued in the Ninth Circuit. Enactment of S. 1845 would place federal appellate review of Lake Tahoe issues in two circuits.

4. Efficient judicial administration. As I have previously discussed, any circuit division will dramatically decrease the efficiency of judicial administration by requiring replication of core functions, and reduction of vital staff functions.

5. Consensus. To date, Congress has never divided a circuit unless there was a consensus of the judges on the circuit that division was required. Not only is there no consensus among Ninth Circuit judges supporting a division, but the vast majority of judges oppose the split. In fact, only 3 of the 26 active judges of the circuit favor circuit division.

Conclusion

The Long Range Plan for the Federal Courts proposed in 1990 observed that:

> Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.

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. Division will be costly, inefficient, ineffective, and result in the significant impairment of the administration of justice in the Western United States.

For these reasons, I oppose S. 1845.

I thank the Committee for its consideration of my views and those of my colleagues.