Testimony of

The Honorable Diarmuid O'Scannlain

U.S. Circuit Judge
U.S. Court of Appeals for the Ninth Circuit
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The Pioneer Courthouse Portland, OR 97204-1396 503-833-5380

Good afternoon, Chairman Specter and Members of the Committee. My name is Diarmuid F. O'Scannlain, United States Circuit Judge for the Ninth Circuit with chambers in Portland, Oregon. I am honored that you invited me to participate in this hearing on Examining the Proposal To Restructure the Ninth Circuit. I am very pleased to see that S. 1845 has been on the Chairman's mark-up agenda for several months, and hopefully may be passed out to the Senate floor shortly.

My testimony today is essentially unchanged from my appearance before the subcommittee in October of last year. I continue to believe that the urgency of restructuring the largest judicial circuit in the country is evident by the number of Ninth Circuit reorganization bills pending in this session of Congress, perhaps the highest in congressional history. As you know, Senator Ensign, on behalf of Senators Kyl, Murkowski, and five other sponsors, introduced the latest Ninth Circuit reorganization bill, S. 1845, "The Circuit Court of Appeals Restructuring and Modernization Act of 2005," which is presumably the central focus of your hearing today. It joins at least six other bills that have been introduced in the 109th Congress, including those sponsored by Congressman Simpson of Idaho, who has taken the lead on similar efforts in the House of Representatives.

S. 1845 is laudable for recognizing and directly responding to the public concerns of those who have opposed restructuring until now, and for replying with uncommon sensitivity to the concerns of judges on my Court, the United States Court of Appeals for the Ninth Circuit. I remain steadfast in my belief that it is inevitable that Congress must restructure the Ninth Circuit, and S. 1845 would go a long way to accomplish that goal.

I

I have served as a federal appellate judge for almost two decades on what has long been the largest court of appeals in the federal system (now forty-nine judges, soon to be fifty-one).1 I have also written and spoken repeatedly on issues of judicial administration.2 Therefore, I feel qualified to share these perspectives

1 I previously served as Administrative Judge for the Northern Unit of our Court and for two terms as a member of our Court's Executive Committee.

2 See Statement of Diarmuid F. O'Scannlain, Hearing before Subcommittee on Administrative Oversight and the Courts, United States Senate, Revisiting Proposals To Split the Ninth Circuit: An Inevitable Solution to a Growing Problem (October 26, 2005); Statement of Diarmuid F. O'Scannlain, Hearing before Subcommittee on Administrative Oversight and the Courts, United States Senate, Improving the Administration of Justice: A Proposal To Split the Ninth on our mutual challenge to address the judiciary's 800-pound gorilla: The United States Court of Appeals and the fifteen District Courts which comprise the Ninth Judicial Circuit.

I appear before you as a judge of one of the most scrutinized institutions in this country. In many

contexts, that attention is negative, resulting in criticism and controversy. Some view these episodes as fortunate events, sparking renewed interest in how the Ninth Circuit conducts its business.3 But a restructuring proposal like S. 1845 should be analyzed solely on grounds of effective judicial administration; grounds that remain unaffected by Supreme Court batting averages and public perception of any of our decisions. However one views our jurisprudence, I want to emphasize that my support of a fundamental restructuring of the Ninth Circuit has never been premised on the outcome of any given case.

Restructuring the circuit is the best way to cure the administrative ills affecting my court, an institution that has already exceeded reasonably manageable

Circuit (April 7, 2004); Statement of Diarmuid F. O'Scannlain, Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property, United States House of Representatives, Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003 (October 21, 2003); Statement of Diarmuid F. O'Scannlain, Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property, United States House of Representatives, Ninth Circuit Reorganization Act of 2001 (July 23, 2002); Statement of Diarmuid F. O'Scannlain, Hearing Before the Committee on the Judiciary, United States Senate, Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and S. 253, the Ninth Circuit Reorganization Act (July 16, 1999); Statement of Diarmuid F. O'Scannlain, Hearing Before the Committee on the Judiciary, United States House of Representatives, Oversight Hearing on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (July 22, 1999); Diarmuid F. O'Scannlain, Should the Ninth Circuit Be Saved?, 15 J. L. & Pol. 415 (1999); Diarmuid F. O'Scannlain, A Ninth Circuit Split Commission: Now What?, 57 Mont. L. Rev. 313 (1996); Diarmuid F. O'Scannlain, A Ninth Circuit Split Is Inevitable, But Not Imminent, 56 Ohio St. L. J. 947 (1995).

3 See, e.g., Blaine Harden, O'Connor Bemoans Hill Rancor at Judges, Wash. Post, July 22, 2005, at A15; Bruce Ackerman, The Vote Must Go On, N.Y. Times, Sept. 17, 2003, at A27; Adam Liptak, Court That Ruled on Pledge Often Runs Afoul of Justices, N.Y. Times, June 30, 2002, at A1.

proportions. Nine states, sixteen thousand annual case filings, forty-nine judges, and approximately fifty-nine million people are too much for any non¬discretionary appeals court to handle satisfactorily.4 The sheer magnitude of our court and its responsibilities negatively affects all aspects of our business, including our celerity, our consistency, our clarity, and even our collegiality. Simply put, the Ninth Circuit is too big. It is time now to take the prudent, well-established course and restructure this circuit. Restructuring large circuits is the natural evolution of judicial organization. Restructuring has worked in the past.5 Restructuring will work again. For these reasons alone, I urge serious consideration of S. 1845.

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

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

Since then, I have learned a great deal about the severe judicial administration problems facing

the Ninth Circuit. I have studied them and experienced them first hand, and I would like to share my thoughts and

4 For numerical data, please see Supplemental 2006 Appendix, to be filed separately with the Senate Judiciary Committee. In lieu of attaching the Supplemental 2006 Appendix here, I have appended a shortened version called "Ninth Circuit Graphics." All the numerical data used in this testimony and graphics can be found in the Supplemental 2006 Appendix, unless otherwise noted. For most of my numerical data, I use caseload statistics provided by the Administrative Office of the United States Courts. U.S. Courts of Appeals Statistical Tables, http://jnet.ao.dcn/Statistics/Caseload_Tables.html. When statistics are publicly unavailable, I use the Ninth Circuit's internally generated statistics. Unless otherwise noted, all caseload statistics reflect appeals filed from January 1, 2005 to December 31, 2005, and I use population statistics compiled by the United States Census Bureau for the year 2004.

5 To trace the numerous splits that have occurred within the circuits over the last centuries, please see Supplemental 2006 Appendix, pages 5-9 (Exhibit 1).

conclusions.

II

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

At a certain point, larger circuits became unwieldy because of their size. Lawmakers recognized that adding new judges served only as a temporary anodyne rather than a permanent cure. Instead, Congress wisely restructured larger circuits. The District of Columbia Circuit can trace its origin as a separate circuit to a few years after the enactment of the Evarts Act.6 Congress transferred part of the Eighth Circuit into a new Tenth Circuit in 1929 and split off portions of the Fifth to form the Eleventh in 1981. The next year Congress created the Federal Circuit.7 And, in due course, I have absolutely no doubt that Congress will act upon the need to form a Twelfth--and even, perhaps, a Thirteenth--out of the current Ninth.

Congress formed each new circuit, at least in part, to respond to the very real problems posed by overburdened predecessor courts. That same rationale applies with special force to the Ninth Circuit, as many experts acknowledge. Indeed, both the White Commission of 19988 and the Hruska Commission of 19739 concluded that the Court of Appeals for the Ninth Circuit is too big. Regardless of which party controlled Congress when the commissions were

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

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

8 See White Commission Report.

9 See Commission on the Revision of the Federal Court Appellate System, Final Report (1973) [hereinafter "Hruska Commission Report"].

4 A

From a purely numerical perspective, the sheer enormity of my court is undeniable, whether one measures it by number of judges, by caseload, by population, or by geographic area. Our official

allocation is twenty-eight active judges--more than the total number of judges, active and senior combined, on any other circuit. Currently, twenty-six of those active judgeships are filled, and we have an additional twenty-three senior judges, who are in no sense "retired," with each generally hearing a substantial number of cases ranging from one-hundred percent to twenty-five percent of a regular active judge's load. There are forty-nine judges on our court today. And when the two existing vacancies are filled, our court will have fifty-one.

I should pause to put that figure in perspective. When vacancies are filled, the number of judges in the Ninth Circuit will have more than twice the number of total judges of the next largest circuit (the Sixth with twenty-five), and will have more than five times that of the smallest (the First with ten). Indeed, there are more judges currently on the Ninth Circuit than there were in the entire federal judiciary at the birth of the circuit courts of appeals. And every time a judge takes senior status, we grow ever larger. Meanwhile, compared to our forty-nine judges (soon to be fifty-one), the average size of all other circuits today remains at around twenty judges.

Even with the lumbering number of judges on our Circuit, we can hardly keep up with the immense breadth and scope of our Circuit's caseload. During the twelve months ending December 31, 2005, 16,101 appeals were filed--over triple the average of other circuits, and 6,690 more cases than the next busiest circuit, the Fifth. In fact, our total appeals exceed the next largest circuit's by more than the entire annual dockets of the First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits. Unfortunately, such disparity continues to widen, for the Ninth Circuit's caseload has increased more rapidly between 2000 and 2005 than has any other circuit's. In fact, the Ninth Circuit's caseload increased seventy percent during that period, nearly five times that of the average of all other circuits. You can find the statistical details in the Supplemental 2006 Appendix to my testimony. Part of this increase flows from the huge upswing in immigration appeals, as the Board of Immigration Appeals' streamlined review procedures continue to add to our Circuit's caseload.

By population, too, our circuit dwarfs all others. The Ninth Circuit's nine states and two territories range from the Rocky Mountains and the Great Plains to the Sea of Japan and the Rainforests of Kauai, from the Mexican Border and the

Sonoran Desert to the Bering Strait and the Arctic Ocean. In this vast expanse live approximately fifty-nine million people--almost exactly one fifth of the entire population of the United States. Indeed, there are almost twenty-seven million more people in the Ninth Circuit than in the next most populous circuit, the Sixth. As a result, our population exceeds the next largest circuit's by more than the total number of people in each of the First (encompassing Boston), Second (encompassing New York), Third (encompassing Philadelphia and Pittsburgh), Seventh (encompassing Chicago and Indianapolis), Eighth (encompassing St. Louis, Kansas City, and Minneapolis/St. Paul), Tenth (encompassing Denver and Salt Lake City), and D.C. Circuits (encompassing, of course, Washington, D.C.). And as with the number of appeals filed, the Ninth Circuit's population is growing at an exceptional rate. Of the ten fastest-growing cities of over 100,000 residents, seven are located in the Ninth Circuit.10

No matter what metric one uses, the Ninth Circuit overwhelms the federal judicial system. Compared to the other circuits, we employ more than twice the average number of judges, we handle more than triple the average number of appeals, and are approaching three times the average population. It makes very little sense to create a structure of regional circuits, and then place a fifth of the people, a fifth of the appeals, and a fifth of the judges into just one of twelve

regions. From any reasonable perspective, the Ninth Circuit already equals at least two circuits in one.

B

These striking numbers tell only a fraction of the story. I have concluded as a firsthand observer that our court's size negatively affects our ability as judges to do our jobs. For example, we all participate in numerous week-long sittings on regular appellate oral argument panels. The composition of those panels often changes during a given week. Thus, presuming I sit with no visiting judges and no district judges--a mighty presumption in the Ninth Circuit, where we often enlist such extra-circuit help to deal with the overwhelming workload--I may sit with fewer than twenty of my colleagues on three-judge panels over the course of a year. That is less than half of the total number of judges on my court. Because the

10 Cumulative Estimates of Population Change for Incorporated Places over 100,000, Ranked by Percent Change: April 1, 2000 to July 1, 2005, http://www.census.gov/popest/cities/SUB-EST2004.html. The ten fastest growing cities of over 100,000 residents during that time period are: (1) Gilbert, AZ; (2) North Las Vegas, NV; (3) Port St. Lucie, FL; (4) Miramar, FL; (5) Elk Grove, CA;

(6) Cape Coral, FL; (7) Chandler, AZ; (8) Rancho Cucamonga, CA; (9) Roseville, CA; (10) Henderson, NV.

6

frequency with which any pair of judges hears cases together is quite low, it becomes difficult to establish effective working relationships in discerning the law.

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

If we had fewer judges, three-judge panels could circulate opinions to the entire court before publication, which is the practice of many other appellate courts. Pre-circulation not only prevents intra-circuit conflicts, it also fosters a greater awareness of the body of law created by the court. As it now stands, I read the full opinions of my court no earlier than the public does--and frequently later, which can lead to some unpleasant surprises. Even with our pre-publication report system, we do not get the full implications of what another panel is about to do. For, in addition to handling his or her own share of our 16,000 appeals, each judge is faced with the Sisyphean task of keeping up with all his or her colleagues' opinions--not to mention all the opinions issued by the Supreme Court along with the relevant public and academic commentary. Without question, we are losing the ability to keep track of the legal field in general and our own precedents in particular. From a purely anecdotal perspective, it seems increasingly common for three judge panels to make sua sponte en banc requests for review of their own decisions, because they at a late hour uncover directly conflicting Ninth Circuit precedent on a dispositive issue. This is as embarrassing as it is intolerable. It is imperative that judges read our court's opinions as--or preferably before--they are published. This is the only way to stay abreast of circuit developments. It is the only way to ensure that no intra-circuit conflicts develop. And it is the only way to ensure that when conflicts do arise (which is inevitable as we continue to grow), they are considered en banc. This task is too important to delegate to staff attorneys, and, as it

now stands, too unwieldy for us judges adequately to do ourselves.
Many point to the en banc process as a solution to some of these problems, but it is nothing more than a band-aid. Theoretically, the ability to rehear en banc promotes consistency in adjudication by resolving intra-circuit conflicts once and for all. In my practical experience, however, this has not been the case in the Ninth Circuit. Only a fraction of our published opinions can receive en banc review. Last year we reexamined only about three percent of our published dispositions. Such a small fraction cannot significantly affect the overall
consistency of a court that issued 606 published dispositions in 2005 alone.11
C
The Ninth Circuit's enormous size not only hinders judicial decisionmaking, it also creates problems for our litigants. In my court, the median time from when a party activates an appeal to when it receives resolution is over sixteen-and-a-half months--almost four months longer than the average for the rest of the Courts of Appeals. No Circuit takes longer than the Ninth, and whatever point in the process to which this delay may be attributed, the striking length of time our circuit takes to dispose of cases is alarming. While we are the slowest, we are not lazy; my colleagues and I are veritable workaholics. We are entitled to ten more judgeships; the seven new judgeships in S. 1845 will go a long way to solve this problem. No litigant should have to wait that long to receive due justice. But at the same time, judges need time to deliberate and to ensure that they are making the correct decision. This backlog increases the pressure on us to dispose of cases quickly for the sake of the litigants, which, in turn, can only inflate the chance of error and inconsistency. I believe our unreasonable size is directly responsible for this serious problem.
Also, because of the circuit's geographical reach, judges must travel on a regular basis from faraway places to attend court meetings and hearings. For example, in order to hear cases, my colleagues must fly many times a year from cities including Honolulu, Hawaii, Fairbanks, Alaska, and Billings, Montana to distant cities including Seattle, Washington and Pasadena, California. In addition, all judges must travel on a quarterly basis to attend court meetings and en banc panels generally held in San Francisco. A certain amount of travel is unavoidable, especially in any circuit that might contain our non-contiguous states of Alaska and Hawaii, and our Pacific island territories. But why should any one circuit encompass close to forty percent of the total geographic area of this country when the remaining sixty percent is shared by eleven other regional circuits?12 Traveling across this much land mass not only wastes time, it costs a considerable amount of money.
D I am not alone in my conclusions. Several Supreme Court Justices have
11 This is not to mention the over 5,000 non-precedential, unpublished dispositions we circulate each year.
12 See U.S. Census Bureau, State and County "QuickFacts," available at http://quickfacts.census.gov/qfd/.
commented that the risk of intra-circuit conflicts is heightened in a court that publishes as many opinions as the Ninth.13 Furthermore, after careful analysis, the White Commission concluded that circuit courts with too many judges lack the ability to render clear, timely and uniform decisions,14 and as consistency of law falters, predictability erodes as well. The Commission pointed out that a disproportionately large number of lawyers indicated that the difficulty of discerning circuit law due to conflicting precedents was a "large" or "grave" problem in the Ninth Circuit. Predictability is clearly difficult enough with twenty-eight active judgeships. But this figure mightily understates the problem, for it fails to consider both senior judges (most of whom

continue to carry heavy workloads), and the large number of visiting district and out-of-circuit judges who are not even counted as part of our forty-nine-judge roster. Notably, the White Commission also concluded that federal appellate courts cannot function effectively with as many judges as the Ninth Circuit has.

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

III

The question then becomes how to split the circuit: nine states and two territories offer a wealth of possibilities. The most recent restructuring efforts address substantially all of the arguments against previous proposals advanced by Chief Judge Schroeder and other opponents in recent years, clearly demonstrating that the continuing dialogue between Congress and the judiciary has led to positive results for all.

I should be clear that S. 1845 does not implement the circuit configuration I would prefer. I have long felt that the Hruska Commission approach was the better solution, but due to concerns over placing California into two different

13 See White Commission Report, supra note 2, at 38.

14 The White Commission's principal findings told us: (1) that a federal appellate court cannot function effectively with a large number of judges; (2) that decisionmaking collegiality and the consistent, predictable, and coherent development of the law over time is best fostered in a decisionmaking unit smaller than what we now have; (3) that a disproportionately large proportion of lawyers practicing before the Ninth Circuit deemed the lack of consistency in the case law to be a "grave" or "large" problem; (4) that the outcome of cases is more difficult to predict in the Ninth Circuit than in other circuits; and (5) that our limited en banc process has not worked effectively.

circuits, I have demurred. The present circuit is so large, I think it could appropriately be divided into three circuits--a new California-based Ninth Circuit, a Twelfth "Mountain" Circuit, and a Thirteenth "Pacific Northwest" Circuit--the configuration which actually passed the House in 2004 as an amendment to S.

878. Alternatively, I would welcome Senator Murkowski's bill, S. 1301, which would be a Northwest/Southwest split.

Nevertheless, I continue to support passage of S. 1845 because it corrects many of the problems currently facing our court by creating smaller decisionmaking units, which in turn fosters greater decisional consistency, increased accountability, collegiality among judges, and responsiveness to regional concerns. And, of course, the new circuits created would remain bound by pre-split Ninth Circuit precedent, helping to minimize confusion in interpreting the law.

A

S. 1845 creates a new Twelfth Circuit comprised of the Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington. The "new" Ninth Circuit would contain California, Hawaii, and the Pacific island territories of Guam and the Northern Mariana Islands.

This bill adds five new judgeships and two temporary ones, all located in the "new" Ninth Circuit with duty stations in California. Total active judges would increase for at least the next ten years to thirty-five, with twenty-two allocated to the new Ninth Circuit and fourteen to the Twelfth (although I think there is a technical glitch as to the latter which should be cured in mark-up). This increase in judgeships is particularly notable, for in the past, one of the primary objections

to restructuring proposals was that they did "not address the growing need for additional judgeships."15 As Chief Judge Schroeder has pointed out, these additional judgeships are sorely needed, as there have been no additional judgeships added to the Circuit since 1984.16 It is truly regrettable that we failed to request new judgeships in 1990 notwithstanding our statistical eligibility for

15 Statement of Mary M. Schroeder, Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property, United States House of Representatives, Ninth Circuit Reorganization Act of 2001 (July 23, 2002).

16 In 1984, Congress added new judges to every circuit save the very recently created Eleventh and Federal Circuits. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. In 1990, Congress added new judges to the Third, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

perhaps as many as ten new judges at the time.

I also commend S. 1845 for placing all of the new judges in California in the reconfigured Ninth Circuit. In the past, critics have condemned other proposals because they did not result in a proportional caseload distribution. This proposal directly addresses those criticisms.

B

The caseload of the newly created Twelfth Circuit would place it squarely within the normal operating range of the other existing circuits. The Twelfth Circuit would process more litigation than the current First, Third, Seventh, Eighth, Tenth, and D.C. Circuits. And at 348 appeals filed per authorized judgeship, the new Twelfth Circuit's caseload would compare favorably to eight of the twelve current regional circuits.

Of course, the new Ninth Circuit would still remain the largest circuit in the country by judges, population, and case filings--although complete parity is impossible, of course, and there will always be one "largest" circuit. However, the two new circuits would have populations of approximately thirty-seven million and twenty-one million respectively. The Twelfth Circuit would be of roughly average size when compared to the other circuits, and the new Ninth Circuit would be closer to the sizes of the Fifth, Sixth, and Eleventh Circuits, which have populations of around thirty million.17

What is more important, however, is that S. 1845's new Ninth would be significantly better off, with fewer appeals, fewer judges, and a smaller population and geographical area to cover. As a result, the benefits of reorganization should be immediately apparent to all involved.

In sum, S. 1845 offers a unique solution by separating the Ninth Circuit into two and provides immediate help with the caseload crunch.

IV

Some objections inevitably survive even the most generously conciliatory restructuring proposals. Alas, these are the same arguments that no reorganization bill can answer, as they amount to nothing more than a plea to keep the gigantic Ninth Circuit intact.

A For example, one suggestion is that the Ninth Circuit should stay together to provide a consistent law for the West generally, and the Pacific Coast specifically.

17Without dividing California, any reorganization plan will result in at least one Circuit with a population over 35 million.

This is a red herring, as is the "need" to preserve a single maritime law for the Pacific Coast. The Atlantic Coast has five separate circuits, but freighters do not appear to collide more frequently off Long Island than off the San Francisco Bay because of uncertainties of maritime law back

East. The same goes for the desire to adjudicate a cohesive "Law of the West." There is no corresponding "Law of the South" nor "Law of the East." The presence of multiple circuits everywhere else in the country does not appear to have caused any deleterious effects whatsoever. In fact, our long history with Circuit Courts of Appeals demonstrates that more discrete decisionmaking units enhance our judicial system. We should not be treated differently based on the assumption that our borders were fixed inviolate in 1891. Indeed, naturally coherent geographic divisions separate the highly distinct areas scattered throughout the West, each with their own climates and cultures: there are the inter-mountain states, the Pacific Northwest states, the non-contiguous states and territories, as well as our California megastate.

B

Nor should cost alone be a reason to maintain the status quo. I respectfully disagree with my Chief's conclusion that any reorganization would require a new courthouse and administrative headquarters with wild cost estimates in the hundreds of millions of dollars. First, it utterly ignores the substantial savings necessarily arising from any reorganization, not to mention the smaller staff requirements of the new Ninth. The current Ninth Circuit's budget could be cut by 1/3 following the restructuring, and that savings would serve to defray at least part of the administrative costs of the new Twelfth Circuit. Second, there are far simpler--and far cheaper--solutions. There is plenty of space in existing courthouses in Phoenix to accommodate a circuit headquarters there. The Gus J. Solomon Courthouse in Portland has remained unoccupied since the construction of the Mark O. Hatfield Courthouse for the District of Oregon. Likewise, the William K. Nakamura Courthouse in Seattle sits empty with plenty of room for circuit operations, the Western District of Washington having moved to its newly constructed building in August 2004. Any of these physical plants would be appropriate for administrative operations. Indeed, there is absolutely no need for new building construction, aside from relatively modest design and remodeling expenses--expenses that must be borne regardless of what use the buildings will take. In any event, the costs of circuit reorganization are much more modest than opponents claim--and pale in comparison to the administrative costs imposed by a megacircuit such as ours.

C I concede that there are judges on the Ninth Circuit Court of Appeals who believe the disadvantages of splitting the circuit outweigh the advantages. There
are, however, a significant number who favor restructuring. In addition, each of the five Supreme Court Justices who commented on the Ninth Circuit in letters to the White Commission "were of the opinion that it is time for a change."18 The Commission itself reported that, "[i]n general, the Justices expressed concern about the ability of judges on the Ninth Circuit Court of Appeals to keep abreast of the court's jurisprudence and about the risk of intra-circuit conflicts in a court with an output as large as that court's."19 An increasing number of district judges have expressed support for restructuring, and many joined the recent letter--one that received wide recognition around the Ninth Circuit--from twenty-four judges to Chairman Specter in support of S. 1845. A significant number of practitioners also concur. In any event, I truly believe that support for a split is not so thin as many objectors suggest.

D

Finally, I would like to reiterate my belief that these proposals to split the Ninth Circuit do not represent "a threat to judicial independence." Such a view is directly contradicted by over a century of Congressional legislation on circuit structure. S. 1845, like many of the recent split proposals, incorporates many provisions directly responding to the concerns voiced by split opponents, and these proposals demonstrate the good-faith efforts made by the House and Senate

reasonably to restructure the judicial monstrosity of the Ninth Circuit. Calling for a circuit split based on particular judicial case decisions is counterproductive and unacceptable, and, in my view, the case for the split stands on the grounds of effective judicial administration, supported by the statistics which show the ongoing caseload explosion.

Split opponents are loathe to confront the judicial administration arguments and the statistics behind them. They would much rather cast the debate as one of ideology. In a recent article, Judge Kozinski, one of the split's most vocal opponents, insisted that belief in the split "'is, in the realm of religion, like some sort of paganism.'"20 He said, "I think [split proponents are] unhappy with some of our rulings, and they think that if they split the 9th Circuit, it'll send a message to those activist judges. But if they split it, they'll still have the biggest circuit in the

18 White Commission Report, supra note 2, at 38.

19 Id.

19 Justin Scheck, 9th Circuit Split Proponents Attack Case Overload, July 17, 2006, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1152867927545. 13

country, and it'll be way more liberal."21 In his view, then, "the split has become a conservative shibboleth rooted in historic dissatisfaction with liberal opinions."22 At the risk of repeating myself, I must again emphatically state that my support for the split has nothing whatsoever to do with opposition to certain of my court's decisions.

Split opponents are content to ignore the fact that there is nothing unusual, unprecedented, or unconstitutional about the restructuring of judicial circuits. Federal appellate courts have long evolved in response to the public interest as well as natural population and docket changes. As geographic or legal areas grow ever larger, they divide into smaller, more manageable judicial units. No circuit, not even mine, should resist the inevitable. Only the barest nostalgia suggests that the Ninth Circuit should keep essentially the same boundaries for over a century. But our circuit is not a collectable or an antique; we are not untouchable, we are not something special, we are not an exception to all other circuits, and most of all, we are not some "elite" entity immune from scrutiny by mere mortals. The only consideration is the optimal size and structure for judges to perform their duties. There can be no legitimate interest in retaining a configuration that functions ineffectively. Indeed, I am mystified by the relentless refusal of some of my colleagues to contemplate the inevitable.23 As loyal as I am to my own court, I cannot oppose the logical and inevitable evolution of the Ninth Circuit as we grow to impossible size.

After denying these concerns, our past official court position straddles the fence by arguing that we can alleviate problems by making changes at the margin. Chief Judge Schroeder and her predecessors have done a truly admirable job with the limited tools they have had, chipping away at the mounting challenges to efficient judicial administration. However, I do not believe that long-term solutions to long-term problems come from tinkering at the edges. Courts of appeals have two principal functions: Correcting errors on appeal and declaring the law of the circuit. Simply adding more judges may help us keep up with our error-correcting duties, but as things now stand, it would severely hamper our law-declaring role. Twenty-eight judges is too many already, and more judges -

20 Id.

21 Id.

23 See, e.g., Ninth Circuit in "Very Good" State, but Needs More Judges, Schroeder Tells Federal Bar Association Chapter, Metropolitan News-Enterprise, April 4, 2002, at 3; Procter Hug, Jr. & Carl Tobias, A Split by Any Other Name..., 15 J.L. & Pol. 397 (1999); Procter Hug, Jr., The Ninth Circuit Should Not Be Split, 57 Mont. L. Rev. 291 (1996).

however necessary - will only make it more difficult to render clear and consistent decisions. The time has come when such cosmetic changes can no longer suffice and a significant restructuring is necessary.

This task has been delayed far too long, and each day the problems get worse. I do not mean to imply that our circuit as a whole is beyond the breaking point. Instead, my focus is on where we go from here. If the Ninth Circuit Court of Appeals has not yet collapsed, it is certainly poised at the edge of a precipice. Only a restructuring can bring us back from the brink.

V

Unfortunately, the Ninth Circuit's problems will not go away; rather, they continue to get worse. This issue has already spawned, both within and outside the court, too much debate, discussion, reporting, and testifying, and for far too long. We judges need to get back to judging. I ask that you mandate some kind of restructuring now. One way or another, the issue must be put to rest so that we can concentrate on our sworn duties and end the distractions caused by this never-ending controversy. I urge you to give serious consideration to the reasonable restructuring proposals before you, and any others that might be offered.

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