

**Statement of**

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**House Committee on the Judiciary  
Subcommittee on Courts, the Internet, and  
Intellectual Property**

**Hearing on**

**H.R. 2723**

**“The Ninth Circuit Court of Appeals Judgeship  
and Reorganization Act of 2003”**

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## Executive Summary

**1. General principles.** Congress should not restructure a circuit unless there is substantial evidence indicating that the circuit will be better off with a particular reorganization than with the status quo or other possible courses of action. The most persuasive evidence generally will be found in the experience of the legal community of the circuit, particularly the judges.

**2. What has not changed.** Three familiar arguments for dividing the Ninth Circuit are no more persuasive today than they have been in the past. These arguments, which focus on the “coherence and correctness” of circuit law, are undercut by empirical studies.

**3. The prospect of a 50-judge court.** The primary reason for taking a fresh look at the idea of dividing the circuit is the recommendation by the Judicial Conference of the United States that Congress authorize 7 new judgeships for the Ninth Circuit Court of Appeals. With 35 active judges, the members of the court would sit with one another even less frequently than they do today. (For example, after joining the Ninth Circuit Court of Appeals, a judge must ordinarily serve for more than three years before he or she will sit on a regular argument calendar with all other active judges.)

Arguably, this dispersion impairs the court’s ability to carry out its work effectively. But no outsider can speak with authority on that point. I urge the judges to consider the question in light of the new data and their own experiences on a 28-judge court.

**4. Other reasons for reconsideration.** The prospect of a 50-judge court also provides an incentive to take a fresh look at aspects of the court’s operations that, at least in the past, would not have sufficed to justify a division of the circuit. Among them: a persistent history of delay in the disposition of cases.

**5. What’s in it for the new Ninth Circuit?** The potential benefits of H.R. 2723 are not as great for the judges of the proposed new Ninth Circuit as they would be for the judges of the northwest, but they are more than de minimis. They include: more opportunities for the judges to sit with each other, a reduction in travel, and the prospect of a more broadly participatory Circuit Judicial Conference.

**6. The arguments against dividing the circuit.** Opponents emphasize the value of having a single court interpret and apply federal law in the west. But the “uniformity” argument is undercut by empirical studies showing that conflicts between circuits generally do not present a serious problem in the legal system.

Most of the other concerns are addressed by H.R. 2723. However, even under H.R. 2723 the judges from Arizona, California, and Nevada would lose out

on some of the caseload relief that the Judicial Conference has said is needed. To avoid this, the judges from the northwest could commit themselves in advance to providing the judgepower that would help to redress the inequality in per-judge workloads in the two circuits.

**7. Conclusion.** If Congress accepts – as I believe it should – the conclusion of the Judicial Conference that the Ninth Circuit needs 7 additional appellate judgeships, then the choice lies between moving forward with H.R. 2723 and simply adding 7 judgeships to the present Ninth Circuit Court of Appeals. That is a question on which reasonable people can disagree. This hearing is a valuable first step in the process of discussion and inquiry that can lead to a sound judgment on the best course of action.

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**Statement of  
Arthur D. Hellman**

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to express my views at this hearing on H.R. 2723, the “Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003.”

By way of personal background, I am a professor of law and Distinguished Faculty Scholar at the University of Pittsburgh School of Law. I have been studying the Ninth Circuit for more than 25 years, starting in the mid-1970s, when I served as Deputy Executive Director of the Commission on Revision of the Federal Court Appellate System (Hruska Commission). In the late 1980s I supervised a distinguished group of scholars in analyzing the innovations of the Ninth Circuit and its court of appeals.<sup>1</sup> From 1999 through 2001, I served on the Ninth Circuit Court of Appeals Evaluation Committee appointed by Chief Judge Procter Hug, Jr. Turning to the present – and by way of disclosure – I was consulted by Rep. Simpson in the drafting of H.R. 2723. Of course, in my testimony today I speak only for myself.

Because this statement is rather lengthy, I begin with a roadmap and summary. The first part of the statement offers some general guidelines for considering legislation such as H.R. 2723. The standard I suggest is this: Congress should not restructure a circuit unless there is substantial evidence indicating that the circuit will be better off with a particular reorganization than with the status quo or other possible courses of action.

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<sup>1</sup> The results of the research were published as a book by Cornell University Press. See *RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS* (Arthur D. Hellman ed. 1990) [hereinafter *RESTRUCTURING JUSTICE*].

The remainder of the statement examines the considerations relevant to making that judgment. Here are some of the major points:

- Part II briefly reviews three familiar arguments for dividing the Ninth Circuit. The arguments focus on the “coherence and correctness” of the law of the circuit. They are not persuasive because they are undercut by empirical studies.
- Parts III and IV explain why recent developments lead me to believe that the idea of dividing the circuit deserves a new look. Primary among these is the recommendation by the Judicial Conference of the United States that Congress authorize 7 new judgeships for the Ninth Circuit Court of Appeals.
- With 35 active judges, the members of the court would sit with one another even less frequently than they do today. (For example, after joining the Ninth Circuit Court of Appeals, a judge must ordinarily serve for more than three years before he or she will sit on a regular argument calendar with all other active judges.) Arguably, this dispersion impairs the court’s ability to carry out its work effectively. But no outsider can speak with authority on that point. I urge the judges to consider the question in light of the new data and their own experiences on a 28-judge court.
- The prospect of a 50-judge court also provides an incentive to take a fresh look at aspects of the court’s operations that, at least in the past, would not have sufficed to justify a division of the circuit. Among them: a persistent history of delay in the disposition of cases.
- Part V asks: how would H.R. 2723 help the judges of the proposed new Ninth Circuit? The benefits are not as great as they would be for the judges of the northwest, but they are more than de minimis. They include: more opportunities for the judges to sit with each other, a reduction in travel, and the prospect of a more broadly participatory Judicial Conference.
- Part VI considers the arguments against dividing the circuit. The “uniformity” argument is not persuasive, and most of the other concerns are addressed by H.R. 2723. However, even under H.R. 2723 the judges from Arizona, California, and Nevada would lose out on some of the caseload relief that the Judicial Conference has said is needed. To avoid this, the judges from the northwest could commit

themselves in advance to providing the judgepower that would help to redress the inequality in per-judge workloads in the two circuits.

How should the balance be drawn? If Congress accepts – as I believe it should – the conclusion of the Judicial Conference that the Ninth Circuit needs 7 additional appellate judgeships, then the choice lies between moving forward with H.R. 2723 and simply adding 7 judgeships to the present Ninth Circuit Court of Appeals.

That is a question on which reasonable people can disagree. This hearing is a valuable first step in the process of discussion and inquiry that can lead to a sound judgment on the best course of action.

### **I. General Principles**

Before turning to details, it is helpful to look at the issue in general terms. What principles should guide Congress and its Judiciary Committees in considering legislation such as H.R. 2723? What criteria should the judges and lawyers of the Ninth Circuit focus on as they make their own evaluation of the proposed Judgeship and Reorganization Act?

First, some proponents of a circuit split openly acknowledge that they are motivated by disagreement with decisions of the Ninth Circuit Court of Appeals. This is wrong. As the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission) said, “There is one principle that we regard as undebatable: It is wrong to realign circuits (or not to realign them) and to restructure courts (or to leave them alone) because of particular judicial decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.”<sup>2</sup>

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<sup>2</sup> Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 6 (1998) [hereinafter White Commission Report]. The Commission was chaired by the late Justice Byron R. White.

Second, I continue to believe that it would be a mistake for Congress to divide a circuit unless the proposed reorganization has substantial support from the judges and lawyers in the affected region. This is partially a matter of comity – the respect due to a co-equal branch of the government. It is also the course suggested by history – the history of circuit reorganization controversies over the last century.<sup>3</sup> And it is good policy as well. If the arguments in favor of a split have not persuaded those who would be most directly affected by any inadequacies in the existing structure, it is hard to see why Congress should conclude otherwise.

But comity is a two-way street. If Congress is to give such heavy weight to the views of the judges and lawyers, it must have confidence in the process by which those views have been reached. This means that the judges and lawyers (particularly the judges) have an obligation to reconsider previously stated positions in the light of new information and to give a fair and thorough hearing to reasonable new legislative proposals.

In any event, it must be acknowledged that Congress has a constitutional responsibility to make its own assessment of the need for change. This leads to the question: what standard should Congress apply in considering proposals for circuit realignment?

The Long Range Plan of the Federal Courts, approved by the Judicial Conference of the United States in 1995, offered this standard: “Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to

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<sup>3</sup> For a brief account of the history, see Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 Montana L. Rev. 261, 268-70 (1996) [hereinafter Hellman, *Dividing the Ninth Circuit*].

deliver quality justice and coherent, consistent circuit law in the face of increasing workload.”<sup>4</sup>

This is an extraordinarily demanding standard. I doubt very much that Congress would insist on having “compelling empirical evidence demonstrating ... dysfunction” before moving ahead with the restructuring of any other governmental institution. While it may be appropriate to apply a somewhat higher standard to judicial institutions, this one goes too far. Among other things, the nature of the issue is such that empirical evidence will never be “compelling,” especially to those who resist the conclusion to which it points.<sup>5</sup>

There is a further difficulty. Empirical evidence requires time to gather, analyze, and absorb. Legislation too takes time. Under the approach of the Long Range Plan, relief for a beleaguered circuit would often be delayed until long after most lawyers and judges have concluded that the existing structure is indeed dysfunctional.

So I do not think Congress should accept the standard of the Long Range Plan. Instead, I suggest this: Congress should not restructure a circuit unless there is substantial evidence indicating that the circuit will be better off with a particular reorganization than with the status quo or other possible courses of action. The burden remains on the proponents of change. The most persuasive evidence generally will be found in the experience of the legal community of the circuit, particularly the judges. But the focus must be on the benefits and drawbacks of a

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<sup>4</sup> Judicial Conference of the United States, Long Range Plan of the Federal Courts 44 (1995) [hereinafter Long Range Plan].

<sup>5</sup> This holds true both ways. I have carried out extensive empirical research on the asserted problem of inconsistency in Ninth Circuit panel decisions, see *infra* notes 9 & 10, but that research has never persuaded those who believe that pervasive inconsistency is inevitable in a large circuit.

particular reorganization plan. Congress does not legislate in the abstract; benefits and drawbacks cannot be assessed in the abstract.

With this standard in mind, I turn now to the considerations bearing on the desirability of circuit realignment generally and H.R. 2723 in particular.

## **II. What Has Not Changed**

The White Commission believed that “a smaller decisional unit [than the existing Ninth Circuit Court of Appeals] can more effectively maintain the coherence and correctness of the law of that unit.”<sup>6</sup> That belief underlies three of the most often heard arguments for dividing the Ninth Circuit. But these arguments are no more persuasive today than they have been in the past.<sup>7</sup>

First, proponents of the split insist that the circuit’s size “increases the likelihood of inconsistent decisions between panels within the circuit.”<sup>8</sup> There is no empirical support for this argument, and indeed the existing empirical evidence (primarily my own studies) strongly negates the assertion. Of particular interest is a comparative study published in 1999.<sup>9</sup> This research seriously undercuts the contention that conflicts between panels are more prevalent in the Ninth Circuit than in smaller circuits.<sup>10</sup>

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<sup>6</sup> White Commission Report, *supra* note 2, at 51.

<sup>7</sup> I have dealt with these arguments in great detail in my published writings. In this statement I offer only brief summaries of my conclusions, with citations to some of the relevant articles.

<sup>8</sup> Senate Judiciary Committee, Ninth Circuit Court of Appeals Reorganization Act of 1995, S. Rep. No. 104-197 at 10 (1995) [hereinafter 1995 Senate Report]. This report endorsed a bill to split the Ninth Circuit.

<sup>9</sup> Arthur D. Hellman, Precedent, Predictability, and Federal Appellate Structure, 60 U. Pitt. L. Rev. 1029 (1999).

<sup>10</sup> See *id.* at 1088-1100. For a summary of previous studies, with citations to detailed reports, see Hellman, Dividing the Ninth Circuit, *supra* note 3, at 274-80.

Second, proponents frequently emphasize the Ninth Circuit's record of reversals by the Supreme Court. I do think that the record is troubling, but after careful empirical analysis I was not able to substantiate a causal connection between the court's size and the pattern of reversals.<sup>11</sup>

Third, proponents criticize the limited en banc court as insufficiently representative. I do not share these criticisms. Again, I rely in part on empirical research. My studies indicate that, "far more often than not, decisions of the limited en banc court in the Ninth Circuit do reflect the position of a majority of the court's active judges."<sup>12</sup> Further, it is open to question whether majority rule is an essential characteristic of multi-judge courts that generally hear cases in panels of three.<sup>13</sup>

Thus, with respect to two of the arguments (inconsistency and the limited en banc), the evidence does not show that a problem exists. As for the third (the reversals by the Supreme Court), there may be a problem, but it cannot be traced to the size of the circuit.

### **III. The Prospect of a 50-Judge Court**

If the arguments just discussed encompassed all of the relevant considerations, I would probably continue to simply urge Congress to leave the Ninth Circuit alone. However, recent developments lead me to believe that the idea of dividing the circuit deserves a fresh look. Primary among these is the prospect of a substantial expansion in the size of the Court of Appeals.

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<sup>11</sup> See Arthur D. Hellman, Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals, 34 U.C. Davis L. Rev. 425, 431-52 (2000).

<sup>12</sup> Id. at 462.

<sup>13</sup> See id. at 462-66.

**A. The Judicial Conference request and the FJC study's concern**

Currently, the Ninth Circuit Court of Appeals has 28 authorized judgeships. On March 18, 2003, the Judicial Conference of the United States recommended creation of 7 new judgeships (5 permanent, 2 temporary) for the court. The Judicial Conference acted in response to the court's request for 7 permanent judgeships.

As the Judicial Conference Subcommittee on Judicial Statistics pointed out in explaining the recommendation, adjusted filings per panel in the Ninth Circuit are now the third largest in the nation.<sup>14</sup> Even with 7 additional judgeships, adjusted filings would be more than 20% above the standard that triggers consideration of a judgeship request. As I testified at a hearing of this Subcommittee in June 2003, there can be no doubt that the Judicial Conference recommendation is justified.

If the pending request is approved by Congress, the Ninth Circuit will become a court of 35 active judges. In addition, we can expect that the court will have a corps of between 15 and 20 senior judges who will regularly participate in the court's decisional work (except for en banc cases).<sup>15</sup> Thus, in practical terms, the court will be a court of 50 or more judges. I believe that there is a real question

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<sup>14</sup> The two circuits with the largest adjusted filings are the Fifth and the Eleventh. The judges of these circuits have decided, as a policy matter, that they will not request additional judgeships for their courts notwithstanding enormous increases in caseloads. See Federal Judiciary: Is There a Need for Additional Federal Judges? Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 108th Cong. at 61 (2003) (statement of Arthur D. Hellman) [hereinafter Judgeships Hearing].

<sup>15</sup> In 2002, the court had 14 senior judges who sat on four or more calendars in the course of the year. (This figure does not include Judge Fernandez, who took senior status on June 1, 2002.) In January 1999, when the court of appeals had 7 vacancies, 35 judges voted at a court meeting. See White Commission Report Hearing, *supra* note 2, at 23 (statement of Chief Judge Procter Hug, Jr.). On this basis, I think it is reasonable to assume that a court of 35 authorized judgeships is likely to have at least 15 senior judges who regularly participate in the decision of cases.

whether the judges on a court of that size will be able to know one another as members of a court should do.

In saying this, I do not embrace the concept of “representative collegiality” discussed by the Federal Judicial Center’s 1993 report on structural alternatives.<sup>16</sup> But I do have concerns about the “process” element. I think there is at least some validity to the idea that when judges “feel themselves a part of a court and know the minds of their fellow judges,”<sup>17</sup> they will find it easier to reach agreement when agreement can be reached and easier to disagree amicably when disagreement is unavoidable. Perhaps, too, when judges must view their colleagues as men and women whom they will be seeing on a more or less regular basis rather than as disembodied names on opinions and e-mail messages, they will have a greater incentive to smooth out differences and to respect the spirit as well as the letter of unpalatable precedents.

Yet even if these ideas are valid as generalizations, they do not necessarily point to any kind of actual dysfunction in the Ninth Circuit Court of Appeals as it exists today. Nor do they necessarily tell us what we would like to know about the consequences of creating an appellate court in which 50 or more judges are regularly participating in the work of three-judge panels. Those questions require more searching inquiry.

#### **B. Interaction among the judges: some empirical data**

Even with a court of 28 judgeships, the White Commission said in its Final Report, “constraints on the assignment schedules of the court’s judges have meant that some judges do not sit with every other judge even once in a three-year

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<sup>16</sup> Federal Judicial Center, *Structural and Other Alternatives for the Federal Courts of Appeals* 106 (1993).

<sup>17</sup> *Id.*

period.”<sup>18</sup> To test this proposition, I have carried out a new study examining the experience of the 7 judges appointed by President Clinton in 1999 and 2000. The new research strongly confirms the White Commission’s observation.

The study was carried out in July 2003.<sup>19</sup> As of that time, the 7 judges had served on the court for periods ranging from 2 years and 11 months (Judge Rawlinson) to 4 years and 5 months (Judge W. Fletcher). But not one of the 7 judges had sat on a regular argument panel with all of his or her active colleagues – let alone the many senior judges who regularly participate in the decision of cases.<sup>20</sup> Here are some details.

- Judge Paez joined the court in March 2000 and sat on his first argument calendar in June 2000. As of July 2003 he had not yet sat on an argument panel with 6 of the court’s active judges (not counting the judges appointed by President George W. Bush). Nor had he participated in a motions/screening panel with any of those 6 judges.
- Judge Berzon also joined the court in March 2000 and sat on her first argument calendar in June 2000. As of July 2003, she too had not yet sat on an argument calendar with 6 of the court’s active judges (again not counting George W. Bush appointees).<sup>21</sup> However, she participated in a motions/screening panel with 2 of the 6 judges.
- Judge W. Fletcher is the most senior of the judges in the group. He joined the court in February 1999 and sat on his first argument calendar the following month. As of July 2003 – more than 4 years later – he had not sat on an argument panel with 2 of the court’s active

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<sup>18</sup> White Commission Report, *supra* note 2, at 47 n. 106.

<sup>19</sup> The study was based primarily on an examination of the court’s public calendars, which are posted on the court’s web site. This information was supplemented by Westlaw searches.

<sup>20</sup> Because of vacancies, the court never had a full complement of active judges during the period studied. For purposes of the study, Judge Fernandez, who took senior status on June 1, 2002, was included among the active judges. Judge Hug, who took senior status on Jan. 1, 2002, was not. The total number of active judges in the study was 24.

<sup>21</sup> If only full argument weeks are counted, the number would be 9.

judges.<sup>22</sup> He sat for only a single day of argument with 2 other active judges. He did not participate in a motions/screening panel with any of the 4 judges.

- Judge Fisher is the second most senior of the judges studied. He joined the court in October 1999 and sat on his first calendar in February 2000. As of July 2003, he had not sat on an argument panel with 5 of the court's active judges.<sup>23</sup> He participated with one of those judges in 2 motions/screening panels.

A fair summary is this: after joining the Ninth Circuit Court of Appeals, a judge must ordinarily serve for more than three years before he or she will sit on a regular argument calendar with all other active judges. Indeed, the data suggest that the process will take closer to four years than to three.<sup>24</sup>

### **C. The effect of adding new judgeships**

How would these patterns be affected if Congress were to create the 7 additional judgeships without dividing the circuit, thus expanding the Ninth Circuit to a court of 35 active judges? It might seem obvious that on a larger court, the judges would sit even less frequently with each of their colleagues. But before reaching that conclusion, it is necessary to consider several variables whose interplay will determine the actual consequences of enlarging the court.

A detailed analysis will be found in Appendix A. That analysis yields two conclusions. First, taking all of the relevant considerations into account, I am quite

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<sup>22</sup> Both were judges who joined the court in 2000. Once again, the figure in the text does not include appointees of President George W. Bush.

<sup>23</sup> Two of the active judges who never sat on an argument panel with Judge Fisher participated with him in the decision of one case each. The 2 judges were drawn to replace Judge Wiggins, who sat on the February 2000 panel but died shortly afterwards.

<sup>24</sup> I acknowledge that the experience of new judges is not entirely representative, because a new judge's sittings must be fitted into calendars that were set up before he or she became a member of the court. Nevertheless, it is significant that after completing three years as a member of the Ninth Circuit Court of Appeals, a new judge probably will not have sat on a regular argument calendar with one-fourth of the court's active judges

confident that, for the foreseeable future, the Ninth Circuit Court of Appeals would use its new judgepower to increase the number of argument panels sitting each month. Second, the intuitive assessment is correct: adding 7 judges to a 28-judge court will probably diminish the frequency with which the members of the court sit with each of their colleagues.

#### **D. Other possible responses to the findings**

Even if the effect of expanding the court is to perpetuate or exacerbate the patterns revealed by the study, that would not necessarily be a reason for dividing the circuit. I can anticipate three lines of argument in response to the concern expressed by the White Commission.

First, one might point out that, as the White Commission itself acknowledged, “there are other opportunities for interaction [among the judges], such as en banc proceedings, court symposia, and committee work.”<sup>25</sup> But en banc proceedings involve participation by 11 judges; thus, interaction with individual members of the limited en banc court is likely to be minimal. As for court symposia, court meetings, and committee work, these do not involve adjudication. While the judges may have the opportunity to work closely with one another, they would not gain an understanding of their colleagues’ approach to deciding cases.

A second response is that White Commission did not take account of the Ninth Circuit’s motions and screening panels.<sup>26</sup> That is true, but these panels do not give the judges the opportunity to delve into legal issues and learn one another’s philosophies that argument panels do. By hypothesis, screening panels

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<sup>25</sup> White Commission Report, *supra* note 2, at 47-48 n. 106.

<sup>26</sup> The study reported above did so to this extent: I ascertained whether judges who did not sit together on an argument panel participated in a motions/screening panel. As indicated in the text, this additional information did not alter the overall conclusion.

decide only easy cases. These cases almost never generate published opinions. Occasionally a motion will present a difficult issue, but rarely will the panel publish an opinion. And without the need to agree on a rationale and an explanation that will have the status of precedent, the process is not likely to expose the “ways of thinking and reasoning”<sup>27</sup> that judges draw upon in cases where they must struggle to understand and apply the law.

Finally, one might respond with a question: So what? What difference does it make if the judges do not sit with one another except at long intervals? Does it really interfere with the court’s ability to perform its error-correcting and law-declaring functions in an effective way?

Outside the Ninth Circuit, many if not most appellate judges would say that it does. They believe that frequent interaction in the decisional process does bring important and even necessary benefits. Judge Harry T. Edwards of the District of Columbia Circuit recently summarized this view:

Familiarity is one of the major components of collegiality ... Through the experience of working as a group, one becomes familiar with colleagues’ ways of thinking and reasoning, temperaments, and personalities. All of this makes a difference in how smoothly and comfortably group members can share, understand, and assimilate each other’s ideas and perspectives.<sup>28</sup>

On the other hand, Judge Edwards’s observations may reflect only one way of carrying out the federal appellate function – the way that he has experienced and believes to be best.<sup>29</sup> It is quite possible that the system that has evolved in the Ninth Circuit is equally valid and equally effective.

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<sup>27</sup> Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. Pa. L. Rev. 1639, 1648 (2003).

<sup>28</sup> Edwards, *supra* note 27, at 1647-48.

<sup>29</sup> Judge Dennis Jacobs of the Second Circuit Court of Appeals spoke in a similar vein in discussing why the various circuits differ in their judgeship needs. He said that “in smaller courts

Ultimately, only the judges can answer the question I have posed. No outsider can say with confidence how much, if anything, is lost when judges sit with one another only at infrequent intervals. Indeed, even the judges themselves may have difficulty ascertaining the consequences of the dispersion that is now an established part of their working environment. A study based on interviews conducted in 1986 suggests that the dispersion does make a difference, but the published information is too fragmentary to be conclusive.<sup>30</sup>

The question is important. I urge the members of the Ninth Circuit Court of Appeals to reflect on their own experiences and to consider the likely consequences of being part of a court in which 50 judges (and perhaps more) are regularly rotated among the argument panels in the six cities where calendars are regularly scheduled.<sup>31</sup>

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like the First Circuit or the Second Circuit, we all sit with each other, and we all know each other, and we all deal with each other, and we all understand each other better.” See *Judgeships Hearing*, supra note 14, at 69 (testimony of Judge Jacobs).

<sup>30</sup> See Stephen L. Wasby, *Communication in the Ninth Circuit: A Concern for Collegiality*, 11 U. Puget Sound L. Rev. 73, 131 (1987). Professor Wasby wrote:

Instead of sitting with each other every two to three months (when the court had eleven judges), as long as two years would elapse before one judge would sit with another. . . . Their infrequent sitting together reduces judges’ chances to communicate to “an occasional social visit if they are in the same town at the same time, or at court functions.” Thus it is “less comfortable . . . to carry on communication,” particularly personal communication. As an overall result, “you know less about how [other judges] respond to cases.” “When you sit with someone new for a whole week, it can change that judge’s outlook about you,” leading that judge “to call and kick things around.” Maintaining “close collegial relationships” in the court is also more difficult.

Professor Wasby did not indicate how many different judges were being quoted or how many of them served on the court “when it had only 13 active-duty judges.” See *id.* at 83.

<sup>31</sup> As already suggested, the constraints of the geographical parity rule reinforce the effect of numbers. For further discussion, see *infra* Part V.

#### **IV. Other Reasons for Reconsideration**

The prospect of a 50-judge court is important in its own right. It also provides an incentive to take a fresh look at aspects of the court’s operations that, at least in the past, would not have sufficed, alone or in combination, to justify a division of the circuit.

##### **A. The problem of delay**

As discussed in Part II, three familiar arguments for dividing the Ninth Circuit should be given no weight because they are undercut by empirical evidence. But another oft-heard argument cannot be dismissed so readily.

Proponents of reorganization assert that the Ninth Circuit’s size results in delays in the disposition of cases. They point out that for the last decade and a half, the Ninth Circuit Court of Appeals has consistently ranked at or near the bottom among federal appellate courts in the median time interval from filing the notice of appeal to final disposition.<sup>32</sup> For example, in 2002 the median time in the Ninth Circuit was 15.1 months, compared with a national median of 10.7

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<sup>32</sup> Here is the ranking of the Ninth Circuit for the last ten years (12th is slowest):

2002 .....	11
2001 .....	12
2000 .....	12
1999 .....	11
1998 .....	10
1997 .....	12
1996 .....	11
1995 .....	11
1994 .....	11
1993 .....	12

The rankings and other data in this section are limited to cases terminated on the merits. Here and elsewhere in this statement, case management data are taken from publications of the Administrative Office of U.S. Courts – Annual Reports and Federal Court Management Statistics – unless otherwise stated.

months.<sup>33</sup> Moreover, the phenomenon has persisted even in years when the court has had virtually its full complement of active judges.<sup>34</sup>

To be sure, there is contrary evidence also: if one considers only the time that the cases are in the hands of the judges, the circuit is among the fastest. But that is little consolation to the litigants whose cases linger in the pipeline.

On balance, this record does suggest dysfunction of some sort. But is the dysfunction related to the size of the circuit? That is a much more difficult question. To provide a broader range of data, I have compiled a table that lists the three slowest circuits for each year from 1980 through 2002. The table will be found in Appendix B. Analysis of the patterns suggests that in most of the courts of appeals, delay is the product of transient circumstances. When circumstances change, the circuit goes off the list. But in the Ninth Circuit, delay appears to be chronic and persistent.

This finding does lend support to the argument. But correlation does not prove causation. And in the absence of a well-grounded theory that would explain why delay is a consequence of the court's size, it is impossible to conclude that splitting the circuit would provide a cure.<sup>35</sup>

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<sup>33</sup> These figures are quite typical. Since 1987, there has been only one year in which the Ninth Circuit's median time dropped below 14 months. During that period the national median has generally been less than 11 months. See Table 1 in Appendix B, *infra*.

<sup>34</sup> From 1990 through 1993 – a span of four years – the court was short no more than one active judge. (To be more precise, the number of vacant judgeship months was 12 or fewer each year.) Yet in all four years the Ninth Circuit was the slowest in the median time from filing the notice of appeal to final disposition. More recently, the vacancy rate has been much higher, but the court has also had a larger cohort of sitting senior judges.

<sup>35</sup> One might speculate, for example, that the many manifestations of circuit size – number of cases, number of circuit judges, number of districts, number of trial judges, etc. – somehow combine to produce a complexity that defies even the most skillful and determined management efforts. But speculation – even plausible speculation – is not enough.

Without further information, Congress might choose to provide more judges to help the court dispose of its backlog – and to split the circuit later only if the additional judgepower does not enable the court to speed up its pace of disposition. The drawback is that if size does contribute to the pattern of delay, adding judges to the existing circuit could make the situation even worse. From this perspective, splitting the circuit in accordance with H.R. 2723 could actually be the less risky course of action.

**B. The proposed rule on citation of unpublished opinions**

In June 2003, the Judicial Conference Committee on Rules of Practice and Procedure decided to move forward with an amendment to the Federal Rules of Appellate Procedure that will allow lawyers to cite unpublished or “non-precedential” opinions in their briefs and arguments. The Ninth Circuit Court of Appeals has steadfastly resisted this proposal, and it has given the impression that its position rests to some extent on the size of the circuit – both the volume of appeals and the number of judges. To the extent that that impression is accurate, the court’s resistance to an otherwise desirable change provides evidence that the court’s size does hinder its performance of its essential functions.

The citation rule now under consideration by the Standing Committee originated with the Solicitor General’s office in the Clinton administration. The Justice Department in the Bush administration continues to favor such a rule, but when the Advisory Committee on Appellate Rules held its meeting, the Solicitor General’s representative abstained. He explained that Judge Kozinski (and perhaps other Ninth Circuit judges) had called the Solicitor General and expressed concerns about the proposed amendment.

According to a report in *The New York Times*, the Solicitor General explicitly linked the judges' objections to the court's size. He said: "The immense size of the circuit, the number of judges there and the huge volume of work they handle make it very difficult for them to monitor all of the decisions of their colleagues."<sup>36</sup> Earlier, at the hearing on unpublished judicial opinions held by this Subcommittee in June 2002, Judge Kozinski himself said:

I believe very strongly there is a justification for having different rules for different circuits. ... We don't want a lot of clutter. ... And given that we have over two dozen judges doing the speaking, plus 10 senior judges, plus visiting judges, you can actually get quite a cacophony going; and then we speak to a very large group as well, more district judges than any other circuit.<sup>37</sup>

Judge Kozinski also said:

In our circuit, in our court of appeals, you always get an explanation in writing. One of the points I want to make is if you make all of those things citable, we are simply going to say less. We are simply going to say less, because everything that you say and you put in an opinion, anything that is precedential, lawyers will look at, lawyers will try to twist and find a way of using to their advantage, and we will simply say less.<sup>38</sup>

I recognize that Judge Kozinski does not speak for the Ninth Circuit Court of Appeals. But the position he is defending is the position of the court.<sup>39</sup> And I do not think it is far-fetched to read his comments as saying that (a) the court adheres to its non-citation rule in part because the court is so large (both in number of

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<sup>36</sup> Adam Liptak, *Federal Appeals Court Decisions May Go Public*, *N.Y. Times*, Dec. 25, 2002 (quoting Solicitor General Theodore B. Olson).

<sup>37</sup> *Unpublished Judicial Opinions: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. 58 (2002) (testimony of Judge Kozinski).

<sup>38</sup> *Id.* at 56 (testimony of Judge Kozinski).

<sup>39</sup> In his written statement, Judge Kozinski said: "The views I express are ... my own, although I believe that they reflect the views of a substantial majority of my Ninth Circuit colleagues ..." *Id.* at 11 (statement of Judge Kozinski).

judges and in the volume of decisions);<sup>40</sup> and (b) if the proposed national rule is adopted, the court may respond by issuing non-precedential opinions that “simply say less” – i.e., opinions that do not do as good a job of explaining to the losing party why he or she lost. If those are the consequences of the court’s size, then Judge Kozinski has given a good reason for the judges to reconsider their opposition to a division of the circuit that would create two smaller appellate courts.<sup>41</sup>

Perhaps I have misunderstood Judge Kozinski’s comments. Fortunately, Judge Kozinski is testifying today, and he can clarify his position on the connection, if any, between the Ninth Circuit’s size and its resistance to the proposed rule that will allow lawyers to cite unpublished opinions.

### **C. Burdens of air travel**

One of the familiar arguments for dividing the circuit relies not on the number of judges or the volume of appeals but on the circuit’s far-flung geographical reach. Because of that geography, judges and other court personnel must fly long distances, often via connecting flights, for arguments and other court business. I suspect that this argument has always seemed something of a makeweight, but two recent developments give it greater force.

The first is the new world of air travel. I am not referring to the post-9/11 security measures; those have been normalized, and experienced travelers can generally get through security without great delays. (Of course that may change if

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<sup>40</sup> Judge Kozinski emphasized not only the size of the court, but also the size of the circuit: “we speak to a very large group as well, more district judges than any other circuit.”

<sup>41</sup> As I said in my own testimony at the Subcommittee hearing, I do not share Judge Kozinski’s concerns about the effect of a rule allowing lawyers to cite “unpublished” opinions. But if the court acts in accordance with Judge Kozinski’s position, my own view is irrelevant.

there is another terrorist attack.) The long-range problem is that the airlines are in terrible shape financially, and one consequence is that service is being cut back. This makes travel more burdensome. As the Wall Street Journal reported recently, “To a degree [that surprises] even travel experts, the nation’s much-publicized airline troubles are reshaping the American skies, and giving fliers a whole new set of hassles.”<sup>42</sup> Judges will spend more time traveling, and the court will have less flexibility in scheduling oral arguments and other proceedings.

I also believe that the burdens of travel may weigh more heavily on judges today than they would have done in the past. Professor Michael Gerhardt has noted that recent nominees to the federal courts of appeals tend to be younger than their predecessors.<sup>43</sup> They are thus more likely to have children at home. Additionally, judges today will often be part of a dual career family. “Personal time” is more precious than it used to be.

One possible response is that the court could make greater use of videoconferencing. But if the judges communicate electronically from their own chambers or courthouses rather than meeting in person for oral arguments and conferences, they lose the principal opportunities for getting to know one another in a way that really makes them part of a common enterprise. The effect will be felt even more strongly if the court expands in accordance with the Judicial Conference recommendation.

Video hookups also have their limitations for the attorneys who argue the cases. A leader of the ABA’s Section on Litigation commented recently that “a

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<sup>42</sup> Nancy Keates & Paula Szuchman, Where Did My Flight Go? Wall St. J., Apr. 11, 2003.

<sup>43</sup> Michael J. Gerhardt, Here’s What Less Experience Gets You, Washington Post, Mar. 2, 2003.

lawyer can more effectively communicate in person. A lot of information that can be used in presenting an argument involves reading the judges' body language, their facial expressions, and their reactions. Sometimes, that cannot be caught [on camera]."<sup>44</sup>

In this light, I would give more weight today than I did in the past to the desirability of dividing the Ninth Circuit into two relatively compact circuits and thus reducing the burdens of travel. There would also be some savings in costs, and the judges would regain productive time that is now lost in transit.

#### **D. Caseload developments**

Opponents of circuit reorganization have often relied on the assumption that federal appellate caseloads will continue to grow at a rapid pace.<sup>45</sup> This assumption has been important for two reasons. First, a pattern of continuing growth suggests that dividing the Ninth Circuit would be almost futile; before long, the new Ninth Circuit would reach the same caseload levels and require the same large number of judges. Second, if one believes that other circuits will experience similar growth, the continued existence of an undivided Ninth Circuit can provide a valuable source of guidance for managing the ever-increasing volume of appeals elsewhere in the nation.<sup>46</sup>

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<sup>44</sup> Thomas E. Zehnle, *Court Uses Video Technology for Appellate Arguments*, *Litigation News*, Mar. 2003, at 4.

<sup>45</sup> See, e.g., *White Commission Report Hearing*, *supra* note 2, at 29 (statement of Judge Charles E. Wiggins).

<sup>46</sup> This theme has been prominent in my own writings. See, e.g., Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 *U. Chi. L. Rev.* 541, 542-43 (1989); Hellman, *Dividing the Ninth Circuit*, *supra* note 3, at 286-87.

Today, however, assumptions of inexorable growth are open to question. New – and newly available – data may reduce the force of arguments grounded in those assumptions. Three developments point in that direction.

First, the rate of growth has slowed. In 1995, when the last major Congressional debate over circuit division took place, the federal courts of appeals had experienced more than three decades of rapid and almost unrelenting expansion in their caseloads. Filings doubled between 1960 and 1967, and again between 1967 and 1974. Another doubling took place between 1974 and 1985. In the decade that followed, the volume of filings increased by about 50%.<sup>47</sup> A member of the 104th Congress, considering whether to support the Ninth Circuit Court of Appeals Reorganization Act of 1995, could reasonably assume that similar rapid growth lay ahead.

As it happens, we need not speculate about what the future looked like in 1995. In December of that year, the Judicial Conference of the United States approved a Long Range Plan for the Federal Courts. The Plan included projections of caseload growth for the courts of appeals. The projected caseload for the year 2000 was 85,700.<sup>48</sup>

The reality has been very different. In 2002, filings were only 57,555, two-thirds of the total anticipated for 2000. In contrast to the 50% increase registered

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<sup>47</sup> Here are the figures on filings for the years mentioned in the text:

1960 .....	3,899
1967 .....	7,903
1974 .....	16,436
1985 .....	33,506
1995 .....	50,072
2002 .....	57,555

<sup>48</sup> See Long Range Plan, *supra* note 4, at 161.

in the decade ending in 1995, the increase for the most recent decade amounts to less than 25% (from 47,013 to 57,555).

It is true that appellate filings in the Ninth Circuit have continued to increase at a rapid rate. This is primarily because of changes in the way the Justice Department processes immigration appeals. However, it is not clear whether this represents a transitional bump or a long-term phenomenon. And the total for 2002 is well below the number projected for 2000 in the Long Range Plan.<sup>49</sup>

This brings me to the second development. Starting in 1993, the Administrative Office has collected and published data on appeals filed by litigants acting pro se. Although pro se appeals may consume a great deal of staff time, they can generally be dealt with expeditiously by the judges. For that reason, when the Judicial Conference calculates judgeship needs, pro se appeals are counted as only one-third of a counseled appeal.<sup>50</sup>

We now have 10 years' data on pro se and counseled appeals. Nationwide data show that, remarkably, counseled appeals have actually decreased in numbers during the decade, from 33,181 in 1993 to 30,931 in 2002. In the Ninth Circuit, counseled filings have increased, but only modestly, from 6,333 in 1993 to 6,585 in 2002.

Finally, the idea that other circuits would look to the Ninth Circuit as a model for managing caseload growth now appears wildly unrealistic. Other courts of appeals do not see the Ninth Circuit as an exemplar to be followed; on the

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<sup>49</sup> The Long Range Plan anticipated that the Ninth Circuit Court of Appeals would have 15,900 new filings in 2000. *Id.* at 163. Even in FY 2002, with the enormous influx of immigration cases, the total was under 12,000.

<sup>50</sup> For further discussion, see *Judgeships Hearing*, *supra* note 14, at 57-58 (statement of Arthur D. Hellman).

contrary, they see it as the “jumbo circuit” they do not want to become. The Fifth and Eleventh Circuits have resolutely set themselves against adding judges. No other circuit has demonstrated the slightest interest in adopting a limited en banc court.

I am not saying that appellate caseloads will level off permanently, or that the undivided Ninth Circuit is an experiment that has failed. But I do think that perhaps the experiment has run its course; that one of the major arguments for keeping the circuit intact no longer carries much weight; and that reorganizing the Ninth Circuit today could give us a structure that would not require adjustment for many years to come.

#### **V. What’s in It for the New Ninth Circuit?**

It is hardly surprising that the strongest support for legislation to divide the Ninth Circuit has come from the judges and lawyers of the five northwestern states. For example, if the circuit is split as proposed by H.R. 2723, the Twelfth Circuit would be a court of 9 active judges, the second smallest in the federal appellate system. The judges would have numerous opportunities to develop working relationships as members of argument panels; they could easily maintain a sense of cohesiveness. All active judges could participate in all en banc cases. The judges’ overall travel burdens would be substantially reduced.

But how would a split help the judges of the new Ninth Circuit? The answer depends in large part on the specific provisions of the legislation. In my view, three elements are essential if a bill is to deserve support from throughout the existing Ninth Circuit. First, the new Ninth Circuit should comprise a minimum of three states. Otherwise, the circuit would lose the influence and diversity in

appointments that come from having three pairs of senators.<sup>51</sup> Second, Arizona and Nevada should be included in the new Ninth Circuit along with California.<sup>52</sup> Finally, the legislation should authorize the 7 new appellate judgeships recommended by the Judicial Conference of the United States, and all 7 should be allocated to the new Ninth Circuit.

Unlike previous circuit division legislation, H.R. 2723 satisfies all three criteria. The new Ninth Circuit would be composed of three states: Arizona, California, and Nevada. The Ninth Circuit Court of Appeals would have 24 judgeships on a permanent basis, augmented by 2 temporary judgeships for at least 10 years. With those provisions, I can see four benefits that the new Ninth Circuit could expect to gain after the reorganization contemplated by the bill.

#### **A. Caseload relief for the judges**

First, of course, the judges of the new appellate court would enjoy a reduction in their individual workloads. In 2002, filings per judgeship in the Ninth

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<sup>51</sup> The White Commission cogently explained why a federal judicial circuit should be composed of at least three states:

Circuit realignment to produce circuits smaller than three states is undesirable. We conclude this because we believe three is the minimum necessary for units of the intermediate tier of a *federal* system to serve an appropriate federalizing function. Appellate courts serve this function better when they comprise judges from several states. This not only ensures a broader, more national perspective essential to a federal court system, but enlists the continuing interest of several congressional delegations and spreads among a larger number of senators the informal but ingrained influence over the appointment of the court's judges. Concentrating such influence in one or two senators over a court with appellate caseloads as large as those generated, for example, by California, New York, or Texas, would not be, in our view, wise policy.

White Commission Report, *supra* note 2, at 52-53. See also A. Leo Levin, Lessons for Smaller Circuits, Caution for Larger Ones, in *RESTRUCTURING JUSTICE*, *supra* note 1, at 339-40.

<sup>52</sup> Arizona's closest legal and commercial ties are with California. The state also has close ties with Nevada. It is also relevant that Arizona and Nevada generate substantial appellate caseloads. Each state will be entitled to several seats on the court of appeals, thus promoting the "federalizing function" described by the White Commission.

Circuit Court of Appeals were 403. If H.R. 2723 had been in effect, filings per judgeship in the new Ninth Circuit would have been 349, a decrease of 13%.<sup>53</sup> This figure may understate the probable effect over time; in 2002, the extraordinary influx of immigration appeals was concentrated in the Central and Northern Districts of California.

### **B. More opportunities for the judges to sit with their colleagues**

Second, the judges would have more opportunities to sit with one another as members of three-judge argument panels. As shown in Part II, it is quite possible today that a judge will go for three years – or even longer – without sitting with all of his or her active colleagues. The situation would only get worse if Congress were to add 7 new judgeships while leaving the circuit intact. But if the circuit were split in accordance with H.R. 2723, the new Ninth – even with the additional positions – would become a court of only 26 judges (to be reduced to 24 when the temporary judgeships expire).

In fact, I believe that the opportunity for equalizing judges' sittings with one another in a reorganized Ninth Circuit may be greater than the numbers alone would suggest. Currently, the court's calendaring program aims at achieving parity not only in judge pairings but also in geography – the assignment of judges to the various cities where the court regularly schedules oral argument.<sup>54</sup> The cities of rotation include "Seattle/Portland" as well as Honolulu and Anchorage. In 2002,

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<sup>53</sup> The figures in this paragraph are for statistical year 2002 (Oct. 1, 2001 through Sept. 30, 2002); they are taken from a chart prepared by the Clerk's Office of the Ninth Circuit. I would prefer to use adjusted filings, the workload measure used by the Judicial Conference of the United States in calculating judgeship needs in the federal courts of appeals. See Arthur D. Hellman, *Assessing Judgeship Needs in the Federal Courts of Appeals: Policy Choices and Process Concerns*, -- J. App. Prac. & Proc. – (forthcoming). Unfortunately, the data that are needed for calculating adjusted filings in the two new circuits are not available.

<sup>54</sup> For further discussion, see Appendix A.

the court deployed 13 panels in Seattle, 4 in Portland, 2 in Honolulu and 1 in Anchorage.

If the Ninth Circuit consisted of only three states, the court would have to equalize sittings among only two (perhaps three) cities.<sup>55</sup> With no need to give judges a fair share of sittings in the cities of the Twelfth Circuit – or even to schedule judges for argument panels there – it should be easier to assure that each active judge sits with every other active judge at least once in a three-year period.

### **C. Less travel for the judges**

Third, the judges in the three states of the new Ninth Circuit would enjoy some reduction in their travel burdens. No longer would they be regularly flying to Seattle, Portland, Anchorage, and Honolulu. The judges who have their chambers in the Los Angeles area – a group that currently includes 8 of the court's 27 active judges – would probably be able to participate in at least half of their oral argument calendars without having to get on a plane at all.

I do not want to overstate the point. Currently, the judges from the northwestern states travel to California for oral arguments far more than the judges from the proposed new Ninth Circuit travel to the northwest. But if H.R. 2723 is enacted, there would be fewer journeys for the California judges and shorter journeys for the judges from Arizona and Nevada.<sup>56</sup>

### **D. Wider participation in the Circuit Judicial Conference**

Finally, creation of a three-state Ninth Circuit would make possible a more broadly participatory Judicial Conference. Congress requires each circuit to

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<sup>55</sup> Today, the court holds oral argument sessions every month in Pasadena and San Francisco. A new Ninth Circuit composed of Arizona, California, and Nevada might choose to hear arguments on a regular basis in Phoenix as well.

<sup>56</sup> This month (October 2003), four judges from southern California traveled to Seattle for oral arguments.

provide “for representation and active participation at [the circuit conference] by members of the bar of [the] circuit.”<sup>57</sup> The Ninth Circuit has probably done more than any other to encourage “active participation” by lawyers in Conference activities.<sup>58</sup> But because of the circuit’s size, the number of lawyers who can participate is severely limited. For example, the Central District of California is by far the most populous federal judicial district in the nation.<sup>59</sup> But in 2000 the Central District sent only 38 lawyer representatives to the Circuit Conference.

In a three-state Ninth Circuit, the Conference would not include the judicial officers, lawyer representatives, and other participants from the districts of the Twelfth Circuit. This means that without increasing the total number of people in attendance, the circuit could more than double the number of lawyers who participate.<sup>60</sup> If it wished, it could substantially augment the number of lawyer representatives from each of the six remaining districts. Or, the circuit could invite some lawyers to attend as individuals without obligations as representatives, as is done in other circuits. Either way, more lawyers would have an opportunity to meet the judges, to learn about the operation of the courts, and to share their experiences and ideas with the other participants.

Over the years, I have attended several of the circuit’s Conferences. Without doubt, they are a good advertisement for the federal courts generally and for the Ninth Circuit in particular. I am confident that the lawyers who participate come

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<sup>57</sup> 28 U.S.C. § 333.

<sup>58</sup> See Stephen L. Wasby, *The Bar’s Role in Circuit Governance*, in *RESTRUCTURING JUSTICE*, supra note 1, at 281.

<sup>59</sup> See *Judgeships Hearing*, supra note 14, at 5 (Letter of Chief Judge Consuelo B. Marshall).

<sup>60</sup> In 2000, there were 97 lawyer representatives from the districts of Arizona, California, and Nevada. The number of participants from the districts of the proposed Twelfth Circuit was about 180.

away with a renewed appreciation for the dedication of the judges and the importance of an independent judiciary. In an era when the courts need all the support they can muster, there would be substantial value in making it possible for a larger number of lawyers to enjoy this experience.

### **E. Conclusion**

In sum, the benefits of H.R. 2723 for the judges of the new Ninth Circuit, while not as great as they would be for the judges of the northwest, are certainly more than de minimis – perhaps substantially more. The question is whether these benefits are outweighed by the disadvantages of breaking up the existing structure. I turn now to the negative side of the balance.

## **VI. The Arguments Against Dividing the Circuit**

At the House Judiciary Committee hearing on H.R. 1203 in the 107th Congress, Chief Judge Schroeder and Judge Thomas presented the arguments against dividing the circuit.<sup>61</sup> Some of their concerns have been addressed by H.R. 2723. Others remain open to debate.

### **A. Preserving “uniform federal law” in the west**

Both Judge Schroeder and Judge Thomas argued that that dividing the Ninth Circuit “would deprive the West and the Pacific seaboard of a means to maintain uniform federal law in the area.”<sup>62</sup> On this point the hearing generated differing views. Judge O’Scannlain characterized the uniformity argument as a “red herring;” he noted that there are five separate circuits on the eastern seaboard,

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<sup>61</sup> Ninth Circuit Court of Appeals Reorganization Act of 2001: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Judiciary Comm. (2002) [hereinafter House Hearing].

<sup>62</sup> Id. at 10 (statement of Chief Judge Schroeder) (quoting Final Report of White Commission); id. at 63 (statement of Judge Thomas) (same).

without any apparent disruption of commercial or other relationships governed by federal law.<sup>63</sup>

If the uniformity argument is well taken, it stands as an obstacle to any plan for dividing the Ninth Circuit. I therefore deal with it first.

Judge O’Scannlain’s response, standing alone, is not a sufficient rebuttal. His observations do not negate the possibility that intercircuit disagreements create problems in the eastern seaboard region, but that people take them for granted and have adjusted – perhaps at some cost – to the consequences. However, we need not rely on speculation. In the Judicial Improvements Act of 1990, Congress asked the Federal Judicial Center to study the extent and effect of unresolved conflicts between federal judicial circuits. The Center asked me to design and conduct the study. Working with the Center, I carried out an elaborate program of empirical research, including interviews with lawyers. Recently I summarized my findings as follows: “When one considers both the tolerability of the unresolved conflicts and their persistence, the evidence points strongly to the conclusion that unresolved intercircuit conflicts do not constitute a problem of serious magnitude in the federal judicial system today.”<sup>64</sup>

On the basis of this research, I see little reason for concern about the loss of “jurisprudential coherence”<sup>65</sup> that would result from division of the Ninth Circuit. No doubt there would be some disagreements between the two new circuits on

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<sup>63</sup> Id. at 31-32 (statement of Judge O’Scannlain).

<sup>64</sup> Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. Pitt. L. Rev. 81, 89-90 (2001). For a report on the lawyer interviews, see Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 Sup. Ct. Rev. 247 (1999) [hereinafter Hellman, *Time and Experience*].

<sup>65</sup> House Hearing, *supra* note 61, at 63 (statement of Judge Thomas).

issues of federal law, but these would be no more troublesome than the disagreements that sometimes arise today between the Ninth and other circuits. And with rare exceptions those disagreements have minimal impact on counseling and litigation.

It is true that the White Commission emphasized the value of “[h]aving a single court interpret and apply federal law in the western United States.”<sup>66</sup> But the Commission’s commitment to uniformity in the west was more rhetorical than real. As Chief Judge Hug pointed out in his analysis of the Commission proposal, the divisional structure contemplated by the Commission fell “far short of the Commission’s goal of maintaining consistent law throughout the circuit.”<sup>67</sup> On the contrary, if the Commission’s plan were to be adopted, it is likely that “the law of the circuit would steadily drift apart.”<sup>68</sup> My own analysis reached a similar conclusion.<sup>69</sup>

There is another reason why the Final Report of the White Commission lends little support to the uniformity argument. The Commission acknowledged that uniformity is important only “on issues of law that matter to the entire circuit.”<sup>70</sup> Its examples make clear that it was referring to issues that affect the conduct of multi-circuit actors. But my research – including interviews with lawyers – has

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<sup>66</sup> White Commission Report, *supra* note 2, at 49.

<sup>67</sup> Procter Hug, Jr., Potential Effects of the White Commission’s Recommendations on the Operation of the Ninth Circuit, 34 U.C. Davis L. Rev. 325, 329 (2000).

<sup>68</sup> *Id.* at 330.

<sup>69</sup> Arthur D. Hellman, The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit, 73 S. Cal. L. Rev. 377, 381-92 (2000).

<sup>70</sup> White Commission Report, *supra* note 2, at 44 n.99.

shown that appellate decisions play a much smaller role in that context than one might suppose.<sup>71</sup>

Perhaps it goes too far to characterize the uniformity argument as a “red herring.” But if dividing the Ninth Circuit is otherwise a good idea, concern about uniformity of law in the west should not stand in the way.

### **B. Cost and efficiency**

The judges testifying in opposition to H.R. 1203 also focused on considerations of cost and efficiency. First, the judges pointed to the economies of scale that the circuit now enjoys in administrative and managerial functions. For example, Judge Thomas noted that the resources of a central staff “are available to manage courthouse construction, assist in information technology, provide aid in personnel management, and help in capital case management.”<sup>72</sup>

This concern is addressed by H.R. 2723. Section 13 of the bill authorizes any two contiguous circuits to jointly carry out administrative functions and activities when the circuit councils of the two circuits determine that these functions will benefit from coordination or consolidation. Thus, if it is efficient to have a single person or office handle matters like courthouse construction or information technology for both of the new western circuits, there will be no need to forgo that efficiency.<sup>73</sup>

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<sup>71</sup> See Hellman, *Time and Experience*, supra note 64, at 293-95.

<sup>72</sup> House Hearing, supra note 61, at 63 (statement of Judge Thomas). In a similar vein, Chief Judge Schroeder observed that the new circuit would have to replicate functions such as “processing complaints against judges, ascertaining budgetary requirements for the courts, ... and meeting [heightened security requirements].” *Id.* at 11 (statement of Chief Judge Schroeder).

<sup>73</sup> There is precedent for this kind of intercircuit coordination; the statute governing bankruptcy appeals allows “the judicial councils of 2 or more circuits” to establish “a joint bankruptcy appellate panel” for the participating circuits. See 28 U.S.C. § 158(b)(4). That statute requires authorization by the Judicial Conference of the United States, but there is no reason to include such a requirement in the circuit division legislation.

Second, the judges called attention to economies of scale at the judicial level. The Subcommittee was told that “any division will inevitably result in circuit judges assuming greater administrative burdens” because the Twelfth Circuit Court of Appeals would have to duplicate the administrative tasks that one judge now carries out for the unitary court.<sup>74</sup>

There is some merit to this point. Because the two courts would be separate juridical entities, coordination of the administrative functions performed by circuit judges would not be feasible. However, it is not clear that all of the administrative tasks required in a large court would necessarily be required in a small court. For example, the Twelfth Circuit might want to designate one of its judges to serve as death penalty coordinator, but I doubt that the court would need a judge to act as coordinator for en banc proceedings. Overall, division of the circuit would probably result in some net increase in the circuit judges’ administrative burdens, but I think the effect would be modest.

Third, there was discussion at the hearing of the cost of creating a new circuit. Because the witnesses offered different estimates, Chairman Coble asked a representative of the Administrative Office to get some figures on the probable cost. As far as I know, that information has not yet been provided, but if dividing the circuit will improve the administration of justice in the west, even the larger estimates strike me as a rather modest price to pay.

Beyond this, arguments about cost differ in a significant way from most of the other arguments over circuit reorganization. When the question is whether dividing the circuit will improve or hinder the administration of justice, the judges can draw on their experience and expertise. They speak with a special authority.

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<sup>74</sup> House Hearing, *supra* note 61, at 59 (statement of Judge Thomas).

That is not so with respect to issues of cost. If Congress is persuaded that the benefits of creating a new circuit are worth the additional expenditures, contrary views from the judges deserve respect, but there is no reason to give them special weight.<sup>75</sup> By the same token, the judges, in formulating their recommendations to Congress, need not devote much attention to cost issues.

### **C. Adequacy and allocation of resources**

Judge Schroeder and Judge Thomas also raised issues about the adequacy and allocation of resources for the proposed new circuits.

First, the judges expressed concern that splitting the Ninth Circuit would impair the ability of courts within the circuit “to lend judges to those districts suffering temporary judicial need.”<sup>76</sup> In response, section 12 of H.R. 2723 authorizes each of the new circuits to designate judges for service in the other circuit without having to seek authorization from the Chief Justice of the United States, as current law would require. This would not quite replicate the current arrangement; two approvals would be required instead of one. But if we assume, as I do, that the two circuits would do their best to make the system work, the argument loses much of its force.

Second, the judges emphasized the need for additional judgeships to meet caseload demands. As already discussed, H.R. 2723 responds by authorizing the 7 new appellate judgeships requested by the Judicial Conference of the United States. That might seem to take care of the problem, but it does not quite do so. The reason lies in a point made by Judge Thomas.

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<sup>75</sup> However, it may be desirable to include a provision in the reorganization statute specifically authorizing an appropriation for the start-up costs for the new circuit.

<sup>76</sup> House Hearing, *supra* note 61, at 63 (statement of Judge Thomas).

Judge Thomas noted that H.R. 1203 would have given the new Ninth Circuit a disproportionately large share of the cases and a disproportionately small share of the judges. One might think that this inequality would disappear under H.R. 2723, because the new bill allocates all 7 of the additional judgeships to the new Ninth Circuit. And it is certainly true that with the creation of the new positions the per-judge caseload in the new Ninth Circuit would decrease. But the per-judge caseload in the Twelfth Circuit would shrink substantially more. This means that the judges of the new Ninth Circuit would not receive the full benefit of the additional judgepower that the Judicial Conference deems necessary.

The disparity is particularly great if we look at the caseload data for 2002 – data skewed by the heavy influx of immigration appeals spurred by the Attorney General’s directive to clear an administrative backlog. In 2002, as already noted, the Ninth Circuit Court of Appeals had 403 filings per judgeship.<sup>77</sup> If the 7 new judgeships had been created for the existing court in accordance with the Judicial Conference recommendation, the figure would have dropped to 322. But if the circuit had been divided as proposed by H.R. 2723, filings in the new Ninth Circuit would have been 349, while in the Twelfth Circuit the figure would have decreased to 243.

H.R. 2723 does not ignore this problem. As stated in Rep. Simpson’s summary of the bill: “Section 11 maximizes flexibility in the allocation of judges between the two circuits by allowing circuit judges of each circuit serve in the other circuit without the need to seek designation by the Chief Justice.” But unless this authority is invoked, the judges from Arizona, California, and Nevada would

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<sup>77</sup> Again, these are actual filings for the statistical year. Data on adjusted filings are not available. See *supra* note 53. I have used statistical year 2002 as the basis for my calculations so that my figures will be consistent with those used by Judge O’Scannlain in his statement.

lose out on some of the caseload relief that the Judicial Conference has recommended for them.

One possible solution would be for the judges of the northwest and Hawaii to commit themselves in advance to providing judgepower that would help to redress the inequality in per-judge workloads in the two circuits. But as long as the circuit continues to be flooded by immigration appeals concentrated in the Central and Northern Districts of California, complete parity would require substantial effort. For example, based on the 2002 data, if each of the 9 active judges from the Twelfth Circuit states had sat on one calendar or screening panel in the new Ninth Circuit in the course of the year, that would have given the Ninth Circuit judges most of the relief that the Judicial Conference has requested for them, but it would not have come close to equalizing the per-judge filings between the two circuits.<sup>78</sup>

How much assistance will be needed in the future will depend on patterns of caseload growth, the fortuities of judicial vacancies, and the courts' choices regarding calendaring practices. Moreover, if the judges from Arizona, California, and Nevada decide that reorganization is otherwise a good idea, they might well be willing to forgo complete parity as long as they get substantial workload relief. But I suspect that without some sort of commitment along the lines I have described, the judges of the southwest will be understandably reluctant to endorse legislation that denies them their full share of the new judgeships.<sup>79</sup>

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<sup>78</sup> Active judges ordinarily sit on 8 argument calendars and 1 screening panel a year (or 7 argument calendars and 2 screening panels). Thus, 9 judges sitting for one calendar each would provide the equivalent of exactly one active judge. A shift of 1.0 judges would result in per-judge filings in the new Ninth Circuit of 336. The figure for the Twelfth Circuit would have been 273.

<sup>79</sup> In addition, Congress might create an additional temporary judgeship for the new Ninth Circuit Court of Appeals to help in coping with the enormous volume of immigration appeals.

## **VII. Conclusion**

For many years, I have written and testified in opposition to successive proposals to divide the Ninth Circuit. My view has been shared by a majority of the judges of the Ninth Circuit Court of Appeals and – so far as one can tell – by a majority of the lawyers in the western states. Today, however, I think the time has come for the judges and lawyers to take a fresh look at the question.

One reason judges and lawyers have resisted efforts to reorganize the circuit is that, too often, the legislation has been motivated by hostility to decisions of the Ninth Circuit Court of Appeals, particularly on issues of environmental law and Indian law. It is especially unfortunate that Senator Murkowski, in introducing her circuit division bill in the current Congress, took aim at the Ninth Circuit ruling on the Pledge of Allegiance. But the fact that some who support a circuit split do so from improper motives does not mean that all do. Further, bad motives do not necessarily mean that the idea is bad.

A second reason for opposition has been that all previous proposals were seriously flawed in one way or another – and supporters of the legislation in Congress showed little interest in fixing the problems or accommodating the legitimate concerns that the judges expressed.

H.R. 2723 is different. The new bill addresses most of the objections that were raised at the hearing on H.R. 1203 in the 107th Congress. And Congressman Simpson has made clear that he welcomes suggestions for further improvements in the legislation.

I continue to believe that it would be wrong for Congress to divide a circuit unless the proposed reorganization has substantial support from the judges and lawyers in the affected region. But I also believe that the judges and lawyers

(particularly the judges) have a correlative obligation to give fair and open-minded consideration to reasonable new legislative proposals such as H.R. 2723.

The Ninth Circuit Court of Appeals and the Judicial Conference of the United States have determined that the circuit needs 7 additional appellate judgeships. If Congress accepts that conclusion – as I believe it should – then the choice lies between moving forward with H.R. 2723 and simply adding 7 judgeships to the present Ninth Circuit Court of Appeals.

That is a question on which reasonable people can disagree. The Subcommittee has done the Ninth Circuit a great service by holding this hearing, because the statements and other materials in the record will frame and illuminate the issues that should be addressed. I hope the judges and lawyers of the Ninth Circuit will reflect on these issues and communicate their views to the Subcommittee.<sup>80</sup> The hearing thus constitutes a valuable first step in the process of discussion and inquiry that can lead to a sound judgment on the best course of action.

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<sup>80</sup> In my testimony at the Subcommittee's hearing on federal judgeship needs, I suggested a more broadly participatory process using the courts' web sites as communication centers. See Judgeships Hearing, *supra* note 14, at 64-65 (statement of Arthur D. Hellman). A variation on this process might work very well in this setting.

## **Appendix A**

### **Interaction Among Ninth Circuit Judges: The Effect of Adding New Judgeships**

As noted in Part III, it might seem obvious that if the Ninth Circuit Court of Appeals were to add 7 judgeships to its present complement, the members of the court would sit with each of their colleagues even less frequently than they do today. But before reaching that conclusion, it is necessary to consider several variables whose interplay will determine the actual consequences of enlarging the court.

#### **A. Other criteria in the panel composition process**

First, even with a court of 28 authorized judgeships, the patterns revealed by the study reported in Part III were not mathematically inevitable. For example, although Judge Berzon never sat on an argument calendar with Judge Rymer or Judge McKeown, she sat on three calendars with Judge Trott.<sup>81</sup> Almost certainly, it would be possible to adjust the court's calendaring program to assure that every judge sits at least once with every other active judge during a three-year period.<sup>82</sup>

The difficulty is that to do this, the court would have to compromise – or perhaps abandon – the other criteria that it uses in assigning judges to argument panels. For example, the General Orders include a provision requiring what might be called geographical parity in sittings:

Insofar as possible, over a two-year period, each active judge should sit on approximately the same number of panels in San

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<sup>81</sup> Disparities abound. For example, Judge Tallman never sat with 4 of his active colleagues – but he sat on 3 full panels with Senior Judge Lay of the Eighth Circuit.

<sup>82</sup> Currently, the General Orders provide: “Insofar as possible, each active judge should sit with every other active and senior judge approximately the same number of times over a two-year period.” 9th Cir. General Orders 3(2)(d) (eff. Mar. 26, 2003).

Francisco, Pasadena, Seattle/ Portland as each of the other active judges, and, over a span of several years, each active judge should sit on approximately the same number of panels in Honolulu and Anchorage as each of the other active judges.

As long as the circuit remains a single juridical entity, the court will probably adhere to some form of the geographical parity rule.

Assignment of judges to calendars also takes account of “the wishes of each judge with regard to sitting during particular months.” Today, many judges are part of a two-career family. I suspect that judges’ preferences “with regard to sitting during particular months” often reflect the desire to coordinate schedules with those of a working spouse or other family members. Eliminating this flexibility would not be without cost.

In this light, it is understandable that the court has not been willing to subordinate all other considerations and give absolute priority to equalizing the number of times active judges sit with one another. And one would think that the addition of 7 judges would only diminish the frequency with which the members of the court sit with each of their colleagues. But panel composition criteria are not the only considerations that affect the pairing of the court’s judges.

#### **B. Participation by visiting and senior judges**

In recent years the Ninth Circuit has made extensive use of visiting judges from other courts to fill out its argument panels. There are obvious drawbacks to relying on outsiders to decide Ninth Circuit cases and establish Ninth Circuit law. With 7 additional judgeships, the court would be able to reduce its dependence on these outsiders. To the extent that visiting judges are replaced on calendars by judges appointed to the newly created positions, the members of the court will have more opportunities to sit with their own colleagues.

That is one possible outcome, but the analysis is incomplete. In particular, the court has also relied heavily on its own senior judges. However, as the Judicial Conference of the United States pointed out in explaining why the new positions are needed, a majority of the Ninth Circuit's senior judges are "75 years of age or older, including seven that are at least 80 years old." Thus, some of the additional judgepower will be needed, not to replace visitors but to replace senior judges who are no longer able to sit on cases. To the extent that this occurs, the court might have to continue to bring in judges from other courts. And the members of the Ninth Circuit Court of Appeals would gain no additional opportunities to sit with their own colleagues.<sup>83</sup>

### **C. Increasing the number of argument panels**

The preceding analysis might suffice if we could assume that, after the addition of new judgeships, there would be no change in the total number of argument panels that sit each year. Under this scenario, the Court of Appeals would cut back somewhat on its use of visiting judges, but otherwise it would carry out its work pretty much as it does today. However, that assumption is highly doubtful. Reducing dependence on visiting judges is not the only benefit the court would expect to obtain from an expansion in the size of the bench. There are at least three other ways in which the court might make use of the new judgepower, and all would point to an increase in the number of argument panels.

First, as discussed in Part IV, the Ninth Circuit Court of Appeals has for many years been one of the slowest of the federal appellate courts in processing

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<sup>83</sup> Another relevant variable is the effect of vacancies. This is so unpredictable that I have not attempted to take account of it in this analysis.

cases from filing the notice of appeal to final disposition.<sup>84</sup> Almost certainly, the court would use its new judges to reduce these delays. That means increasing the number of panels that will sit each year.

Second, the court may want to reduce the number of cases that are decided by screening panels. Although the court's method of dealing with apparently insubstantial appeals is as good as that of any circuit, it remains a distinctly second-best form of adjudication, especially for counseled cases. With more judges, the court could limit screening panels to the simplest and most straightforward appeals.

Third, the court may want to cut back on the number of cases heard by each argument panel. This would enable the judges to study the cases in greater depth; it would also allow them to give somewhat closer scrutiny to the unpublished dispositions that may soon be citable.

Taking all of these considerations into account, I am quite confident that, for the foreseeable future, the Ninth Circuit Court of Appeals would use its new judgepower to increase the number of argument panels sitting each month. And if that is so, the intuitive assessment is correct: adding 7 judges to a 28-judge court will probably diminish the frequency with which the members of the court sit with each of their colleagues.

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<sup>84</sup> See also Appendix B and Table 1, *infra*.

## **Appendix B**

### **Delay in the Federal Courts of Appeals: The Three Slowest Circuits, 1980-2002**

As explained in Part IV, proponents of reorganization assert that the Ninth Circuit's size results in delays in the disposition of cases. To assist in evaluating this argument, I have compiled a table that lists the three slowest circuits for each year from 1980 through 2002. The table appears at the end of this Appendix. Column two gives the Ninth Circuit's median time from filing the notice of appeal to final disposition. Column three provides the national median. The remaining columns list the three lowest-ranked circuits for the particular year. (The Ninth Circuit is shown in boldface.) Several points stand out:

- Five circuits do not appear on the list at all: the First, Second, Fourth, Fifth, and Eighth.
- The Ninth Circuit appears on the list in every year except 1984 and 1985. Those were the only two years in which the Ninth Circuit's median dropped below the 13-month mark.
- The Third Circuit appears on the list only once – in 2002. Remarkably, in 1989 the Third Circuit was the fastest in the country. Its median time increased every year thereafter, and in 2002 it became the third slowest of the courts of appeals.
- The Sixth Circuit appears on the list for every year from 1980 through 1986, disappears from 1987 through 1995, and then reappears. In each of the last five years it has been the slowest or second slowest of the courts of appeals.
- The Seventh Circuit appears on the list in 1984 and 1985 and then from 1989 through 1992. That is its last appearance.
- The Tenth Circuit appears on the list every year from 1980 through 1990; for seven years in a row it had the longest median time of any circuit. It disappears from the list until a single reappearance in 2001.

- The Eleventh Circuit makes its first appearance on the list in 1991. It appears on the list every year through 2000. For three years in a row it was the slowest of the circuits.

**Table 1**  
**Three Slowest Circuits, 1980-2002**

<b>Year</b>	<b>9th Circuit Median Time (Months)</b>	<b>National Median Time (Months)</b>	<b>#12</b>	<b>#11</b>	<b>#10</b>
2002	15.1	10.7	6th	<b>9th</b>	3rd
2001	15.8	10.9	<b>9th</b>	6th	10th
2000	15.8	11.6	<b>9th</b>	6th	11th
1999	14.2	12.0	6th	<b>9th</b>	11th
1998	13.8	11.6	6th	11th	<b>9th</b>
1997	14.4	11.4	<b>9th</b>	11th	6th
1996	14.3	10.4	11th	<b>9th</b>	6th
1995	14.3	10.4	11th	<b>9th</b>	DC
1994	14.5	10.5	11th	<b>9th</b>	DC
1993	14.6	10.3	<b>9th</b>	11th	DC
1992	15.2	10.6	<b>9th</b>	11th	7th
1991	15.6	10.2	<b>9th</b>	7th	11th
1990	15.7	10.2	<b>9th</b>	10th	7th
1989	15.8	10.3	10th	<b>9th</b>	7th
1988	14.7	10.2	10th	<b>9th</b>	DC
1987	14.1	10.3	10th	<b>9th</b>	DC
1986	13.6	10.3	10th	<b>9th</b>	6th
1985	12.6	10.3	10th	6th (tie)	7th (tie)
1984	12.1	10.8	10th	6th	7th
1983	13.3	11.1	10th	6th	<b>9th</b>
1982	16.4	11.5	<b>9th</b>	6th	10th
1981	20.3	11.5	<b>9th</b>	6th	10th
1980	20.8	10.8	<b>9th</b>	6th	10th