

COMMISSION ON STRUCTURAL ALTERNATIVES

FOR THE FEDERAL COURTS OF APPEALS

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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:00 a.m.)

3 CHAIRMAN WHITE: (I am the) Chairman of
4 this Commission, which was created by Congress to
5 report on certain aspects of the Federal Courts of
6 Appeals. The other Commissioner personally present is
7 Bill Browning, a former Chief Judge in Arizona. And
8 he is a very experienced District Court major.

9 We are fortunate to have a Circuit Judge
10 Pamela Ann Rymer to listen in on this hearing by a --
11 from her office via telephone hook-up. Good morning,
12 Pamela Ann.

13 JUDGE RYMER: Good morning, Judge White.
14 Thank you. I appreciate the opportunity of
15 participating electronically.

16 CHAIRMAN WHITE: All right. And the most
17 important man in the room is our executive director,
18 Dan Meador, a famous professor of law at the
19 University of Virginia.

20 And we do have some representatives of
21 both the administrative office and the federal
22 judicial center. Otherwise we would be without food,

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1 or hotels, (Laughter) or writing material, or anything
2 else, or the FJO says that if you want to know
3 something, ask us.

4 Congress created the Commission late last
5 year, and charged it with studying the structure and
6 alignment of the Federal Appellate system, with
7 particular reference to the Ninth Circuit. In
8 December 1998, the Commission is to report to the
9 President and Congress any recommendations for changes
10 in the Circuit boundaries or structure consistent with
11 fair and due process.

12 The Commission is interested in obtaining
13 views on whether each Federal Appellate Court renders
14 decisions that are reasonably timely, are consistent
15 among the litigants appearing before it, show due
16 consideration for nationwide uniformity in their
17 interpretations of Federal law, and are reached
18 through processes that afford appeals adequate
19 deliberative attention as judges.

20 The Commission has held four public
21 hearings across the nation. And this hearing, and the
22 following hearing in San Francisco will conclude those

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1 hearings. Characteristically, interested persons are
2 asked to submit a statement in writing of their views.

3 The Commission has received an
4 extraordinarily large number of requests to testify at
5 this one-day public hearing. In order to afford an
6 opportunity for all interested persons to testify, it
7 has become necessary to organize witnesses into
8 panels, and to adhere to a rather tight time schedule.

9 If you want to know what a tight schedule
10 is, ask your Senator from -- he knows all about the
11 Supreme Court. Since the Commission members will have
12 copies of your statements which we will study
13 carefully, you need not plan to read them, but to
14 summarize your essential points within six to seven
15 minutes, with additional questions or discussion with
16 Commission members.

17 The time keeper is sitting right there,
18 and so you can't fail to see him. And we will now
19 start the testimony. And Senator Slade Gorton will
20 start first. And Senator, you and I are not
21 strangers.

22 You argued fourteen cases in the Supreme

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1 Court as a member of the Attorney General's staff, or
2 as Attorney General. And I was with you seven to
3 three, but the Court wasn't. (Laughter.) But I
4 think you broke even. I think -- but I was also
5 against you once. I think it was with some oil
6 company -- some oil company case. But anyway, you
7 look exactly like you did years ago at the podium, and
8 speaking well. You were a good Attorney General.

9 SENATOR GORTON: Justice White, I thank
10 you for those compliments. And this does remind me of
11 the most interesting aspect of my time as Attorney
12 General. You don't know it, but in not one of those
13 cases I argued it totally and completely to you, as it
14 seemed to me.

15 CHAIRMAN WHITE: I could tell it, too.
16 (Laughter.)

17 SENATOR GORTON: You were absolutely key,
18 and I was persuasive enough so that you wrote the
19 opinion of the Court on my side on that particular
20 case. You were also, as I remember the toughest
21 questioner of the Members of the Supreme Court, or at
22 least so it seemed to me.

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1 CHAIRMAN WHITE: And it never bothered
2 you, Senator.

3 SENATOR GORTON: I hope that I will not
4 have such a difficult time today. You do have --

5 CHAIRMAN WHITE: I don't --

6 SENATOR GORTON: No comment on that.
7 (Laughter.)

8 CHAIRMAN WHITE: Yeah. All right.

9 SENATOR GORTON: You do have my written
10 statement.

11 CHAIRMAN WHITE: Yes, sir.

12 SENATOR GORTON: And I will simply
13 summarize in three points -- first, the Ninth Circuit
14 should be divided, because it is simply too large. It
15 is now double the size that the -- Commission
16 recommended a quarter of a century ago as being as
17 large as a circuit court should be. It hears more
18 appeals than at least four of the circuits combined.
19 It is physically and extremely large court.

20 More significantly to me, however, is the
21 lack of collegiality on a court with 28 authorized
22 judges. And therefore, simply, by simple arithmetic,

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1 an individual judge in a three judge panel has 3,276
2 possible combinations of judges. And therefore, even
3 a young man or woman appointed to the court is
4 unlikely to ever serve twice with exactly the same
5 three judge panel.

6 You know, my friend and Ninth Circuit
7 Judge Bill O'Scannlain, on the Ninth Circuit, from
8 Portland, has spoken and written to you eloquently,
9 you know, on that subject of collegiality. One I feel
10 to be the most important of all the considerations in
11 connection with this proposed division.

12 I had, or my office at least, had even
13 more experience, of course, with the Ninth Circuit
14 than we did with the Supreme Court, while I was
15 attorney general for the state. I argued only a
16 relatively small number of cases before the Ninth
17 Circuit, one of the privileges of my job -- the
18 arguments in the Supreme Court.

19 But my assistants felt that lack of
20 collegiality. They never saw the same people twice,
21 or rarely did so, you know, as I did you and your
22 colleagues on the Supreme Court.

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1 To me the more difficult question for you
2 to decide is, assuming that you agree that the Ninth
3 Circuit should be divided, the question is how should
4 it be divided? In what respect should it be divided?
5 I must admit to a parochial prejudice.

6 I am primarily interested in a circuit
7 court of appeals in the Pacific Northwest, with the
8 inclusion of Hawaii, Guam, and the Trust Territories,
9 each of whom made that choice last year, when the
10 Senate passed a division of the Ninth Circuit.

11 I much prefer the Northwest, plus Hawaii,
12 Guam, and the Trust Territories, to the proposal that
13 was passed by the Senate last year which, as you know,
14 had a non-contiguous circuit. It had it because the
15 Senators from Arizona felt as anxious for a divorce
16 from California as I did, you know, on behalf of the
17 State of Washington.

18 But I don't think that an ideal division.
19 I believe an ideal division would divide the Ninth
20 Circuit into three circuits. And would therefore, you
21 know, solve the problem of size and collegiality for
22 an extended period of time.

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1 But whether that would involve dividing
2 California, Northern California with Nevada, Southern
3 California with Arizona, whether it would involve
4 putting Arizona in an entirely different circuit, and
5 leaving a circuit with California and Nevada, I must
6 confess that I'm not certain as to which of those
7 choices is best.

8 I do think, as I say, that probably a
9 division into three is preferable. And obviously
10 here, with my own experience on the Court, and as a
11 Senator from the State of Washington, to plead
12 primarily, at least, for a circuit court of the four
13 contiguous states in the Northwest, plus Alaska and
14 the other Pacific Ocean states and territories of the
15 United States.

16 CHAIRMAN WHITE: I take it that you would
17 accept splitting the State of California, if that's as
18 well as you can do?

19 SENATOR GORTON: Yes. I would. You know,
20 California, of course, is so much larger now in
21 population than the next largest state, New York, that
22 it might well be appropriate in dividing California

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1 into north and south.

2 And you know, I guess a possible
3 combination, if you wanted to divide it only into two,
4 would be to have northern California with the Pacific
5 Northwest states. I certainly don't regard that as
6 ideal, but I do regard it as preferable.

7 JUDGE RYMER: Senator, this is Pam Rymer.
8 One of the arguments in support of leaving the circuit
9 as it is, is that there is a commercial commonality
10 between the states, along -- and among the states
11 along the coast, that it is important to protect by a
12 common body of law, particularly in areas such as
13 maritime and intellectual property.

14 Do your constituents have a view on that
15 point?

16 SENATOR GORTON: Well, I guess many of my
17 constituents would have to speak for themselves, you
18 know, on that subject. But I note that that -- that
19 a division of, say, New York and Massachusetts and
20 Pennsylvania into three separate circuits on the East
21 Coast does not seem to have inhibited commonality and
22 business interests that are perhaps more frequent and

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1 closer than those of Washington and California. And
2 how many circuits, I guess we may have five circuits
3 along the Atlantic, without it harming maritime --
4 consistency in maritime law.

5 CHAIRMAN WHITE: Well, you would have to
6 count the number of maritime cases that the Supreme
7 Court had before you could say that, because all of
8 those states didn't decide those cases the same.

9 SENATOR GORTON: That's true. And you
10 would know far better than I the burden of maritime in
11 the Supreme Court. But they're as likely to take
12 place between Pacific and Atlantic as they are -- down
13 the Pacific coast.

14 CHAIRMAN WHITE: And what is -- how do you
15 define collegiality?

16 SENATOR GORTON: I would define it as the
17 intimate, you know, personal knowledge and
18 relationships among members of any organization. A
19 court or any other organization, you know, a degree --
20 a relationship that is more than a relationship by
21 mail, and FAX, and E-mail.

22 CHAIRMAN WHITE: But what -- what does

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1 that do with the judge's output?

2 SENATOR GORTON: You, Justice White, are
3 better able to answer that question than I. But I
4 know, for example, in my own position, the fact that
5 I am together with a relatively small number of
6 members of committees and sub-committees constantly,
7 give me, and I think them, an understanding that is of
8 great assistance, and greatly facilitates our reaching
9 decisions.

10 Now, at one level, of course, you know,
11 the law is an abstraction off in the sky somewhere in
12 many of the textbooks. But I suspect that the law is
13 greatly influenced by the relationships between the
14 judges who actually state it, who sit on panels like
15 this panel here.

16 And an intimate knowledge of the strengths
17 and weaknesses, and foibles and attitudes of others
18 arguably facilitates not perhaps so much the substance
19 of the law in many cases, as it does perhaps the
20 efficiency with which judgments are rendered.

21 CHAIRMAN WHITE: Senator, has there been
22 any organized effort at the practicing bar in this

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1 town -- ?

2 SENATOR GORTON: Yeah.

3 CHAIRMAN WHITE: -- to make a decision?

4 SENATOR GORTON: Again, I think you will
5 have other witnesses here who can speak more for the
6 organized bar than I can. When I was attorney
7 general, you know, this was some time ago, and was
8 first interested in this subject, the governors of the
9 Washington State Bar Association voted by a narrow
10 margin in favor of a division. In fact, I think at
11 the time the president of the state bar was -- I was
12 presidential nominee for the Ninth Circuit.

13 But I think it's probably safe to say the
14 bar here is divided on the issue. Many are happy, you
15 know, with the situation in which they find themselves
16 at the present time, you know? They are comfortable
17 with the status quo. Others agree with me that it
18 would be appropriate to have a division, you know,
19 largely for the reasons that I've outlined to you
20 already.

21 CHAIRMAN WHITE: All right.

22 COMMISSIONER: Senator, one of the

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1 comments we've heard, and I'm sure you have heard, is
2 that the Northwest is uncomfortable having judges who
3 are not from the Northwest participating in, or making
4 decisions that are of great importance and concern to
5 this area of the country.

6 Is that a concern of yours, as well as
7 size on the number of panels?

8 SENATOR GORTON: It is, though I think it
9 is subsidiary to the three rationales that I've
10 outlined at this point. I'd rather have judges from
11 Washington judging Washington State law, than to go to
12 the Supreme Court of Oregon, and ask the Supreme Court
13 of Oregon to make such judgments.

14 And it is, I think, always at least a
15 modest advantage to have a mental picture of the
16 geography and the attitudes of the area in which one
17 is a judge. But I think that rationale can be greatly
18 over-stated. It's not the most important reason.

19 CHAIRMAN WHITE: Thank you. And you're --
20 by the way, you're hitting two or three more judges
21 from these states, aren't you?

22 SENATOR GORTON: Oh, yes, Mr. Justice

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1 White. I am quite active in that pursuit.

2 CHAIRMAN WHITE: I read all about it.

3 (Laughter.) All right. Thank you, Senator.

4 SENATOR GORTON: Thank you very much for
5 your attention. And I may tell you, Mr. Justice
6 White, how much I enjoyed our earlier associations
7 with one another. And it's been a pleasure --
8 (Unclear.)

9 CHAIRMAN WHITE: We will now hear from
10 Sanford Svetcov, president of the American Academy of
11 Appellate Lawyers. You practice in San Francisco?

12 MR. SVETCOV: I do, Your Honor.

13 CHAIRMAN WHITE: Yes. All right.

14 MR. SVETCOV: And I happen to have
15 fourteen appearances before you, Justice White, but
16 you have a pint of my blood going back to 1977, when
17 I appeared before you.

18 CHAIRMAN WHITE: Oh, yes, but you've
19 recovered. (Laughter.)

20 MR. SVETCOV: I have. But I had help from
21 Justice Stewart. You asked me a question midway
22 through the argument, and Justice Stewart leaned over

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1 and said, "Son, you don't have to answer that
2 question. Justice White has gone too far."

3 (Laughter.)

4 CHAIRMAN WHITE: That's what he thought.

5 (Laughter.)

6 MR. SVETCOV: I think you wrote the
7 majority opinion in my favor, an eight-to-one
8 decision. So, I appreciate the --

9 CHAIRMAN WHITE: All right. What was the
10 case?

11 MR. SVETCOV: Ropudier v. Navarette.

12 CHAIRMAN WHITE: Oh, yes.

13 MR. SVETCOV: It was a good faith case.
14 It wasn't a civil rights case. Although I'm president
15 of the American Academy of Appellate Lawyers, I do not
16 come here to speak on behalf of the Academy. We have
17 members all over the country, and we did not have time
18 to reach a consensus. And I don't think we would
19 have.

20 I really, I speak for myself. I've been
21 practicing in the Ninth Circuit for 33 years. They
22 have lots of pints of my blood. I was in the state

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1 attorney general's office. I was chief assistant
2 United States Attorney, chief of the strike force,
3 chief of the appellate section of the U.S. Attorney's
4 Office, and I've been in private practice, practicing
5 before the Ninth Circuit for the past ten years.

6 I come before you with just a suggestion.
7 It's kind of like a red light in Rome, if you've ever
8 travelled in Rome. A red light in Rome is just a
9 suggestion to the drivers of the car. (Laughter.)

10 You've heard lots of testimony from
11 Senator Gorton and others, and Judge O'Scannlain,
12 about splitting the Ninth Circuit, and you're going to
13 hear lots of testimony about keeping it status quo.

14 I don't think any of the suggestions for
15 splitting the circuit are workable, because I don't
16 know of a viable way to split California. And I don't
17 think Judge O'Scannlain's approach is workable.

18 Instead, I've attempted to come up with a
19 measure that would be somewhere in between those two
20 approaches. And that is to try to operate the circuit
21 in two discrete divisions, north and south, dividing
22 the case load approximately in half if possible, by

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1 having the five northwest states, the northern and
2 eastern districts of California in the north, Nevada,
3 Arizona, the southern district, and the central
4 district in the south, and figuring out whether
5 Hawaii, Guam, and the Mariana's should go north or
6 south, to come as close to a 50-50 split of the
7 caseload as possible.

8 And I thought of that using the Fifth
9 Circuit's approach of having a complete split. Judges
10 from the north only on northern cases, and judges from
11 the south on southern cases. But I think that would
12 detract from the consistency, and collegiality, and
13 contact between the judges that you need in a single
14 circuit.

15 So, my proposal is that for cases that
16 arise in the north, two judges from the north, and one
17 from the south. And vice versa for southern cases.

18 CHAIRMAN WHITE: Well, what would be the
19 split?

20 MR. SVETCOV: Excuse me?

21 CHAIRMAN WHITE: What would be the split?

22 What would make up the -- ?

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1 MR. SVETCOV: The northern division would
2 be the five northwestern states, Oregon, Washington,
3 Alaska, Montana, Idaho, the northern and eastern
4 districts of California.

5 CHAIRMAN WHITE: Uh-huh?

6 MR. SVETCOV: And the southern division
7 would be Arizona, Nevada, the central district, and
8 the southern districts of California. And I don't
9 know how the population goes these days, whether
10 Hawaii, Guam and the Mariana's would tip it one way or
11 the other, but put those in whichever north or south
12 would come closest to a 50-50 split.

13 CHAIRMAN WHITE: Now, what are the
14 advantages that -- ?

15 MR. SVETCOV: Of this approach?

16 CHAIRMAN WHITE: I'm not sure that what I
17 read in your statement that I understand.

18 MR. SVETCOV: Okay. It would attempt to
19 address some of the concerns about having judges from
20 the region decide cases arising from the region, and
21 address the ancillary concern that there is California
22 dominance in too many of these cases. It would serve

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1 to some degree to reduce that. It wouldn't eliminate
2 that concern, but it would address it in some way.

3 CHAIRMAN WHITE: I understand that.

4 MR. SVETCOV: It would also attempt to
5 reduce some of the flying time that is required for
6 judges, by having, if a cases arises in the north,
7 predominantly heard by judges from the north, it would
8 reduce somewhat, but not entirely, the flying time.

9 CHAIRMAN WHITE: But so would the rest of
10 --

11 MR. SVETCOV: So would a split.

12 CHAIRMAN WHITE: Yeah.

13 MR. SVETCOV: Yes. But the problem with
14 a split, and the reason I think that it's -- that
15 Judge O'Scannlain's split doesn't work is, it would
16 mean two different circuits would be decided, both
17 state and federal law for California.

18 CHAIRMAN WHITE: So would yours.

19 MR. SVETCOV: Yes. But it would be within
20 a --

21 CHAIRMAN WHITE: So would yours.

22 MR. SVETCOV: Oh, no. No. It would be

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1 one circuit, two divisions in one circuit, judge.

2 CHAIRMAN WHITE: Well, I know. But there
3 would be two parts of California in both divisions.

4 MR. SVETCOV: That is correct.

5 CHAIRMAN WHITE: Well, just a minute.
6 Just a minute. Here is a federal question that is
7 before one of the divisions, and it decides, and the
8 other division decides it differently?

9 MR. SVETCOV: Well, it could not. Because
10 the law of the circuit is that once a panel decides a
11 case, it is the law of the circuit.

12 CHAIRMAN WHITE: You didn't say that.

13 MR. SVETCOV: Pardon?

14 CHAIRMAN WHITE: You didn't say that.

15 MR. SVETCOV: Well, you know, I keep a few
16 tricks in my pocket, judge, in case of curve-ball
17 questions, judge --

18 CHAIRMAN WHITE: That's not a curve ball
19 question.

20 MR. SVETCOV: But that is the law of the
21 circuit. Once a panel in the Ninth Circuit decides a
22 point of law, that is the law of the circuit. And

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1 remember, judge, there would be a judge from the south
2 on that panel. It would not be an exclusively
3 northern panel.

4 CHAIRMAN WHITE: So, what -- let's assume
5 that is there any way to correct a --

6 MR. SVETCOV: A split?

7 CHAIRMAN WHITE: No. No. Is there any
8 way to correct what everybody says is a wrong decision
9 by the first division that --

10 MR. SVETCOV: Absolutely.

11 CHAIRMAN WHITE: What is it?

12 MR. SVETCOV: En banc review.

13 CHAIRMAN WHITE: How do you do that?

14 MR. SVETCOV: At present we have a limited
15 en banc court drawn by lot from the entire circuit.

16 CHAIRMAN WHITE: So, you don't mind this
17 limited en banc -- ?

18 MR. SVETCOV: I do not. I would modify it
19 slightly, if they're going to operating in two
20 divisions, to have five judges from each division
21 drawn for the en banc, instead of having eleven drawn
22 at large.

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1 CHAIRMAN WHITE: But you don't mind that?

2 MR. SVETCOV: No. I think that seems to
3 be working well. Probably, it ought to be invoked
4 more often --

5 CHAIRMAN WHITE: And how many judges would
6 there be in each division?

7 MR. SVETCOV: My proposal contemplates
8 than an effort be made to divide the case load in
9 half, and the number of judges in have. So, there
10 would be 14 judges in each division of the present
11 configuration of 28.

12 JUDGE BROWNING: Let me ask you one
13 question, Mr. Svetcov, if I may. Your pairing of
14 Southern California with Arizona and Nevada, Arizona
15 is the second largest contributor to the workload of
16 this circuit.

17 Wouldn't you be overloading that half of
18 the circuit? And when you also consider the
19 demographics of growth, wouldn't that be something
20 that would have to be dealt with ten, fifteen years
21 down the road as another overloaded circuit?

22 MR. SVETCOV: Judge Browning, that may

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1 well be. And I am not wedded precisely to the
2 configuration. I think that the Commission ought to
3 look at that. And I just didn't have the time or the
4 resources to do that.

5 But if there's a better configuration,
6 north and south, or even a three way configuration of
7 dividing -- I think you're looking for a solution of
8 how to deal with a large circuit's operations. And
9 one of those suggestions is to divide it into
10 divisions for operational purposes. And whether it's
11 two or three, or how the two are divided, I think an
12 effort should be made to find the best balance.

13 CHAIRMAN WHITE: Let me ask that question
14 another way. Have you given any consideration, even
15 without empirical evidence, to the growth patterns of
16 the western United States, to the Ninth Circuit, and
17 what we're going to be looking at, or the nation's
18 going to be looking at in, say, 30 or 50 - 60 years,
19 when one of us are still here?

20 MR. SVETCOV: Well, only in this sense,
21 Judge Browning, we have 28 judges now. The Court has
22 -- at four, eight, six or eight, or ten more judges

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1 already, that would bring the Court to 38. And you
2 could envision having it to 45 or 50 at some point.

3 And yes, in that sense, you do have to
4 look at growth patterns, and what are we going to do
5 with a circuit of 50 judges? I'm afraid that I'm not
6 really prepared to answer that. I think future
7 generations are going to have to address that.

8 In a sense, your work is a kind of an
9 exercise in creative delay. Of trying to address a
10 particular situation now with all of these
11 possibilities in the future, in terms of case growth
12 and demographics. I mean, let's face it, the case
13 load in the Federal Circuits has tripled, but the
14 number of judges hasn't tripled.

15 We don't have enough Article Three judges
16 deciding our cases. We have staff attorneys doing it.
17 That's not the way it should be. We need more judges.

18 CHAIRMAN WHITE: Thank you.

19 MR. SVETCOV: Thank you.

20 CHAIRMAN WHITE: Mr. Bivens, I broke a
21 rule that we just passed before we went to the -- we
22 weren't supposed to question him until all of you at

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1 that table had talked. So, we will let you obey that
2 rule.

3 MR. BIVENS: (Laughs.) Okay, Your Honor.
4 I do come today as the president-elect of the State
5 Bar of Arizona. I take office as president next month
6 at our convention in Tucson.

7 The State Bar of Arizona has over 14,000
8 active members. And from our perspective, it's those
9 lawyers, on behalf of their clients, who have the best
10 perspective in our state on the use of the Ninth
11 Circuit, and its performance.

12 I would point out that from Arizona's
13 perspective, we are the second largest contributor to
14 the case load. And as Judge Browning noted, we are
15 one of the areas of the country that has been
16 enjoying, and looks to continue to enjoy, explosive
17 growth over the next several decades.

18 And we worry about that, in terms of
19 decisions to be made about the configuration of the
20 Ninth Circuit, not just today, but in 2010, and 2020,
21 and how that would affect Arizona.

22 The opinions that I have provided you in

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1 my written materials, and then I'll try to summarize
2 today, I will tell you were the product of a unanimous
3 vote by the board of governors of the State Bar of
4 Arizona. That in itself is relatively rare. We are
5 an elected body that tries to be representative of all
6 of the geographic areas within the state.

7 The Bar considers Arizona to be well
8 served by the Ninth Circuit in its existing
9 configuration. We enjoy the broad precedent and the
10 numbers, literally, of cases on which to draw for a
11 precedent. The en banc review functions well. From
12 our perspective, the administration functions well.

13 Our only concern is the gaping judicial
14 vacancies that have been allowed to persist in the
15 Ninth Circuit for several years. From the Bar's
16 perspective, the chief result of those vacancies has
17 been the backlog in getting civil cases to oral
18 argument. Once cases get to oral argument, they move
19 relatively quickly. But there is a backlog in getting
20 civil cases to oral argument.

21 And again, as we look at it, that's a
22 product of having 18 judges last year trying to do the

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1 work of 28, but I understand now we're up to about 21.
2 That's still not 28. And we think that before we try
3 to solve problems that may be perceived to exist in
4 the Ninth Circuit, we ought to first see if filling
5 those 28 vacancies would solve those problems.

6 From Arizona's perspective, workload is
7 going to continue to increase as population continues
8 to increase. And a solution to that problem is not to
9 divide the judges into the workload, but to apply more
10 resources to that workload.

11 And we would recommend that by achieve
12 continuities of scale, and investing money in
13 technology and communications, as we do in every other
14 aspect of America, from business and government, that
15 makes much more sense in terms of addressing growth
16 than dividing the workload.

17 From a fiscal perspective, the Bar in
18 Arizona sees no need to construct new port facilities,
19 or invest in new port facilities, when we have ample
20 and comparatively new facilities that exist today.

21 And for those reasons, and because we have
22 no posed solutions that I have seen that are better

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1 than the existing solution, the existing
2 configuration, we prefer to remain as-is. But let me
3 add as a footnote that if you do decide to do -- to
4 reconfigure in some way, the Bar in Arizona has a
5 preference to remain connected with an undivided
6 California.

7 And that is for reasons I have articulated
8 in my paper. But one of them was alluded to by Judge
9 Browning a moment ago. There are more business
10 relationships between Arizona and California than any
11 other state in the Ninth Circuit.

12 If you just look at the commercial airline
13 guides -- the flights in and out of Phoenix and Tucson
14 overwhelm the other patterns of travel. And that's
15 reflective, I think, of our business relationships,
16 our personal relationships.

17 We're the only, California and Arizona
18 within the Ninth Circuit share that Mexican border,
19 and all of the challenges that come therefrom, in
20 terms of the immigration, in terms of the demographics
21 of our population.

22 We're going to be enjoying a similar

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1 growth curve, as far as everyone can predict, to
2 California. And indeed, a fair number of our people
3 in Arizona come from California, and have remained
4 there.

5 I think as Judge Browning can also attest,
6 in Arizona, being a comparatively small state, we have
7 grown up looking to California to fill the gaps where
8 we have not had precedents of our own -- we often look
9 to the re-statement or to California for guidance, and
10 have done so historically, as -- have members of the
11 Bar.

12 So, as you have invested your time and
13 energy in this important task, we hope you take these
14 remarks from the organized Bar in Arizona to heart, in
15 arguing -- to keep us with an undivided California.

16 ANNOUNCER WESTFELING: Thank you. Thank
17 you very much. And Judge Sidney R. Thomas of the
18 United States Court of Appeals for the Ninth Circuit.
19 And I just sat with this judge maybe a month ago, and
20 he -- he wouldn't think of moving to California. He
21 wants to stay in Montana. Good for you. (Laughter.)

22 JUDGE THOMAS: That is quite correct,

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1 Judge. This why, Members of the Commission, I
2 certainly appreciate the opportunity to testify. I am
3 Sid Thomas. I am a United States Circuit Judge of the
4 Ninth Circuit.

5 I share -- and I want to compliment, I
6 guess, Senator Gorton, and the other Northwest
7 Senators, including Senators Bacchus and Byrnes from
8 Montana for their long attention to improving judicial
9 administration in the west.

10 I think it is an important subject. The
11 Commission is a very valuable product of that concern,
12 and a -- (Unclear.)

13 I share many of those concerns,
14 particularly about the -- on the bench. And so, I
15 join the court with a very open mind about circuit
16 division. However, having seen it from both sides,
17 from the bench and from the practitioner's side, after
18 serving on the executive committee, the long range
19 planning committee, and the automation committee of
20 the circuit, I oppose circuit division.

21 I think that dividing the Ninth Circuit
22 would not solve or alleviate any of the problems that

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1 I have identified, and in fact would increase it.

2 I must say in passing, although I didn't
3 make this part of my written remarks, that I was very
4 surprised when I tried the Ninth Circuit at the
5 strength of its collegiality. It's a very warm court.
6 A very cordial relationships, very strong
7 relationships there.

8 And I really do believe that on a smaller
9 court, where you have strong personalities, you have
10 greater problems, of perhaps a -- lack of collegiality
11 than you do on a larger court. But I was surprised at
12 the strength of the court family. It's a very warm
13 court. And I was very proud to join it. I was
14 surprised at that aspect of it.

15 I was also surprised when I -- looking at
16 problems, particularly for that of the Northwest, that
17 they are not going to be solved by dividing the
18 circuit. The Northwest attorneys are primarily
19 concerned about delay. But dividing the circuit will
20 not improve delay.

21 And I say this for this reason, any
22 division of the circuit will involve duplicating

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1 unnecessarily clerical functions and those types of
2 function that -- which are critical. That means fewer
3 administrative resources. But the caseload is not
4 decreased. You're dividing the caseload, you're not
5 decreasing it. So, in any division, you're simply
6 allocating -- (Unclear.)

7 I think the problems of dividing the
8 circuit geographically are demonstrated by the vast
9 number of proposals that we've had to split the
10 circuit. Six in the last several sessions of Congress
11 alone.

12 There is the Northwest circuit that
13 Senator Gorton described, of Montana, Idaho,
14 Washington, Oregon, and Alaska. There is the what we
15 call the hopscotch circuit, which would be those
16 states, plus Arizona and Hawaii. The -- proposal,
17 which would divide California in half, and divide the
18 circuit north and south.

19 The Pacific Rim proposal, which would put
20 Montana and Arizona in the Tenth Circuit, and leave
21 the Pacific Rim states alone. The string bean
22 circuit, which would be the Northwest circuits, plus

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1 Nevada and California. And finally, the horse collar,
2 or horseshoe circuit, which would be a California-only
3 circuit.

4 I think the very number of proposals
5 indicates that there is simply no good way to divide
6 the present circuit. In analyzing this when I came on
7 the court, I thought really there ought to be five
8 factors or criteria that one ought to use in examining
9 whether or not a new circuit should be created.

10 First, the circuit should have critical
11 mass. It should have a sufficient number of cases to
12 justify creation. There should be a critical mass to
13 allow administrative support.

14 Second, any division ought to be
15 proportional. That is, the caseload ought to be
16 equally divided among the remaining circuits.

17 Third, there ought to be geographic -- we
18 shouldn't have a circuit such as the hopscotch
19 circuit, which would put Arizona away from,
20 geographically away from any other circuit.

21 Fourth, there ought to be jurisprudential
22 coherents. That is, there ought to be common laws,

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1 and common legal concerns.

2 And finally, it ought to increase judicial
3 efficiency.

4 I won't analyze all the proposals, as I
5 have in my written statement. First, the Northwest,
6 which is appealing to many practitioners in the
7 Northwest. The difficulty with the Northwest circuit
8 is that it lacks critical mass. It will only take 18
9 percent of the caseload.

10 Because budgets are divided by caseload
11 rather than by sheer number of circuits, that would
12 mean that we would only have 18 percent of the
13 resources. That would mean for practitioners in the
14 Northwest, they'd have the same number of cases per
15 judge, that something would have to be eliminated.

16 The Northwest would lose the bankruptcy
17 appellate panel, or it would lose the mediation unit,
18 which has resolved 500 cases plus a year. It would
19 lose the pro se unit, which has resolved thousands of
20 pro se cases a year, helped the circuit resolve those
21 cases.

22 It might well lose the circuit executive's

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1 office, which has provided administrative strength.
2 And it would increase the administrative burdens on
3 the remaining judges.

4 We have also lacked the capacity here in
5 the Northwest to engage in some of the video
6 technologies and computer technologies which will help
7 us in the future.

8 So, I think the Northwest circuit would
9 lack the critical mass. Only the First Circuit and
10 the D.C. Circuit would be smaller. It would also lack
11 proportionality, only 18 percent of the cases. That
12 would leave the remaining Ninth Circuit with 20
13 judges, and 82 percent of the cases, which is hardly
14 a good division if you're concerned about the size of
15 the circuit.

16 It would have jurisprudential coherence.
17 But it would also divide Montana from Arizona.
18 Montana and Arizona, particularly eastern Montana,
19 have many problems, in terms of Native American law,
20 in terms of water and mining, that are critical.

21 It would divide Montana from California.
22 Montana's relationship with California law, is much as

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1 Don Bivens described as Arizona's relationship with
2 California law.

3 So overall, it would not be an effective
4 use of resources. The Kruske Commission division
5 would divide California, and I agree with -- Sunny
6 Svetcov, that that's undesirable for California
7 practitioners. It's undesirable for the circuit, as
8 well.

9 Particularly when you look at initiatives,
10 which would be national attention and Congressional
11 concern. It would be a different -- potentially
12 different results in the northern division and
13 southern division of California, on the
14 constitutionality of initiatives, if the Kruske
15 Commission proposal were --

16 And therefore, even with a limited en banc
17 proposal, which would gear toward solving that
18 problem, some conflict would remain between north and
19 south. The Kruske Commission, though, is the only
20 proposal which divides the circuit proportionally.
21 Every other proposed division weights heavily in favor
22 of a California, whatever is left in California.

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1 I won't go through the remaining versions
2 of the circuit, but I guess -- I hope the Commission
3 will take a look at a criteria by which we ought to
4 divide it.

5 I see I'm just over my time, and I know
6 the importance of that, having been on the other side.
7 Let me just close by saying that I think the more
8 important solutions lie in terms of technology, by use
9 of video-conferencing, computers, we can bring the
10 circuit closer to practitioners. We're not there yet.
11 But I think with the use of that, we can decrease
12 delay, and if we put our resources there, we'll be
13 more efficient for it, more quickly --

14 CHAIRMAN WHITE: Thank you, Sidney. Are
15 there questions? Young man?

16 JUDGE BROWNING: I guess that's me. Judge
17 Thomas, I think earlier you said as a given, how big
18 is too big? At what point have we reached the
19 critical mass you've talked about?

20 JUDGE THOMAS: If you're talking about how
21 I was going to serve the growth?

22 JUDGE BROWNING: Yes.

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1 JUDGE THOMAS: I'm not sure. In a way,
2 it's sort of like asking how long is a string. But I
3 think that we can't grow indefinitely.

4 JUDGE BROWNING: But Congress has kind of
5 asked us how long is a piece of string.

6 JUDGE THOMAS: That's right. And we have
7 -- we have modified our request, and I think we're
8 only asking for 32 judges. I think we can operate
9 effectively for the foreseeable future with 28 or 32
10 judges.

11 Beyond that, I think, although
12 administratively on a three judge panel, if things
13 continue to work, I think from an en banc perspective,
14 things start to break down. So, there is a point
15 where it's simply too large to manage effectively.
16 But I don't think the federal judiciary should
17 continue to grow. I think we need to find other
18 solutions, and keep the size relative as it is --

19 CHAIRMAN WHITE: Thank you. (Pause.) Any
20 other questions?

21 PROFESSOR MEADOR: May I ask a question?

22 CHAIRMAN WHITE: Yes.

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1 PROFESSOR MEADOR: I would like to ask
2 this question of both Mr. Bivens and Judge Thomas.
3 What would be your reaction to the suggestion that Mr.
4 Svetcov made that the circuit be retained intact as a
5 whole administratively, but there be divisions
6 created, either two or three divisions, which would
7 function with an overall circuit en banc available?

8 MR. BIVENS: Professor -- this is Don
9 Bivens. I have only had the time to digest that
10 proposal this morning. It was certainly not
11 considered at the board of governors. From this
12 lawyer's perspective, I perceived no administrative
13 value to that particular suggestion, with all due
14 respect to my predecessor -- it seemed to me to be
15 adding two -- two layers of administration within the
16 circuit.

17 I would need to understand how that made
18 things better before I could speak anything to it.
19 From the perspective of maintain Arizona's
20 relationship with California, and with the entire
21 circuit, which I understood it to preserve, I guess we
22 would have to favor that over some of the other

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1 divisions. But I personally did not find that to be
2 a compelling suggestion.

3 JUDGE THOMAS: Professor -- I, too, find
4 the suggestion -- virtually unworkable and
5 undesirable. It's unworkable currently because we
6 don't have enough judges to go around. Currently 70
7 percent of our panels are comprised of visiting
8 judges, 90 percent comprised of seniors and visiting
9 judges.

10 You cannot, under our current structure,
11 where there aren't sufficient judges to say you have
12 two judges from any particular division, coupled with
13 one from another, it would reduce the number of
14 panels, it would increase the -- (Unclear.)

15 I think it's also undesirable for a couple
16 of reasons, even if we had enough judges. I don't it
17 solves anything, in terms of -- I think it reduces
18 collegiality. And in addition, if you, for example,
19 if you're talking about judges from the north and
20 south sitting -- being entire segregated, it reduces
21 the flexibility of the court to deal with problems.

22 Currently, we have a large death penalty

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1 problem between the north and the south. About 90
2 percent of the death penalty cases are located in the
3 south, and about ten percent in the north. We're
4 going to need to devote judicial resources to that,
5 and Congress has mandated to do so.

6 There is a strict division, and lack of
7 flexibility. I think we need -- (Unclear.)

8 MR. SVETCOV: May I respond, if I may?

9 CHAIRMAN WHITE: Shortly.

10 MR. SVETCOV: We currently have two
11 clerk's offices, one in Pasadena, and one in San
12 Francisco, predominantly San Francisco, to be sure.
13 But the divisions could be operated out of the two
14 existing clerk's offices, no additional facilities.
15 So, administratively, it's doable.

16 Operationally, I'm not suggesting discrete
17 panels, strictly north and south. We could draw
18 judges, one judge from the south, senior judges and
19 district judges from the region count as part of the
20 -- the judges from whom you would draw. And I
21 specifically addressed the collegiality question by
22 not having strict panels.

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1 So, maybe it's not a suggestion whose time
2 has not come, but all I have heard this morning are
3 the two extremes. Leave us alone and do nothing
4 and/or split it in some way that, none of which is
5 acceptable to anyone, including myself, who has tried
6 to figure out a way of dealing with the problem.

7 My suggestion for operating divisions is
8 an experiment that was used in the Fifth Circuit as a
9 prelude to a split. I think there must be a fear that
10 it's a slippery slope. I don't see it that way. I
11 think it can operate long-term in the division.

12 CHAIRMAN WHITE: It seems to me like you,
13 in your writing, feared to leave the status quo alone
14 because of what Congress would do.

15 MR. SVETCOV: Well, we've already seen the
16 kinds of --

17 CHAIRMAN WHITE: Well, is that true? Is
18 that true? You're trying to head off a bad split of
19 the Ninth Circuit?

20 MR. SVETCOV: Candidly, yes.

21 CHAIRMAN WHITE: Okay.

22 JUDGE RYMER: Mr. Svetcov, have you had

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1 any personal, professional experience with the, I
2 believe it's Division Two of the California Court of
3 Appeals, which in fact, in the greater Los Angeles
4 metropolitan area, as I understand it, operates on a
5 division principle. And I wondered whether you had
6 any notion of how that was received by the Bar?

7 MR. SVETCOV: Quite frankly, Judge Rymer,
8 the divisions there are divisions of three judges
9 each.

10 JUDGE RYMER: I understand. But that is
11 just fortuitous. It could be divisions of three, six,
12 nine, twelve, fifteen, operating effectively,
13 contiguously throughout any given geographic area.

14 MR. SVETCOV: Judge Rymer, in fact, that
15 is true in other divisions in California. For
16 example, in Sacramento, for the region that that
17 involved there, there are, I think, eight or nine
18 judges who sit randomly in panels of three, but
19 they're drawn from a group of nine.

20 JUDGE RYMER: Yes.

21 MR. SVETCOV: Similarly in San Jose.
22 Similarly in the Fresno Division. So, these divisions

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1 of about nine judges seem to operate effectively and
2 efficiently in California. Yes. That's true.

3 JUDGE RYMER: Yes. What I am interested
4 in, the kernel of your idea, as much as I am in its
5 actual specifics. In other words, if I understand you
6 correctly, what you're really saying is that it would
7 be possible to have the circuit, the Court of Appeals,
8 administratively set up in divisions. Whether they
9 were floating up and down the circuit, or whether they
10 were geographically oriented, but serviced as a whole
11 by the circuit administrative structure.

12 MR. SVETCOV: Correct. And by the
13 circuit's limited en banc structure. And I think that
14 I would leave it to the court -- the circuit itself to
15 decide the best way to operate the divisions, and do
16 it by internal rule of the court, which I think you
17 can do.

18 JUDGE RYMER: Thank you.

19 MR. SVETCOV: Thank you.

20 CHAIRMAN WHITE: I think -- are we taking
21 a break?

22 STAFF: One more panel. I think there's

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1 one more panel.

2 (Whereupon, a recess was taken.)

3 GOVERNOR LOCKE: Thank you very much, Mr.
4 Justice White, and the other distinguished members of
5 the Commission. I thank you very much for this
6 opportunity to appear before you on the structure and
7 the administration of the Federal Courts of Appeals.

8 First and foremost, I do not believe that
9 this is an issue that should be dealt with in
10 political terms. Nationally, the Federal Courts
11 should be structured and operated in a way that
12 results in a timely, efficient, and uniform justice.
13 Short term political issues should not be given
14 weight. And our Washington State attorney general
15 Christine Gregoire is in agreement with me on these
16 points.

17 An important question being addressed by
18 the Commission is whether the Ninth Circuit should be
19 divided, so I'll focus my testimony on that particular
20 issue. Washington State has a strong interest in
21 maintaining the current unified structure of today's
22 Ninth Circuit. Our state is part of a geographical,

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1 economic, political, and historical fabric that is
2 woven from throughout the western and Pacific states
3 and territories.

4 In looking back, it's evident to me that
5 we have benefitted from sharing the same Ninth Circuit
6 Court of Appeals. Looking forward to the future, I'm
7 even more convinced that single body of precedent
8 makes sense, and that splitting the circuit would be
9 a wrong move.

10 Washington is tied to other states and
11 territories in the Ninth Circuit in a variety of ways.
12 Washington, Oregon, and California share a contiguous
13 coastline, and therefore share, and sometimes compete,
14 and conflict, on issues relating to coastal fish and
15 wildlife, commercial ports, and maritime law.

16 These three states, plus Alaska, Hawaii,
17 and the Territories share the Pacific Ocean, and many
18 of the same concerns. Washington, Oregon, Idaho, and
19 Montana share the Columbia Snake River Basin, the
20 backbone of the Northwest, with its salmon, its hydro-
21 electric dams, its barges, and water for irrigation
22 and recreation.

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1 Our electric system, including the Federal
2 Bonneville Power Administration, is part of an
3 electric power grid that quite literally binds the
4 entire western United States.

5 Washington, Oregon, Montana, and Alaska,
6 share borders with Canada, along with California,
7 which borders Mexico. And so, we all share particular
8 concerns about immigration law and commerce along our
9 international borders.

10 My point is this, if we were to split up
11 the Ninth Circuit, we could cut the cake in many ways.
12 But why cut the cake? Given the ties among the
13 states, the Ninth Circuit is a case where the whole is
14 greater than the sum of its parts could ever be.

15 Arguments that the Ninth Circuit does not
16 function well are not compelling. And I'm convinced
17 by the ample rebuttal to those arguments made by
18 people intimately familiar with the courts that the
19 administrative problems can be remedied without
20 dividing the court.

21 And I'm here to testify about concerns on
22 a different level. Washington and the Northwest are

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1 closely tied to California and the other western
2 states. Washington is home to many major
3 corporations, whose products, I'm willing to bet, we
4 have all used and enjoyed, even within the last few
5 days.

6 How many people fly on a Boeing airplane?
7 How many people have sipped a Starbuck's latté?
8 Shopped for clothes or shoes at Nordstroms? Stayed in
9 a house or a hotel built with Weyerhauser lumber,
10 although you might not recognize it? Or even used
11 Microsoft software?

12 We are proud of these businesses. But we
13 recognize that they are part of a national, and
14 indeed, a world economy. And as you know, if
15 California were a country, a separate nation, it would
16 be the ninth largest nation in the world, as measured
17 by gross national product.

18 Those who see California as a liability,
19 in my belief, have too narrow a view. California is
20 an integral part of the western and Pacific states,
21 and is an important economic partner. All the more
22 reason for uniformity in the case law between

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1 Washington and California.

2 It would not benefit Washington to see
3 California become part of another circuit, with
4 conflicting case opinions, and forum shopping, that
5 separate circuits would produce. I'm thinking of
6 cases relating to immigration law, labor law,
7 Endangered Species Act, the Bonneville Power
8 Administration, maritime law, and tribal treaty law.

9 The western states are not -- they are
10 tied together by geographic, natural resource,
11 economic, and legal issues. Issues that are
12 distinctive to the west. It is a virtue, not a vice,
13 that the Ninth Circuit is able to bring consistency
14 and coherence in all of these areas of law as they
15 apply to the states and the territories of the
16 circuit.

17 If the circuit were divided, there would
18 be unnecessary, friction, forum shopping, competitive
19 advantages and disadvantages among states in different
20 circuits. There would be conflicts in the laws that
21 apply to fish, which know no boundaries, commerce that
22 is traded up and down the coast, and people who work,

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1 play, and emigrate throughout the Pacific Northwest.

2 It is a virtue, not a vice, that the Ninth
3 Circuit's judicial panels are drawn from large and
4 geographically diverse pool of judges, ensuring a
5 broad, not parochial approach to how federal law is
6 applied within our region.

7 I think these virtues will become even
8 more evident in the future, especially as the United
9 States Supreme Court finds it increasingly difficult
10 to review and resolve all of the conflicting cases
11 from the various circuits.

12 The twenty-first century will ties all of
13 us closer in many ways. Technology will increase our
14 communication. Multiple demands for limited natural
15 resources will force us to allocate them more wisely,
16 and in a cooperative fashion. And commerce will
17 become seamless across international borders.

18 So, we should not be guided by short-term
19 political concerns. But rather, we should take the
20 long term look at the future. In that regard, we are
21 well served by a unified, integrated, well-run Ninth
22 Circuit Court of Appeals that we have.

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1 Thank you very much. I want to thank you
2 for coming to Washington to hear our views.

3 CHAIRMAN WHITE: Thank you, Your Honor.
4 You're -- I understand you are on a sort of a short
5 schedule. Would you care to withdraw?

6 GOVERNOR LOCKE: Yes. I'm more than happy
7 to entertain any questions that you might have. But
8 again, I want to thank you for coming to our state,
9 and soliciting our views.

10 CHAIRMAN WHITE: All right. Do you have
11 any questions?

12 (Multiple voices.): No, sir.

13 GOVERNOR LOCKE: And who is following you?

14 UNIDENTIFIED: I'm Governor's counsel.
15 I'm not going to speak.

16 CHAIRMAN WHITE: Oh, okay.

17 GOVERNOR LOCKE: Thank you very much, sir.

18 CHAIRMAN WHITE: Thank you, sir. And good
19 luck to you. (Pause.) Boy, we're honored.

20 MS. GREGOIRE: My pleasure to be here. I
21 had expected to be in Washington, D.C., and was
22 allowed to stay home, and so I came myself.

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1 CHAIRMAN WHITE: Great.

2 MS. GREGOIRE: Justice White and Members
3 of the Commission, I am Christine Gregoire, the
4 attorney general for the State of Washington. I have
5 been attorney general since 1993. And I have served
6 in the Washington state attorney's general office
7 since 1975.

8 Let me say first, thank you very, very
9 much for holding this hearing, and for undertaking
10 this very important task.

11 We are in challenging times today. Our
12 public's confidence in our justice system is low for
13 a number of reasons, but noticeably because of the
14 time and the cost involved in seeking justice.

15 My purpose here today is not to urge you
16 in any way, shape or form to lend an ear to those who
17 politically want to divide the Ninth Circuit, to those
18 who want to philosophically divide the Ninth Circuit.
19 But my purpose here today is to say that we must
20 insure that we do everything we can to restore public
21 confidence in our federal appellate system to meet the
22 needs of our public here in the Ninth Circuit now, and

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1 into the future.

2 The statistics are revealing with regard
3 to the Ninth Circuit. It includes nine states, and
4 two territories, larger than any other circuit.
5 Geographically, it covers 14 million square miles,
6 Alaska to Mexico, Montana to Hawaii. This is
7 comparable to all of western Europe. It consists of
8 45 million people, with the next largest circuit at
9 less than 29 million people.

10 It is the fastest growing in terms of
11 population, with an expected 40 percent increase in
12 growth of our population over the next 15 years. At
13 28 authorized judge-ships, it is by far the largest,
14 well above the 12.6 average of all the other circuits.

15 The challenge with size is clear. There
16 is a challenge for those who are members of the Ninth
17 Circuit in terms of collegiality. The travel time,
18 and costs, involved with that geographics.
19 Familiarity with the state laws with the respect of
20 the nine states and the two territories. The ability
21 of the judges to stay on top of the circuit decisions.
22 The humongous workload, and it's a growing workload.

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1 En banc, and its ability to fulfill its
2 intended purpose. What is an en banc hearing in the
3 Ninth Circuit? The rates of review and reversal are
4 staggering. And domination by one state, 27 percent
5 of those heard in the Ninth Circuit are the Central
6 District of California.

7 The Ninth Circuit should be applauded. It
8 has worked very hard to manage itself, and its growth,
9 and the volume of the workload. And under the
10 circumstances, it must be commended. All of these
11 issues have been exacerbated by the vacancies, and the
12 failure to timely fill and replace those judicial
13 vacancies in the Ninth Circuit.

14 This has been an untenable situation for
15 the citizens and the practitioners of the Ninth
16 Circuit.

17 In no set of cases in my office is
18 timeliness a greater problem than that of capital
19 cases, and it is the one area I wish to bring to your
20 attention specifically. By way of example, it took
21 over six months from the bringing of the schedule to
22 the notice of appeal, six months elapsed.

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1 In another case, a very notorious capital
2 case in Washington State, it took five years to
3 process a single decision. Out of frustration, my
4 office has asked the U.S. Supreme Court to urge the
5 Ninth Circuit to take a position, and make a decision
6 in that particular case.

7 The attorneys general of the Northwest are
8 united in requesting your review, out of concern for
9 the future. While the Ninth Circuit has done a
10 commendable job with what it has to deal with today,
11 with that 40 percent growth projected over the next
12 fifteen years, that in and of itself I think is very
13 telling for the future of the Ninth Circuit.

14 With an increasing population, and a
15 resulting caseload, we urge you to look at what the
16 ramifications will be to the Ninth Circuit over the
17 course of the next fifteen years.

18 We ask for a thoughtful review of the
19 entire federal appellate system for uniformity.
20 Clearly, the Ninth Circuit is not consistent, or
21 uniform, in terms of size, or geography, or workload,
22 or judicial appointments.

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1 We need to ensure the timely filing of
2 vacancies by the White House and the Congress. And we
3 would ask you as at least a footnote to urge that this
4 is ensured to occur in the future. Politics,
5 conservative and liberal, philosophically, those
6 issues we believe have no issue before you, no purpose
7 before you.

8 We ask that you look at the timely and
9 affordable processing of justice to the citizens of
10 the Ninth Circuit, and to our nation. And what that
11 calls for is a look, not just today, as to whether the
12 Ninth Circuit is meeting the needs of those citizens,
13 but what the future holds, with that increased,
14 workload increased population.

15 Again, thank you very, very much. For
16 your willingness to undertake this project is
17 extremely important to the public confidence of the
18 citizens of this state, and to the other states, and
19 the two territories of the Ninth Circuit. Thank you.

20 CHAIRMAN WHITE: Do you want to go ahead?

21 COMMISSIONER: General Gregoire, if the
22 tenor of your remarks that the Ninth Circuit is

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1 functioning well today, but is doomed to failure in
2 the future because of growth?

3 MS. GREGOIRE: I have joined with my
4 colleagues, five colleagues, we issued a letter saying
5 we need to look at splitting up the Ninth Circuit. My
6 greatest concern today, in terms of timeliness, and
7 ability to process the issues lie in capital cases.

8 The experience in my office with regard to
9 the civil cases is one that we don't think we're
10 particularly out of sync with the rest of the country.
11 So, today they have taken extra-ordinary efforts to
12 deal with their caseload.

13 But we do not believe in any way shape or
14 form they will be able to do so with the projected
15 growth in the Ninth Circuit in the future.

16 COMMISSIONER: So, if we were to wait for
17 the crisis to fully develop, what does your remark
18 mean? That we should look at the Ninth Circuit with
19 an eye towards restoring confidence in the federal
20 decision making process occurs?

21 MS. GREGOIRE: Well, I would implore you
22 not to wait until the crisis occurs. I think the

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1 timing of this commission is absolutely perfect,
2 because we can project out, and see what the future
3 holds for us.

4 So, I think the timing for you to make a
5 decision and a recommendation is now. It doesn't have
6 to happen tomorrow. But it does have to happen, and
7 we do have to put ourselves on a course, to make it a
8 thoughtful way, to process a division of the Ninth
9 Circuit, so that we can meet the needs of the public
10 at large in the Ninth Circuit.

11 CHAIRMAN WHITE: So what is it -- so, what
12 is your suggestion that we do?

13 MS. GREGOIRE: Well, I'm not into the,
14 should it be the Northwest states? Should it be
15 California, and the few territories, and Hawaii? I
16 don't have an opinion as to how the circuit should be
17 divided. But very clearly, to meet the needs of our
18 citizens, it must be divided, in my estimation, in a
19 thoughtful way for the future.

20 How that division occurs, I remember the
21 -- commission in which it said no less than three
22 states. But again, that issue is for you to decide

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1 today, as to whether that is even an appropriate
2 course, in light of the humongous amount of cases that
3 are being sent to the Ninth Circuit by way of
4 California alone. But I would hate to see one circuit
5 for one state. I do believe there should be a joining
6 of the territories and at least a couple of states
7 with California, and potentially the rest of the
8 states being the separate circuit.

9 CHAIRMAN WHITE: Could I ask you a
10 different question? Have you taken a stand as the
11 attorney general to oppose the Congressional effort to
12 expand the -- to expand the jurisdiction of the
13 federal courts into what usually has been state
14 business?

15 MS. GREGOIRE: I have not. To be
16 perfectly honest with you, I believe, as an aside, I
17 have not taken a position at this point. But I
18 believe that the federal court system is that
19 sufficient, frankly, with which it must deal. And I'm
20 not talking alone to the Ninth Circuit. I'm talking
21 about all of the circuits.

22 CHAIRMAN WHITE: But I don't think -- it

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1 seems to me that unless -- unless people who know what
2 they're talking about attempt to stop this trend,
3 we're in bad shape. And so, maybe you could get your
4 association to do something about it.

5 MS. GREGOIRE: I serve as president-elect.
6 I will be president the next two years.

7 CHAIRMAN WHITE: (Laughs.)

8 MS. GREGOIRE: And to be honest with you,
9 one of the major issues that I will be confronting, as
10 president of the National Association of Attorneys
11 General, my agenda will be, how do we insure
12 restoration of public confidence in the justice system
13 with a full view of what it is attorneys general
14 around the country need --

15 CHAIRMAN WHITE: Well, they're just taking
16 away -- they're invading your territory.

17 MS. GREGOIRE: And obviously the National
18 Association would oppose such effort. But I will urge
19 my colleagues to get involved with this issue.

20 JUDGE BROWNING: You came here to lobby
21 Justice White, and it appears he's lobbying you now.
22 (Laughter.)

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1 MS. GREGOIRE: I see this. I see this.
2 (Laughs.) Effectively.

3 COMMISSIONER: At previous public
4 hearings, the Commission has heard the point made that
5 there is, or should be, a distinction between the
6 circuit and the Court of Appeals. And we've had
7 several different proposals along the way to organize
8 the Court of Appeals into geographical divisions. And
9 we heard that again this morning earlier before you
10 got here.

11 What would be your reaction to the
12 proposal of organizing the Court of Appeals into, say,
13 three divisions, a northern, central, southern
14 division, while retaining the circuit as an
15 administrative territorial unit intact?

16 MS. GREGOIRE: You know, I -- I hadn't
17 heard that proposal before. I'd like the opportunity,
18 if I could, to review it, and think more about that
19 before I give you an opinion -- a position on that
20 today. If you would allow me to supplement my
21 remarks, I would be happy to think -- I want to do
22 that in a much more thoughtful way than just

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1 responding to you right now.

2 CHAIRMAN WHITE: All right. You may
3 inform yourself -- Dan, isn't it the first speaker in
4 that line of -- ?

5 PROFESSOR MEADOR: -- Svetcov?

6 CHAIRMAN WHITE: Yeah.

7 PROFESSOR MEADOR: Yes. As you may know,
8 the testimony, written testimony at all previous
9 public hearings is on the Commission's Web site. It's
10 available there. You can have access to that. Sandy
11 Svetcov this morning, he made this point in his
12 testimony this morning.

13 MS. GREGOIRE: Okay. I will. Thank you.

14 COMMISSIONER: General Gregoire, may I ask
15 one other question. We all know that capital cases
16 receive intense and considerable scrutiny at every
17 level of the process, state and federal.

18 Other than capital cases, is there any
19 under-current in your office, or do you have any
20 feeling about how the Ninth Circuit transacts its
21 business, and how effective it is? And whether, for
22 example, there are undue numbers of inter-circuit

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1 conflicts, or intra-circuit conflicts?

2 Do your assistants bring those subjects to
3 your attention? And what is the general under-
4 current?

5 MS. GREGOIRE: Right. We -- I have about
6 440 lawyers that practice in my office, and we have a
7 number of cases before the Ninth Circuit. I surveyed
8 all of my lawyers with respect to this issue, and I
9 got no issue with respect to the civil cases that are
10 paneled by the Ninth Circuit Court of Appeals.

11 Very clearly, the dominant concern was
12 with respect to capital cases. And unfortunately,
13 there was a very notorious case that has occurred on
14 my watch as attorney general in which the Ninth
15 Circuit has held the case for five years, with no
16 issuance of any opinion.

17 And there was a public outrage here about
18 that. That is one example. That is not the only
19 example. But with respect to the civil cases, with
20 all of the issues that you've just addressed, I've
21 gotten no complaints from my lawyers. We may be a
22 little bit out of sync, in terms of, say, three to six

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1 months longer than the other circuits in some cases.

2 We didn't think that that was a sufficient
3 concern to bring to your attention. And in
4 particular, because of our conference of western
5 attorneys general this past summer, we invited one of
6 the judges from the Ninth Circuit to come talk to us.

7 And we shared our concerns. And they've
8 taken action to try and address those concerns. So,
9 we've been pleased with their attempts to address it.
10 So, my position today is not that I have a problem
11 today.

12 I can't imagine, with the increased
13 workload, increased population projected in those nine
14 states, the two territories, over the next fifteen
15 years, that the circuit can even remotely be able to
16 handle it, in terms of all of the issues that I
17 identified for you in terms of size. So, my concern
18 lies with the future.

19 COMMISSIONER: Thank you.

20 CHAIRMAN WHITE: Is the Ninth Circuit's
21 workload increasing very much?

22 MS. GREGOIRE: Dramatically.

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1 CHAIRMAN WHITE: Where?

2 MS. GREGOIRE: Well, predominantly,
3 frankly, out of California. If you look at --

4 CHAIRMAN WHITE: In the south, I take it.

5 MS. GREGOIRE: Right. If you look at the
6 central district, it now has some 27 percent of the
7 total workload of the Ninth Circuit.

8 CHAIRMAN WHITE: Yeah. And what about
9 your jurisdiction?

10 MS. GREGOIRE: Ours is increasing. But it
11 is not -- it is not dramatic, like what you find --

12 CHAIRMAN WHITE: It's what, one or two
13 percent, or -- a year, maybe? Or -- ?

14 MS. GREGOIRE: Or probably more than that,
15 Your Honor. But -- but again, it is not dramatic,
16 like what you --

17 CHAIRMAN WHITE: Well, it isn't what it
18 used to be. (Pause.) Thank you very much.

19 MS. GREGOIRE: Thank you very much.
20 Again, I appreciate the opportunity.

21 CHAIRMAN WHITE: All right. (Pause.)
22 Who's -- ?

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1 COMMISSIONER: I guess Mr. Lance, from the
2 attorney general of Idaho.

3 CHAIRMAN WHITE: Mr. attorney general?

4 MR. LANCE: Good morning, sir. Mr.
5 Justice White, distinguished members of the
6 Commission, I would like to thank you for the
7 opportunity for Idaho to speak here today.

8 I will say at the commencement that I have
9 been authorized by my governor, Phillip E. Bath to
10 convey the remarks that I am about to convey. And he
11 and I are in total concert relative to the desire and
12 necessity of dividing the Ninth Circuit Court of
13 Appeals into additional circuits.

14 Let me commence by saying that of course
15 the average case stays with the Ninth Circuit for
16 about 14.4 months. It's the longest of any circuit.
17 The Second Circuit has the least time average, at 8.5
18 months. And I think the parallel here is the Fifth
19 Circuit, which was divided a few years ago. And
20 presently, their workload is turned around at an
21 average of 9.9 months.

22 In September of 1995, there were five of

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1 us attorneys general signing off on the concept of
2 dividing the Ninth Circuit. Attorney general Bothelo
3 of Alaska, attorney general Zurich of Montana, my
4 colleague Chris Gregoire appeared in the State of
5 Washington. The attorney general of Oregon, and
6 myself.

7 Since September of 1995, I find no reason
8 to withdraw or retreat from that request that the
9 circuit be divided. I have prepared my written
10 statements, and I had a very speech prepared by my
11 staff.

12 But listening to the inquiry of the panel
13 this morning to some of the previous speakers, one of
14 the questions that I detected was, how does one divide
15 up the Ninth Circuit in a fair, and equitable, or
16 reasonable manner?

17 Senator Groton from Washington here, I
18 believe, had a proposal that would be consistent with
19 my thoughts on the matter. But I would like to point
20 out a couple of things. In Idaho, we are engaged in
21 the Snake River Basin adjudication, which is the
22 largest adjudication in the United States, to my

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1 knowledge.

2 Presently, we have 185,000 claims pending.
3 And we are discerning -- determining the water rights
4 of all of the litigants, to all of the water in the
5 State of Idaho, to include the federal government, and
6 agencies of the federal government.

7 We have common, too, of course, Oregon, as
8 well as Washington, and with interests in Montana, the
9 Columbia River Basin. And of course, the Columbia
10 River Basin is the subject of some discussion
11 recently, relative to dam breaching. Some discussion
12 relative to the recovery of salmon, steel-head runs,
13 and things of that nature. There is a commonality.

14 One of your witnesses this morning was
15 speaking about the prospect of Canadian immigration,
16 and failed to mention the fact that we and Idaho also
17 have a common border, of course, with the country of
18 Canada.

19 Some of the tribal issues that we
20 experienced in the northwest, Pacific Northwest,
21 dealing with our tribes, are very common, relative to
22 Washington, Montana, Idaho, and Oregon. We have

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1 before us the prospect of electrical de-regulation,
2 and the Bonneville Power Authority. And we believe
3 that there's a certain commonality of issues in
4 Montana, Idaho, Washington, and Oregon.

5 And lastly, to say that we have federal
6 lands in Idaho that are presently under federal
7 management. Sixty-seven percent of our land mass is
8 under federal management, or federal agencies.
9 Alaska, I believe, has a number that is greater than
10 that. And of course, Nevada does, as well. And we
11 anticipate that there will be several issues in the
12 immediate future that deal with those issues.

13 So, in short, my request of you is to, A,
14 divide the Ninth Circuit, to make it more efficient
15 and more wieldly, and do it now, rather than later.
16 B, precisely how you choose to do it, or how you
17 choose to recommend to do it is certainly your
18 prerogative. But I pointed out, I believe, some areas
19 where we have a commonality of interests in the
20 Pacific Northwest states.

21 And with that, sir, I submit myself to
22 your comments.

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1 CHAIRMAN WHITE: Well, I wish it were our
2 decision. But it's the Congress of the United States
3 that is going to make the decision.

4 MR. LANCE: I'm sure they'll go along with
5 whatever you recommend. (Laughter.)

6 CHAIRMAN WHITE: Go ahead.

7 COMMISSIONER: I don't have any questions.
8 Thank you.

9 COMMISSIONER: Thank you all very much.

10 CHAIRMAN WHITE: Barbara Ritchie, the
11 deputy attorney general of Alaska.

12 MS. RITCHIE: Thank you.

13 CHAIRMAN WHITE: You may proceed.

14 MS. RITCHIE: My name is Barbara Ritchie.
15 I am the deputy attorney general for the State of
16 Alaska. And I want to thank you for the opportunity
17 to testify today, and present the views of the State
18 of Alaska.

19 Attorney general Bruce Botelho was
20 originally scheduled to testify today, and this issue
21 is very important to him. However, our governor
22 requires his presence at a special session of the

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1 Alaska legislature, which began yesterday afternoon,
2 to take up another very difficult and very decisive
3 issue, at least in our state, that of subsistence
4 hunting and fishing rights.

5 As requested, I will summarize the
6 essential point of our written statement, why the
7 State of Alaska believes that the Ninth Circuit should
8 be split.

9 CHAIRMAN WHITE: Would you say that again?

10 MS. RITCHIE: Excuse me. Why the State of
11 Alaska believes that the Ninth Circuit should be
12 split. We believe that the Ninth Circuit should be
13 split to create a new circuit that are composed of
14 states that are more alike in population, and social
15 and economic factors. The circuit is simply too big
16 to equitably and effectively resolve its cases in a
17 timely manner.

18 The court's vast and diverse geographical
19 area, and the large and growing population of the nine
20 states and two territories it encompasses have made
21 the circuit too large in terms of the number of judges
22 and the number of cases it must handle.

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1 Because of the relatively few number of
2 Alaska cases, and the many significant differences
3 between our state and the heavily populated states in
4 the circuit, the judges assigned to Alaskan cases are
5 often not familiar with Alaska's unique issues, its
6 people and culture, and the complex and specialized
7 matrix of laws that apply to Alaska.

8 As the Commission members know, the Ninth
9 Circuit is the largest in the nation. It serves a
10 population of 45 million people, fifteen million more
11 than the next largest circuit. The Court's filings
12 are more numerous than any other circuit, and there
13 are also more judges in the Ninth Circuit, 28,
14 compared to seventeen in the next largest circuit.

15 How does all this affect Alaska? Alaska's
16 impact on the Ninth Circuit caseload is truly dwarfed
17 by the more populated states in the circuit. Alaska,
18 with its population of six hundred and six thousand
19 generated only two percent of the Court's cases in
20 1997.

21 Given the relatively few Alaska cases,
22 Alaskan litigants are far less likely than litigants

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1 in the heavily populated states to draw panels with
2 judges who are familiar with their state.

3 Not only is Alaska remarkedly different
4 socially, economically, and geographically, from the
5 heavily populated states in the circuit, but Alaskan
6 cases often involve complex federal statutes that the
7 judges do no encounter in the other 98 percent of
8 their cases.

9 Most notably the Alaska Native Claims
10 Settlement Act, which granted 44 million acres of
11 lands to corporations owned by Alaska natives, and the
12 Alaskan National Interest Lands Conservation Act,
13 which added over 104 million acres of lands to the
14 federal conservation -- units in Alaska.

15 In order to reach just results, the Court
16 must have a good degree of understanding about its
17 constituency, so that it can appreciate the legally
18 relevant facts of the case. Many aspects of life in
19 Alaska are very different than any other western
20 states. But this may not be readily apparent to a
21 judge from California or Arizona reading a brief.

22 To highlight just some of our differences,

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1 and to give you a little insight into Alaska's
2 geography and -- people, I have compiled for you some
3 Alaska facts that I have entitled, "Alaska: It's Hard
4 to Imagine". And I have left copies of these with the
5 clerk, that will be in your packets.

6 Alaska, with an area of 586,400 square
7 miles, is more than one fifth the size of the
8 contiguous United States. Its coastline is longer
9 than all of the other 48 states combined. Yet Alaska
10 has only 12,200 miles of public roads, about the same
11 as the State of Vermont.

12 Less than one third of our recognized
13 communities are connected to the road system. The
14 rest are accessible only by boat, plane, snow-shoeing,
15 or dog sled. Even the town I'm from, June, the state
16 capital, and with 30,000 people, the third largest
17 city in our state, is not accessible by road.

18 And many of our communities are remote
19 native villages, with populations of under 300 people.
20 Thus, in Alaska, an easement or river might have the
21 significance given to a major highway in another
22 state.

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1 Independent thinking, living off the land,
2 and overcoming challenges presented by isolation and
3 vast distances between communities are all central
4 elements of the collective identity and experience of
5 Alaskans.

6 Regardless of how well attentioned the
7 judges may be, if their opinions reveal a lack of
8 depth of understanding about a people or a place, the
9 result -- patronizing or even offensive.

10 I'd like to take a moment to explain one
11 aspect of a case that illustrates our point. The
12 Alaskan National Interests Lands Conservation Act
13 grants priority for hunting and fishing for
14 subsistence purposes to rural residents in Alaska.

15 The case raised the issue of whether the
16 Keenai peninsula, an area on the road system in south
17 central Alaska, is rural. In Alaska, rural has a
18 definite and well understood meaning. Rural Alaska
19 means bush Alaska. Self-dependent, isolated
20 communities that are generally un-connected to
21 Alaska's roads or railways.

22 The state defined the term to encompass

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1 these communities by excluding areas characterized by
2 -- (Unclear.) The Ninth Circuit rejected the state's
3 interpretation out of hand, calling it an exotic and
4 unusual. The judges cannot conceive that rural might
5 have a different meaning in Alaska than it does in the
6 realm of their experience.

7 The Court remarked that the term rural is
8 not a term of art, but is, and I quote, "A standard
9 word in the English language commonly understood to
10 refer to areas of the country that are sparsely
11 populated, where the economy centers on agriculture or
12 farming."

13 Rural simply does not have that meaning in
14 Alaska. Alaskans worked closely with their
15 Congressional delegation drafting this provision of
16 the federal act. The Ninth Circuit's failure to lend
17 any deference to the state's interpretation, and
18 instead to impose on Alaska its perceptions of the
19 word, changed the scope and impact of the statute.

20 Undoubtedly, the Court was more
21 intentioned, but its lack of understanding of Alaska
22 was so evident that regardless of the equity of the

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1 result, the decision made Alaskans feel alienated.

2 In summary, in order to be well served by
3 a federal court of appeals, a state must be either
4 sufficiently populated to generate enough cases so
5 that each judge frequently hears one, or similar
6 enough to the more populated states, so that
7 infrequent contact by the judges is inconsequential.

8 Compared to the heavily populated states
9 of the Ninth Circuit, Alaskan are neither frequent,
10 nor similar. For these reasons, we urge that the
11 Commission recommend to the President and Congress
12 that the Ninth Circuit be split to combine the more
13 similarly situated states into a new circuit.

14 This would enable speedier and more
15 consistent rulings by judges who would have a greater
16 familiar with the social, geographical, and economic
17 life of the region.

18 Thank you for your time and attention
19 today.

20 CHAIRMAN WHITE: Do you have suggestion
21 about how it should be split, other than that you
22 would like some judges that understand a little bit

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1 more about Alaska?

2 MS. RITCHIE: Your Honor, like my
3 colleagues from Washington and the State of Idaho, I
4 didn't come today with a specific proposal. Our
5 attorney general, along with the other attorney
6 generals in the Pacific Northwest, has supported a
7 split -- Ninth Circuit, that would combine Washington,
8 Oregon -- Washington, Idaho, and Montana.

9 Having done some reading on this issue
10 before coming down, I can perceive there have been
11 many, many various options for looking at re-
12 configuration of the Ninth Circuit proposed, all of
13 which have been --

14 CHAIRMAN WHITE: And there are some
15 problems about your suggestion.

16 MS. RITCHIE: Right. I realize that. I
17 think, our main points are simply to try to come up
18 with an improvement configuration that would make the
19 residents of our state and states more similarly
20 situated to Alaska feel more in touch with the federal
21 court system that is serving their communities.

22 CHAIRMAN WHITE: Does Alaska have a judge

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1 on the Court of Appeals?

2 MS. RITCHIE: Yes. It does.

3 CHAIRMAN WHITE: And who is that?

4 MS. RITCHIE: We have Judge Kleinfeld, and
5 Senior Judge Bucheber.

6 CHAIRMAN WHITE: And those two judges are
7 old enough to educate some friends?

8 MS. RITCHIE: (Laughs.) Well, I'm sure
9 they're doing their best.

10 CHAIRMAN WHITE: All right.

11 COMMISSIONER: Ms. Ritchie, let me ask a
12 question. You talk about the interpretation of rural
13 in a Ninth Circuit opinion. Was that word used in a
14 federal or state statute?

15 MS. RITCHIE: Your Honor, that was a
16 federal statute, the Alaska --

17 COMMISSIONER: Well, is regionalism
18 important when judges are interpreting federal law,
19 and announcing federal law? Our -- the Court of
20 Appeals judges I have known are unfortunately very
21 able to read federal law and decide what it means.

22 And if they are going to come to the wrong

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1 result, probably the oral argument process exposed
2 this line of thinking about what rural might have
3 been. And wouldn't you think that if it were that
4 distinctive and unique, it would be the lawyer's
5 responsibility to bring that to the Court's attention?

6 MS. RITCHIE: Your Honor --

7 COMMISSIONER: In a case like that?

8 MS. RITCHIE: Certainly important is the
9 lawyer's obligation. I think our point is that to be
10 -- equitable and just result, however, it would
11 greatly benefit the Court if it were more familiar
12 with the entire context of a particular federal law.

13 Particularly in this instance, with some
14 -- both the Nopa and Ancsa, which are unique to
15 Alaska. And yet, of critical importance to our state,
16 and very carefully crafted. And you really need to
17 have some familiarity with the context of those
18 particular laws to properly interpret and apply them.

19 COMMISSIONER: Well, to understand your
20 argument fully, suppose this case had gone to the
21 United States Supreme Court with its present
22 composition. I'm walking on some tender ground here.

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1 I hope I get away with it. (Laughter.)

2 CHAIRMAN WHITE: No. I have no ground
3 anymore. (Laughter.)

4 COMMISSIONER: They probably know as
5 little about Alaska, its culture, and its social,
6 political, and economic conditions as I do, or as
7 whoever decided that Ninth Circuit case does. Yet,
8 they decide cases affecting the future of Alaska on a
9 monthly basis.

10 Are -- do you think they are deficient in
11 assessing the peculiar needs of Alaska in those cases?
12 I don't mean that to put you on the spot. I mean,
13 answer it any way you want. I just mean, do you think
14 that's a problem?

15 MS. RITCHIE: I would say -- we've had a
16 recent example of that -- situation, actually, with
17 the State of Alaska. The particular case I was
18 mentioning, we did -- we did -- and was denied.

19 And I don't think Alaska or any other
20 state should have to be in a position of trying to get
21 cases to the U.S. Supreme Court to straighten out what
22 they think are incorrect interpretations of the law,

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1 as that apply -- that applies to their state.

2 In addition, a recent example that you may
3 have noticed -- what's called the Venetai Indian
4 Country case, where the Ninth Circuit had reversed the
5 District Court in Alaska, and had interpreted the
6 Alaskan Native Claims Settlement Act to provide that,
7 what is called Ancsel lands, the appropriation lands,
8 could be indian country.

9 We did successfully seek -- in that case,
10 and it was unanimously reversed by the United States
11 Supreme Court. In that case, we were trying to find
12 out what the proper interpretation is of Ancsa to
13 these lands -- to these lands in Alaska -- indian
14 country was applied to Ancsa lands.

15 And in many people's view, the Ninth
16 Circuit essentially re-wrote Ancsa in that case. And
17 that's why we went ahead, and to it to the Supreme
18 Court. There, the Supreme Court accepted the state's
19 interpretation of that law, and reversed the Ninth
20 Circuit. So, obviously, you can get get these kinds
21 of things corrected. It's not without major effort.

22 COMMISSIONER: You say there are two

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1 judges from Alaska on the Court of Appeals. Do you
2 sense there is any effort on the part of the Court of
3 Appeals to have one of those Alaska judges sitting on
4 Alaska cases?

5 MS. RITCHIE: Let's see, in answer to that
6 question, I would say no. I don't think there is.
7 The number of combinations of potential panels, I --
8 I could be wrong. I'm just not aware of anywhere
9 we've had panels that have had those two judges. But
10 --

11 COMMISSIONER: Well, specifically, was
12 there an Alaska judge on the panel that decided the
13 quote rural case you're talking about?

14 MS. RITCHIE: No. There was not. Nor on
15 the -- case.

16 CHAIRMAN WHITE: Thank you very much.
17 (Pause.) No more questions?

18 STAFF: If we could have this panel
19 excused, and if we could have the next panel?

20 MR. SMITH: Good morning.

21 CHAIRMAN WHITE: Good morning, Mr. Smith.
22 Welcome.

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1 MR. SMITH: Thank you very much, Justice
2 White. It is indeed a great pleasure to be here
3 before all of you, and to express a few views on
4 bankruptcy. I have a very, very narrow niche to
5 address, and I will try and stick within that niche.
6 The impact of a -- split of the circuit on bankruptcy
7 practice in the Ninth Circuit as we know it today.

8 I have submitted a written statement. It
9 does give a little information on an ad hoc canvassing
10 of prominent Ninth Circuit bankruptcy lawyers, which
11 I must confess for the accuracy of the record, the
12 great majority of which are California residents. I
13 want to make that clear. But we did have some
14 recurrence from others.

15 I will address their remarks only briefly,
16 in the sense that I believe with two exceptions, they
17 concur in what I am about to say. Those two
18 exceptions, one abstained, feeling that there was too
19 much delay in resolving bankruptcy appellate matters
20 at the Ninth Circuit level at this point in history.
21 And the other said he was not convinced that there
22 shouldn't be a split.

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1 But out of all of those that I canvassed,
2 some seventy-some, not all returned, but the vast
3 majority of those that did shared my views. I have
4 submitted my statement to them. And I think it's fair
5 for me to make that statement for the record, although
6 I speak only on my own behalf, and not on behalf of
7 any organization of which I may be a member.

8 Let me turn quickly to simply stating for
9 the cord that I have read carefully, and concur in
10 several of the statements that have been submitted,
11 insofar as they do impact on bankruptcy practice.
12 Those statements include Judge Huggs' statement, the
13 submission by Judge Meyer on behalf of the bankruptcy
14 and appellate panel for the Ninth Circuit, and the
15 statements of Judge Newsome.

16 I will not go into those statements. I
17 just simply wanted to make that clear, that I do
18 concur with their statements.

19 Let me turn to the question of the adverse
20 impact on the bankruptcy appellate panel if there is
21 a split. As you, I hope recall, back in the
22 seventies, there was a recommendation by the

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1 commission of which I participated in as the deputy
2 director, that there be a different approach to
3 bankruptcy appeals.

4 Traditionally, it had simply gone to the
5 district court, and it didn't work out very well.
6 District judges didn't care much about bankruptcy.
7 There were intolerable delays, and no one was happy.

8 The Commission recommended that there be
9 a possible direct appeal to the circuit, but it had to
10 be with the consent of both parties. That wasn't
11 bought by Congress. But I mention it, because it has
12 been revived in the most current commission that just
13 concluded its work last year.

14 It has recommended a direct appeal of
15 bankruptcy cases to the circuit -- just a second, I
16 think that would be a terrible idea. And I think it
17 would overwhelm the circuits. Because of the great
18 number of bankruptcy appeals, I also believe it would
19 unfairly prejudice litigants in the bankruptcy field,
20 because many cases simply can't afford the process of
21 going through the circuit, the expense of it.

22 But let me address the fact, what

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1 happened, after the 1978 code was enacted is that the
2 Ninth Circuit took the lead in developing a bankruptcy
3 appellate panel system, and it has worked
4 extraordinarily well. It works today, and it works,
5 I believe, in large part because of the size of the
6 Ninth Circuit.

7 Having as many bankruptcy judges as there
8 are in the circuit, and it's in excess of 70, and it's
9 my understanding it enables a bankruptcy appellate
10 panel to function, because you must have judges from
11 outside the district to sit on the panel, to resolve
12 an issue coming up from a particular district.

13 The size of the Ninth Circuit makes that
14 possible. Now, in 1990, Congress recognized that the
15 Ninth Circuit had done a great job of this, and gave
16 the circuits encouragement to do this on a broader
17 basis. Several of them have done so, and we have a
18 number of bankruptcy appellate panels.

19 CHAIRMAN WHITE: Well, how many -- oh,
20 sorry. You can go ahead. Go ahead.

21 MR. SMITH: I don't mind being
22 interrupted, Your Honor.

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1 CHAIRMAN WHITE: Well, they do.

2 (Laughter.)

3 MR. SMITH: Well, in any event, a number
4 of circuits really haven't been able to, because
5 they're small, and they don't have the resources
6 within the circuit. There was a proposal for a joint
7 approach by two circuits that were small. But you can
8 readily see how difficult that would be, which circuit
9 law would you apply on an interpretation of the
10 bankruptcy code. It would be difficult, indeed. It
11 would take the intro-circuit panel dispute to its
12 logical extreme.

13 In any event, we have something that
14 really works. And to the extent we reduce the
15 resources available, it will be less effective, and
16 perhaps not effective at all.

17 One of the things that the bath has done
18 is to increase the ability and the stature of the
19 bankruptcy judge in the Ninth Circuit. And I think it
20 has been a very good thing for the bankruptcy
21 practice, generally. And I believe practitioners
22 generally concur in that statement.

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1 Now, one problem we have, though, is their
2 decisions really don't bind anyone, except the
3 particular litigants. I think you must address this
4 issue. The recent commission tried to address it, and
5 recommended, well, let's just take everything to the
6 circuit.

7 I have an alternate suggestion that I
8 submitted after I listened to Judge Browning in
9 Tucson, and realized that you were to do more than
10 simply resolve the dispute as to the split of the
11 circuit. And I think it would be very useful, and I'm
12 not reviving the idea of a national court of appeals.
13 That's dead and gone back in the early seventies.

14 But I am suggesting that we have an inter-
15 circuit panel of Article III judges that could resolve
16 splits within the circuit without waiting until the
17 Supreme Court ultimately takes those up. Because
18 frankly, bankruptcy appeals really never should wend
19 their way to the Ninth Circuit, unless it's a truly
20 important -- the Supreme Court, unless it's a
21 significant constitutional issue.

22 That's the only time, like Marathon, or a

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1 case of that nature. There are just statutory issues
2 of interpretation. If we know what the rule is, we
3 can live with it, and apply it, and we don't need to
4 have the Supreme Court spend its time resolving it.
5 We just need a clear statement of law.

6 And the other thing that's important, if
7 we had binding precedent by statute by the bankruptcy
8 appellate panels, if you can structure that in, it
9 will reduce an enormous amount of litigation. I can't
10 tell you how many thousands of times a year the same
11 issue is litigated because we don't have a binding
12 issue -- or, a binding answer in the circuit.

13 That's why it's also destructive to the
14 bankruptcy practice to split, or potentially split the
15 Ninth Circuit. Because we now have a large body of
16 bankruptcy precedent which is extremely valuable.
17 People dealing in commerce in the Ninth Circuit, the
18 Pacific rim, in these areas.

19 We know what many of the issues are,
20 because they've been resolved. We have a large body
21 of precedent. To the extent you split the circuit,
22 you necessarily begin to erode that large body of

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1 precedent that's available, and uniformity.

2 I realize you can handle it in part as the
3 split of the Fifth Circuit into the Fifth and Eleventh
4 -- they simply adopt it, existing precedent. That's
5 --

6 CHAIRMAN WHITE: Is your time up?

7 MR. SMITH: I think it probably is. And
8 if I can just conclude with one statement.

9 CHAIRMAN WHITE: All right.

10 MR. SMITH: And that is, I think
11 bankruptcy is unique, in that you can best utilize
12 resources in a large geographic area, and with a large
13 workload, because you have economic diversity. And
14 you can therefore put resources where they are needed.
15 Some courts are light, some are heavier. I think it's
16 best done at the circuit level, not at the national
17 level. And that's another reason for a large circuit.

18 CHAIRMAN WHITE: What -- you said that
19 there is nothing that binds any precedent?

20 MR. SMITH: From the bankruptcy appellate
21 panels, it is not binding on an Article III court.
22 And it, indeed, it is not binding on another

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1 bankruptcy court, except to the extent that they give
2 it deference. We need something to make that binding.

3 CHAIRMAN WHITE: Well, what if it were
4 binding on the bankruptcy court itself?

5 MR. SMITH: Well, it just has not been
6 interpreted --

7 CHAIRMAN WHITE: Well, I know. But what
8 if? What if? Would that help?

9 MR. SMITH: Yes. It would help very much.

10 CHAIRMAN WHITE: Well then, why not do it
11 that way?

12 MR. SMITH: It may run into a marathon
13 issue. Because you'll have an Article I court,
14 assuming it's an Article I court. And that would be
15 a determinative decision on the litigants.

16 Now, it's true that the way it's
17 structured, they have to choose the bankruptcy
18 appellate panel. And maybe that saves --

19 CHAIRMAN WHITE: Well, how do you get from
20 -- how do you get from your appellate court to the
21 circuit court?

22 MR. SMITH: By appeal, Your Honor. And

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1 it's appeal as a matter of right, at this time, from
2 the bankruptcy appellate panel.

3 CHAIRMAN WHITE: Um hm. And -- but going
4 up there, it isn't on a conflict, is it?

5 MR. SMITH: No. It is not. So I think
6 you're right, it would probably solve the issue, the
7 marathon type issue.

8 CHAIRMAN WHITE: Yeah. Yeah.

9 MR. SMITH: So, it would be very helpful,
10 in my opinion.

11 CHAIRMAN WHITE: Yeah. All right. All
12 right. So, you -- I was amazed, when I read that
13 report of the -- of your past, this newest report?

14 MR. SMITH: Yes.

15 CHAIRMAN WHITE: Just how many -- how many
16 direct appeals would that mean for just the Ninth
17 Circuit?

18 MR. SMITH: I wish I had those statistics
19 at hand. But I'm sure it's in the hundreds, if not
20 thousands.

21 CHAIRMAN WHITE: Yeah.

22 MR. SMITH: Because generally, bankruptcy

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1 attorneys tend to appeal these matters.

2 CHAIRMAN WHITE: You know -- the
3 bankruptcy court --

4 JUDGE BROWNING: I'm the district judge
5 that created the panel for it. They didn't want
6 anything to do with me. (Laughter.) So, I'm not a
7 good one to ask about that.

8 CHAIRMAN WHITE: Well, I know. But would
9 it help if the -- if the bankruptcy review was binding
10 on you?

11 JUDGE BROWNING: I think so. Sure. I
12 think it definitely would. And the parties being
13 there by option, I think you're right, would obviate
14 any Article III concern.

15 MR. SMITH: (Unclear.)

16 JUDGE BROWNING: I think Professor -- had
17 a question.

18 PROFESSOR MEADOR: No. That's all right.
19 They passed.

20 CHAIRMAN WHITE: Dan, there was some
21 suggestion, when we were at the federal circuit that
22 -- there was some suggestion to -- that bankruptcy

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1 ought to be given to the federal circuit.

2 PROFESSOR MEADOR: Yes. That was in part
3 made. Do you have any views on -- in the appellate
4 realm of bankruptcy cases, routing appeals to the
5 federal circuit, either by petition for leave to appeal,
6 or as a matter of right?

7 MR. SMITH: Well, I think it would be
8 useful if we could have some court, short of the
9 Supreme Court --

10 CHAIRMAN WHITE: Yeah.

11 MR. SMITH: -- resolving conflicts, and
12 reaching out on a discretion basis to resolve
13 important issues, so that we can have a binding rule
14 of law. I think it would save a great deal of
15 litigation. Now, whether it's the federal circuit, or
16 an inter-circuit panel created by the existing
17 circuits I don't think is particularly important. I
18 think it --

19 CHAIRMAN WHITE: The numbers are just
20 unending, aren't they.

21 MR. SMITH: Yes. They are.

22 CHAIRMAN WHITE: Yeah. Well, tough duty.

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1 (Pause.) I screwed up the deal again.

2 MR. SMITH: I'll sit down quickly.

3 CHAIRMAN WHITE: (Pause.) Mr. Butler?

4 MR. BUTLER: Good morning, and thank you
5 for this opportunity. I am an attorney out of
6 Anchorage, Alaska, and I practice in state and federal
7 courts there.

8 Before coming here to speak to you this
9 morning, I did do some research among my colleagues to
10 try and determine if there was a general consensus.
11 And I did not find one, other than, it seemed to me
12 that one of the concerns practitioners in Alaska did
13 mention was that it took a certain period of time to
14 decisions back from the Ninth Circuit.

15 And I asked some of them whether they felt
16 that if we in this circuit had our full complement of
17 circuit judges, would that have some impact on how
18 they felt, in terms of decisions coming back. And I
19 believe that that would be something that would assist
20 us in terms of getting decisions back in a timely
21 fashion.

22 I think it's difficult to judge the

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1 circuit in terms of response time if the circuit does
2 not have its full complement of judges. I have heard
3 other criticisms. And of course, let me say from the
4 onset, I would like to see the Ninth Circuit remain
5 as-is.

6 One of the things that bothers me
7 personally as a practitioner is, I've heard people
8 complain about some of the decisions that come out of
9 the Ninth Circuit, some of the decisions that the
10 United States Supreme Court, for example, may have
11 reversed.

12 And while I am not an historian in terms
13 of those decisions, I would say that I think that it's
14 a -- notion for people to complain, in a way, about
15 certain decisions. I mean, when a decision comes down
16 from any appellate court, there's always going to be
17 a certain side that's not going to win. That's just
18 the way it goes.

19 It happens, even with decisions coming out
20 of the United States Supreme Court. And I think when
21 we start openly criticizing -- in those decisions, I
22 think we tend to erode public confidence in what those

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1 courts are doing.

2 And so, what I am saying to you is that,
3 certainly, I hope that the recommendation that comes
4 from this Commission will be strong, and will say that
5 the Ninth Circuit should remain as-is.

6 I hope that this Commission will also
7 indicate that the Congress and the President need to
8 move as quickly as they can to give us our full
9 complement of certain judges.

10 And I also think that we should make it
11 known that people need to tone down their criticisms
12 of the circuit opinions. If the United States Supreme
13 Court feels that an opinion that comes out of the
14 circuit should be reversed, that case comes before
15 them, they reverse it. Then that's -- what -- how our
16 system is designed to do.

17 But I have heard too many people openly
18 criticize circuit decisions. And I'm sure there's
19 decisions everywhere that -- many circuits that could,
20 and maybe should be reversed by the United States
21 Supreme Court.

22 But in terms of people of influence and

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1 power openly criticizing what happens, I feel there's
2 a problem with that, and I'm totally against it.
3 That's my primary concern, in terms of whatever
4 happens with the Ninth Circuit, that should be one of
5 the issues that ought to be toned down. Because there
6 are going to be differences of opinions among legal
7 minds.

8 I think that -- I hope that the Ninth
9 Circuit remains as one, I guess in a way because I
10 practice here. I've been practicing within the Ninth
11 Circuit for twelve years or so, maybe -- maybe more.
12 And it certainly is easier among practitioners for us
13 to be able to respond in our work to precedents for
14 the circuit that we live in.

15 It was my understanding that if the Ninth
16 Circuit is split, more likely than not, Alaska will
17 not be a part of it. And that means starting over
18 again, in terms of precedent, really. I mean,
19 certainly we would be able to cite Ninth Circuit case
20 law. But that doesn't mean that we have -- that
21 that's the precedent anymore.

22 And this type of change involved policy as

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1 a practitioner, because I think it tends to put a lot
2 of -- create certain changes, at least for the states
3 that would be in a different circuit, probably more so
4 than many people realize. Because you have a new set
5 of circuit judges who certainly are going to make the
6 decisions as they see them, which is fine, without a
7 certain precedent other than what has been done in
8 other circuits.

9 And so that throw, I think, our law for
10 the new circuit up for grabs, in terms of how we
11 approach our work. I think it's going to make it a
12 lot more difficult for those citizens and
13 practitioners who would be in -- a new circuit. And
14 I, for one, would hate to see us re-invent the wheel.

15 Aside from that, those are my views, and
16 that's the information that I wanted to bring. And I
17 certainly, as I had mentioned, I hope you understand,
18 I feel very strongly about some of the criticism of
19 the decisions.

20 I don't always agree with Ninth Circuit
21 decisions, either. But this business of openly
22 criticizing, and I think back to the case out of New

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1 York, where there was a judge who suppressed some
2 evidence. And it seemed like the whole world came
3 down on that judge for his decision. And that also
4 bothered me deeply.

5 And it just appears to me that there seems
6 to be more and more of that happening now. And I
7 think it's very, very important to our system of
8 justice is the independence of our judiciary.

9 And I think even when sometimes
10 we hear people who -- out of Washington, talk about
11 Ninth Circuit opinions, and their disagreements with
12 them. Certainly we can disagree, and talk about
13 disagreements. But to talk about them in a way that
14 brings some disdain for them is a problem.

15 If there is any questions, I'll --

16 CHAIRMAN WHITE: I'll cite to you -- we
17 will question you after this young man over there --
18 Judge Robert C. Broomfield, United States District
19 Court, District of Arizona.

20 JUDGE BROOMFIELD: Mr. Chairman, members
21 of the Commission -- years ago, I made a major
22 mistake. I was presenting at a trial -- a case. And

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1 it was of some import, at least the plaintiff thought
2 it was some import, because the plaintiffs were after
3 over a billion dollars in damages.

4 So, I decided that I would set over a
5 hundred motions for summary judgment and related
6 motions, at one time. So, for four and a half days,
7 I heard motions for summary judgment, nine to five.
8 There was a break at lunchtime.

9 And about this time of the morning, I had
10 a terrible time staying awake. I suspect that's the
11 views that you all have right now, so I shall try to
12 be quick about my views, and not delay you long.
13 (Laughter.)

14 There are several reasons I have put forth
15 in my statement. I have really three that I would
16 like to -- I characterize myself as a -- circuit
17 person. When I'm not talking about the Ninth Circuit,
18 I think there should be more circuits like the Ninth
19 Circuit --

20 The most important reason I believe is
21 that if Supreme Court is to ultimately interpret the
22 national laws, we need less courts of appeals rather

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1 than more courts of appeals. Congress is going to
2 continue to expand the role of federal courts.

3 I wish it were otherwise. And if we had
4 the time, and I won't take the time, I could give you
5 a precise example with respect to a committee of the
6 United States judicial conference that I used to
7 chair.

8 But that role has expanded, and is going
9 to continue to expand. Population will increase. The
10 case load of the federal court system is not going to
11 go down. It's not going to stay stable. It's going
12 to continue to rise.

13 That being the case, since the Supreme
14 Court takes cases from fifty states, and currently
15 twelve or thirteen courts of appeals, depending on how
16 you look at the federal circuit. If you split the
17 Ninth Circuit, or other circuits, and it's inevitable
18 -- you will soon have fifteen, twenty, twenty-five.

19 There is no limit. And at that point,
20 there is a real question whether we will have a
21 national law that the United States Supreme Court will
22 be able to interpret and pronounce. You will have a

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1 series of regional interpretations of national law
2 that won't get the attention of the Supreme Court that
3 it ought to.

4 The second and third reasons that I note
5 in my statements are really variations of one another.
6 And they deal with commercial law, business law,
7 maritime law. Not maritime law as I heard referred to
8 this morning, as that discrete body of law. I'm
9 talking about the whole of commercial and business
10 interests of the United States as it interfaces with
11 the western world.

12 I had a law professor -- Professor Edgar
13 at the University of Michigan. He used to come teach
14 at the University of Arizona in the spring semester.
15 And his view was that for commercial and business
16 interests, it was more important that the law had
17 certainty, that people knew and understood was the law
18 was, rather than a view of whether the law was correct
19 or not.

20 That may be an over-statement. But he
21 believed very strongly in that certainty. As the
22 current situation on the eastern seaboard, there are

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1 five, or if you want to count the D.C. Court of
2 Appeals -- go over to the Caribbean seven circuits
3 that announce the law, or interpret the law, on the
4 eastern seaboard.

5 Today, there is one circuit that announces
6 or interprets the law of the Pacific rim. And that's
7 a fundamental change that I think should not be toyed
8 with lightly. Right now, if you go to the port of New
9 York, or Savannah, or Miami, or anywhere on the
10 eastern seaboard, you might have different law to look
11 at, to make an determination as to how you will
12 interface with the rest of the world, and the rest of
13 the world with us. But not so in the Ninth Circuit.

14 The second and the third reason, variation
15 of that is what I call the NAFTA question. I realize
16 NAFTA is a national treaty, in dealing with Canada,
17 the United States, and Mexico. But much of it -- is
18 in the west. And there's going to be more and more,
19 because so much of the country is moving west. We're
20 expanding in the west.

21 And it's tough enough with the different
22 procedural laws that exist, particularly with Mexico,

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1 not so much with the United States or Canada. We have
2 different interpretation of the law. With more than
3 one circuit on the west coast, it seems to me, does a
4 dis-service to the implementation of that treaty.

5 I believe this country, and this
6 Commission, as a body to make recommendations to the
7 United States Congress, is really at a crossroads. I
8 think you have to bite the fundamental bullet. I
9 think you should be recommending more consolidation,
10 not proliferation of the United States courts of
11 appeals.

12 If you have questions, I'd be happy to try
13 to answer them.

14 COMMISSIONER: Yes. I have. You
15 mentioned consistency of law in the Ninth Circuit. I
16 assume you have to read a lot of Ninth Circuit
17 opinions in the course of your work. Are you saying
18 that you never encounter any inconsistencies in the
19 Ninth Circuit court of appeals opinions?

20 JUDGE BROOMFIELD: ---- I am not. And you
21 also will notice from my statement that I believe that
22 the Ninth Circuit, indeed any circuit, should be

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1 taking more cases en banc, rather than less.

2 I think the Ninth Circuit -- en banc
3 process is a very good process. It should be looked
4 at favorably in other circuits. And I think they
5 should take more cases en banc which would deal with
6 the problem of potential inconsistencies.

7 I realize the impact, court of appeals
8 judges, and several of them -- probably all likely say
9 it. But I think that's important. If there is a
10 distinction that I make between the work of the courts
11 of appeals, it isn't discreetly between announcing the
12 law, and what I call the bulk of their work, of
13 correcting errors --

14 But the greater portion -- and if you take
15 cases en banc on the former, it seems to me it avoids
16 the problem of inconsistent law at the same time, if
17 they have much -- a number of -- a lesser number of
18 federal circuits, so the Supreme Court of the United
19 States can truly take on cases -- interpretation of
20 national law.

21 CHAIRMAN WHITE: So, you would rather --
22 you would rather have vigorous circuits all around the

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1 country?

2 JUDGE BROOMFIELD: Yes, sir.

3 CHAIRMAN WHITE: And should -- are you
4 proposing that right now the Ninth Circuit should be
5 left as it is, but say, create some -- some other
6 larger circuits?

7 JUDGE BROOMFIELD: It may be impolitic --

8 CHAIRMAN WHITE: Or recommend -- ?

9 JUDGE BROOMFIELD: -- it may be impolitic
10 for me to say so, but as to the Ninth Circuit -- it
11 should not be. As to the latter, I realize there are
12 traditions that are involved, and I think -- the
13 question of consolidation. Because I think you truly
14 are at a crossroads.

15 Whether we are going to start at --
16 continual splits of the circuits, and that's what's
17 going to happen, if we don't stop it sometime.

18 COMMISSIONER: Well, does the -- is the
19 alternative to that simply to let every court of
20 appeals grow as large as it will grow in order to
21 accommodate the business?

22 JUDGE BROOMFIELD: Professor Meador,

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1 that's a tough question. And I've seen statistics
2 that show that in some period of time in the future,
3 I don't know how many years it is, twenty, thirty,
4 that there will be 35,000 appeals out of the courts of
5 appeals. Fifty-thousand -- I don't know -- the
6 numbers.

7 A whole lot more. And I'm not sure how
8 one deals with that in the future. But if you -- if
9 your only answer to the problem is to continue to
10 split, you are inevitably asking for another layer of
11 courts, or you are accepting regional law, instead of
12 national, federal law.

13 I don't know how you -- at some point, I
14 suppose, the court can get too big. I don't know what
15 that number is right now. It darned sure isn't
16 twenty-eight -- the circuit, as it is now.

17 CHAIRMAN WHITE: Could I ask, Mr. -- is it
18 Mr. Butler? Yeah. Do you have any remarks about
19 whether or not the Ninth Circuit ought to be split, in
20 order to provide some judges that knew more about
21 Alaska?

22 MR. BUTLER: Well, my view on that, Your

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1 Honor is, first of all, I don't have a criticism of
2 the decisions that have come out that -- that some
3 people in Alaska have not liked, in particular, the
4 (Unclear.) -- decision.

5 I haven't studied enough about Indian law
6 to really make a comment on that. But I think that if
7 we start talking about getting judges on the circuit
8 that know more about Alaska, then of course, you'll
9 have to do that for other states, as well, if those
10 states feel that they may be under-represented.

11 And so, in that regard, I don't agree that
12 we need to do that. I think that when we -- judges of
13 the Ninth Circuit sit and make decisions, I trust that
14 they make those decisions wisely with thought, and
15 judgment. And the decisions that they make -- all --
16 (Unclear.)

17 CHAIRMAN WHITE: And there -- there must
18 be some lawyers in Alaska that know quite a bit about
19 Alaska.

20 MR. BUTLER: There are, Your Honor.

21 CHAIRMAN WHITE: And it looks to me like
22 they are -- they ought to educate these green-horn

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1 judges.

2 MR. BUTLER: I agree, judge. I think that
3 is our job to do that.

4 CHAIRMAN WHITE: Yeah.

5 MR. BUTLER: And maybe that's what we need
6 to put more focus on.

7 CHAIRMAN WHITE: Yeah. Yeah.

8 COMMISSIONER: As a practitioner, what
9 difference would it make to you in your work if the
10 circuit were divided?

11 WITNESS: Well, Your Honor, I think in
12 terms of research, and providing our district court
13 judges with precedent, we certainly -- I don't think
14 that they would be required any more to follow Ninth
15 Circuit precedent if we were in a different circuit.

16 It's my understanding that if the circuit
17 were to split, we would be in the Twelfth Circuit.
18 And so, I think that certainly would create more call
19 for litigation -- would be required, then, I think to
20 research properly all of the circuits, to present to
21 our new circuit what we feel should be the precedent.

22 And realizing that the decisions that the

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1 district court judges in that new circuit would be
2 making would be forming at least a foundation for new
3 circuit precedent. So, it certainly would be
4 substantially more costly for clients to live in a new
5 circuit, and then have to, I think, start all over.

6 If I didn't mention it, I am currently one
7 of the -- reps for the Ninth Circuit, and I've been
8 chairman this year. And I'll be giving that up in the
9 course of the next month. But it's been a good -- a
10 good month.

11 CHAIRMAN WHITE: Well, thank you.

12 MR. BUTLER: Thank you.

13 CHAIRMAN WHITE: Any more questions?

14 COMMISSIONER: Not from me, sir.

15 CHAIRMAN WHITE: I think we are through
16 for the -- aren't we? Not for the day, but -- to go
17 to lunch.

18 STAFF: This hearing is dismissed. And we
19 will take up again at 1:30 this afternoon.

20 (Whereupon, a lunch recess was had.)

21

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(1:30 p.m.)

JUDGE GOODWIN: (Recording begun in mid-sentence.) -- distinguished members of this panel, I just want to talk about a very few points. Because we all heard some good speeches this morning, and much of which I agree with.

I want to mention a quality problem. We are criticized in the circuit for being too big. And one of the criticisms is that we have -- that size creates delay.

I disagree with that. I don't think size has anything to do with delay, except possibly in the Clerk's office, when we get a big backlog of civil cases, we don't get them set down on calendars. And right now, that delay, in that -- that pre-argument delay is caused by not being up to strength on our -- assigned strength in judges.

If we were at our assigned strength, we would probably be pretty close to current. The other

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1 point is collegiality. I never had the privilege of
2 being on the Oregon football team. But they had about
3 42 people on the bus. And I don't think anybody who
4 was not a member of that team should have criticized
5 them for not being collegial. I thought they were
6 quite collegial. (Laughter.)

7 On intra-circuit consistency, again, I
8 don't think size has anything to do with it. If we
9 made better use of our en banc apparatus, we could
10 maintain consistency of decisions. We are
11 inconsistent in a couple of areas, partly because they
12 don't seem to be important enough to cause the court
13 to want to go en banc over them.

14 One problem is that we -- we dispose of a
15 lot of cases with unpublished memoranda. These
16 infiltrate into the reporting systems. These
17 unpublished memoranda create mischief, but they don't
18 get taken en banc, because they're not authoritative,
19 and they're not -- they're not precedent.

20 UNIDENTIFIED: (Sound interruption.)
21 Pardon me.

22 JUDGE GOODWIN: I'm sorry. I didn't

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1 realize that Judge Rymer -- my good friend, with whom
2 I love to sit on three-judge panels wasn't tuned in
3 yet. But I didn't say anything, Pam, that you missed.

4 JUDGE RYMER: That's okay. I think when
5 you said I wasn't tuned in, you've already said
6 enough. (Laughter.)

7 JUDGE GOODWIN: I just want to say that if
8 we have a very good system, which has worked for
9 fifteen or -- more than fifteen years, since we
10 started the en banc -- reduced size en banc court.

11 And Professor Helman, I've mentioned this
12 in my written material, and I'm not going into all the
13 detail. But Professor Helman wrote a very good piece
14 on this. And he discovered that there is very little
15 intra-circuit conflict that isn't taken care of by the
16 en banc court.

17 In the areas of immigration and social
18 security, those cases don't get taken en banc, because
19 they don't attract enough attention. But those are
20 areas that are very fact-specific. And it's difficult
21 to find any explanation for the fact that different
22 panels sometimes see those in different ways.

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1 The cultural dissonance between the urban
2 -- the urban centers of southern California, Arizona,
3 Las Vegas perhaps, and the rural, or more spread out
4 areas of Montana, and Alaska, and Oregon, I don't
5 think that's a cause of weakness in the circuit. I
6 think it's a cause of strength.

7 It gives us a great deal of diversity.
8 And we have judges on our court from places like south
9 Montana, and Prineville, Oregon, and Beverly Hills,
10 and San Francisco. And Las Vegas, and Phoenix.

11 And it gives us a tremendous amount of
12 diversity and strength. And I think we've mobilized
13 that diversity in dealing with about a fifth of the
14 federal litigation in the United States. With the
15 bankruptcy, I think even more than that.

16 Finally, on the -- where we are headed.
17 We know where we've been. And we've come a long way.
18 The first time Judge -- Chief Judge -- wanted to split
19 the Ninth Circuit was in 1937. About thirty years
20 later, the Ruske Commission took a look at it. And
21 now, about another thirty years have gone by. We're
22 still talking about it.

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1 But except for the problem that Judge
2 Kleinfeld mentioned in his paper about the judges not
3 being able to read all of each other's opinions, I
4 don't think size has anything to do with our problem.
5 I sat for nearly ten years on the Oregon Supreme
6 Court. Seven judges, we all read each other's
7 opinions before they were filed.

8 And I don't think we're going to turn the
9 clock back to those good old days, where we can all
10 sit around, and read each other's opinions, not matter
11 how big -- or how small the circuit is.

12 CHAIRMAN WHITE: And then forget them.

13 JUDGE GOODWIN: (Laughs.) Yeah. And then
14 dis-regard. Except for the -- there is talk of
15 dividing up administratively, into regions. We tried
16 that in the 70's. And Judge Kilkenny, and Judge
17 Wright, and Judge Skopil, and I, sat in Seattle, and
18 Portland, and heard a lot of cases.

19 And we found, within five months, we were
20 starting to decide cases differently than Walter Ely,
21 and Shirley Hofstaedler, and some of our dear friends
22 down in the south who are deciding the same kinds of

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1 cases. And we -- we've got -- we had a court meeting.
2 We were going to let this experiment run six months.

3 We had a court meeting in five months, and
4 called a halt to it, because our collegiality was
5 wearing out, and our consistency was becoming
6 threadbare. So, I -- we had a century -- the first
7 century in this republic when we had a two-tiered
8 system of courts. And then, the century, after 1891,
9 was three tiers. And now there's talk about possibly
10 four tiers.

11 I'm bearish about that, because of the
12 expense. I mean, the expense now is pretty
13 substantial. And if we went to four tiers, judiciary,
14 I think it would be too much.

15 The other -- another point that's been
16 raised is specialized courts. And the lawyers who
17 will still talk to me after I've been a judge for 43
18 years are all bearish about specialized courts. I
19 don't know whether it's their experience with
20 administrative agencies, or a combination of things.

21 But while I have great respect for the tax
22 court, and I think that is a successful specialized

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1 court, I don't know how, while that could be
2 duplicated in other areas of professional concern. At
3 least the lawyers that talk to me are not in favor of
4 much experimentation along that line.

5 And in conclusion, I just strongly believe
6 that the burden of proof is on those who think that
7 the system can be improved by changing certain
8 boundaries. And I don't think they have demonstrated
9 proof.

10 I'll be happy to answer questions after my
11 turn.

12 CHAIRMAN WHITE: Thank you.

13 JUDGE SKOPIL: Justice White, Judge Rymer,
14 Judge Browning, and Professor Meador, I am indeed
15 pleased that I've been invited to testify at this
16 Commission hearing. I deem it not only an honor, but
17 a privilege.

18 I am hopeful that my experience of having
19 served on a long range planning committee for five
20 years, and the long range plan which was adopted by
21 the conference will be of some assistance to the
22 Commission in this awesome challenge that you have.

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1 My remarks, strange as it may seem, will
2 be generally directed to the courts of appeal
3 throughout the country. And I will specifically
4 mention the Ninth Circuit only in that you have been
5 directed specifically to give it special treatment.

6 And also because I sincerely believe that
7 the Ninth Circuit has been, and will continue to be,
8 if it is maintained in its present stature, as a great
9 contributing factor to the federal courts of appeal.

10 I -- for five years, I was involved as
11 chairman of the long range planning committee. And
12 during that time, we had outstanding assistance from
13 three consultants. Reese Rosenberg, during his
14 lifetime. Dean Tom Mengler, of the University of
15 Illinois. And Jeffrey Jackson, who was a former
16 judicial fellow, and now teaches at the Mississippi
17 Law School.

18 In addition to that, we had great
19 assistance from our staff at the administrative
20 office, from the federal judicial center, under Russ
21 Wheeler's tutelage. And also, that we received great
22 assistance from people from the private sector, and

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1 long range planning futurists.

2 We also received contributions from over
3 200 individuals, and 62 national associations, as well
4 as having had public hearings throughout the country,
5 as well as the numerous meetings with members of both
6 the state and the federal judiciary.

7 And that is why my experience, I feel,
8 hopefully will be of some help to this Commission.

9 I intend to first offer my thoughts and
10 suggestions, and then I will outline the reason why I
11 make those -- I present those thoughts and suggestions
12 to you.

13 First of all, I do oppose splitting the
14 Ninth Circuit. Secondly, I oppose any immediate re-
15 alignment of any of the circuits. And third, if re-
16 alignment is deemed necessary by this Commission, then
17 I suggest that larger circuits, rather than smaller
18 circuits, would be my preference.

19 And fourth, I favor mechanisms which will
20 in some way control the number of appeals that are
21 coming into the circuit courts.

22 Now, the reasons for my suggestion that

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1 the Ninth Circuit should be maintained in its present
2 status is really two-fold. First of all, I think it
3 will serve as a pilot, and as a guide to other
4 circuits, as they increase in size. Projections would
5 lead us to believe that they will increase in size.

6 And also, by comparison, I think the Ninth
7 Circuit has performed far above any of the other
8 circuits in the country. I personally have never read
9 nor heard any valid reason for splitting the Ninth
10 Circuit.

11 It seems logical to me, as the long range
12 planning committee suggested in its recommendation
13 seventeen, that re-structuring or re-alignment should
14 not occur unless there is reliable empirical evidence
15 that demonstrates a dysfunction either in the
16 adjudicative or the administrative process of the
17 court. Which would, in effect, prohibit or prevent
18 the circuit from administering a high quality of
19 justice, and coherent and consistent circuit court
20 law.

21 That is hardly the situation as far as the
22 Ninth Circuit is concerned. As far as production is

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1 concerned, they rank third among all of the circuits
2 in the United States, as far as merit determinations
3 per judge, 518. Only the Fifth and the Eleventh
4 Circuit have exceeded that number in per judge
5 determinations.

6 I think it's interesting to note that the
7 three largest circuits, as far as filings are
8 concerned, are the most productive circuits. The
9 administrative function of the Ninth Circuit is more
10 adequately presented, I think, in the Ninth Circuit
11 paper, which I just read this morning.

12 But it seems to me that the Ninth Circuit
13 has really been a leader in the administrative -- in
14 the function of the courts. First of all, they are
15 the only ones to develop a long range plan. That long
16 range plan was actually developed before our long
17 range plan for the United States judicial conference
18 was created.

19 They have originated and used bankruptcy
20 appellate panels, a process which I think now has been
21 recognized throughout the United States as a leader in
22 that type of appeal. They are -- we have used

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1 extensively alternate dispute resolution processes.

2 We have originated a unique computerized
3 issue tracing system, which I think has been very,
4 very beneficial, and certainly one that I think will
5 be copied in the future by other circuits.

6 And we have created, and are presently
7 using an appellate commission. I think, as I say,
8 many of the innovative procedures that have been
9 developed by the Ninth Circuit are more than
10 adequately presented in the paper presented to this
11 Commission by the Ninth Circuit judicial council, and
12 by the Ninth Circuit court.

13 Re-alignment and restructuring, if we use
14 the -- the long range planning committee developed, in
15 its recommendation number seventeen, I can't see that
16 there is any dysfunction among any of the circuits in
17 the United States.

18 And if the Commission concludes that some
19 re-alignment is necessary, I suggest larger, rather
20 than smaller circuits. Presently, I can only think of
21 two logical reasons why you would want to restructure
22 any of the circuits.

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1 But one being that their workload among
2 the active circuit judges is very, very
3 disproportionate. The D.C. circuit last year had 214
4 merit decisions per judge, as compared to -- or, I
5 should say, that they had that -- that they filed that
6 many dispositions.

7 While the Eleventh Circuit filed 792
8 dispositions per judge. A great contrast, and one
9 that would indicate that perhaps there has to be some
10 mechanism established to equalize the workload among
11 circuit judges.

12 The other is that certainly a lesser
13 number of circuits would indicate to me, at least,
14 that there would be lesser number of conflicts between
15 the circuits, and a greater opportunity for the
16 Supreme Court to resolve those conflicts, knowing now
17 that they do not have sufficient time, actually, to
18 resolve all the conflicts between the circuits.

19 If it's necessary to go ahead and re-
20 align, then I would think that the best standard to
21 apply would be based upon the filings in the circuit.
22 And it appears to me that you're going to be

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1 confronted with either the filings in the Fifth, the
2 Eleventh, or the Ninth Circuit. And those filings are
3 relatively close, as far as numbers are concerned.

4 Controlling appeals, the number of
5 appeals, I think it's very apparent to all of us that
6 one of the main concerns that we have, and the reason
7 that we're here, is the tremendous increase in
8 caseload over the last -- well, since I've been on the
9 court, over the last 25 years.

10 And certainly that substantial increase I
11 think has come about principally as a result of
12 Congressional acts. In the last twenty years, they
13 have enacted some 202 statutes which have a direct
14 affect upon the work of the courts of appeal.

15 It seems to me that in determining what
16 the structure of the court should be that it would be
17 necessary to determine what the work of the courts
18 would be. I don't think you can divorce workload from
19 structure. I think you have to go ahead, and
20 determine what the workload is in order to go ahead,
21 and provide a competent structure, to go ahead and
22 take care of the workload.

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1 I think there are many statistics.
2 Statistics are -- I think you're at risk if you rely
3 on statistics, as far as projections of the future are
4 concerned. But we certainly know that in 1940, I
5 think there were some 300 -- or, some 3,000 appellate
6 filings. And as compared to, what '94? I think
7 somewhere over 52,000 filings.

8 If we based upon the last 55 years of our
9 experience, if we could rely on those as far as the
10 future is concerned, I think we would all be so
11 startled that it would be almost unbelievable to us.

12 Because if that happens, of course, we
13 could have -- I think the projections would say, as
14 many as over 500 appellate judges. I'm hopeful that
15 that does not happen. And as I say, I think we are at
16 risk if we rely on future projections.

17 We do list future projections in our long
18 range planning situation. And the reason we do is not
19 so much to rely on the fact that there are going to be
20 that many cases filed, but the fact that we need
21 planning. We do have to plan for the future. And I
22 think those statistics and projections will indicate

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1 the reason for that.

2 I suppose the whole problem in my mind
3 could be solved if we could go ahead and have
4 discretionary review in the courts of appeal. I
5 question whether that's going to happen, but that
6 would be a solution that certainly would -- many of
7 our concerns of today.

8 If we cannot have the entire discretionary
9 review, then I think we should have some sort of a
10 limited review of appeals that raise only factual
11 errors.

12 And third, that we should create and
13 expand the role of the appellate commissioner. Our
14 appellate commissioner has done an enormous amount of
15 work for us. Last year, he had -- somewhere around
16 2,000. Which of course then relieves the judges for
17 their main responsibility of resolving and deciding
18 conflicts.

19 I would like to make specific reference to
20 the long range plan, and principally at pages fifteen
21 and sixteen, which goes into projections. Also,
22 chapter three, which deals with alternative -- with

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1 the alternative future. Chapter five, which deals
2 with structure. And chapter ten, which in effect is
3 confronting the alternate future.

4 With that, I really am -- have nothing
5 more to say. I think we are all reluctant -- I think
6 human nature being what it is, we're reluctant to
7 accept change. I think the legal profession is
8 particularly wrong with that, and I think the
9 judiciary is even more -- with that.

10 But regardless of our reluctance to accept
11 change, it's here. And we have to go ahead, I think,
12 the bar and the judiciary has to have sufficient
13 flexibility to go ahead, and cope with those changes.
14 Because I'm sure that we're not going to change --

15 With that, I really thank you for the
16 opportunity to appear here, and to have testified. I
17 said, having chaired that long range planning
18 committee, that I don't relish your responsibility.
19 But I think your decisions will determine largely what
20 the future courts of appeal will be to our nation.

21 So, with that, I say thank you very much.

22 CHAIRMAN WHITE: Thank you. Should we

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1 question him first?

2 UNIDENTIFIED: Sure. Either one. Do you
3 want to -- ?

4 CHAIRMAN WHITE: Judge Skopil, has the
5 judicial conference got committees that you think will
6 keep planning?

7 JUDGE SKOPIL: Well, I can answer that
8 with some hesitation. I think maybe -- I think maybe
9 Judge Browning was on the conference at the time this
10 whole matter came before the conference. I strongly
11 advocated that the long range planning committee work
12 continue.

13 Because I don't think the plan itself is
14 as important as the planning concept.

15 CHAIRMAN WHITE: Yeah.

16 JUDGE SKOPIL: The conference decided not
17 to continue the long range planning committee, and
18 delegated that responsibility principally to the
19 conference committees, under the supervision of the
20 executive committee of the conference.

21 CHAIRMAN WHITE: Hmm.

22 JUDGE SKOPIL: So, they -- they are -- I

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1 don't know how effective it's been. But they are, in
2 effect, doing their future planning in that forum.

3 CHAIRMAN WHITE: So, if you don't know, we
4 certainly don't know whether -- whether they are --
5 are doing what you would call planning for the future.

6 JUDGE SKOPIL: I do not know the answer to
7 that, Justice White.

8 CHAIRMAN WHITE: As to --

9 JUDGE SKOPIL: I wish that I did, because
10 I feel strongly -- one lesson I learned, and I might
11 say, when I entered into that situation of long range
12 planning, I knew absolutely nothing. But the one
13 thing I did learn, from talking with the futurists,
14 and the long range planners from the private sector,
15 the plan isn't the important thing. It's the planning
16 concept that is the important thing.

17 CHAIRMAN WHITE: Yeah. Dan?

18 PROFESSOR MEADOR: Judge Skopil, we have
19 had suggestions along the way at previous hearings
20 that one way to go to relieve pressure on the courts
21 of appeal is to shift some of the reviewing function
22 to the district level, having what you might call

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1 district court appellate panels, somewhat by analogy
2 to the bankruptcy appellate panels, in which you would
3 have panels of either three district judges, or two
4 district judges and one circuit judge, sitting to
5 review certain categories of cases.

6 Not necessarily everything, but diversity
7 cases was suggested as one, sentencing appeals was
8 suggested as another. And there could be other
9 categories. And once that panel had decided that
10 level of review, then review thereafter in the courts
11 of appeal or questions of law would be by petition for
12 leave to appeal, discretionary with the courts of
13 appeals. What is your general reaction to that idea?

14 JUDGE SKOPIL: That idea was discussed in
15 chapter ten of the long range plan for an absolute --

16 COMMISSIONER: What was --

17 JUDGE SKOPIL: Professor Meador was a
18 great contributor of that long range plan, as was
19 Judge Browning.

20 COMMISSIONER: As I recall, you didn't
21 endorse the idea of those.

22 JUDGE SKOPIL: We did not endorse that.

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1 You're absolutely --

2 COMMISSIONER: And I'm wondering what your
3 view of it now would be.

4 JUDGE SKOPIL: Well, you want to remember
5 that there were four district judges on that long
6 range planning committee. I think conceptually, the
7 idea is worth exploring. Because there are so many
8 cases that come before us, that really should not be
9 before the circuit. And you have outlined, I think,
10 some of the areas.

11 One other area that I think is -- it's
12 almost criminal to me the amount of reviews that the
13 social security, disability cases get. They get more
14 reviews than the capital punishment cases. And all
15 we're reviewing is the factual matter, whether there's
16 substantial evidence to go ahead, and justify the
17 findings of the administrative judge, or the board.

18 So, there are many areas that I think that
19 would be appropriate. Having been a district judge,
20 I am not too sure that they would necessarily agree
21 with that. I think their workload is sufficiently
22 heavy. Probably they don't want to take on any more.

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1 But again, as I said before, I think with
2 the changes we have, I think the judiciary, as well as
3 the bar, has to be more flexible in their approach to
4 these problems.

5 CHAIRMAN WHITE: Dan, didn't we get a
6 request to meet with the judicial conference committee
7 on case management?

8 PROFESSOR MEADOR: Two committees, a
9 federal state committee, and case management
10 committee. And we are meeting with them in June.

11 JUDGE SKOPIL: The one disappointment --
12 I am speaking, and you haven't even asked me a
13 question, but this has been on my mind. The one
14 disappointment I think the long range planning
15 committee encountered was that I did initially contact
16 members of the Senate and House Judiciary Committees,
17 as well as the Executive branch, not only requesting,
18 but soliciting contributions from them.

19 I am hesitant to say, but the truth is
20 that we received actually no assistance from either of
21 those two branches of government. We did -- Attorney
22 General Reno did appoint a liaison with the committee,

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1 who never attended a committee meeting.

2 We were -- I was given the benefit of an
3 audience with Senator Hatch, Senator Heflin, and
4 Congressman Hughes. And I did have an appointment
5 with Senator Biden, who then chaired the Judiciary
6 Committee, but wound up talking to his staff.

7 So, that was -- that was a disappointment
8 to me. Because --

9 CHAIRMAN WHITE: Yeah.

10 JUDGE SKOPIL: -- the long range -- the
11 proposed long range plan, and the long range plan
12 itself, was circulated to every Member of Congress.
13 So, there were two separate -- two separate documents
14 that they received. And absolutely no response.

15 It was amazing to me that Senator Gorton,
16 who never contributed anything, or never raised any
17 questions about the long range plan, now indicates his
18 desire in this situation.

19 CHAIRMAN WHITE: Yeah. Go ahead.

20 COMMISSIONER: Judge Skopil, as I
21 understand it, you think the Ninth Circuit's size is
22 no impediment to its positioned operation at the

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1 present time. And if there were going to be
2 alignments driven by case loads, you would prefer more
3 jumbo circuits, I don't use that pejoratively, rather
4 than fewer circuits.

5 Is there a point at which a circuit can
6 too big? And if so, what is that point?

7 JUDGE SKOPIL: You know, that's like ask
8 -- that's why I like relying on projections as to what
9 the future's going to be. I can't answer that. I do
10 know that based upon what we had before us at the long
11 range planning committee state, that we felt presently
12 there was no need to restructure or split the Ninth
13 Circuit.

14 I still feel that's true. Strange as it
15 may seem, our projections have not proven to be true.
16 The projections of caseload have not been as rapid as
17 we anticipated. And I'm thankful for that.

18 Somewhere along the line, and I was here
19 this morning when Justice White asked the question,
20 how do we keep Congress under control? I don't know
21 of any reason. (Laughter.) It just seems to me,
22 however, that if the citizens of our country knew that

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1 we have two judicial systems running along parallel
2 with one another in many areas, that they would be
3 very upset about it.

4 They're paying taxes for two systems that
5 actually, in effect, are doing much the same thing.
6 Many of the remedies of those 202 acts of Congress are
7 already available in the state courts. But I don't
8 know. My response, when I visited with the members of
9 Congress was that if it was not politically acceptable
10 at home, well, they didn't really want to talk about
11 it.

12 JUDGE RYMER: Judge Skopil, do you have
13 any thoughts about -- markers that might be used to
14 measure whether a court is so dysfunctional that it
15 isn't delivery quality justice?

16 JUDGE SKOPIL: Well, I think I'd rely on
17 your judgment, Judge Rymer. I think that's very
18 easily ascertainable. I think just from what you
19 would view a circuit doing would reveal that. I don't
20 have any particular --

21 JUDGE RYMER: Well, we've heard from a
22 number of people who say, for example, that the

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1 decreasing availability of oral argument, or the
2 increasing incidence of dispositions that are quite
3 summary, or unreasoned, and the increased number of
4 unpublished dispositions which may tend to have -- or
5 suggest inconsistency in the law of the circuit, are
6 troubling to the bar, and to some judges elsewhere in
7 the country.

8 And I'm not talking particularly about the
9 Ninth Circuit. I'm just saying in general. Certainly
10 those are trends that one could perceive going on
11 elsewhere, as well as in the Ninth Circuit. Should we
12 be troubled about those things? Is there a limit
13 beyond which circuits, or courts of appeals shouldn't
14 go, in those directions, and still -- still stay on
15 the correct side of dysfunction?

16 JUDGE SKOPIL: Well, I'm going to answer
17 that from my own experience on the Ninth Circuit, and
18 as well as the knowledge that I have acquired from the
19 way that the Fifth and the Eleventh Circuits handle
20 their matters.

21 I think it's very apparent that there are
22 many, many appeals that come before the circuits that

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1 really deserve little or no attention. And I think
2 that it's a waste of time to these circuit judges to
3 spend a lot of time on matters where there is case
4 precedent already. And thus ignore what -- the
5 responsibility of matters which are of great
6 importance to the economy of the country, and to the
7 individual rights of individuals.

8 So, the -- from that standpoint, the
9 unpublished opinions do not bother me. The lack of
10 oral argument in certain cases does not bother me.
11 With reference to inconsistencies in -- decisions
12 within the circuit, I do not believe that's true.

13 Judge Goodwin mentioned Arthur Hellman's
14 book, or actually, chapter of a book. And I think
15 that probably -- and I think Professor Meador
16 acknowledged that in the chapter that he wrote in that
17 same book. That probably has been the most thorough
18 study of inconsistencies or conflicts within circuit
19 decisions of any made.

20 And he was very explicit in saying that
21 that was not a problem within the Ninth Circuit. So,
22 the inconsistencies do not bother me. The lack of

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1 time between filing and disposition has been answered,
2 I think, by Judge Goodwin. It's interesting to note
3 that the Ninth Circuit is not the last, as was
4 represented here this morning, between filing and
5 disposition.

6 I think we're maybe third from the bottom
7 of that list. But we are either number one or number
8 two, according to my recollection, of the time from
9 argument to disposition. Which certainly indicates
10 that the big problem is that even though their case is
11 ready for argument, there aren't sufficient panels to
12 hear them.

13 And that is largely attributable to the
14 vacancies that we've had on our court. We have sort
15 of computed in our own mind that, had all our
16 vacancies been filled, we would have had 100 more
17 panels each year, annually, to decide these cases.
18 And that certainly would make a big difference, as far
19 as the backlog from filing to argument.

20 I don't know whether I've answered all
21 your questions or not, Judge Rymer, but I hope that I
22 have.

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1 JUDGE RYMER: Thank you. Appreciate it.

2 COMMISSIONER: What do you think of two-
3 judge panels?

4 JUDGE SKOPIL: What do I think of them?

5 COMMISSIONER: Yes.

6 JUDGE SKOPIL: I think there's certain
7 types of cases where two-judge panels would be
8 sufficient. I think in other types of cases, even
9 maybe a one-judge review would be sufficient. We're
10 talking about classification of cases, however. But
11 I do feel that that's an area to explore. And I think
12 -- I think at least from my experience, I think
13 there's certain cases that need no more than even a
14 two-judge or a one-judge review.

15 CHAIRMAN WHITE: What, for example, would
16 you say a two-panel would be sufficient in your mind?

17 JUDGE SKOPIL: I think any question which
18 involves a factual issue does not need three-judge
19 decisions.

20 CHAIRMAN WHITE: Yeah. Yeah, well --

21 JUDGE SKOPIL: And that -- that comes
22 principally, a lot, from administrative appeals.

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1 CHAIRMAN WHITE: Yeah. Well, that's a lot
2 of cases.

3 JUDGE SKOPIL: It's quite a few cases.
4 But on the other hand, in most situations, the
5 standard of review is very explicit.

6 CHAIRMAN WHITE: Yeah.

7 JUDGE SKOPIL: And if you apply that
8 standard of review, the outcome seems very obvious.

9 CHAIRMAN WHITE: Yeah. Thank you.

10 JUDGE SKOPIL: Thank you.

11 CHAIRMAN WHITE: Thank you. (Pause.)
12 Judge Boochever? Welcome.

13 JUDGE BOOCHEVER: Thank you, sir, Justice
14 White, members of this distinguished Commission. I
15 think it might be appropriate if I gave you a little
16 of my background before proceeding, because it does
17 give me somewhat of an insight, maybe a little
18 different from most of the other judges that have
19 appeared before you.

20 When I got out of the service in January
21 1946, I went to Alaska as assistant U.S. attorney.
22 After that, I was in private practice in Alaska for 25

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1 years, mostly in trial work. And then, I went on to
2 be on the Alaska Supreme Court from 1972 to 1980.
3 And I served during part of that time as chief justice
4 in charge of the administration of that huge state.

5 Then, I was appointed as the first Alaskan
6 on the Ninth Circuit Court of Appeals in 1980. So, I
7 do bring an Alaskan perspective, I guess, to my view
8 of the court. And when I first went on the court, I
9 had the idea it was too large, and that it should be
10 divided.

11 But after serving on it, and seeing the
12 innovations that were made, and the different steps
13 that were taken, so that there would not be
14 inconsistency of opinions between the panels, I became
15 convinced that a large circuit, and particularly the
16 Ninth Circuit, did work, and worked well.

17 I might say just as an aside, when we were
18 in -- I was in the territory, all of our appeals went
19 to the Ninth Circuit. And I argued numerous cases
20 before different panels. And I'm particularly
21 reminded of one cases I had, in which the panel was
22 not at all as attentive and kind as this panel is.

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1 The case -- cases normally were assigned
2 to San Francisco. And we'd go down there to argue,
3 which was a long trip in those days, from Alaska. And
4 this one particular case I had was assigned to
5 Portland, instead of San Francisco.

6 And I arrived, and was all ready to argue.
7 And my opposing had gotten into the habit of going to
8 San Francisco, and had gone to San Francisco. So, the
9 panel was kind enough to postpone the argument to the
10 following day.

11 Well, the following day, we got there.
12 And opposing counsel, after having already been to San
13 Francisco, and now back at Portland, started his
14 argument. And one of the judges on the panel asked
15 him a question. And he responded.

16 And the judge said, "If that's your
17 answer, that's all I want to hear." So, my opposing
18 counsel said, "Well, do you mind if I go on with my
19 argument?" The judge said, "You can if you want to."

20 The -- my opposing counsel proceeded to
21 argue. The judge took out a newspaper, and read it
22 for the entire time. I might say that that occurred

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1 when there were much fewer judges on the Ninth
2 Circuit. And I'm sure you wouldn't get that kind of
3 a situation today.

4 In 1980, when I was appointed, there were
5 3,738 appeals filed. And at that time, we had already
6 reached the limit -- the limit that we have now, of
7 twenty-eight active judges, and all of them were
8 participating. In 1997, there were 8,649 appeals
9 filed, and we had only seventeen active judges most of
10 the year, during the vacancies.

11 This was an increase of over three hundred
12 percent. And if we had a full complement of judges,
13 it would still be an increase of over two hundred
14 percent. I think that the circuit has coped with this
15 situation amazingly well because of various
16 innovations that they've made.

17 Now, I know that different judges have
18 already spoken about these innovations. And I think
19 you've heard enough about them. And I'm not going to
20 go into them in detail. We do have three
21 administrative divisions, which help handle the
22 administration of the courts a great deal.

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1 And we -- I think, with a limited en banc,
2 we have practically eliminated inconsistent decisions,
3 as far as published decisions are concerned.

4 So, I don't think those are any good
5 arguments any more for breaking up the circuit.
6 Another argument that is made is in regard to
7 collegiality. I remember the warm welcome that I
8 received when I first went on the court, and
9 particularly from some of the judges who were
10 appointed by Presidents from a different party from
11 the one that appointed me.

12 Among those, I can remember Judge Kennedy,
13 now Justice Kennedy, taking a good deal of his time to
14 explain the workings of the court. And various other
15 judges, likewise, who were very kind, and made me feel
16 very much at home.

17 I think that the size of the circuit has
18 nothing to do with collegiality. Most of the
19 communications are made through E-mail now. And there
20 are full discussions of issues, particularly when
21 cases are coming up for en banc consideration. And
22 the memos go into very serious discussions, and also

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1 have a certain amount of jokes, and a certain amount
2 of good-natured jostling back and forth.

3 So that you get that collegiality that you
4 might not get in a much smaller court. In fact, I
5 know that the United States Supreme Court has had
6 occasions where some of the justices wouldn't talk to
7 other justices. So, I don't think the size has much
8 to do with collegiality. I think it's more with the
9 personalities involved, and how they handle the types
10 of cases that they have.

11 I believe that the main push for division
12 of the Ninth Circuit has arisen from certain
13 controversial cases that have been decided. These
14 cases usually involve economic interests, and strong
15 divisions of opinion.

16 I can recall the spotted owl case
17 involving environmental considerations in Oregon.
18 This was a case that affected the timber industry.
19 And many people felt very strongly about it. Yet, one
20 of the judge who -- on the panel that decided it for
21 the Ninth Circuit was a former Supreme Court justice
22 of Oregon.

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1 Similarly, in the State of Washington,
2 there were fishing rights cases. The case of
3 Washington against the Guinoic Tribe of Indians, and
4 other tribes. And that case was a very long,
5 protracted case.

6 And the final decision was made, giving
7 certain rights to the Indian tribes to fish. And
8 this, again, raised a great storm of protest.

9 Yet, the panel that decided that case that
10 two judges from Oregon on it, one a district judge
11 sitting by designation, and the other a circuit judge.
12 So, regionality, or the size of the circuit, was not
13 really of consideration.

14 Now, I do believe there have been a few
15 cases in Alaska where there has certainly been
16 suggested among Alaskans that the judges were not
17 sufficiently acquainted with some of the peculiarities
18 of that huge state.

19 One case involved an Alaska legislated
20 definition of rural. And the panel that decided the
21 case equated rural with what is rural in the lower
22 states, namely agriculture, and grazing land. And

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1 there were those in Alaska who perceived that this was
2 a mis-understanding of the local situation.

3 Another case that brought a lot of
4 criticism was a recent case involving a decision as to
5 whether local Indian groups could be considered as
6 Indian country, having legislative powers over the
7 area involved.

8 There were strong protests when the Ninth
9 Circuit panel held that there were Indian country.
10 And then, this was reversed by the United States
11 Supreme Court. And I understand that recently, there
12 have been Indian groups that have been strongly
13 protesting about the reversal.

14 So, I think when you get highly
15 controversial cases, one is going to have people that
16 are strongly opposed to it, and that will use that as
17 an attack on the court that makes the decision.

18 I think that the solution in those rare
19 cases is to have counsel adequately alert the panel to
20 any regional problems. In any event, a few
21 controversial decisions are not grounds for limiting
22 the size of the circuit.

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1 If we were to consider a limit of, say,
2 fifteen judges on a circuit, any split of the present
3 Ninth Circuit could not do that without splitting the
4 State of California. And I think almost everyone
5 agrees that that's an undesirable result.

6 I think that one problem is that as the
7 case load invariably increases, more judges are going
8 to be required. If we limit a circuit to fifteen
9 judges, we're shortly going to require many more
10 circuits.

11 And if that occurs, you're going to have
12 a layer of court, or at least a court, between the
13 present circuit courts, and the Supreme Court, to
14 perform their function of seeing that there isn't
15 discrepancy in the decisions of the various circuits.

16 And I think it's the last thing we need,
17 is another layer of courts, with the additional
18 duration and expense of litigation.

19 I think there is -- I was pleased to see
20 that this panel was considering the jurisdiction of
21 the circuit courts of appeal. It is not specifically
22 mentioned in your -- in the Act. But it's certainly,

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1 I think any discussion of the structure of the circuit
2 courts has to take into consideration their workload.

3 And I think that this is where there are
4 various things that could be done that would lessen
5 the workload, and thus lessen the need for more and
6 more judges. Otherwise, I see no solution other than
7 increasing the number of judges, and increasing the
8 size of the circuits.

9 Now, I am not going to go into detail on
10 jurisdictional suggestions. Some of them have been
11 made to you already today. Certain ones, such as
12 certiorari of the court of appeal, and certain types
13 of appeals.

14 There also could be considered
15 administrative courts, such as in the Federal
16 Employees Compensation Act, where the appeals are
17 taken to an appellate division, and that ends it.
18 That's the ending of the appellate procedure there.
19 And there are certain other types of cases, such as
20 Longshoremen and Harbor Workers Act, that might have
21 a similar appellate division that would end it, or at
22 least that would give just a certiorari right to go to

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1 the Ninth Circuit court of appeals.

2 I think that another means of addressing
3 this problem is through alternate dispute resolution.
4 We have a fine mediation program in the Ninth Circuit
5 at the present time. And I was excited to hear that
6 there are many new steps being taken to increase, and
7 even through Congress, make more alternate dispute
8 resolution available to litigants.

9 So, in conclusion, I'd like to say that I
10 see no reason to split the Ninth Circuit. I think
11 that it functions well, and is doing its job. And
12 that I do think that it would be wise to look into the
13 jurisdiction of the appellate courts in such a way
14 that it did not diminish the rights of those who are
15 in pecunius from having a right of appeal, and would
16 not limit what Article III judges should do.

17 But at the same time, would have some of
18 the other functions that are not essential handled by
19 other bodies, or by certiorari.

20 Thank you, Your Honor.

21 CHAIRMAN WHITE: Thank you. Thank you,
22 Judge. (Pause.) Judge John Sheehy.

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1 JUDGE SHEEHY: Members of the Commission,
2 my name is John Sheehy. I live now in Elden, Montana.
3 I served for thirteen years as a Montana Supreme Court
4 Justice. After 30 years of active trial and appellate
5 practice in Billings, Montana.

6 On three separate occasions in that
7 period, I served as a lawyer-designate from the
8 Montana to the Judicial Conference of the Ninth
9 Circuit.

10 I want to advise the Commission that U.S.
11 Circuit Judge Sydney Thomas, who submitted a statement
12 to you, and who spoke to you this morning, is my son-
13 in-law. (Laughter.) However, I practice law, or sat
14 on a court for 45 years --

15 CHAIRMAN WHITE: You're talking well.
16 (Laughter.)

17 JUDGE SHEEHY: -- before he came into my
18 family. And the views I express are my own, as his
19 views are his own. I'm only happy that our views seem
20 to coincide.

21 He comes before you, however, as an
22 insider judge, fully familiar with the internal

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1 working of the Ninth Circuit. I stand before you from
2 the limited viewpoint of a practicing lawyer, and a
3 state judge, within the geography of the Ninth
4 Circuit, for whatever value that might have to this
5 Commission.

6 I have not discussed with my son-in-law
7 before hand our respective statements to you, for the
8 very good reason that we live 250 miles apart, and he
9 is too busy trying to be a diligent judge on this
10 circuit, on the short-handed circuit.

11 By and large, the legal community of
12 Montana seems to be satisfied with the present
13 structural geography of the Ninth Circuit court of
14 appeals. Our organized state bar went on record in
15 1996 in opposition to then-pending legislation in
16 Congress designed to split Montana off from the Ninth
17 Circuit, and into a new circuit.

18 Between our state courts, and the court of
19 appeals for the Ninth Circuit there is what I have
20 designated in my statement a mutual cordial respect.
21 Any attempt to cut Montana away from the Ninth Circuit
22 would have the unfortunate result of shutting us off

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1 from an important source of precedent. This is
2 because our code law came originally from California.

3 That state contributes a large number of
4 judges to the Ninth Circuit, who bring with them the
5 California experience. The contention that the Ninth
6 Circuit court is dominated by, quote, "liberal
7 California judges" unquote, is a political shibboleth,
8 for which there is no substance -- any substance to be
9 demonstrated.

10 This argument is an outgrowth of a
11 perceived political thing that is called the federal
12 war on the west, that is pushed by some who think that
13 judicial decisions affecting the Northwest economies
14 should be based on regional considerations, rather
15 than on the need for a national, as opposed to a
16 regional law.

17 Montana's state constitution has in it
18 several decisions that parallel the federal Bill of
19 Rights. While Montana cannot use its state provisions
20 to diminish a citizen's federal civil rights, under
21 the U.S. Constitution, Montana does not have to march
22 lockstep with the United States Supreme Court

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1 decisions respecting those rights, but can expand them
2 under our state constitution.

3 In examining such questions, our state
4 Supreme Court has always looked respectfully at
5 decisions of the court of appeals of the Ninth Circuit
6 for precedents respecting those parallel rights. In
7 a new circuit, we would be starting over regarding
8 precedents. I realize that in itself, that is not a
9 major consideration, perhaps, for this Commission.
10 But it does demonstrate the sea of uncertainty that
11 would result in the states involved in a split of the
12 circuit.

13 However, we have here a Commission that is
14 mandated by Congress to make recommendations. And I
15 have a fear that some of the recommendations might lie
16 on the desk, and not be acted upon in much the same
17 way that happens to the rest of the Commission.

18 I think it should be really clear that a
19 split of the court of appeals of the Ninth Circuit is
20 not going to happen anytime soon. First of all, the
21 great weight of the arguments before this Commission,
22 before the Congress, before the various other bodies

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1 studying the matter, after the Horeske Commission, is
2 against carving the Ninth Circuit.

3 The learned judges, the professors, the
4 experts I've met and challenged, and overcome all the
5 arguments conjured up by those who would advocate a
6 split. The configuration of -- circuit seems to have
7 the support of the legal community, a very important
8 factor.

9 Senator Conrad Byrnes, too, a sponsor of
10 the Senate bills 853 and 956 -- a few legal scholars
11 advocate dividing the Ninth Circuit, but instead offer
12 innovative reform measures, like re-defining the
13 circuit boundaries, or re-structuring the federal
14 appellate court system said, quote, "However, all of
15 those articles ignore the political reality facing
16 each of these proposals. Congress is unlikely to
17 adopt any reform proposal which is opposed by the
18 legal community."

19 I think that's an important factor. A
20 further reason why a split of the circuit will not
21 happen anytime soon, as no workable plan to divide the
22 circuit can be or has been conjured up. So far, every

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1 split either divides California, or creates a new
2 circuit or circuits with unfair and unworkable
3 caseload, distributions of caseload.

4 And each new circuit would be under
5 staffed with judges available to undertake the
6 administrative work now being handled by the Ninth
7 Circuit. All of this is ably set out for you by
8 others who have made statements to the Commission.

9 A third reason why the Ninth will not be
10 split anytime soon is purely political, and not within
11 the purview of the work of this Commission. Because
12 assumedly, this Commission will not make its report --
13 will make its report based on what is good for the
14 country with regard to the appellate future of the
15 federal judiciary, and without regard to the politics
16 of the matter.

17 When politics enters in, we get ridiculous
18 results. For example, Senate Bill 956 passed the
19 Senate because the Judiciary Committee of the Senate
20 was by-passed, and the Senate Bill 956 was attached as
21 a rider to an appropriation bill in the Senate
22 Appropriations Committee.

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1 Had Senate Bill 956 finally passed, we
2 would have had the absurdity of two legal clerk's
3 offices at opposite sides of the new circuit handling
4 only thirty percent of the work of the old Ninth
5 Circuit.

6 Fortunately, this situation was avoided.
7 And the only good thing to come out of the political
8 process was the establishment of this Commission. But
9 if this Commission comes to the conclusion, as I hope
10 it will, that no workable and fair carving of the
11 Ninth Circuit can be recommended by it, there are
12 still the contentions of some that -- divisions of the
13 Ninth can be made that will in effect be creating new
14 districts.

15 These proposals include such things as
16 assigning certain divisions within the circuit to hear
17 appeals from certain judges within the circuit.
18 Future appointments of appellate judges not to the
19 circuit, but to divisions within the circuit. And
20 dividing cases out of the four California districts
21 among the divisions.

22 These suggestions are looking only to case

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1 volumes in dividing up the circuit. They ignore case
2 types, which require a different quantification than
3 merely volume. For example, in death penalty cases --
4 a case management issue, plus -- the deployment of
5 district judges to panels, and many other innovative
6 procedures now in effect in the Ninth Circuit.

7 The truth is that creating divisions by
8 law, I am not clear from what has been -- here,
9 whether the proposal to establish divisions is meant
10 by law, or by internal court rule. But creating it by
11 law would in effect carve up the circuit de facto.

12 The methods of handling the judicial
13 business of each circuit is better left to the judges
14 appointed to each circuit. They have the best feel
15 for the efficient administration of the judicial work,
16 and they all have a wide latitude of options for
17 innovation, as the Ninth Circuit has already
18 demonstrated.

19 I have no idea at present what this
20 Commission is learning or has learned about the other
21 federal appellate circuits, nor how they relate to the
22 whole appellate system, or to the Ninth Circuit. I

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1 offer my comments only because the Congressional
2 mandate to this Commission included a special
3 reference to the Ninth Circuit.

4 The continuing efforts over the last year
5 to divide the Ninth must be a terrible distraction to
6 the judges on that court, and a loss of work time that
7 could otherwise be devoted to true judicial work.

8 Somewhere along the line, it is my hope
9 that some investigative body, and I hope this
10 Commission, or perhaps this Commission will tell the
11 world that the court of appeals for the Ninth Circuit
12 is presently doing its job in a manner that is
13 comparable to any other circuit, and -- is
14 commensurate with the demands of justice, as far as
15 can be expected.

16 And it will surely do even a better job if
17 it is soon given its full complement of judges to
18 handle the important judicial business of the west.

19 I respectfully submit that, Your Honor.

20 CHAIRMAN WHITE: Thank you. Do you have
21 any questions?

22 COMMISSIONER: I would like to ask --

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1 Judge Boochever -- Judge Boochever, I wonder if you
2 could provide a definition of collegiality in the
3 appellate court setting?

4 JUDGE BOOCHEVER: (Pause.) That's a good
5 question. I think it comes in, in being able to
6 communicate with each other in a civil fashion, and
7 discuss cases, discuss issues. I think particularly
8 it comes in on three-judge panels when one gets a
9 draft of a decision from another judge, and spend as
10 much time on it as your own case, in trying to
11 strengthen different parts, or make suggested changes,
12 where you work together to get a collegial product
13 that is better than you would get otherwise.

14 Now, there are social gatherings that are
15 fun. It's nice to be with other judges, and to joke
16 with them, and to go out with them. But I don't see
17 that as what is the real collegial function in an
18 appellate court.

19 COMMISSIONER: Does it have anything to do
20 with how well you know the other judge, how often you
21 work with him, and so on?

22 JUDGE BOOCHEVER: I really don't think it

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1 necessarily does. I know that you can have an
2 immediate collegial relationship with a new judge that
3 comes in, or with one that you're sitting with for the
4 first time. So that I don't think it's essential that
5 you have a long time working relationship.

6 Now, long time working relationships
7 sometimes can be good, and sometimes can be bad.
8 Speaking quite frankly, there are certain judges that
9 are going to have more arguments with certain other
10 judges, and we've got some examples on our court of
11 that.

12 But I don't think that overall, as a
13 matter of size, you could have them on one small
14 court, and they would still jostle back and forth.
15 And actually, the exchanges often give some good
16 insights into problems that you might not get if
17 everyone were just buddy buddy about it.

18 COMMISSIONER: Judge, were you through
19 now?

20 JUDGE BOOCHEVER: Yes.

21 COMMISSIONER: Judge Boochever, I have
22 asked this question as I've asked several others not

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1 because I have any mindset in this regard, but because
2 people ask us that, and we ask one another that.

3 One of your colleagues recommends doubling
4 the size of the Ninth Circuit, and says it can be done
5 without sacrificing any of the values of appellate
6 decision making.

7 Another of your colleagues, Judge
8 O'Scannlain says that almost any increase would be too
9 much. I may be quoting him too drastically in that
10 regard. But certainly, he would not be able to live
11 with doubling the size of the circuit, according to
12 his remarks.

13 Where do you come down in that argument?
14 And by what criteria do we -- should we look, to see
15 when a circuit reaches, or is likely to reach a size
16 that it becomes too large, or too cumbersome, or has
17 to compromise on too many traditional appellate values
18 to guarantee its product?

19 JUDGE BOOCHEVER: I think that's a good
20 question. I really don't -- I think we can go a long
21 ways if we have to. I would -- I would prefer that
22 the jurisdictional aspect be looked into to keep the

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1 case load from constantly increasing.

2 But I do think that as long as we set up
3 proper systems for resolving any conflicts, and
4 particularly now that we have computers that can
5 instantly draw any other case that has the same issue,
6 I don't think that increasing size is going to be a
7 tremendous problem.

8 I can't say that at some point it may get
9 so big that it would be -- that we'd had a real
10 serious problem. One thing is that one has to be
11 willing to abide by a limited en banc, even though it
12 does not necessarily represent a majority of the
13 court.

14 I think we can do that. I mean, we can
15 accept that their decision is going to decide which of
16 two possible conflicting views is going to be the view
17 of the circuit. And we can -- we can live with that.
18 If it's an important case, and the view is wrong, the
19 Supreme Court will correct this.

20 COMMISSIONER: Do I understand you to be
21 saying, if you put what you just said there in
22 response to what you said a moment ago, it's

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1 irrelevant to the quality or consistency of appellate
2 decision work whether you deal with strangers, or
3 judges you know.

4 In other words, if you -- or a panel you
5 sit on, you sit once every three or four years with
6 Judge A, it makes no difference, I take it, from what
7 you're saying, that you're dealing with strangers, as
8 distinguished from dealing with judges you really know
9 and work with regularly.

10 JUDGE BOOCHEVER: I would say that it
11 probably makes little difference. It may make some
12 difference. But it would make little difference as
13 long as the stranger did the same preparation, and the
14 same careful looking at the case, as the judges on the
15 present court do.

16 If we get a stranger from, say, another
17 circuit, and if he's more interested in a trip to
18 someplace than to really study the case, then you
19 aren't going to get the contribution and the exchanges
20 that are meaningful to a panel.

21 But as long as one gets the type of judge
22 that I'm talking about, then I don't think -- I think

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1 it makes little difference that one is not familiar
2 with him, or her, I should say, too.

3 COMMISSIONER: Judge Boochever, in answer
4 to my last question, I guess you think that by
5 increasing size, if a necessary concomitant of that is
6 reducing the number of oral arguments granted even
7 further, increasing memorandum decisions to an even
8 greater number would not compromise the quality of
9 justice that our citizens have a right to expect from
10 our courts of appeal.

11 JUDGE BOOCHEVER: Well, --

12 COMMISSIONER: Is that a fair statement of
13 how you feel?

14 JUDGE BOOCHEVER: I don't think that is.

15 COMMISSIONER: Okay. Well, good.

16 JUDGE BOOCHEVER: I think it's important
17 that the standards be kept up, and that it's
18 preferable to have more judges, and to be able to keep
19 up those standards, than to shunt off more and more
20 cases to memorandum decisions, particularly if one
21 starts sluffing at the standards, and doing memorandum
22 decisions when they're really tough issues involving

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1 new -- new facets of the law.

2 Then I think we're compromising, and I
3 don't think that should be done.

4 CHAIRMAN WHITE: Well, I think there are
5 some people who seek -- a solution to our old problem,
6 are -- are about five big circuits, or six big
7 circuits. And I wouldn't -- I wouldn't think that
8 right now it's -- that's much of a solution. But it
9 might be a solution for the Ninth Circuit.

10 If it got too big, that you would go ahead
11 and make another big circuit.

12 JUDGE BOOCHEVER: You mean making the
13 Ninth Circuit into two big circuits?

14 CHAIRMAN WHITE: No. No. No. No. Take
15 the -- take the Sixth Circuit, or the Tenth Circuit,
16 and make a big circuit out of it.

17 JUDGE BOOCHEVER: I think the ones in that
18 judge are probably a little better able to speak to
19 that. But theoretically, I would see no objection to
20 that.

21 CHAIRMAN WHITE: Yeah. Well, it's -- it's
22 probably better than taking all of the planned jumbo

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1 circuits, and doing it all at once.

2 JUDGE BOOCHEVER: I don't -- I'm sorry.

3 I didn't follow that last one.

4 CHAIRMAN WHITE: Well, if you have a
5 choice, right now, and under present circumstances, if
6 you have a choice of creating six big circuits, as
7 against just waiting until you need to have another
8 one, I would suppose you'd wait to have another one.

9 JUDGE BOOCHEVER: Well --

10 CHAIRMAN WHITE: Which would cure the
11 necessity to have more judges in the Eighths -- in the
12 Ninth Circuit. Well, anyway, don't worry. I'm just
13 dreaming. (Laughter.)

14 JUDGE BOOCHEVER: Well, thank you, Your
15 Honor.

16 CHAIRMAN WHITE: (Pause.) Do you want to
17 brief? Do we need to brief? All right. We will take
18 a five minute rest.

19 (Whereupon, a recess was taken.)

20 CHAIRMAN WHITE: Welcome. Welcome.

21 JUDGE HOLLAND: Thank you, sir. Mr.
22 Justice White, members of the Commission, I am very

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1 pleased to be with you this afternoon. I want to tell
2 you first that I speak only for myself in appearing
3 before the Commission.

4 Our court is one of those that is somewhat
5 divided on this issue of whether the circuit should or
6 should not be divided. Our senior judges tend toward
7 wishing to see a division. Our newest judge sees the
8 matter likewise. The chief judge and I are opposed to
9 a division of the Ninth Circuit.

10 The second thing that I would say today is
11 that I believe that the reasons that have been
12 advanced to you by the circuit itself in favor of
13 retaining the present composition of the circuit are
14 numerous, and persuasive, and well reasoned.

15 Third, if I may expand, or reiterate just
16 a bit what I have said in my written presentation, I
17 think a principle job that this Commission has, before
18 it is to do some analysis of the politics that lie
19 behind your charter to study alternatives for the
20 structure of courts of appeal.

21 I believe that you face the very real
22 problem of having to tell Congress something which

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1 many of those who support the division of the Ninth
2 Circuit do not want to hear. Namely, that there is
3 not any serious fault in the structure of the U.S.
4 appellate courts generally, or the Ninth Circuit in
5 particular.

6 I have seen no empirical evidence that
7 there is anything inherently or fundamentally wrong
8 with the appellate decision-making process as we now
9 know it. What we have out there is a problem. And
10 the problem, I suggest is that the media, and the
11 technology which supports the public media, have
12 expanded so greatly, and are able to spread so far and
13 wide their notions of what is and what is not right
14 and wrong with the courts, that those who are
15 listening are overwhelmed.

16 Those who are listening I think
17 unfortunately do not have much of a frame of reference
18 within which to evaluate that which they are being
19 bombarded with. Those who ought to and need to know
20 better what is really going on, I fear, are
21 overwhelmed by the volume and the intensity of what
22 they are hearing.

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1 I submit that they are by and large un-
2 informed as to the demands which they are considering
3 for change in the appellate process. Those who have
4 lost an important case before an appellate court
5 become the vanguard of those who think that there is
6 something inherently wrong with a large court, and
7 they vent their frustration over losing their
8 important case on the messenger of the bad tidings, a
9 court.

10 Even if we could de-politicize the
11 judicial appointment process, judges will always
12 reflect their political, legal, and cultural
13 philosophies in their decision-making. Given their
14 different backgrounds, and given life tenure, judges
15 will always have different views of the law. The
16 honest views of any judge or panel of judges at any
17 given time may or may not comport with the dominant
18 view of Congress.

19 Despite these diversities, tough cases
20 have to be decided, someone will prevail. And some
21 will lose. And the loser will complain to all who
22 will listen to him. Only the most extreme of changes

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1 in our judicial system could alter this.

2 And I seriously doubt that Congress is
3 prepared to replace the advocacy system which we
4 presently employ with a decision-making process based
5 on conciliation and consensus. And only that kind of
6 fundamental change would, in my view, silence those
7 who would otherwise be the losers, some of the whom
8 would dis-member the messenger.

9 I do not envy the Commission the task that
10 it has before it. You may be in a no-win situation.
11 You cannot change the views of sitting judges. You
12 cannot end their terms. You cannot make everyone
13 aware of his or her important case.

14 So, what do you do? I urge you to
15 consider and propose some innovations in a number of
16 areas. I urge you consideration of the timeliness of
17 the appointment of judges as a primary problem which
18 must be addressed. If it were possible, we should de-
19 politicize to some degree the confirmation process.
20 That's probably a pipe dream.

21 You might consider enhancing the
22 transportability of appellate judges, to smooth out

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1 the availability of judges between circuits. In the
2 area of decision-making, I urge you to consider the
3 improvement of en banc procedures for the
4 consideration for the consideration of difficult
5 cases.

6 I urge you to reject the notion that a
7 court may be divided over its own objections, and for
8 the purpose of quieting those who have lost some
9 important cases or cases. A circuit division aimed at
10 isolating a judge or judges because of his, her or
11 their views of the law is wrong. Such action would
12 violate the independence of the judiciary.

13 I believe that the courts of appeal
14 generally, and the Ninth Circuit in particular, have
15 performed well. I believe that with rural staffing,
16 the Ninth Circuit could prove the efficacy of a large
17 circuit court. I urge you to tell Congress that there
18 is currently no valid reason for dividing the Ninth
19 Circuit court of appeals.

20 Now, if you will bear with me for just a
21 moment more, I feel some need to respond to the Alaska
22 situation. It came up this morning with the assistant

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1 attorney general, who was here in place of her boss
2 because of the meeting of the legislature.

3 That legislature is currently addressing
4 one of the very cases which the assistant attorney
5 general mentioned. They're wrestling with the rural
6 residents problems of our subsistence law. It is
7 still not resolved.

8 Mention was also made of the Indian
9 Country case. I should perhaps tell you in fairness
10 that both the Canine Subsistence case, as regards
11 rural preferences, and the Indian Country case were
12 mine at the district level.

13 The circuit reversed me on both of them.
14 And I say with a straight face, and there is a judge
15 behind me who will be my witness, if need be, that
16 despite this situation, my situation, I remain
17 convinced that while Alaska is different in many
18 respects, it is not really different when it comes to
19 federal law.

20 Judge Browning, you got it exactly right.
21 The Indian Country case, the Rural Preference case,
22 and a whole laundry list of other land law cases, and

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1 things of that ilk, they are, in a sense, unique to
2 Alaska. All fundamentally turned on the
3 interpretation of federal law. We're talking about
4 figuring out what Congress meant.

5 Not what the State of Alaska meant. Not
6 what the individual citizens of Alaska might wish.
7 We're talking about figuring out what Congress meant.
8 And lots of times, Congress doesn't speak very
9 clearly, at least not to me.

10 My point is that the Indian Country case,
11 the Subsistence Law case, and a whole laundry list of
12 other cases, were legitimate, good faith disputes
13 between people who honestly believed their own point
14 of view. Who received at my hands a decision that one
15 side thought was favorable, and received a different
16 decision at the appellate level.

17 That doesn't necessarily make me right,
18 and them wrong, or the reverse. It simply means there
19 are different views. There will always be different
20 views. And dividing circuits will not end that.

21 Thank you very much for the opportunity to
22 speak before the Commission this morning.

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1 CHAIRMAN WHITE: Thank you, sir. Judge
2 Redden?

3 JUDGE REDDEN: Thank you. Members --
4 Justice White, Members of the Commission, I am here
5 with three of my colleagues, and we do speak for a
6 majority of our district and magistrate judges in the
7 District of Oregon. All but one magistrate judge
8 favors a split.

9 Judge Hogan, and -- I would say, disfavors
10 the California split, or a split involving a split of
11 the State of California. And wishes me to point out
12 that any split will be the long range solution to the
13 problems of the judiciary in this -- in this circuit,
14 or in the nation. And of course, we all must agree
15 with that.

16 But we favor a division of the Ninth
17 Circuit, and appreciate the opportunity to briefly
18 explain our reasons, as well as our preference in the
19 manner in which it should be divided. Our reason, at
20 least in Oregon, and the reason with other judges I
21 have talked to, district judges favoring a split, is
22 that the circuit is just too big.

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1 There are too many panels, and too many
2 possible combinations of judges on a given panel. We
3 don't desire a split for any liberal versus
4 conservative theory, which has been advanced,
5 unfortunately, by the political branches. Which is
6 pointless, and has been somewhat divisive in our
7 circuit.

8 Neither do we seek our own little
9 Northwest corner of the world on the theory we can
10 better administer to the needs of the Northwest, or
11 that they are our constituency. We are not
12 administrators. We are independent judges.

13 And we do have the greatest respect for
14 those who have led us in the 80's and 90's. Judges
15 Browning, Goodwin, Wallace, and now Hugg. They have
16 done a good job, and are doing a good job. Three of
17 them were here today, all of them friends and
18 colleagues. But there is just so much they can do.

19 Judge Wilkinson pointed out to this panel
20 that as the court grew, so do the possible panel
21 combinations. And the law becomes fuzzier and less
22 distinct. I won't read this full quote. We've had it

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1 in several letters to you. I think that that is true.
2 I think it's inescapable.

3 The real problem with a court as large as
4 the Ninth Circuit is, of course, there are too many
5 panels, and too many possible combinations of judges
6 on any given panel. And there was a question asked
7 about the meaning of collegiality. Collegiality to me
8 does not mean friendship, necessarily, or beer
9 drinking buddies, like you might perhaps on the
10 district court level.

11 Collegiality, it seems to me on the
12 appellate level is that cooperation and association --
13 in working together. Someone told you earlier today,
14 I believe, that it might be three years before the
15 same judges will sit on the same three-judge panel in
16 a circuit as large as the Ninth Circuit. And I
17 suggest to you that that is a problem.

18 Judge Parker has told you about the task
19 of maintaining coherence and uniformity when a court
20 has more than twelve active judges, though he was
21 seeking three more.

22 Judge Hatchet recalls the old Fifth

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1 Circuit as a horror. I don't know the number of
2 possible combinations here. But in the Ninth Circuit,
3 or as it will be when there are ten more judges. And
4 when you consider the visiting judges, the district
5 judges that sit on the Ninth Circuit.

6 But they had 3,500 when there were twenty-
7 six regulars and seniors in the draw in the Eleventh
8 Circuit. And I suggest that we are talking about
9 possibly 5,000 or more. He felt that that rendered
10 the law uncertain, and it is certainly so. Such a
11 court cannot keep up with their own opinions, and
12 neither can the district judges.

13 We are told that isn't too important for
14 district judges, because the lawyers will cite the
15 cases. But the lawyers can't keep up with the number
16 of decisions.

17 It is the uncertainty of the law which
18 encourages appeal, and contributes to more
19 uncertainty. As I said in my statement, lawyers have
20 advised us that they must advise their clients when
21 the question is, shall we appeal, or shall we settle
22 on appeal is yes, because -- yes, we should both

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1 appeal or settle, depending on the position, because
2 we cannot tell you what the position of any given
3 panel you may draw will be.

4 And that may be just their perception.
5 But it is a real thing. And I think there is some
6 basis to it. There will be more judges added to this
7 circuit. It will be -- a split will be inevitable.
8 I think that the legislative branch has told us that
9 it's going to be inevitable. And I hope that this
10 Commission, even if you do not support the proposition
11 of a split, we'll discuss with -- in your report what
12 the best split will be.

13 I think that either the Ruske panel, as
14 recommended by Judge O'Scannlain, or the three way
15 split, either one of those two are the best. A
16 combination of those others within the -- that have
17 been discussed by Judge O'Scannlain, might work. Put
18 you in sort of a position of a three-judge
19 Congressional re-apportionment panel.

20 But I think at least two of them are
21 practical, even if one of them splits the State of
22 California. House Resolution 3654 of 1993 by

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1 Congressman Kopesky deals with the resolution
2 administered to conflicts by the creation of an inter-
3 circuit California en banc court, which is not as
4 complicated as it sounds. I've attached that bill to
5 my statement.

6 We know that the division of the Ninth
7 Circuit is not going to solve all the problems,
8 because this is a structural committee, and not a
9 jurisdictional one. Perhaps the jurisdictional answer
10 would be better. Would they give -- grant -- to the
11 circuits, Congress? I don't think so.

12 Would they do away with diversity? I
13 don't think so. And will they abandon federalization
14 of criminal and civil cases? I don't think so. I
15 think that a split of this circuit in an intelligent
16 fashion will be of great help to this circuit for the
17 next decade, and more.

18 And when you compare it to what will
19 happen if we remain the same, and simply continue to
20 grow, I think you will arrive at that same conclusion.
21 I hope the Commission makes a positive contribution,
22 suggests the appropriate division of the circuit, even

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1 if you do not unanimously endorse the concept.

2 Thank you.

3 CHAIRMAN WHITE: Thank you. Judge Van
4 Sickle. You may approach the bench, or the podium, or
5 wherever you want to talk about. All right.

6 JUDGE VAN SICKLE: Thank you, Mr. Justice
7 White, and members of the Commission. My name is Fred
8 Van Sickle. I am a United States District Court judge
9 from the Eastern District of Washington. I reside in
10 Spokane.

11 I speak primarily for myself. But I also
12 speak in accordance with the general philosophy, as
13 well, of the chief judge in the Eastern District of
14 Washington, Judge William Nielsen.

15 It's always difficult I think when a trial
16 judge is taking a position that is contrary to the
17 appellate system, to not make it appear as though it's
18 a personal criticism of that -- the personnel
19 involved. My comments and concerns are not at all,
20 and should not be understood to be a personal
21 criticism of any of the judges or the staff of the
22 Ninth Circuit whatsoever. They are not.

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1 To give you some idea of my background, I
2 am a country trial judge. I started out in the state
3 system in the State of Washington, in eastern
4 Washington. And served fifteen-plus years as a state
5 trial judge, and have served just about seven years on
6 the federal bench.

7 My concern with the situation involving
8 the Ninth Circuit is the extreme number of cases and
9 determinations that are required to be made by a
10 circuit of that size. When we are talking about a
11 caseload that is approaching almost 9,000 -- 8,600
12 cases to be considered by -- as indicated, as I
13 understand the numbers, the number of panels that are
14 involved in making those decisions.

15 The risks and concerns with conflicts in
16 the cases, and the risks of uncertainty, are
17 significant. They create, I think, difficulties for
18 everyone. I think the judiciary, the trial bench, has
19 a difficult time keeping up with what the law is on a
20 day to day basis, in order to be able to make
21 decisions on cases, and on motions.

22 And I would suggest that that also, that

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1 uncertainty, which is so important, I think, for the
2 general practitioners of law, and people practicing in
3 the federal courts, to know and understand what the
4 law is, or have a good idea of what to be able to
5 predict what the law is, to advise your clients,
6 becomes very important.

7 I am convinced that this also results in
8 more litigation. And thus, we end up with more
9 litigation, and more uncertainty. And I -- I have not
10 yet had it happen, but I had a friend tell me on the
11 phone the other day, someone from outside any of the
12 districts that are here. But also as part of the
13 Ninth Circuit, commented that counsel in his court
14 said, judge, you can rule as you see fit, of course.
15 But we'll take it up, and see what panel we might get
16 in the Ninth Circuit to tell us what the law is.

17 I don't mean to be personally critical,
18 but it has reached the point, and it is a function
19 that is explained, as well, in that article that
20 submitted to The Wall Street Journal, but that then
21 was re-published in the publication of the Federal
22 Judges Association, the May issue of In Camera,

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1 published this article, re-print from The Wall Street
2 Journal, that was authored by Chief Judge Wilkinson of
3 the Fourth Circuit, talking about the size of
4 circuits, and talking about the size of the federal
5 judiciary, in general, his principle concern. But
6 addressing the concerns of the size of the district of
7 the appellate court system.

8 I would say those things do apply. I know
9 you've heard them over and over, I suspect. And the
10 concerns expressed by the people who mentioned them to
11 you. And I think they're real. They are a concern.
12 And I think the question comes down to a very
13 difficult determination.

14 And that is, should there be a split of
15 the Ninth Circuit? And should that happen? And is it
16 really, even more -- to say, is it the time now come?
17 I am convinced that the size of the circuit, not
18 geographically, but in terms of caseload, in terms of
19 the work and energy that has gone into, to do the
20 work?

21 And I am mindful of the difficulties with
22 the vacancies, and the use of technology in an effort

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1 to deal with the problems that are there, that have
2 been done. But I would submit to you, and ask that
3 this Commission give very serious consideration to a
4 division of the circuit. Not because the people in
5 the circuit, whether the judges or the staff, are in
6 any way not doing their job.

7 It's because of the difficulties of
8 uncertainty, the difficulties and problems with the
9 judiciary, the bar. And probably more importantly,
10 the litigants, who must then wonder what the federal
11 law is, and must litigate it. And must be involved
12 with the use of their resources to make the
13 determinations, as it relates to their litigation.

14 Thank you very much for allowing me to
15 express my concerns in regard to these issues. Thank
16 you.

17 CHAIRMAN WHITE: Very well. Do you have
18 any questions?

19 COMMISSIONER: Well, let me ask Judge
20 Holland, you can answer from there if you keep your
21 voice up, Judge. Do you -- do attorneys in Alaska
22 share the perception that Judge Redden and Judge Van

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1 Sickle spoke of, that it depends on what panel you
2 get, as to whether the appeal will succeed or not?

3 JUDGE HOLLAND: In all candor, sir, I have
4 said that myself. And I do hear that.

5 COMMISSIONER: There appears to be a study
6 by --

7 JUDGE HOLLAND: I don't -- I'm sorry, sir.

8 COMMISSIONER: There's a study by
9 Professor Helman, which would indicate his examination
10 of empirical data, does not show that to be the case.
11 Now, he admits to some -- I don't know the right word.
12 Shortcomings, perhaps, in his research, or some
13 aspects that aren't completed.

14 But if that were the case, you would think
15 it's still the perception in your district that that
16 is the case.

17 JUDGE HOLLAND: I think there is a
18 perception that it makes a difference which panel you
19 get. And I suggest that that circumstance exists in
20 any circuit. And of course, the bigger it gets, the
21 more combinations there are.

22 But I do not think that dividing this

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1 circuit or that circuit or the other circuit is going
2 to solve the problem for those who say, gee, if I get
3 a panel made up of Judge A, and Judge B, the case is
4 going to go one way. But if I get C and D, it's going
5 to go the other way. I think you can have that on a
6 five judge court.

7 COMMISSIONER: One other observation,
8 there is nobody on this Commission, I believe, who can
9 predict where this Commission stands on any point
10 that's been discussed today. But I'll take the
11 liberty of predicting, we won't recommend to Congress
12 they de-politicize the selection of federal judges.
13 (Laughter.)

14 And from where I sit, that's fine. But
15 were that true twenty years ago, we might have a lot
16 of new faces in this room.

17 JUDGE HOLLAND: It sure is true.

18 CHAIRMAN WHITE: I wonder if I might add,
19 Judge Holland, a question of, we've heard various
20 arguments about what I think for short is called
21 regionalism. That the whole federal judicial
22 structure is based more or less on a regional basis.

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1 Not exactly in every situation. But more or less
2 historically. You've got a New England circuit,
3 you've got a mid-Atlantic, you've got South-eastern,
4 et cetera.

5 And the lower -- planning committee made
6 a point of saying that appellate courts, that the
7 litigants should have access to appellate courts with
8 judges drawn from their region. Now, and then we also
9 have heard that one cannot say that Arizona and Alaska
10 are in the same region. And you have a situation here
11 that is inconsistent with the concept of regionalism
12 historically, and currently.

13 What would be your answer? Is
14 regionalism, in that sense, a legitimate factor to be
15 taken into account in designing circuits?

16 JUDGE HOLLAND: Well, certainly from an
17 historical standpoint, I think one can say that has
18 been a factor. Now, I think one can look at the
19 Pacific Northwest, and say with a straight face that
20 Alaska, for example, has more of an affinity for that
21 which goes on in the Pacific Northwest than it does
22 for what goes on in Arizona.

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1 That's true. I also think that it's true
2 that there is a high level of importance for the
3 entire Pacific coast that we have a unified law for
4 the entire Pacific coast. We in Alaska have
5 significant business dealings with the entire Pacific
6 coast.

7 And in some meaningful sense, I suggest
8 that the Pacific coast is a legitimate, recognizable
9 region, when one speaks of having appellate courts
10 serve, in some sense, on a regional basis.

11 If that's not too waffly an answer, yes,
12 I think it's a factor. But I'm not prepared to
13 concede that the Ninth Circuit fails in that regard.

14 CHAIRMAN WHITE: (Pause.) Thank you.

15 COMMISSIONER: I have no other questions,
16 no.

17 CHAIRMAN WHITE: Judge Barbara Jacobs
18 Rothstein, U.S. District Court, Western District of
19 Washington.

20 JUDGE ROTHSTEIN: Good afternoon. I am
21 sure by now you've heard a lot of testimony from a lot
22 of different people. If I were sitting where you were

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1 sitting, I would probably rule that I am cumulative,
2 and dispense with me. But I do appreciate --

3 CHAIRMAN WHITE: Oh, I know. But
4 cumulation means sometimes convincing.

5 JUDGE ROTHSTEIN: I hope so. I appreciate
6 the opportunity to be able to speak to you. Many of
7 us judges haven't had a chance to argue a point for
8 many years, so this is a good occasion for us to do
9 that.

10 CHAIRMAN WHITE: Uh-huh.

11 JUDGE ROTHSTEIN: I'd like to address some
12 of the questions that you have asked concerning the
13 regionalism, and whether they're -- that should be a
14 factor that counts for or against the splitting of the
15 circuit.

16 I would proffer that regionalism is a poor
17 idea in splitting the circuit. The idea that we could
18 have a Northwest circuit that, either through its
19 judges, or its considerations, is fitted to the needs
20 of a small section of the country, is something that
21 should not recommend itself to this panel.

22 We on the West Coast, as Judge Holland

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1 pointed out, are increasingly facing a number of legal
2 matters that impact the region as a whole. It's not
3 just international law, and the fact that we as the
4 Pacific rim are constantly dealing in an area where
5 it's a great advantage to have a common body of law.

6 But there's admiralty law, where the trade
7 is going up and down the coast. And of course,
8 there's environmental law. As I pointed out in my
9 statement, migrating species have very little regard
10 for state lines, or circuit lines. And indeed, the
11 Commissions and administrative needs for dealing with
12 these have been on a broad geographical basis.

13 The Fisheries Commission is a Pacific
14 Coast Fisheries Commission. It isn't divided in some
15 arbitrary manner between the Northwest and the
16 Southwest.

17 Fragmenting the circuit runs counter to
18 these needs. Our Supreme Court is the ultimate
19 decision maker. It's already faced with countless
20 legal disputes among many circuits. And additional
21 conflicts, by putting in an additional circuit, is not
22 going to lessen those conflicts. Or, it's not going

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1 to make the law any more certain.

2 The function of the federal courts, I
3 would submit, is to fashion a uniform national law.
4 And sectionalism is not an advantageous quality in
5 advancing that uniform body. Historically, the Ninth
6 Circuit has been a common geographic area. Its legal
7 tradition has developed with the entire picture of the
8 circuit.

9 In some areas of the country, history and
10 geography have dictated the creation of smaller
11 circuits. And so be it, they have their smaller
12 circuits. But our legal history and tradition, and
13 that of the West, has shaped itself around a larger
14 circuit.

15 I think it's a fine history, and I think
16 we should maintain. And I do think it's working well.
17 The idea that multiple panels creates an uncertain
18 body of law, I suppose multiple circuits, it's
19 inherent that there is going to be an uncertain body
20 of law, as long as it's not going to lessen it to have
21 an additional circuit.

22 You're just going to have another

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1 possibility of a split between the circuits, and
2 create more law for the Supreme Court. Which I
3 suppose may be fine, but I don't think is going to --
4 uncertainty is part of the law, part of the
5 development of the law.

6 I do not think that -- the fact that there
7 are so many panels has made that big a difference.
8 The circuit has made a concerted effort to keep track
9 of its decisions, to circulate those decisions among
10 its judges. And as technology increases, the facility
11 with which that can be done, I think that kind of
12 problem can be resolved within the circuit as it now
13 stands.

14 Any questions?

15 CHAIRMAN WHITE: Thank you. If we do
16 have, it will be after this young man.

17 JUDGE ROTHSTEIN: Okay.

18 UNIDENTIFIED: (Pause.) Do you want Judge
19 Dwyer to start?

20 CHAIRMAN WHITE: Yes.

21 JUDGE DWYER: May it please the
22 Commission. It's been a while since I've had a chance

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1 to utter a phrase like that. But I did have good
2 fortune to practice law as a trial lawyer in Seattle
3 for thirty years. And I've had the more recent good
4 fortune to serve as a district judge here in this
5 building for ten and a half years.

6 Neither of these jobs automatically
7 influence admiration for the court of appeals, which
8 after all, can take away what you've won as a trial
9 lawyer, or reverse a judgment that you've labored over
10 as a trial judge.

11 And yet, I do admire the Ninth Circuit,
12 and I believe for good reason. In my experience,
13 which includes sitting occasionally as a member of a
14 three-judge panel in the court of appeals, this court
15 of appeals functions very well.

16 It's been mentioned today that there are
17 28 judges, or there would be 28 judges if the
18 vacancies were filled. I see that as a strength,
19 rather than a weakness. This group of judges, drawn
20 from all over the far West is a diverse, multi-
21 talented, and highly dedicated group.

22 It's been asked, does it depend on what

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1 panel you get? I think, really in most cases, and
2 this was my observation as a trial lawyer, as well as
3 now, in most cases, it does not depend on what panel
4 you get.

5 Occasionally, of course, that can make an
6 important difference. But that's true in almost every
7 court. Starting in the trial court, something may
8 depend on what trial judge you get. And in any
9 appellate court of any size at all, the outcome may
10 have something to do with who is on the panel.

11 But I, for one, would rather be reversed
12 by a diverse court with an ample supply of judges from
13 various backgrounds and inclinations, than by a
14 smaller monolithic court.

15 I think those who favor a small circuit
16 may be forgetting the ancient wisdom, be careful what
17 you ask for, because you might get it. These things
18 can change very rapidly. And those who expect a more
19 favorable result eventually from a smaller court could
20 easily find the tables turned very quickly. And that
21 kind of outcome is not going to fit anyway.

22 It's been asked if this court is

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1 collegial. If by collegiality, we mean respect for
2 precedent, respect for each other's views, the answer,
3 by and large, in my experience, is yes.

4 Does this circuit produce a coherent body
5 of law? Again, I say yes. Now, by no means can I
6 take full credit for this, since I am helped by law
7 clerks who are brilliant with computerized research,
8 which is beyond me. But I find it not difficult to
9 nail down the circuit's answer to a particular point
10 of law, as well as can be done with any other circuit.

11 Obviously, there are ambiguities and
12 difficulties. If there were no ambiguities or
13 difficulties, we would now be out of business, or at
14 least have very little to do. But coherence I think
15 is a value maintained very well with the Ninth
16 Circuit.

17 There is the question of timeliness. I
18 think by national standards, and national comparisons,
19 the Ninth Circuit does well, particularly given its
20 short-handedness. But I do think also that all
21 circuits need to improve. I think lack of timeliness
22 is a chronic shortcoming in the entire federal

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1 appellate system.

2 I seized upon one word in the Commission's
3 invitation to comments. It was the word processes.
4 The Commission invited comments on processes, as well
5 as structure. And seizing on that, I included in my
6 written submission a suggestion as to process.

7 Which is very simple. It's that we take
8 a page from the British appellate book, and decide
9 some appeals where the outcome is clear, and simple,
10 and unanimous, from the bench, rather than retiring,
11 taking things under advisement, going home, drafting,
12 re-drafting, circulating, et cetera. Which is time
13 consuming, and in a non-precedential case, I think is
14 very unnecessary.

15 I believe that kind of reform could make
16 a big improvement in our work, that is, in the court
17 of appeals work. And of course, that's just one
18 suggestion of many that could be made.

19 In the future, it seems clear that all
20 circuits will grow in terms of the number of judges.
21 The supply and demand for justice will assure that no
22 matter how much any of us may wish for a small group

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1 of federal judges, limited either by a cap, or by some
2 other means, I simply don't think it's possible, given
3 the public demand for federal justice in this country.

4 And faced with that, we will not solve
5 anything by chopping up circuits. The states of the
6 far West have a great deal in common: history,
7 culture, economics, commerce. And in regard to five
8 of them, a sharing of the Pacific rim.

9 These states need a unified body of
10 federal law. I'm speaking today only for myself. But
11 I do not believe that there is any widespread
12 sentiment among the public or the bar to split off the
13 Northwest from the rest of the circuit.

14 Of course, I respect fully the views of my
15 colleagues and others who disagree. But in terms of
16 public opinion, and sentiment of the bar, I do not
17 think there is any strong movement, or even any
18 majority movement in that direction, nor should there
19 be. And I think what sentiment there is, at least as
20 expressed through Members of Congress, derives chiefly
21 from disagreement or dissatisfaction, with the very
22 small number of decisions, out of thousands recently

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1 decided by the Ninth Circuit.

2 It's hard to imagine a poorer reason to
3 break up a judicial circuit. This brings to mind an
4 historic event of 60 years ago, when out of
5 dissatisfaction with some decisions of the Supreme
6 Court over measures of the New Deal, President
7 Roosevelt made a very determined effort to change the
8 structure of the Supreme Court.

9 History has vindicated the judgment of the
10 majority who rejected that, and stayed with the
11 existing structure. And of course, time took care of
12 the problem. Just as it will take care of anyone's
13 dissatisfaction problem with particular decisions of
14 this circuit, or any other circuit.

15 Every judge, every court of appeals judge,
16 every district judge, even every Supreme Court judge,
17 has only a brief lease on office. And time will soon
18 resolve these disputes or disagreements over
19 particular cases.

20 And I think it's important to note that
21 that is all the more true in a large circuit. In a
22 small circuit, or in a one-judge county court, it is

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1 much easier to get stuck with a cast of characters
2 that breed widespread unhappiness.

3 In a larger circuit, we have a better
4 chance, and I think we have a demonstrated record of
5 being able to improve any areas of judicial decision
6 making through the normal traditional appointment
7 process, the appointment and replacement process,
8 without trying to divide circuits.

9 I do not believe we should divide circuits
10 at this point in history. Rather, we should try to
11 make them work better. And I'm convinced that we can
12 do that.

13 Thank you very much, and I'd be glad to
14 respond to any questions.

15 COMMISSIONER: I have no questions.

16 PROFESSOR MEADOR: Do you -- Judge Holland
17 a while ago talked about the perception of lawyers,
18 and even himself, that the decision you get on appeal
19 depends on the panel you happen to draw. Does either
20 one of you sense that perception among the lawyers in
21 your districts? Among the judges on your district
22 courts?

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1 JUDGE DWYER: I've heard that said,
2 Professor Meador. But it always collapses under cross
3 examination.

4 PROFESSOR MEADOR: You mean the decision
5 does not depend on the panel you get?

6 JUDGE DWYER: In most cases, I'm convinced
7 it does not. There are some cases, cases of
8 particular difficulty, or the cutting edge of the law
9 in some respect, where who is on the panel certainly
10 does make a difference.

11 But I think that is an inherent condition
12 of life in any court where you have more than one
13 judge assigned to the case?

14 PROFESSOR MEADOR: Well, does it follow
15 from that the lawyer -- the number of possible panels,
16 the greater the degree of uncertainty there will be
17 about outcomes?

18 JUDGE DWYER: I don't think so. Because
19 there are so -- only so many basic judicial points of
20 view. Sometimes they're called conservative and
21 liberal. These are two terms of doubtful clarity, in
22 my opinion. But perhaps we all have a rough idea of

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1 what -- there are not 3,000 orientations. There are
2 not even 28 different fundamental orientations. There
3 are a very few.

4 And the combinations of judges that we get
5 I think bring a richness, and a diversity to the
6 process. And a freshness to the process that easily
7 becomes lacking if a court becomes too small.
8 Something like the jury system, in a way, I am a great
9 fan of the jury system. And one reason I am is that
10 it brings freshness and newness to every case.

11 Although a large court doesn't bring
12 newness to every case, but in a sense, it does bring
13 freshness. And I think that is a tremendous advantage
14 we have. And I think those who would prefer, say, a
15 five judge circuit, or a six judge circuit, to a 28
16 judge circuit, if they were to realize that goal,
17 would soon become very disappointed.

18 CHAIRMAN WHITE: I think -- I think that
19 is all.

20 JUDGE DWYER: I thank the Commission.

21 CHAIRMAN WHITE: Thank you. And thank
22 you, Judge Rothstein. (Pause.) You may go ahead.

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1 MR. TRUE: And I'm pleased to be here this
2 afternoon to speak with you for a few minutes about a
3 court that I spend a good deal of time working for.

4 I am an attorney for the Earthjustice
5 Legal Defense Fund. We are a public interest law
6 firm. We practice in the area of environmental and
7 natural resources law. We have a number of offices
8 around the Ninth Circuit, four. And we have handled
9 cases that have arisen in just about all parts of the
10 circuit, from Guam to Alaska, Southern California, to
11 Montana, Arizona, and just about any point in between.

12 We have also followed the issue of re-
13 structuring the Ninth Circuit for at least the last
14 half dozen years. Because in the late 1980's and
15 early 1990's some of the environmental cases we were
16 involved in appeared to provoke a response in Congress
17 that the circuit should be divided, because one part
18 of the circuit didn't understand another part.

19 So, it's an issue that I have some small
20 familiarity with, certainly not as deep as many of the
21 people that you've heard from today. And my
22 familiarity with the court, and with the issue of re-

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1 structuring the court, leads me to have three points
2 that I would like to offer you today.

3 The first is, that the court, as it's
4 structured now, is working fine. That is the
5 perspective of a lawyer to writing briefs, filing
6 cases, filing motions, speaking with the clerk's
7 office, and dealing with the court on essentially a
8 weekly basis, sometimes more often.

9 The motions we file get responded to. The
10 clerk's office is very helpful, it's very prompt.
11 Calendaring of matters is handled well. We are not --
12 we haven't experienced having cases lost, or things
13 disappear into that large Ninth Circuit. They are --
14 they know when things come in, and they respond to
15 them.

16 I think if there is any problem that I see
17 in the court today, it is that the current number of
18 vacancies on the court has somewhat delayed the time,
19 my perception is, has somewhat delayed the time
20 between completion of the hearing and calendaring of
21 argument. But I believe that the problem with
22 vacancies on the court lies somewhere else than with

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1 the structure of the court itself.

2 The court has over the years done quite a
3 good job of taking advantage of technology to work
4 with and track the many appeals that are filed in
5 front of it. I can only recall one occasion in the
6 last ten years when on a point of law, under the
7 National Environmental Policy Act, two panels were
8 considering the same issue.

9 Opinions that took a different position on
10 that issue initially came out, but that was
11 immediately recognized by the court. The two opinions
12 were withdrawn. The panels concurred. And a common
13 position on that particular point of law was adopted
14 by the circuit, and has worked fine ever since.

15 I think where I come out on this point is
16 that just because it's big doesn't mean it needs to be
17 broken up. The court of appeals is not MicroSoft.
18 It's not a division of MicroSoft. It is an
19 institution that has served this region extremely well
20 for over 100 years.

21 And its innovation, and management of its
22 diverse caseload should be allowed to continue. And

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1 it should be allowed to pioneer, essentially, the
2 future of large circuits. Because at some point, we
3 may want more of those, rather than fewer.

4 The second point I think I would make is
5 that in the area where I work, there are actually
6 advantages of the current size of the Ninth Circuit.
7 In the natural resources area, we are often dealing
8 with large eco-systems, large geologic formations,
9 river systems that cover several states.

10 And there are advantages to having one
11 court that announces a rule of law for that whole
12 system, rather than potentially two courts that would
13 go in different directions. There are some examples
14 of that that come to mind. Recently we have been
15 involved in cases of the protection of habitat for a
16 number of birds that have -- that live from San
17 Francisco to the Canadian border.

18 We are involved now in litigation over the
19 protection of salmon which range up and down the West
20 Coast. Having those kinds of natural eco-systems
21 divided between two courts of appeals could raise
22 difficult issues for agencies and litigants to deal

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1 with.

2 For example, right now, the Ninth Circuit
3 and the Tenth Circuit, have a different view on
4 whether an environmental impact statement is required
5 for the designation of critical habitat under the
6 Endangered Species Act.

7 The current division, the current
8 geographic division between the Ninth and Tenth
9 Circuit, has not, to my knowledge, created a situation
10 where that difference of views has caused an agency to
11 wonder whether it should prepare an environmental
12 impact statement or not because part of the species
13 ranges in one circuit, and part in another.

14 If you were to divide the Ninth Circuit,
15 you would have that problem immediately. Because the
16 salmon, for example, are listed from California to
17 Washington. And you have a question of whether the
18 designation of critical habitat for that species
19 requires an EIS. Perhaps it would in Washington, and
20 not in California. What does the agency that covers
21 both of those states do in that situation?

22 Those problems certainly are not

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1 unsolvable. But it seems to me that there is no
2 reason to go out and buy that set of problems when you
3 have a court that is working perfectly well.

4 There has been, at least in the past, some
5 suggestion that part of the court, as I mentioned
6 earlier, take different views on legal issues than
7 other parts. And that has been suggested in
8 particular in the environmental area, when the
9 division of the circuit was proposed in the early
10 90's. The suggestion was that some of the judges from
11 California didn't understand natural resource issues
12 in the Northwest, and were imposing their views.

13 Twice we have looked at three or four year
14 sets of opinions of the court in the environmental
15 area. And we are unable to find that difference in
16 views, if it exists. We have looked at anywhere from
17 75 to 100 cases over those periods. And in cases
18 where there are two California judges on the panel, a
19 successful environmental ruling is just as likely to
20 be reversed as it is when there are not two California
21 judges on the panel.

22 I don't think you can draw a conclusion

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1 that there are geographic prejudices within the court.
2 Certainly not in the environmental area.

3 I guess I would add also a point that
4 Judge Dwyer made earlier. It seems to me that if that
5 restructuring a court to change the outcome and
6 opinions, to change the substantive outcome of
7 opinions, is a poor way to run a railroad. It is not
8 consistent with the kind of independent judiciary I
9 think we all enjoy in this country.

10 And as Judge Dwyer pointed out, the first
11 experience with that, court packing, in the 30's was
12 rejected. And I think anything that even hints of
13 that approach should be questioned very, very closely.

14 It's -- court packing is not something that we need
15 in any form.

16 I think the last point I would make is the
17 one that I ended up with in my written statement,
18 which is that there are important institutional, or
19 important issues of institutional, inter-institutional
20 respect, at issue in the question of whether to divide
21 the Ninth Circuit.

22 The courts have been very careful of

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1 interfering in the internal self-regulation of the
2 Congress. The Congress has been very careful about
3 interfering in the internal self-regulation of the
4 courts. And I think that's reflected in prior
5 legislation that allowed courts to seek to split if
6 they wanted to, but didn't seek to command to that.
7 And it's reflected in a number of judicial opinions
8 regarding the legislature.

9 I think it would take extraordinary
10 compelling evidence for one branch of the government
11 to go in, and re-structure another, over the
12 objections of the people serving in that branch. And
13 I think for that reason, almost alone, the views of
14 the judges of the Ninth Circuit of the attorneys that
15 practice before it, and those who work with the court,
16 should carry tremendous weight in the deliberations of
17 the Commission.

18 And those views currently are in favor of
19 allowing the court to continue its good work, and its
20 experimentation with making a large circuit effective,
21 and responsive to the people in the region that it
22 serves.

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1 Thank you.

2 CHAIRMAN WHITE: Thank you very much.

3 MR. TRUE: I'd be happy to respond to
4 questions, or wait. However you like.

5 CHAIRMAN WHITE: Thomas Hillier?

6 MR. HILLIER: Hillier. Thank you, Justice
7 White, and honorable Commission.

8 CHAIRMAN WHITE: Hillier --

9 MR. HILLIER: The Irish in my family took
10 away that French flourish that might otherwise have
11 been there. So, Hillier it is.

12 As I have listened to many of the
13 conversations this morning, and this afternoon, I am
14 probably going to have to struggle to say something
15 new. And stand here looking for the back door in case
16 I get too repetitive.

17 So, to make sure there is something a
18 little new, let me begin by saying that I speak on
19 behalf of federal public defenders for the entire
20 Ninth Circuit, although you will hear from other
21 defenders in two days, down in San Francisco.

22 I also speak as a third generation

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1 Washingtonian. I was born here in Spokane,
2 Washington. My great-great-uncle, John Earls, was the
3 first state senator from Bellingham, sat on the first
4 state legislature in this state in 1889.

5 Thus, to use Senator Gorton's phrase, I
6 have parochial feelings, indeed, roots that run
7 generations deep. I have an affection for the State
8 of Washington and the Pacific Northwest that is truly
9 immeasurable. And I'm also a public defender. Which
10 is another way of saying, I lose in the Ninth Circuit
11 probably more often than the Ninth Circuit loses in
12 the Supreme Court.

13 So, I should be afraid of the Ninth
14 Circuit, in favor of the split, given that pedigree.
15 The reality is, I strongly, as a personal matter, and
16 on behalf of defenders oppose the notion of dividing
17 the Ninth Circuit.

18 I'm not anxious about California. I heard
19 that phrase earlier this morning. In fact, I don't
20 know what that phrase means. I don't understand it.
21 I don't get it. In fact, I would join what were truly
22 eloquent comments of Governor Locke earlier today, if

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1 I might. We share with California, and indeed, with
2 all the states that occupy this circuit, a common
3 cultural, commercial, and coastal identity.

4 And for the purposes of my comments, I
5 will call it the Western Pacific identity. And a huge
6 part of that identity is the Ninth Circuit court of
7 appeals. And in trying to understand why the circuit
8 should be divided, what I did first in preparing for
9 this opportunity was, try to think about what the
10 Ninth Circuit is.

11 And what I see is decades of tradition, an
12 illustrious and truly lively history. A rich, full-
13 bodied, cohesive stew of Western jurisprudence, a
14 whole bunch of dedicated judges, very helpful judges,
15 respectful and collegial judges.

16 Thousands, literally, when you take into
17 consideration the entire circuit, and its judicial
18 infra-structure, thousands of staff. Institutions,
19 and courtrooms, and court houses, and literally dozens
20 of innovative and successful programs and initiatives
21 that were begun by the judges in this circuit, to make
22 it more efficient in its administration of justice.

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1 So, when I think about what it is, I
2 wonder why it should be disassembled. But more
3 importantly, if it is going to be disassembled, what
4 standard judges such a huge decision? It's obviously
5 got to be a decision that's as large as the
6 institution we're talking about.

7 In that regard, in the paper we submitted,
8 I quoted a phrase that judge -- Chief Judge Hugg put
9 in his statement to you. And it says, "Circuit
10 restructuring should occur only if compelling
11 empirical evidence demonstrates adjudicative or
12 administrative dysfunction in a court, so that it
13 cannot continue to delivery quality justice, and
14 coherent, consistent circuit law, in the face of an
15 increasing workload."

16 And I agree with Judge Holland in that --
17 in that that such evidence simply does not exist.
18 There is not evidence that this circuit is
19 dysfunctional, that it is able to do what it is
20 charged to do.

21 Indeed, Chief Judge Hugg, and his
22 predecessors, one of whom was here today, and two of

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1 whom you'll hear from later this week, offer very
2 persuasive empirical data, and a lot of statistics
3 that speak to the efficiency of the court of appeals,
4 and its favorable comparative status with the other
5 circuits of the country.

6 I don't have a grasp of all that
7 information. It's not my stick. I do have a whole
8 lot of experience in the Ninth Circuit, however, as to
9 the other federal public defenders. We're not
10 occasional visitors. We're not outsiders looking in.
11 We have daily business in the Ninth Circuit. We
12 litigate literally hundreds of cases before the Ninth
13 Circuit on a yearly basis, as a group.

14 And I speak for the other defenders in
15 saying that the service that we receive, the justice
16 that we see, is fast. And it's exceptionally
17 efficient. We see staff that is courteous, and
18 available, and personally acquainted with ourselves,
19 and the other litigants that come before it, and a
20 court which radiates, radiates respect for the
21 litigators and the litigants.

22 And as a small example of that, in the

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1 submission that we provided for you, is the notion
2 that this circuit, unlike many, publishes virtually,
3 well, the vast majority of its opinions, and issues
4 written memoranda on those that are unpublished,
5 explaining to the litigants, the people who we
6 represent, why it is that the court has decided what
7 it has decided.

8 And when we represent the people that we
9 do, that sort of show of respect for the litigants is
10 terribly important. It demonstrates to the people who
11 we represent that this court is concerned with the
12 notion of justice, and explaining what that justice
13 is.

14 I suppose that I should say that, sadly,
15 and often what we see is an all too coherent and
16 cohesive body of law coming from the Ninth Circuit.
17 We lose, and we lose regularly. And that's because
18 this circuit does see what the case law is.

19 I don't agree at all with this notion that
20 because we have so many judges that we risk
21 inconsistency. I agree whole-heartedly with Judge
22 Dwyer, that risk is minimal. If I can find a case

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1 that supports the proposition I am presenting to the
2 Ninth Circuit court of appeals, I win. If my opponent
3 does, my opponent wins.

4 It's only in those cases that are cutting
5 edge, or that are fact driven, that there might be
6 some indecision on the part -- or some room to wiggle.
7 I agree with somebody who spoke here earlier, I
8 believe it was Judge Dwyer, who said that he does not
9 find difficulty in identifying controlling Ninth
10 Circuit law.

11 I work daily with the sentencing
12 guidelines, which are an exceptionally gray area of
13 the law, with a lot of complexity. I can read the
14 guidelines. I can read the cases. And I can predict
15 for my clients with a lot of success or a high degree
16 of probability. And where there is gray area, that's
17 going to be a fact -- fact driven sort of situation.

18 I'm not afraid of those facts. I'm -- in
19 fact, as you may note from the judges that have
20 appeared before you, I am delighted to appear before
21 this court, and argue to them information that I feel
22 should mitigate a particular sentence.

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1 But it's not the sort of risk that
2 translates into a reality of indecision, or
3 incoherence, or anything that would shows an empirical
4 basis for dismantling the Ninth Circuit court of
5 appeals.

6 That standard, I think, should judge the
7 recommendations that this Commission makes, whether or
8 not judges -- Congress' ultimate decision, we don't
9 know. But that -- but it does serve, hopefully, as --
10 to identify a hedge against the politics that many of
11 the speakers have talked about, that seems to be at
12 play here.

13 And in that regard, I think a little look
14 at history is helpful. I've read a little bit about
15 the split of the Eleventh and the Fifth. And it seems
16 to me that, in reading that, the judges and litigators
17 wanted that split, because there were problems in the
18 Fifth Circuit at the time. And they needed the split.

19 So, the judges came forward, and said,
20 here are some problems. How can we address them? Can
21 we address them this way? In the Ninth Circuit, back
22 in the very late 40's and early 50's, there was a big

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1 time move to split the circuit, and that move was
2 prompted by the circuit judges, because they didn't
3 have enough judges to do the work efficiently. And
4 they didn't have the transportation and technology
5 then to do it efficiently.

6 Congress was getting on top of that ride.
7 And there was a bill presented to Congress to split
8 the circuit. Shortly thereafter, more judges were
9 appointed. The court created some -- to deal with its
10 docket. And their efficiency went up. And the court
11 withdrew its request for a circuit split, and it was
12 done.

13 So, I think it's important to listen to
14 who's asking for the split when making that decision,
15 and I hope the Congress will.

16 Have I gone on too long?

17 JUSTICE WHITE: I don't know if you've
18 gone on too long, but you're over your time.
19 (Laughter.)

20 MR. HILLIER: Okay. Well, I -- if I -- I
21 wanted, if I could, just to talk for a second about
22 the collegiality that I see in the circuit. And you

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1 know, I guess everybody has a different definition of
2 that.

3 But we met last week with Judge Syd Thomas
4 from Montana, and three other circuit judges, we, the
5 defenders from the Ninth Circuit, and the Montana
6 School of Law, and the Montana Bar Association, in
7 Missoula, Montana, where the court sat to answer some
8 questions of law presented from that district, in
9 front of people from that district, and students at
10 the Montana Law School.

11 Thereafter, the judges sat at a CLE for a
12 day and a half with defenders, and kids from the law
13 school, and people from the bar association. They ate
14 with us, they talked with us, they argued with us.
15 They debated with us.

16 I was sitting with people who I'm probably
17 an ideological opposite of, kept coming away loving
18 the person that I spoke with, and feeling good about
19 the conversations I had with them. Learning from
20 them. And I think it's that sort of mix, that
21 collegiality, that creates the diversity that so many
22 of the speakers have talked about, and is what being

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1 in the Ninth Circuit is all about.

2 And I respectfully urge this committee to
3 stand behind the circuit when it comes time to make
4 its recommendations.

5 CHAIRMAN WHITE: Thank you. Which one of
6 you is Howard Goodfriend?

7 MR. GOODFRIEND: That's me, Your Honor.

8 CHAIRMAN WHITE: All right. You may
9 proceed.

10 MR. GOODFRIEND: Thank you, Your Honor.
11 May it please the Commission. I am Howard Goodfriend.
12 I am in private practice here in Seattle. My practice
13 concentrates in appellate practice, both in the
14 federal courts, specifically the Ninth Circuit, as
15 well as the state courts.

16 And I really appreciate the opportunity to
17 present my views today. I appreciate your taking this
18 long day to listen to the variety of speakers who have
19 appeared before you.

20 I don't really have a whole lot of new
21 things to add, so I'm going to make my remarks brief.
22 I also oppose splitting the Ninth Circuit. I believe

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1 the fundamental problem facing this circuit, as well
2 as other courts of appeals around the country, is
3 inadequate resources, inadequate staffing, to keep up
4 with burgeoning caseloads.

5 I believe that splitting the Ninth Circuit
6 would not address these problems. And in fact, it
7 would create more problems than it would solve.

8 I have been very active in professional
9 associations and committees that focus on the process
10 and the quality of appellate decision making. And I
11 believe that the focus of this Commission should be on
12 finding the means to improve the quality of the
13 administration of justice in the Ninth Circuit, as
14 well as other circuits.

15 And to do this, it should focus really on
16 advocating the measures that would enhance the court's
17 legitimacy, and increase the efficiency of the court,
18 as well as the public perception that it is fair in
19 adherence, even handed, as well as efficient.

20 In order to do that, the most important
21 factor that I think undermines the legitimacy of the
22 delivery of justice is delay. The delay from --

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1 particularly, the delay in filing, in considering a
2 case after the filing of a notice of appeal.

3 And that is more a function of inadequate
4 resources, a function of not filling existing
5 vacancies. And if necessary, creating additional
6 judicial positions.

7 I think the Commission should also study
8 the issue of the use of visiting and district court
9 judges, which have been sitting by designation on
10 Ninth Circuit panels for some time now. And should
11 formalize the process, or study the issue of whether
12 this process should be formalized to add to the
13 resources of the federal courts of appeals.

14 Visiting, and district court judges
15 sitting by designation have been used very effectively
16 to meet the crisis in this circuit that has been
17 caused by a 35 percent vacancy rate. I think it
18 should be further studied, even if those vacancies are
19 filled, in order to meet the future challenges of all
20 the federal courts of appeals. Much as Professor
21 Resnick has advocated in prior testimony before this
22 Commission.

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1 It would enhance the legitimacy of the
2 court if litigants and counsel had the expectation
3 each time they appeared, that there would be a
4 district court judge sitting by designation on the
5 panel in virtually every case.

6 And I think it would also help the
7 delivery of justice in the district courts by
8 formalizing their mixing with appellate court judges
9 on a regular basis.

10 It would also help meeting the greatest
11 challenge in the court's legitimacy, if you will, and
12 that is granting oral argument in an even greater
13 number of cases. This circuit has -- I have submitted
14 my written materials, done extremely well, in
15 carefully screening cases for oral argument, given the
16 woeful lack of resources that it has faced over the
17 last decade.

18 But to litigants, and to counsel, and to
19 the public at large, oral argument is far and away the
20 single most important event in the appellate process.
21 It is the only time that the public gets to see the
22 appellate process in action. And to the extent that

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1 it can be delivered, in more cases, that is a goal
2 that the court should strive for.

3 Also, additional resources, and filling
4 vacancies, and allowing district court judges to sit
5 more frequently, would allow the court to issue more
6 detailed, and well-reasoned memoranda, and written
7 opinions.

8 Again, the Ninth Circuit I think has done
9 an exceptionally good job, given the resources at
10 hand, in publishing the opinions that are in cases of
11 complex legal issues, or novel legal issues, and not
12 publishing the ones that don't meet those criteria.

13 I don't believe that dividing the court in
14 two or three circuits will address any of these
15 problems. And as I have said, it's going to create a
16 host of others. By simply assigning existing judges
17 to a new circuit, without increasing the resources,
18 you in fact detract from the available resources at
19 hand.

20 And other judges who have appeared today
21 have testified about the economies of scale, and the
22 duplication of administrative cost. I think Judge

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1 Thomas testified to that this morning. It will not
2 necessarily enhance collegiality. And I firmly
3 believe collegiality is also more a function of
4 attitude, than it is of size, as Judge Boochever so
5 well testified before.

6 Further, it's going to reduce the
7 available pool of judges sitting on cases from this
8 state. And thus, reduce the diversity of views that
9 might be brought to bear on a particular issue.

10 And I'm not just talking about diversity
11 for diversity's sake. I also believe that it is an
12 advantage to have a more diverse, large court. Not
13 just because it increases the variety of cultural,
14 political, and philosophical views, that more
15 accurately reflect the constituencies of an increasing
16 diverse Western Pacific region.

17 But also because the heart and soul of the
18 appellate process is the intellectual debate, the
19 give-and-take that not only occurs between counsel and
20 the court in oral argument, but occurs among the
21 judges themselves. And a diversity of views among
22 panels I believe makes for better, well-reasoned

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1 judicial opinions, by honing debate, and focusing the
2 issues.

3 Finally, I'm going to repeat the view that
4 adding more circuits will only burden the Supreme
5 Court further, increase the instability of the law.
6 And another important factor I think which hasn't been
7 mentioned is, basically lead to increasing
8 balkanization among appellate courts in this country.

9 And we've seen with each circuit vastly
10 different procedural rules, local rules being adopted.
11 That makes it harder and harder for practitioners in
12 an increasing national bar to move from circuit to
13 circuit.

14 I think uniformity in those rules is
15 important. And to the extent that you increase the
16 number of circuits, you detract from that.

17 Again, I want to thank the Commission for
18 its time today. And I'll wait -- further testimony,
19 to see if you have any questions.

20 CHAIRMAN WHITE: All right.

21 MR. GOODFRIEND: Thank you very much.

22 CHAIRMAN WHITE: Mike Brown?

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1 MR. BROWN: Thank you, Your Honor. Low
2 man on the totem pole, but that's okay, because it's
3 been educational.

4 I'm not here about the circuit split. I'm
5 here about consistent decisions among the appellate
6 panels in the Ninth Circuit. And as Judge Broomfield
7 pointed out, it's important to law uncertainty.
8 Incidentally, most of what I'm doing extemporaneously
9 here is not from the paper that I prepared, it's from
10 what I learned here today.

11 And one of the things that Professor --
12 pointed out, in addition to consistency, delivering
13 consistent ruling in a case that appears the same is
14 what defines a successful legal system.

15 Now, when I was first here this morning,
16 I want to give a special thanks to Chief Judge --
17 because I told him some of what I observed about the
18 Ninth Circuit. And he said, "Stick around, you'll see
19 why." And I did.

20 As the United States Senator who was here
21 pointed out, you have 28 appellate judges, or at least
22 openings for that many. Which means you 3,276

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1 combinations of personalities. And I'm not the only
2 one to notice the inconsistency in Ninth Circuit
3 appellate rulings. If you'll go to the second page of
4 the almanac of the federal judiciary, you'll see there
5 are quite a few lawyers in this circuit that basically
6 have the same complaint.

7 And one of the reasons that there's a lot
8 of public confidence being eroded is simply because,
9 let's face it, the average person, no matter what his
10 Congressman does, he never finds it out. On the other
11 hand, he goes in front of a judge. And the first
12 thing he's done is saying, "Hey that guy shafted me,
13 but he did something different in another case."

14 Now, the courts are what people come in
15 contact with, more than anything else. The fact is,
16 the average guy out there, you say, "When is the last
17 time your Representative, state or federal, did
18 anything to you, or for you?" He doesn't know.

19 All right. When is the last time you had
20 a run-in with a judge, federal, state, or whatever?
21 You have to listen to the tirade. And what I'm saying
22 here, and I'm just about wound up, believe it or not.

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1 Because most of what I already pointed out, there are
2 specific examples of contradictory Ninth Circuit case
3 law, which I find kind of unusual.

4 Because you have some federal judges who
5 spoke here today, who say there isn't any. And then,
6 you have other federal judges who said, well, yeah,
7 that is the perception.

8 Well, the perception is right there in the work that
9 I did.

10 Anyway, thank you for listening to me.

11 CHAIRMAN WHITE: Yes. We haven't heard
12 you, Eric Redman.

13 MR. REDMAN: Thank you very much. I'm
14 sorry to be late. I thought I was going to be early,
15 but you've been proceeding quickly.

16 My name is Eric Redman. I am a lawyer
17 with the law firm of -- White and McCullough, here in
18 Seattle, and a lifelong resident of Seattle. I
19 testified before the United States Senate in
20 opposition to a bill to split the Ninth Circuit in
21 1990. And I have a copy of my testimony which I have
22 submitted to you. And I brought copies today.

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1 This is really the only topic that I want
2 to address. And I'm looking back to the 1990
3 testimony, I'm afraid I can't really improve on it
4 very much, even today. I think what I said then is
5 what I still believe, and what the members of my firm
6 believe.

7 I would just comment, or try to divide
8 this into two thoughts, or two perspectives. As a
9 practitioner in front of the Ninth Circuit, about
10 splitting the Ninth Circuit, and then as a
11 Northwesterner.

12 First, I think that you'll find, and I'm
13 sure you have heard today, that the idea of splitting
14 the Ninth Circuit doesn't come primarily, or even in
15 any significant part, from the lawyers who actually
16 practice in front of the Ninth Circuit.

17 I think those of us who do could come up
18 with a long list of things we'd like to see to improve
19 the Ninth Circuit, but splitting it isn't what we
20 would have thought of as very high on the list. The
21 idea comes from government officials, and political
22 leaders. And it's natural that people wish to support

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1 their political leaders in efforts like that. But I
2 don't think it comes from the practitioners.

3 Secondly, it's not really responsive to
4 any of the problems the practitioners face, or the
5 judges face. And I haven't heard any of the testimony
6 today, but I'd be surprised if any of them said very
7 much different from that.

8 The problems of congestion, of workload,
9 of overload on the court, aren't cured by splitting
10 it. I've heard people go down that road a while
11 without really thinking it through. And I've tried to
12 say, you know, our highways in Washington States are
13 also congested, and over-crowded. And splitting
14 Washington State into two states would not reduce the
15 congestion on our highways. The sources of those
16 problems can't be solved by more jurisdictions.

17 I have also heard interesting academic
18 debates I think about the value of en banc opinion
19 from a circuit where you can't -- the en banc panel
20 can't represent a majority of the circuit. A starting
21 point I think is mathematically, just the logic of
22 that. You're going to create more and more circuits

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1 as the country grows, until we have just a huge number
2 of circuits, this will be the problem in circuits
3 generally, if you think of it as a problem.

4 And in any event, in any circuit, the
5 majority opinion of the en banc panel may not
6 represent a majority of the circuit, either. This is
7 really an issue about respect for precedent, about --
8 and about abiding with an en banc decision, respecting
9 it. Not about the number of members of the court who
10 are on it.

11 And similarly, I think if you go down a
12 list of supposed problems of the circuit that
13 splitting would address, you find that they go into
14 three categories. They either aren't problems that
15 the practitioners are concerned about, although
16 practitioners are concerned about plenty of other
17 problems.

18 They don't result from the size of the
19 court, as opposed to its workload, or the number of
20 judges. Or, they really apply to every circuit, and
21 not just the Ninth Circuit. There's no general --
22 they're general arguments, not specific ones.

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1 Others know a lot more about those points
2 than I do, and I'm sure you've heard from them. So,
3 I would move quickly to what I think is more
4 important. And that is, as a Northwesterner. I've
5 lived all my life in the Pacific Northwest.

6 Almost exactly thirty years ago to the
7 day, I went to work one floor above us for Senator
8 Warren Magnuson, who is often cited as the father of
9 this idea to split the Ninth Circuit. I can tell you
10 that I worked for him for many years. I knew him very
11 closely in office, and in retirement, for the
12 remainder of his entire life.

13 I can think of hundreds of topics that he
14 raised, and that were discussed. And I never once
15 heard quality -- brought up. I know that there are
16 quotes and efforts attributable to him. But I have to
17 tell you, I think I can say, and anyone who worked for
18 him, this was never near and dear to his heart. And
19 had it been I don't know what significance that should
20 have today, in any event.

21 If it was an idea that he promoted, I
22 suspected it was because his good friends were on the

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1 Ninth Circuit from Seattle in those days, beginning in
2 the 1940's probably complained about the difficulty of
3 the travel that was imposed upon them. And he may
4 have thought that he was helping them out. I don't
5 know. Research might show that.

6 But the problems that this circuit
7 splitting proposal is designed to address are really
8 not problems in the court. They're problems in our
9 region. They're problems about political issues in
10 our region, interpretations of statutes that are made,
11 and come to the courts, and have to be made by judges
12 in the region, by judges here.

13 And the sort of -- the sort of theme is
14 that the Northwest should somehow have its own court,
15 its own federal court. And I think that is just plain
16 wrong for five basic reasons.

17 The first of all is, it's a federal court.
18 We're talking about federal law. We're not talking
19 about state law. And we need uniform application of
20 the federal statutes.

21 The second is, it's a ridiculous fallacy
22 to suggest that where people live determines how

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1 they're going to think, or how they're going to decide
2 cases. Geography is not philosophy. All of the
3 judges of the D.C. circuit live within a few miles of
4 one another, I suspect. And yet we all know that the
5 D.C. circuit can be very sharply split.

6 And you wouldn't say, "Well, maybe let's
7 take the Virginia ones, and keep them separate from
8 the Maryland ones." It doesn't make any sense.

9 Finally, we have plenty of
10 environmentalist judges in the Pacific Northwest, or
11 judges with environmental meanings, if that's where
12 the concern is. The decisions that really caused the
13 firestorm that led to this proposal being revived were
14 made not at the Ninth Circuit level, but at the
15 district court level, by judges right in this
16 courthouse.

17 I also believe for the interest of the
18 Northwest that having Northwest - Southwest issues
19 resolved in courts that are Northwest and Southwest
20 combined, gives us a lot of protection in the
21 Northwest. And we should be happy about it. It
22 legitimizes the outcome of these disputes.

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1 The ones that are most important to me,
2 that I know most about, are electric power disputes.
3 And between the Northwest and the Southwest, these are
4 very fierce. They involve hundreds of millions of
5 dollars.

6 And in the twenty years that we've been
7 litigating them, the Northwest interests have
8 prevailed in every single case in the Ninth Circuit
9 against Californians. And the California judges have
10 always been a majority of the panel.

11 Now, the court has worked very well in
12 inter-regional disputes. It's worked out to the
13 benefit of the Northwest. I submit that if those
14 decisions had instead been made by Northwest judge in
15 Northwest court, by now they would have been
16 overturned in Congress very quickly, simply because
17 the Californians have so much more representation.

18 So, to think that we are harmed by being
19 yoked with this populous state in a court system seems
20 to me very short sighted. And to select certain
21 issues, and not look at other ones, where we've been
22 tremendously protected by that.

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1 And then there's the whole issue of the
2 West coast itself. I would think that the West coast
3 is an economic region. From Southern California to
4 the tip of Alaska, we've got a coastline twice as long
5 as the East coast of the United States.

6 We have only four states. They are really
7 economically integrated in a way the East coast isn't,
8 couldn't be, for historical reasons. And there's a
9 big benefit to the less populous and more northerly of
10 the states of having that integration.

11 We all face the Pacific rim. We're a part
12 of the Pacific rim. And when we go to the other side
13 of the ocean, look back, the idea that there's uniform
14 federal law up and down this coast is a tremendous
15 benefit, I think, to other parts of the coast and
16 California, who would like to attract foreign
17 investment and foreign confidence.

18 So, I remember when I gave the testimony
19 in 1990, Judge Goodwin said that the splitting the
20 circuit was a time whose time had not come. I would
21 say it's an idea has passed -- it's not responsive to
22 any problems that have been faced. It's not in the

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1 interest of the Pacific Northwest. And I hope that it
2 will not be recommended.

3 Thank you very much.

4 CHAIRMAN WHITE: Thank you very much. Any
5 questions?

6 COMMISSIONER: I have one I think I'd like
7 to ask. I have a question for Mr. Hillier. As I
8 understood you, you said you have no particular
9 problem with consistency and coherency in the
10 decisional law of the circuit. And then you went on
11 to say something that seemed on its face to be
12 inconsistent with that.

13 And that is that you repeatedly and
14 frequently lose on appeal. If the law of the circuit
15 is predictable and consistent, why should that be the
16 case? Why are you taking appeals, and you can predict
17 you would lose?

18 MR. HILLIER: Well, there's -- the main --
19 the main reason for the one mass record, well, I mean
20 there's a lot of reasons, some of which are more
21 philosophical, and not responsive to your question.

22 But appeal is a matter of right, even --

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1 appeals in the federal court system. And the federal
2 sentencing -- and then, that's why a lot of cases go
3 forward that perhaps don't have the merit that I would
4 prefer when I took the case up on appeal.

5 And you know, frankly, I was being a bit
6 facetious. We don't lose quite as often as I
7 suggested. But --

8 COMMISSIONER: When you lose, could you
9 reasonably predict that you would lose?

10 MR. HILLIER: Yes. Yes. You know, I go
11 in optimistic on every one. By the time I've finished
12 oral argument I think I've won. But when I stand
13 back, and I look at the facts and the law, in certain
14 cases, I can see that I'm simply not going to win,
15 given that fact pattern, and given the law that
16 exists.

17 I'm arguing a point that's usually, that
18 the court has abused its discretion in deciding on
19 these facts, that this particular sentencing
20 application --

21 COMMISSIONER: Why?

22 MR. HILLIER: -- and as you know, those

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1 sorts of standards are very difficult to jump over and
2 win at the court of appeals level.

3 COMMISSIONER: Mr. Hillier, Professor
4 Meador's question, criminal cases, of course, are
5 different than civil cases. And surely you have
6 clients who you advise don't go to trial before this
7 district judge, or any district judge; this case is a
8 terrible case to take to trial.

9 And they look at the sentencing
10 consequences and say, "What have I got to lose? I
11 might get lucky in the district court." That same
12 client, if he loses in the district court, is, by law,
13 the district judge is required to advise him in some
14 detail about his right to appeal. And -- but it is an
15 absolute right that he can exercise it, whether his
16 lawyer thinks it's a good idea or not.

17 Do you think in both of those cases, the
18 criminal case is different from the civil case, in
19 terms of why cases proceed to trial, or why cases go
20 up on appeal? Is my question clear?

21 MR. HILLIER: Well, I think there are
22 probably huge, fundamental differences. And the

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1 nothing to lose phrase attaches to both. And I think
2 there's a lot to lose, probably, in the civil
3 litigation, if you take an appeal that's frivolous,
4 and you've got a bond that's developing interests, and
5 those sorts of --

6 I mean, I don't do that, Judge, and you
7 know better than I. But it would seem to me that
8 there are economic factors that militate against a
9 frivolous appeal. Whereas, when somebody is looking
10 at ten years, and they're going to be sitting there,
11 wondering, well, what if I -- you know, I don't like
12 what the judge said.

13 The judge said, "I don't want to give this
14 sentence, it's unfair." I mean, that defendant is
15 going to want to appeal that. The judge said it was
16 unfair, you know? He said his hands were tied, and --
17 but he said it was unfair. And maybe the law will
18 change some day, so let's go forward.

19 So, that motivates a lot of those appeals.
20 But the case law, you know, it's there, and we're
21 faced with it. And we try to --

22 COMMISSIONER: Same problem we district

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1 judges have.

2 CHAIRMAN WHITE: Thank you very much. We
3 do appreciate all of your help to the Commission. And
4 we will see you down in -- what's the name of that
5 city? (Laughter.)

6 UNIDENTIFIED: San Francisco.

7 (Whereupon, the hearing was adjourned at
8 5:35 p.m.)

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