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

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

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

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

And we do have some representatives of both the administrative office and the federal judicial center. Otherwise we would be without food,
or hotels, (Laughter) or writing material, or anything
else, or the FJO says that if you want to know
something, ask us.

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

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

The Commission has held four public
hearings across the nation. And this hearing, and the
following hearing in San Francisco will conclude those
hearings. Characteristically, interested persons are asked to submit a statement in writing of their views.

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

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

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

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

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

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

SENATOR GORTON: You were absolutely key,
and I was persuasive enough so that you wrote the
opinion of the Court on my side on that particular
case. You were also, as I remember the toughest
questioner of the Members of the Supreme Court, or at
least so it seemed to me.
CHAIRMAN WHITE: And it never bothered you, Senator.

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

CHAIRMAN WHITE: I don't --

SENATOR GORTON: No comment on that.

(Laughter.)

CHAIRMAN WHITE: Yeah. All right.

SENATOR GORTON: You do have my written statement.

CHAIRMAN WHITE: Yes, sir.

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

More significantly to me, however, is the lack of collegiality on a court with 28 authorized judges. And therefore, simply, by simple arithmetic,
an individual judge in a three judge panel has 3,276 possible combinations of judges. And therefore, even a young man or woman appointed to the court is unlikely to ever serve twice with exactly the same three judge panel.

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

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

But my assistants felt that lack of collegiality. They never saw the same people twice, or rarely did so, you know, as I did you and your colleagues on the Supreme Court.
To me the more difficult question for you to decide is, assuming that you agree that the Ninth Circuit should be divided, the question is how should it be divided? In what respect should it be divided? I must admit to a parochial prejudice.

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

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

But I don't think that an ideal division. I believe an ideal division would divide the Ninth Circuit into three circuits. And would therefore, you know, solve the problem of size and collegiality for an extended period of time.
But whether that would involve dividing California, Northern California with Nevada, Southern California with Arizona, whether it would involve putting Arizona in an entirely different circuit, and leaving a circuit with California and Nevada, I must confess that I'm not certain as to which of those choices is best.

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

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

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

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

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

Do your constituents have a view on that point?

SENATOR GORTON: Well, I guess many of my constituents would have to speak for themselves, you know, on that subject. But I note that that -- that a division of, say, New York and Massachusetts and Pennsylvania into three separate circuits on the East Coast does not seem to have inhibited commonality and business interests that are perhaps more frequent and
closer than those of Washington and California. And
how many circuits, I guess we may have five circuits
along the Atlantic, without it harming maritime --
consistency in maritime law.

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

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

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

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

CHAIRMAN WHITE: But what -- what does
that do with the judge's output?

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

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

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

CHAIRMAN WHITE: Senator, has there been any organized effort at the practicing bar in this
SENATOR GORTON: Yeah.

CHAIRMAN WHITE: -- to make a decision?

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

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

CHAIRMAN WHITE: All right.

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

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

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

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

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

SENATOR GORTON: Oh, yes, Mr. Justice
White. I am quite active in that pursuit.

CHAIRMAN WHITE: I read all about it.

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

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

(Unclear.)

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

MR. SVETCOV: I do, Your Honor.

CHAIRMAN WHITE: Yes. All right.

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

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

MR. SVETCOV: I have. But I had help from Justice Stewart. You asked me a question midway through the argument, and Justice Stewart leaned over
and said, "Son, you don't have to answer that question. Justice White has gone too far."

(Laughter.)

CHAIRMAN WHITE: That's what he thought.

(Laughter.)

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

CHAIRMAN WHITE: All right. What was the case?


CHAIRMAN WHITE: Oh, yes.

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

I really, I speak for myself. I've been practicing in the Ninth Circuit for 33 years. They have lots of pints of my blood. I was in the state
attorney general's office. I was chief assistant United States Attorney, chief of the strike force, chief of the appellate section of the U.S. Attorney's Office, and I've been in private practice, practicing before the Ninth Circuit for the past ten years.

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

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

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

Instead, I've attempted to come up with a measure that would be somewhere in between those two approaches. And that is to try to operate the circuit in two discrete divisions, north and south, dividing the case load approximately in half if possible, by
having the five northwest states, the northern and eastern districts of California in the north, Nevada, Arizona, the southern district, and the central district in the south, and figuring out whether Hawaii, Guam, and the Mariana's should go north or south, to come as close to a 50-50 split of the caseload as possible.

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

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

CHAIRMAN WHITE: Well, what would be the split?

MR. SVETCOV: Excuse me?

CHAIRMAN WHITE: What would be the split?

What would make up the -- ?
MR. SVETCOV: The northern division would be the five northwestern states, Oregon, Washington, Alaska, Montana, Idaho, the northern and eastern districts of California.

CHAIRMAN WHITE: Uh-huh?

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

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

MR. SVETCOV: Of this approach?

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

MR. SVETCOV: Okay. It would attempt to address some of the concerns about having judges from the region decide cases arising from the region, and address the ancillary concern that there is California dominance in too many of these cases. It would serve
to some degree to reduce that. It wouldn't eliminate that concern, but it would address it in some way.

CHAIRMAN WHITE: I understand that.

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

CHAIRMAN WHITE: But so would the rest of --

MR. SVETCOV: So would a split.

CHAIRMAN WHITE: Yeah.

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

CHAIRMAN WHITE: So would yours.

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

CHAIRMAN WHITE: So would yours.

MR. SVETCOV: Oh, no. No. It would be
one circuit, two divisions in one circuit, judge.

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

MR. SVENTCOV: That is correct.

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

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

CHAIRMAN WHITE: You didn't say that.

MR. SVENTCOV: Pardon?

CHAIRMAN WHITE: You didn't say that.

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

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

MR. SVENTCOV: But that is the law of the
circuit. Once a panel in the Ninth Circuit decides a
point of law, that is the law of the circuit. And
remember, judge, there would be a judge from the south
on that panel. It would not be an exclusively
northern panel.

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

MR. SVETCOV: A split?

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

MR. SVETCOV: Absolutely.

CHAIRMAN WHITE: What is it?

MR. SVETCOV: En banc review.

CHAIRMAN WHITE: How do you do that?

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

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

MR. SVETCOV: I do not. I would modify it
slightly, if they're going to operating in two
divisions, to have five judges from each division
drawn for the en banc, instead of having eleven drawn
at large.
CHAIRMAN WHITE: But you don't mind that?

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

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

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

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

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

MR. SVETCOV: Judge Browning, that may
well be. And I am not wedded precisely to the 
configuration. I think that the Commission ought to 
look at that. And I just didn't have the time or the 
resources to do that.

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

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

   MR. SVETCOV: Well, only in this sense, 
Judge Browning, we have 28 judges now. The Court has 
-- at four, eight, six or eight, or ten more judges
already, that would bring the Court to 38. And you
could envision having it to 45 or 50 at some point.

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

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

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

CHAIRMAN WHITE: Thank you.

MR. SVETCOV: Thank you.

CHAIRMAN WHITE: Mr. Bivens, I broke a
rule that we just passed before we went to the -- we
weren't supposed to question him until all of you at
that table had talked. So, we will let you obey that rule.

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

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

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

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

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

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

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

And again, as we look at it, that's a
product of having 18 judges last year trying to do the
work of 28, but I understand now we're up to about 21. That's still not 28. And we think that before we try to solve problems that may be perceived to exist in the Ninth Circuit, we ought to first see if filling those 28 vacancies would solve those problems.

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

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

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

And for those reasons, and because we have no posed solutions that I have seen that are better
than the existing solution, the existing configuration, we prefer to remain as-is. But let me add as a footnote that if you do decide to do -- to reconfigure in some way, the Bar in Arizona has a preference to remain connected with an undivided California.

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

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

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

We're going to be enjoying a similar
growth curve, as far as everyone can predict, to California. And indeed, a fair number of our people in Arizona come from California, and have remained there.

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

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

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

JUDGE THOMAS: That is quite correct,
Judge. This why, Members of the Commission, I certainly appreciate the opportunity to testify. I am Sid Thomas. I am a United States Circuit Judge of the Ninth Circuit.

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

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

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

I think that dividing the Ninth Circuit would not solve or alleviate any of the problems that
I have identified, and in fact would increase it.

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

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

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

And I say this for this reason, any division of the circuit will involve duplicating
unnecessarily clerical functions and those types of
function that -- which are critical. That means fewer
administrative resources. But the caseload is not
decreased. You're dividing the caseload, you're not
decreasing it. So, in any division, you're simply
allocating -- (Unclear.)

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

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

The Pacific Rim proposal, which would put
Montana and Arizona in the Tenth Circuit, and leave
the Pacific Rim states alone. The string bean
circuit, which would be the Northwest circuits, plus
Nevada and California. And finally, the horse collar, or horseshoe circuit, which would be a California-only circuit.

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

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

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

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

Fourth, there ought to be jurisprudential coherents. That is, there ought to be common laws,
and common legal concerns.

And finally, it ought to increase judicial efficiency.

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

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

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

It might well lose the circuit executive's
office, which has provided administrative strength. And it would increase the administrative burdens on the remaining judges.

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

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

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

It would divide Montana from California. Montana's relationship with California law, is much as
Don Bivens described as Arizona's relationship with California law.

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

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

And therefore, even with a limited en banc proposal, which would gear toward solving that problem, some conflict would remain between north and south. The Kruske Commission, though, is the only proposal which divides the circuit proportionally. Every other proposed division weights heavily in favor of a California, whatever is left in California.
I won't go through the remaining versions of the circuit, but I guess -- I hope the Commission will take a look at a criteria by which we ought to divide it.

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

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

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

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

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

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

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

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

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

PROFESSOR MEADOR: May I ask a question?

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

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

I would need to understand how that made things better before I could speak anything to it. From the perspective of maintain Arizona's relationship with California, and with the entire circuit, which I understood it to preserve, I guess we would have to favor that over some of the other
divisions. But I personally did not find that to be a compelling suggestion.

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

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

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

Currently, we have a large death penalty
problem between the north and the south. About 90 percent of the death penalty cases are located in the south, and about ten percent in the north. We're going to need to devote judicial resources to that, and Congress has mandated to do so.

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

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

CHAIRMAN WHITE: Shortly.

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

Operationally, I'm not suggesting discrete panels, strictly north and south. We could draw judges, one judge from the south, senior judges and district judges from the region count as part of the -- the judges from whom you would draw. And I specifically addressed the collegiality question by not having strict panels.
So, maybe it's not a suggestion whose time has not come, but all I have heard this morning are the two extremes. Leave us alone and do nothing and/or split it in some way that, none of which is acceptable to anyone, including myself, who has tried to figure out a way of dealing with the problem.

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

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

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

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

MR. SVETCOV: Candidly, yes.

CHAIRMAN WHITE: Okay.

JUDGE RYMER: Mr. Svetcov, have you had
any personal, professional experience with the, I believe it's Division Two of the California Court of Appeals, which in fact, in the greater Los Angeles metropolitan area, as I understand it, operates on a division principle. And I wondered whether you had any notion of how that was received by the Bar?

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

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

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

JUDGE RYMER: Yes.

MR. SVETCOV: Similarly in San Jose. Similarly in the Fresno Division. So, these divisions
of about nine judges seem to operate effectively and efficiently in California. Yes. That's true.

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

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

JUDGE RYMER: Thank you.

MR. SVETCOV: Thank you.

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

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

(Whereupon, a recess was taken.)

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

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

An important question being addressed by the Commission is whether the Ninth Circuit should be divided, so I'll focus my testimony on that particular issue. Washington State has a strong interest in maintaining the current unified structure of today's Ninth Circuit. Our state is part of a geographical,
economic, political, and historical fabric that is
woven from throughout the western and Pacific states
and territories.

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

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

These three states, plus Alaska, Hawaii,
and the Territories share the Pacific Ocean, and many
of the same concerns. Washington, Oregon, Idaho, and
Montana share the Columbia Snake River Basin, the
backbone of the Northwest, with its salmon, its hydro-
electric dams, its barges, and water for irrigation
and recreation.
Our electric system, including the Federal Bonneville Power Administration, is part of an electric power grid that quite literally binds the entire western United States.

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

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

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

And I'm here to testify about concerns on a different level. Washington and the Northwest are
closely tied to California and the other western states. Washington is home to many major corporations, whose products, I'm willing to bet, we have all used and enjoyed, even within the last few days.

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

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

Those who see California as a liability, in my belief, have too narrow a view. California is an integral part of the western and Pacific states, and is an important economic partner. All the more reason for uniformity in the case law between
It would not benefit Washington to see California become part of another circuit, with conflicting case opinions, and forum shopping, that separate circuits would produce. I'm thinking of cases relating to immigration law, labor law, Endangered Species Act, the Bonneville Power Administration, maritime law, and tribal treaty law.

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

If the circuit were divided, there would be unnecessary, friction, forum shopping, competitive advantages and disadvantages among states in different circuits. There would be conflicts in the laws that apply to fish, which know no boundaries, commerce that is traded up and down the coast, and people who work,
play, and emigrate throughout the Pacific Northwest.

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

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

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

So, we should not be guided by short-term political concerns. But rather, we should take the long term look at the future. In that regard, we are well served by a unified, integrated, well-run Ninth Circuit Court of Appeals that we have.
Thank you very much. I want to thank you for coming to Washington to hear our views.

CHAIRMAN WHITE: Thank you, Your Honor.

You're -- I understand you are on a sort of a short schedule. Would you care to withdraw?

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

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

(Multiple voices.): No, sir.

GOVERNOR LOCKE: And who is following you?

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

CHAIRMAN WHITE: Oh, okay.

GOVERNOR LOCKE: Thank you very much, sir.

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

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

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

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

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

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

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

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

The challenge with size is clear. There is a challenge for those who are members of the Ninth Circuit in terms of collegiality. The travel time, and costs, involved with that geographics. Familiarity with the state laws with the respect of the nine states and the two territories. The ability of the judges to stay on top of the circuit decisions. The humongous workload, and it's a growing workload.
En banc, and its ability to fulfill its intended purpose. What is an en banc hearing in the Ninth Circuit? The rates of review and reversal are staggering. And domination by one state, 27 percent of those heard in the Ninth Circuit are the Central District of California.

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

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

In no set of cases in my office is timeliness a greater problem than that of capital cases, and it is the one area I wish to bring to your attention specifically. By way of example, it took over six months from the bringing of the schedule to the notice of appeal, six months elapsed.
In another case, a very notorious capital case in Washington State, it took five years to process a single decision. Out of frustration, my office has asked the U.S. Supreme Court to urge the Ninth Circuit to take a position, and make a decision in that particular case.

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

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

We ask for a thoughtful review of the entire federal appellate system for uniformity. Clearly, the Ninth Circuit is not consistent, or uniform, in terms of size, or geography, or workload, or judicial appointments.
We need to ensure the timely filing of vacancies by the White House and the Congress. And we would ask you as at least a footnote to urge that this is ensured to occur in the future. Politics, conservative and liberal, philosophically, those issues we believe have no issue before you, no purpose before you.

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

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

CHAIRMAN WHITE: Do you want to go ahead?

COMMISSIONER: General Gregoire, if the tenor of your remarks that the Ninth Circuit is
functioning well today, but is doomed to failure in the future because of growth?

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

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

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

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

MS. GREGOIRE: Well, I would implore you not to wait until the crisis occurs. I think the
timing of this commission is absolutely perfect, because we can project out, and see what the future holds for us.

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

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

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

How that division occurs, I remember the -- commission in which it said no less than three states. But again, that issue is for you to decide
today, as to whether that is even an appropriate course, in light of the humongous amount of cases that are being sent to the Ninth Circuit by way of California alone. But I would hate to see one circuit for one state. I do believe there should be a joining of the territories and at least a couple of states with California, and potentially the rest of the states being the separate circuit.

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

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

CHAIRMAN WHITE: But I don't think -- it
seems to me that unless -- unless people who know what they're talking about attempt to stop this trend, we're in bad shape. And so, maybe you could get your association to do something about it.

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

CHAIRMAN WHITE: (Laughs.)

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

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

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

JUDGE BROWNING: You came here to lobby Justice White, and it appears he's lobbying you now. (Laughter.)
MS. GREGOIRE: I see this. I see this.

(Laughs.) Effectively.

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

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

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

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

PROFESSOR MEADOR: -- Svetcov?

CHAIRMAN WHITE: Yeah.

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

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

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

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

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

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

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

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

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

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

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

   COMMISSIONER: Thank you.

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

   MS. GREGOIRE: Dramatically.
CHAIRMAN WHITE: Where?

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

CHAIRMAN WHITE: In the south, I take it.

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

CHAIRMAN WHITE: Yeah. And what about your jurisdiction?

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

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

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

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

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

CHAIRMAN WHITE: All right. (Pause.) Who's -- ?
COMMISSIONER: I guess Mr. Lance, from the
attorney general of Idaho.

CHAIRMAN WHITE: Mr. attorney general?

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

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

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

In September of 1995, there were five of

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

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

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

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

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

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

Some of the tribal issues that we experienced in the northwest, Pacific Northwest, dealing with our tribes, are very common, relative to Washington, Montana, Idaho, and Oregon. We have
before us the prospect of electrical de-regulation, and the Bonneville Power Authority. And we believe that there's a certain commonality of issues in Montana, Idaho, Washington, and Oregon.

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

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

And with that, sir, I submit myself to your comments.
CHAIRMAN WHITE: Well, I wish it were our
decision. But it's the Congress of the United States
that is going to make the decision.

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

CHAIRMAN WHITE: Go ahead.

COMMISSIONER: I don't have any questions.

Thank you.

COMMISSIONER: Thank you all very much.

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

MS. RITCHIE: Thank you.

CHAIRMAN WHITE: You may proceed.

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

Attorney general Bruce Botehlo was
originally scheduled to testify today, and this issue
is very important to him. However, our governor
requires his presence at a special session of the
Alaska legislature, which began yesterday afternoon, to take up another very difficult and very decisive issue, at least in our state, that of subsistence hunting and fishing rights.

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

CHAIRMAN WHITE: Would you say that again?

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

The court's vast and diverse geographical area, and the large and growing population of the nine states and two territories it encompasses have made the circuit too large in terms of the number of judges and the number of cases it must handle.
Because of the relatively few number of Alaska cases, and the many significant differences between our state and the heavily populated states in the circuit, the judges assigned to Alaskan cases are often not familiar with Alaska's unique issues, its people and culture, and the complex and specialized matrix of laws that apply to Alaska.

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

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

Given the relatively few Alaska cases, Alaskan litigants are far less likely than litigants
in the heavily populated states to draw panels with
judges who are familiar with their state.

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

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

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

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

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

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

And many of our communities are remote native villages, with populations of under 300 people. Thus, in Alaska, an easement or river might have the significance given to a major highway in another state.
Independent thinking, living off the land, and overcoming challenges presented by isolation and vast distances between communities are all central elements of the collective identity and experience of Alaskans.

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

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

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

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

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

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

Undoubtedly, the Court was more intentioned, but its lack of understanding of Alaska was so evident that regardless of the equity of the
result, the decision made Alaskans feel alienated.

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

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

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

Thank you for your time and attention today.

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

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

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

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

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

CHAIRMAN WHITE: Does Alaska have a judge
on the Court of Appeals?

MS. RITCHIE: Yes. It does.

CHAIRMAN WHITE: And who is that?

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

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

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

CHAIRMAN WHITE: All right.

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

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

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

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

MS. RITCHIE: Your Honor --

COMMISSIONER: In a case like that?

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

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

COMMISSIONER: Well, to understand your argument fully, suppose this case had gone to the United States Supreme Court with its present composition. I'm walking on some tender ground here.
I hope I get away with it. (Laughter.)

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

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

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

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

And I don't think Alaska or any other state should have to be in a position of trying to get cases to the U.S. Supreme Court to straighten out what they think are incorrect interpretations of the law,
as that apply -- that applies to their state.

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

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

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

   COMMISSIONER: You say there are two
judges from Alaska on the Court of Appeals. Do you
sense there is any effort on the part of the Court of
Appeals to have one of those Alaska judges sitting on
Alaska cases?

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

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

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

CHAIRMAN WHITE: Thank you very much.

(Pause.) No more questions?

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

MR. SMITH: Good morning.

CHAIRMAN WHITE: Good morning, Mr. Smith.

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

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

I will address their remarks only briefly, in the sense that I believe with two exceptions, they concur in what I am about to say. Those two exceptions, one abstained, feeling that there was too much delay in resolving bankruptcy appellate matters at the Ninth Circuit level at this point in history. And the other said he was not convinced that there shouldn't be a split.
But out of all of those that I canvassed, some seventy-some, not all returned, but the vast majority of those that did shared my views. I have submitted my statement to them. And I think it's fair for me to make that statement for the record, although I speak only on my own behalf, and not on behalf of any organization of which I may be a member.

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

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

Let me turn to the question of the adverse impact on the bankruptcy appellate panel if there is a split. As you, I hope recall, back in the seventies, there was a recommendation by the
commission of which I participated in as the deputy director, that there be a different approach to bankruptcy appeals.

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

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

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

But let me address the fact, what
happened, after the 1978 code was enacted is that the
Ninth Circuit took the lead in developing a bankruptcy
appellate panel system, and it has worked
extraordinarily well. It works today, and it works,
I believe, in large part because of the size of the
Ninth Circuit.

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

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

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

MR. SMITH: I don't mind being
interrupted, Your Honor.
CHAIRMAN WHITE: Well, they do.

(Laughter.)

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

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

One of the things that the bath has done is to increase the ability and the stature of the bankruptcy judge in the Ninth Circuit. And I think it has been a very good thing for the bankruptcy practice, generally. And I believe practitioners generally concur in that statement.
Now, one problem we have, though, is their decisions really don't bind anyone, except the particular litigants. I think you must address this issue. The recent commission tried to address it, and recommended, well, let's just take everything to the circuit.

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

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

That's the only time, like Marathon, or a
case of that nature. There are just statutory issues of interpretation. If we know what the rule is, we can live with it, and apply it, and we don't need to have the Supreme Court spend its time resolving it. We just need a clear statement of law.

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

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

We know what many of the issues are, because they've been resolved. We have a large body of precedent. To the extent you split the circuit, you necessarily begin to erode that large body of
precedent that's available, and uniformity.

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

CHAIRMAN WHITE: Is your time up?

MR. SMITH: I think it probably is. And

if I can just conclude with one statement.

CHAIRMAN WHITE: All right.

MR. SMITH: And that is, I think

bankruptcy is unique, in that you can best utilize
resources in a large geographic area, and with a large
workload, because you have economic diversity. And

you can therefore put resources where they are needed.

Some courts are light, some are heavier. I think it's

best done at the circuit level, not at the national

level. And that's another reason for a large circuit.

CHAIRMAN WHITE: What -- you said that

there is nothing that binds any precedent?

MR. SMITH: From the bankruptcy appellate

panels, it is not binding on an Article III court.

And it, indeed, it is not binding on another
bankruptcy court, except to the extent that they give it deference. We need something to make that binding.

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

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

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

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

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

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

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

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

MR. SMITH: By appeal, Your Honor. And
it's appeal as a matter of right, at this time, from
the bankruptcy appellate panel.

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

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

CHAIRMAN WHITE: Yeah. Yeah.

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

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

MR. SMITH: Yes.

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

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

CHAIRMAN WHITE: Yeah.

MR. SMITH: Because generally, bankruptcy
attorneys tend to appeal these matters.

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

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

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

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

MR. SMITH: (Unclear.)

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

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

CHAIRMAN WHITE: Dan, there was some suggestion, when we were at the federal circuit that -- there was some suggestion to -- that bankruptcy
ought to be given to the federal circuit.

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

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

CHAIRMAN WHITE: Yeah.

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

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

MR. SMITH: Yes. They are.

CHAIRMAN WHITE: Yeah. Well, tough duty.
(Pause.) I screwed up the deal again.

MR. SMITH: I'll sit down quickly.

CHAIRMAN WHITE: (Pause.) Mr. Butler?

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

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

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

I think it's difficult to judge the
circuit in terms of response time if the circuit does
not have its full complement of judges. I have heard
other criticisms. And of course, let me say from the
onset, I would like to see the Ninth Circuit remain
as-is.

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

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

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

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

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

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

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

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

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

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

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

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

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

I don't always agree with Ninth Circuit decisions, either. But this business of openly criticizing, and I think back to the case out of New
York, where there was a judge who suppressed some evidence. And it seemed like the whole world came down on that judge for his decision. And that also bothered me deeply.

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

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

If there is any questions, I'll --

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

JUDGE BROOMFIELD: Mr. Chairman, members of the Commission -- years ago, I made a major mistake. I was presenting at a trial -- a case. And
it was of some import, at least the plaintiff thought
it was some import, because the plaintiffs were after
over a billion dollars in damages.

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

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

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

The most important reason I believe is
that if Supreme Court is to ultimately interpret the
national laws, we need less courts of appeals rather
than more courts of appeals. Congress is going to continue to expand the role of federal courts.

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

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

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

There is no limit. And at that point, there is a real question whether we will have a national law that the United States Supreme Court will be able to interpret and pronounce. You will have a
series of regional interpretations of national law that won't get the attention of the Supreme Court that it ought to.

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

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

That may be an over-statement. But he believed very strongly in that certainty. As the current situation on the eastern seaboard, there are
five, or if you want to count the D.C. Court of Appeals -- go over to the Caribbean seven circuits that announce the law, or interpret the law, on the eastern seaboard.

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

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

And it's tough enough with the different procedural laws that exist, particularly with Mexico,
not so much with the United States or Canada. We have
different interpretation of the law. With more than
one circuit on the west coast, it seems to me, does a
dis-service to the implementation of that treaty.

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

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

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

JUDGE BROOMEFIELD: ---- I am not. And you
also will notice from my statement that I believe that
the Ninth Circuit, indeed any circuit, should be
taking more cases en banc, rather than less.

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

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

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

    CHAIRMAN WHITE: So, you would rather -- you would rather have vigorous circuits all around the
country?

JUDGE BROOMFIELD: Yes, sir.

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

JUDGE BROOMFIELD: It may be impolitic --

CHAIRMAN WHITE: Or recommend -- ?

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

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

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

JUDGE BROOMFIELD: Professor Meador,
that's a tough question. And I've seen statistics
that show that in some period of time in the future,
I don't know how many years it is, twenty, thirty,
that there will be 35,000 appeals out of the courts of
appeals. Fifty-thousand -- I don't know -- the
numbers.

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

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

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

MR. BUTLER: Well, my view on that, Your
Honor is, first of all, I don't have a criticism of the decisions that have come out that -- that some people in Alaska have not liked, in particular, the (Unclear.) -- decision.

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

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

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

MR. BUTLER: There are, Your Honor.

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

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

CHAIRMAN WHITE: Yeah.

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

CHAIRMAN WHITE: Yeah. Yeah.

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

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

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

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

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

CHAIRMAN WHITE: Well, thank you.

MR. BUTLER: Thank you.

CHAIRMAN WHITE: Any more questions?

COMMISSIONER: Not from me, sir.

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

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

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

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

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

UNIDENTIFIED: (Sound interruption.)
Pardon me.

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

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

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

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

In the areas of immigration and social
security, those cases don't get taken en banc, because
they don't attract enough attention. But those are
areas that are very fact-specific. And it's difficult
to find any explanation for the fact that different
panels sometimes see those in different ways.
The cultural dissonance between the urban -- the urban centers of southern California, Arizona, Las Vegas perhaps, and the rural, or more spread out areas of Montana, and Alaska, and Oregon, I don't think that's a cause of weakness in the circuit. I think it's a cause of strength. It gives us a great deal of diversity. And we have judges on our court from places like south Montana, and Prineville, Oregon, and Beverly Hills, and San Francisco. And Las Vegas, and Phoenix. And it gives us a tremendous amount of diversity and strength. And I think we've mobilized that diversity in dealing with about a fifth of the federal litigation in the United States. With the bankruptcy, I think even more than that. Finally, on the -- where we are headed. We know where we've been. And we've come a long way. The first time Judge -- Chief Judge -- wanted to split the Ninth Circuit was in 1937. About thirty years later, the Ruske Commission took a look at it. And now, about another thirty years have gone by. We're still talking about it.
But except for the problem that Judge Kleinfeld mentioned in his paper about the judges not being able to read all of each other's opinions, I don't think size has anything to do with our problem. I sat for nearly ten years on the Oregon Supreme Court. Seven judges, we all read each other's opinions before they were filed.

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

CHAIRMAN WHITE: And then forget them.

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

And we found, within five months, we were starting to decide cases differently than Walter Ely, and Shirley Hofstaedler, and some of our dear friends down in the south who are deciding the same kinds of
cases. And we -- we've got -- we had a court meeting. We were going to let this experiment run six months.

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

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

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

But while I have great respect for the tax court, and I think that is a successful specialized
court, I don't know how, while that could be
duplicated in other areas of professional concern. At
least the lawyers that talk to me are not in favor of
much experimentation along that line.

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

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

CHAIRMAN WHITE: Thank you.

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

I am hopeful that my experience of having
served on a long range planning committee for five
years, and the long range plan which was adopted by
the conference will be of some assistance to the
Commission in this awesome challenge that you have.
My remarks, strange as it may seem, will be generally directed to the courts of appeal throughout the country. And I will specifically mention the Ninth Circuit only in that you have been directed specifically to give it special treatment.

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

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

In addition to that, we had great assistance from our staff at the administrative office, from the federal judicial center, under Russ Wheeler's tutelage. And also, that we received great assistance from people from the private sector, and
long range planning futurists.

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

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

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

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

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

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

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

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

That is hardly the situation as far as the
Ninth Circuit is concerned. As far as production is
concerned, they rank third among all of the circuits in the United States, as far as merit determinations per judge, 518. Only the Fifth and the Eleventh Circuit have exceeded that number in per judge determinations.

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

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

The have originated and used bankruptcy appellate panels, a process which I think now has been recognized throughout the United States as a leader in that type of appeal. They are -- we have used
extensively alternate dispute resolution processes.

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

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

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

    And if the Commission concludes that some
re-alignment is necessary, I suggest larger, rather
than smaller circuits. Presently, I can only think of
two logical reasons why you would want to restructure
any of the circuits.
But one being that their workload among
the active circuit judges is very, very
disproportionate. The D.C. circuit last year had 214
merit decisions per judge, as compared to -- or, I
should say, that they had that -- that they filed that
many dispositions.

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

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

If it's necessary to go ahead and re-
align, then I would think that the best standard to
apply would be based upon the filings in the circuit.
And it appears to me that you're going to be
confronted with either the filings in the Fifth, the
Eleventh, or the Ninth Circuit. And those filings are
relatively close, as far as numbers are concerned.

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

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

It seems to me that in determining what
the structure of the court should be that it would be
necessary to determine what the work of the courts
would be. I don't think you can divorce workload from
structure. I think you have to go ahead, and
determine what the workload is in order to go ahead, and
take care of the workload.
I think there are many statistics. Statistics are -- I think you're at risk if you rely on statistics, as far as projections of the future are concerned. But we certainly know that in 1940, I think there were some 300 -- or, some 3,000 appellate filings. And as compared to, what '94? I think somewhere over 52,000 filings.

If we based upon the last 55 years of our experience, if we could rely on those as far as the future is concerned, I think we would all be so startled that it would be almost unbelievable to us. Because if that happens, of course, we could have -- I think the projections would say, as many as over 500 appellate judges. I'm hopeful that that does not happen. And as I say, I think we are at risk if we rely on future projections.

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

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

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

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

I would like to make specific reference to the long range plan, and principally at pages fifteen and sixteen, which goes into projections. Also, chapter three, which deals with alternative -- with
the alternative future. Chapter five, which deals with structure. And chapter ten, which in effect is confronting the alternate future.

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

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

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

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

CHAIRMAN WHITE: Thank you. Should we
question him first?

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

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

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

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

CHAIRMAN WHITE: Yeah.

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

CHAIRMAN WHITE: Hmm.

JUDGE SKOPIL: So, they -- they are -- I
don't know how effective it's been. But they are, in effect, doing their future planning in that forum.

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

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

CHAIRMAN WHITE: As to --

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

CHAIRMAN WHITE: Yeah. Dan?

PROFESSOR MEADOR: Judge Skopil, we have had suggestions along the way at previous hearings that one way to go to relieve pressure on the courts of appeal is to shift some of the reviewing function to the district level, having what you might call
district court appellate panels, somewhat by analogy to the bankruptcy appellate panels, in which you would have panels of either three district judges, or two district judges and one circuit judge, sitting to review certain categories of cases.

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

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

COMMISSIONER: What was --

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

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

JUDGE SKOPIL: We did not endorse that.
You're absolutely --

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

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

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

So, there are many areas that I think that would be appropriate. Having been a district judge, I am not too sure that they would necessarily agree with that. I think their workload is sufficiently heavy. Probably they don't want to take on any more.
But again, as I said before, I think with the changes we have, I think the judiciary, as well as the bar, has to be more flexible in their approach to these problems.

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

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

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

I am hesitant to say, but the truth is that we received actually no assistance from either of those two branches of government. We did -- Attorney General Reno did appoint a liaison with the committee,
who never attended a committee meeting.

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

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

CHAIRMAN WHITE: Yeah.

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

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

CHAIRMAN WHITE: Yeah. Go ahead.

COMMISSIONER: Judge Skopil, as I understand it, you think the Ninth Circuit's size is no impediment to its positioned operation at the
present time. And if there were going to be alignments driven by case loads, you would prefer more jumbo circuits, I don't use that pejoratively, rather than fewer circuits.

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

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

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

Somewhere along the line, and I was here this morning when Justice White asked the question, how do we keep Congress under control? I don't know of any reason. (Laughter.) It just seems to me, however, that if the citizens of our country knew that
we have two judicial systems running along parallel
with one another in many areas, that they would be
very upset about it.

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

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

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

JUDGE RYMER: Well, we've heard from a
number of people who say, for example, that the
decreasing availability of oral argument, or the increasing incidence of dispositions that are quite summary, or unreasoned, and the increased number of unpublished dispositions which may tend to have -- or suggest inconsistency in the law of the circuit, are troubling to the bar, and to some judges elsewhere in the country.

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

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

I think it's very apparent that there are many, many appeals that come before the circuits that
really deserve little or no attention. And I think that it's a waste of time to these circuit judges to spend a lot of time on matters where there is case precedent already. And thus ignore what -- the responsibility of matters which are of great importance to the economy of the country, and to the individual rights of individuals.

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

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

And he was very explicit in saying that that was not a problem within the Ninth Circuit. So, the inconsistencies do not bother me. The lack of
time between filing and disposition has been answered,
I think, by Judge Goodwin. It's interesting to note
that the Ninth Circuit is not the last, as was
represented here this morning, between filing and
disposition.

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

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

I don't know whether I've answered all
your questions or not, Judge Rymer, but I hope that I
have.
JUDGE RYMER: Thank you. Appreciate it.

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

JUDGE SKOPIL: What do I think of them?

COMMISSIONER: Yes.

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

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

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

CHAIRMAN WHITE: Yeah. Yeah, well --

JUDGE SKOPIL: And that -- that comes principally, a lot, from administrative appeals.
CHAIRMAN WHITE: Yeah. Well, that's a lot of cases.

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

CHAIRMAN WHITE: Yeah.

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

CHAIRMAN WHITE: Yeah. Thank you.

JUDGE SKOPIL: Thank you.

CHAIRMAN WHITE: Thank you. (Pause.)

Judge Boochever? Welcome.

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

When I got out of the service in January 1946, I went to Alaska as assistant U.S. attorney. After that, I was in private practice in Alaska for 25
years, mostly in trial work. And then, I went on to be on the Alaska Supreme Court from 1972 to 1980. And I served during part of that time as chief justice in charge of the administration of that huge state.

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

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

I might say just as an aside, when we were in -- I was in the territory, all of our appeals went to the Ninth Circuit. And I argued numerous cases before different panels. And I'm particularly reminded of one cases I had, in which the panel was not at all as attentive and kind as this panel is.
The case -- cases normally were assigned to San Francisco. And we'd go down there to argue, which was a long trip in those days, from Alaska. And this one particular case I had was assigned to Portland, instead of San Francisco.

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

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

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

The -- my opposing counsel proceeded to argue. The judge took out a newspaper, and read it for the entire time. I might say that that occurred
when there were much fewer judges on the Ninth Circuit. And I'm sure you wouldn't get that kind of a situation today.

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

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

Now, I know that different judges have already spoken about these innovations. And I think you've heard enough about them. And I'm not going to go into them in detail. We do have three administrative divisions, which help handle the administration of the courts a great deal.
And we -- I think, with a limited en banc, we have practically eliminated inconsistent decisions, as far as published decisions are concerned.

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

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

I think that the size of the circuit has nothing to do with collegiality. Most of the communications are made through E-mail now. And there are full discussions of issues, particularly when cases are coming up for en banc consideration. And the memos go into very serious discussions, and also
have a certain amount of jokes, and a certain amount of good-natured jostling back and forth.

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

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

I can recall the spotted owl case involving environmental considerations in Oregon. This was a case that affected the timber industry. And many people felt very strongly about it. Yet, one of the judge who -- on the panel that decided it for the Ninth Circuit was a former Supreme Court justice of Oregon.
Similarly, in the State of Washington, there were fishing rights cases. The case of Washington against the Guinoic Tribe of Indians, and other tribes. And that case was a very long, protracted case.

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

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

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

One case involved an Alaska legislated definition of rural. And the panel that decided the case equated rural with what is rural in the lower states, namely agriculture, and grazing land. And
there were those in Alaska who perceived that this was a mis-understanding of the local situation.

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

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

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

I think that the solution in those rare cases is to have counsel adequately alert the panel to any regional problems. In any event, a few controversial decisions are not grounds for limiting the size of the circuit.
If we were to consider a limit of, say, fifteen judges on a circuit, any split of the present Ninth Circuit could not do that without splitting the State of California. And I think almost everyone agrees that that's an undesirable result.

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

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

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

I think there is -- I was pleased to see that this panel was considering the jurisdiction of the circuit courts of appeal. It is not specifically mentioned in your -- in the Act. But it's certainly,
I think any discussion of the structure of the circuit courts has to take into consideration their workload.

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

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

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

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

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

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

Thank you, Your Honor.

CHAIRMAN WHITE: Thank you. Thank you, Judge. (Pause.) Judge John Sheehy.
JUDGE SHEEHY: Members of the Commission, my name is John Sheehy. I live now in Elden, Montana. I served for thirteen years as a Montana Supreme Court Justice. After 30 years of active trial and appellate practice in Billings, Montana.

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

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

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

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

He comes before you, however, as an insider judge, fully familiar with the internal
working of the Ninth Circuit. I stand before you from
the limited viewpoint of a practicing lawyer, and a
state judge, within the geography of the Ninth
Circuit, for whatever value that might have to this
Commission.

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

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

Between our state courts, and the court of
appeals for the Ninth Circuit there is what I have
designated in my statement a mutual cordial respect.
Any attempt to cut Montana away from the Ninth Circuit
would have the unfortunate result of shutting us off
from an important source of precedent. This is because our code law came originally from California.

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

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

Montana's state constitution has in it several decisions that parallel the federal Bill of Rights. While Montana cannot use its state provisions to diminish a citizen's federal civil rights, under the U.S. Constitution, Montana does not have to march lockstep with the United States Supreme Court.
decisions respecting those rights, but can expand them under our state constitution.

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

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

I think it should be really clear that a split of the court of appeals of the Ninth Circuit is not going to happen anytime soon. First of all, the great weight of the arguments before this Commission, before the Congress, before the various other bodies
studying the matter, after the Horeske Commission, is
against carving the Ninth Circuit.

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

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

I think that's an important factor. A
further reason why a split of the circuit will not
happen anytime soon, as no workable plan to divide the
circuit can be or has been conjured up. So far, every
split either divides California, or creates a new circuit or circuits with unfair and unworkable caseload, distributions of caseload.

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

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

When politics enters in, we get ridiculous results. For example, Senate Bill 956 passed the Senate because the Judiciary Committee of the Senate was by-passed, and the Senate Bill 956 was attached as a rider to an appropriation bill in the Senate Appropriations Committee.
Had Senate Bill 956 finally passed, we would have had the absurdity of two legal clerk's offices at opposite sides of the new circuit handling only thirty percent of the work of the old Ninth Circuit.

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

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

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

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

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

I have no idea at present what this
Commission is learning or has learned about the other
federal appellate circuits, nor how they relate to the
whole appellate system, or to the Ninth Circuit. I
offer my comments only because the Congressional
mandate to this Commission included a special
reference to the Ninth Circuit.

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

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

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

I respectfully submit that, Your Honor.

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

COMMISSIONER: I would like to ask --
Judge Boochever -- Judge Boochever, I wonder if you could provide a definition of collegiality in the appellate court setting?

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

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

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

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

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

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

COMMISSIONER: Judge, were you through now?

JUDGE BOOCHEVER: Yes.

COMMISSIONER: Judge Boochever, I have asked this question as I've asked several others not
because I have any mindset in this regard, but because people ask us that, and we ask one another that.

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

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

Where do you come down in that argument?

And by what criteria do we -- should we look, to see when a circuit reaches, or is likely to reach a size that it becomes too large, or too cumbersome, or has to compromise on too many traditional appellate values to guarantee its product?

JUDGE BOOCHEVER: I think that's a good question. I really don't -- I think we can go a long ways if we have to. I would -- I would prefer that the jurisdictional aspect be looked into to keep the
case load from constantly increasing.

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

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

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

COMMISSIONER: Do I understand you to be saying, if you put what you just said there in response to what you said a moment ago, it's
irrelevant to the quality or consistency of appellate
decision work whether you deal with strangers, or
judges you know.

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

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

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

But as long as one gets the type of judge
that I'm talking about, then I don't think -- I think
it makes little difference that one is not familiar
with him, or her, I should say, too.

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

JUDGE BOOCHEVER: Well, --

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

JUDGE BOOCHEVER: I don't think that is.

COMMISSIONER: Okay. Well, good.

JUDGE BOOCHEVER: I think it's important
that the standards be kept up, and that it's
preferable to have more judges, and to be able to keep
up those standards, than to shunt off more and more
cases to memorandum decisions, particularly if one
starts sluffing at the standards, and doing memorandum
decisions when they're really tough issues involving
new -- new facets of the law.

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

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

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

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

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

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

CHAIRMAN WHITE: Yeah. Well, it's -- it's probably better than taking all of the planned jumbo
circuits, and doing it all at once.

JUDGE BOOCHEVER: I don't -- I'm sorry. I didn't follow that last one.

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

JUDGE BOOCHEVER: Well --

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

JUDGE BOOCHEVER: Well, thank you, Your Honor.

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

(Whereupon, a recess was taken.)

CHAIRMAN WHITE: Welcome. Welcome.

JUDGE HOLLAND: Thank you, sir. Mr. Justice White, members of the Commission, I am very
pleased to be with you this afternoon. I want to tell you first that I speak only for myself in appearing before the Commission.

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

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

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

I believe that you face the very real problem of having to tell Congress something which
many of those who support the division of the Ninth Circuit do not want to hear. Namely, that there is not any serious fault in the structure of the U.S. appellate courts generally, or the Ninth Circuit in particular.

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

Those who are listening I think unfortunately do not have much of a frame of reference within which to evaluate that which they are being bombarded with. Those who ought to and need to know better what is really going on, I fear, are overwhelmed by the volume and the intensity of what they are hearing.
I submit that they are by and large uninformed as to the demands which they are considering for change in the appellate process. Those who have lost an important case before an appellate court become the vanguard of those who think that there is something inherently wrong with a large court, and they vent their frustration over losing their important case on the messenger of the bad tidings, a court.

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

Despite these diversities, tough cases have to be decided, someone will prevail. And some will lose. And the loser will complain to all who will listen to him. Only the most extreme of changes
in our judicial system could alter this.

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

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

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

You might consider enhancing the
transportability of appellate judges, to smooth out
the availability of judges between circuits. In the area of decision-making, I urge you to consider the improvement of en banc procedures for the consideration for the consideration of difficult cases.

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

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

Now, if you will bear with me for just a moment more, I feel some need to respond to the Alaska situation. It came up this morning with the assistant
attorney general, who was here in place of her boss because of the meeting of the legislature.

That legislature is currently addressing one of the very cases which the assistant attorney general mentioned. They're wrestling with the rural residents problems of our subsistence law. It is still not resolved.

Mention was also made of the Indian Country case. I should perhaps tell you in fairness that both the Canine Subsistence case, as regards rural preferences, and the Indian Country case were mine at the district level.

The circuit reversed me on both of them. And I say with a straight face, and there is a judge behind me who will be my witness, if need be, that despite this situation, my situation, I remain convinced that while Alaska is different in many respects, it is not really different when it comes to federal law.

Judge Browning, you got it exactly right. The Indian Country case, the Rural Preference case, and a whole laundry list of other land law cases, and
things of that ilk, they are, in a sense, unique to Alaska. All fundamentally turned on the interpretation of federal law. We're talking about figuring out what Congress meant.

Not what the State of Alaska meant. Not what the individual citizens of Alaska might wish. We're talking about figuring out what Congress meant. And lots of times, Congress doesn't speak very clearly, at least not to me.

My point is that the Indian Country case, the Subsistence Law case, and a whole laundry list of other cases, were legitimate, good faith disputes between people who honestly believed their own point of view. Who received at my hands a decision that one side thought was favorable, and received a different decision at the appellate level.

That doesn't necessarily make me right, and them wrong, or the reverse. It simply means there are different views. There will always be different views. And dividing circuits will not end that.

Thank you very much for the opportunity to speak before the Commission this morning.
CHAIRMAN WHITE: Thank you, sir. Judge Redden?

JUDGE REDDEN: Thank you. Members -- Justice White, Members of the Commission, I am here with three of my colleagues, and we do speak for a majority of our district and magistrate judges in the District of Oregon. All but one magistrate judge favors a split.

Judge Hogan, and -- I would say, disfavors the California split, or a split involving a split of the State of California. And wishes me to point out that any split will be the long range solution to the problems of the judiciary in this -- in this circuit, or in the nation. And of course, we all must agree with that.

But we favor a division of the Ninth Circuit, and appreciate the opportunity to briefly explain our reasons, as well as our preference in the manner in which it should be divided. Our reason, at least in Oregon, and the reason with other judges I have talked to, district judges favoring a split, is that the circuit is just too big.
There are too many panels, and too many possible combinations of judges on a given panel. We don't desire a split for any liberal versus conservative theory, which has been advanced, unfortunately, by the political branches. Which is pointless, and has been somewhat divisive in our circuit.

Neither do we seek our own little Northwest corner of the world on the theory we can better administer to the needs of the Northwest, or that they are our constituency. We are not administrators. We are independent judges.

And we do have the greatest respect for those who have led us in the 80's and 90's. Judges Browning, Goodwin, Wallace, and now Hugg. They have done a good job, and are doing a good job. Three of them were here today, all of them friends and colleagues. But there is just so much they can do.

Judge Wilkinson pointed out to this panel that as the court grew, so do the possible panel combinations. And the law becomes fuzzier and less distinct. I won't read this full quote. We've had it
in several letters to you. I think that is true. I think it's inescapable.

The real problem with a court as large as the Ninth Circuit is, of course, there are too many panels, and too many possible combinations of judges on any given panel. And there was a question asked about the meaning of collegiality. Collegiality to me does not mean friendship, necessarily, or beer drinking buddies, like you might perhaps on the district court level.

Collegiality, it seems to me on the appellate level is that cooperation and association -- in working together. Someone told you earlier today, I believe, that it might be three years before the same judges will sit on the same three-judge panel in a circuit as large as the Ninth Circuit. And I suggest to you that that is a problem.

Judge Parker has told you about the task of maintaining coherence and uniformity when a court has more than twelve active judges, though he was seeking three more.

Judge Hatchet recalls the old Fifth
Circuit as a horror. I don't know the number of possible combinations here. But in the Ninth Circuit, or as it will be when there are ten more judges. And when you consider the visiting judges, the district judges that sit on the Ninth Circuit.

But they had 3,500 when there were twenty-six regulars and seniors in the draw in the Eleventh Circuit. And I suggest that we are talking about possibly 5,000 or more. He felt that that rendered the law uncertain, and it is certainly so. Such a court cannot keep up with their own opinions, and neither can the district judges.

We are told that isn't too important for district judges, because the lawyers will cite the cases. But the lawyers can't keep up with the number of decisions.

It is the uncertainty of the law which encourages appeal, and contributes to more uncertainty. As I said in my statement, lawyers have advised us that they must advise their clients when the question is, shall we appeal, or shall we settle on appeal is yes, because -- yes, we should both
appeal or settle, depending on the position, because we cannot tell you what the position of any given panel you may draw will be.

And that may be just their perception. But it is a real thing. And I think there is some basis to it. There will be more judges added to this circuit. It will be -- a split will be inevitable. I think that the legislative branch has told us that it's going to be inevitable. And I hope that this Commission, even if you do not support the proposition of a split, we'll discuss with -- in your report what the best split will be.

I think that either the Ruske panel, as recommended by Judge O'Scannlain, or the three way split, either one of those two are the best. A combination of those others within the -- that have been discussed by Judge O'Scannlain, might work. Put you in sort of a position of a three-judge Congressional re-apportionment panel.

But I think at least two of them are practical, even if one of them splits the State of California. House Resolution 3654 of 1993 by
Congressman Kopesky deals with the resolution administered to conflicts by the creation of an inter-circuit California en banc court, which is not as complicated as it sounds. I've attached that bill to my statement.

We know that the division of the Ninth Circuit is not going to solve all the problems, because this is a structural committee, and not a jurisdictional one. Perhaps the jurisdictional answer would be better. Would they give -- grant -- to the circuits, Congress? I don't think so.

Would they do away with diversity? I don't think so. And will they abandon federalization of criminal and civil cases? I don't think so. I think that a split of this circuit in an intelligent fashion will be of great help to this circuit for the next decade, and more.

And when you compare it to what will happen if we remain the same, and simply continue to grow, I think you will arrive at that same conclusion. I hope the Commission makes a positive contribution, suggests the appropriate division of the circuit, even
if you do not unanimously endorse the concept.

    Thank you.

CHAIRMAN WHITE: Thank you, Judge Van Sickle. You may approach the bench, or the podium, or wherever you want to talk about. All right.

JUDGE VAN SICKLE: Thank you, Mr. Justice White, and members of the Commission. My name is Fred Van Sickle. I am a United States District Court judge from the Eastern District of Washington. I reside in Spokane.

    I speak primarily for myself. But I also speak in accordance with the general philosophy, as well, of the chief judge in the Eastern District of Washington, Judge William Nielsen.

    It's always difficult I think when a trial judge is taking a position that is contrary to the appellate system, to not make it appear as though it's a personal criticism of that — the personnel involved. My comments and concerns are not at all, and should not be understood to be a personal criticism of any of the judges or the staff of the Ninth Circuit whatsoever. They are not.
To give you some idea of my background, I am a country trial judge. I started out in the state system in the State of Washington, in eastern Washington. And served fifteen-plus years as a state trial judge, and have served just about seven years on the federal bench.

My concern with the situation involving the Ninth Circuit is the extreme number of cases and determinations that are required to be made by a circuit of that size. When we are talking about a caseload that is approaching almost 9,000 -- 8,600 cases to be considered by -- as indicated, as I understand the numbers, the number of panels that are involved in making those decisions.

The risks and concerns with conflicts in the cases, and the risks of uncertainty, are significant. They create, I think, difficulties for everyone. I think the judiciary, the trial bench, has a difficult time keeping up with what the law is on a day to day basis, in order to be able to make decisions on cases, and on motions.

And I would suggest that that also, that
uncertainty, which is so important, I think, for the
general practitioners of law, and people practicing in
the federal courts, to know and understand what the
law is, or have a good idea of what to be able to
predict what the law is, to advise your clients,
becomes very important.

I am convinced that this also results in
more litigation. And thus, we end up with more
litigation, and more uncertainty. And I -- I have not
yet had it happen, but I had a friend tell me on the
phone the other day, someone from outside any of the
districts that are here. But also as part of the
Ninth Circuit, commented that counsel in his court
said, judge, you can rule as you see fit, of course.
But we'll take it up, and see what panel we might get
in the Ninth Circuit to tell us what the law is.

I don't mean to be personally critical,
but it has reached the point, and it is a function
that is explained, as well, in that article that
submitted to The Wall Street Journal, but that then
was re-published in the publication of the Federal
Judges Association, the May issue of In Camera,
published this article, re-print from The Wall Street
Journal, that was authored by Chief Judge Wilkinson of
the Fourth Circuit, talking about the size of
circuits, and talking about the size of the federal
judiciary, in general, his principle concern. But
addressing the concerns of the size of the district of
the appellate court system.

I would say those things do apply. I know
you've heard them over and over, I suspect. And the
concerns expressed by the people who mentioned them to
you. And I think they're real. They are a concern.
And I think the question comes down to a very
difficult determination.

And that is, should there be a split of
the Ninth Circuit? And should that happen? And is it
really, even more -- to say, is it the time now come?
I am convinced that the size of the circuit, not
geofraphically, but in terms of caseload, in terms of
the work and energy that has gone into, to do the
work?

And I am mindful of the difficulties with
the vacancies, and the use of technology in an effort
to deal with the problems that are there, that have been done. But I would submit to you, and ask that this Commission give very serious consideration to a division of the circuit. Not because the people in the circuit, whether the judges or the staff, are in any way not doing their job.

It's because of the difficulties of uncertainty, the difficulties and problems with the judiciary, the bar. And probably more importantly, the litigants, who must then wonder what the federal law is, and must litigate it. And must be involved with the use of their resources to make the determinations, as it relates to their litigation.

Thank you very much for allowing me to express my concerns in regard to these issues. Thank you.

CHAIRMAN WHITE: Very well. Do you have any questions?

COMMISSIONER: Well, let me ask Judge Holland, you can answer from there if you keep your voice up, Judge. Do you -- do attorneys in Alaska share the perception that Judge Redden and Judge Van
Sickle spoke of, that it depends on what panel you get, as to whether the appeal will succeed or not?

JUDGE HOLLAND: In all candor, sir, I have said that myself. And I do hear that.

COMMISSIONER: There appears to be a study by --

JUDGE HOLLAND: I don't -- I'm sorry, sir.

COMMISSIONER: There's a study by Professor Helman, which would indicate his examination of empirical data, does not show that to be the case. Now, he admits to some -- I don't know the right word. Shortcomings, perhaps, in his research, or some aspects that aren't completed.

But if that were the case, you would think it's still the perception in your district that that is the case.

JUDGE HOLLAND: I think there is a perception that it makes a difference which panel you get. And I suggest that that circumstance exists in any circuit. And of course, the bigger it gets, the more combinations there are.

But I do not think that dividing this
circuit or that circuit or the other circuit is going
to solve the problem for those who say, gee, if I get
a panel made up of Judge A, and Judge B, the case is
going to go one way. But if I get C and D, it's going
to go the other way. I think you can have that on a
five judge court.

COMMISSIONER: One other observation,
there is nobody on this Commission, I believe, who can
predict where this Commission stands on any point
that's been discussed today. But I'll take the
liberty of predicting, we won't recommend to Congress
they de-politicize the selection of federal judges.
(Laughter.)

And from where I sit, that's fine. But
were that true twenty years ago, we might have a lot
of new faces in this room.

JUDGE HOLLAND: It sure is true.

CHAIRMAN WHITE: I wonder if I might add,
Judge Holland, a question of, we've heard various
arguments about what I think for short is called
regionalism. That the whole federal judicial
structure is based more or less on a regional basis.
Not exactly in every situation. But more or less historically. You've got a New England circuit, you've got a mid-Atlantic, you've got South-eastern, et cetera.

And the lower -- planning committee made a point of saying that appellate courts, that the litigants should have access to appellate courts with judges drawn from their region. Now, and then we also have heard that one cannot say that Arizona and Alaska are in the same region. And you have a situation here that is inconsistent with the concept of regionalism historically, and currently.

What would be your answer? Is regionalism, in that sense, a legitimate factor to be taken into account in designing circuits?

JUDGE HOLLAND: Well, certainly from an historical standpoint, I think one can say that has been a factor. Now, I think one can look at the Pacific Northwest, and say with a straight face that Alaska, for example, has more of an affinity for that which goes on in the Pacific Northwest than it does for what goes on in Arizona.
That's true. I also think that it's true that there is a high level of importance for the entire Pacific coast that we have a unified law for the entire Pacific coast. We in Alaska have significant business dealings with the entire Pacific coast.

And in some meaningful sense, I suggest that the Pacific coast is a legitimate, recognizable region, when one speaks of having appellate courts serve, in some sense, on a regional basis.

If that's not too waffly an answer, yes, I think it's a factor. But I'm not prepared to concede that the Ninth Circuit fails in that regard.

CHAIRMAN WHITE: (Pause.) Thank you.

COMMISSIONER: I have no other questions, no.

CHAIRMAN WHITE: Judge Barbara Jacobs Rothstein, U.S. District Court, Western District of Washington.

JUDGE ROTHSTEIN: Good afternoon. I am sure by now you've heard a lot of testimony from a lot of different people. If I were sitting where you were
sitting, I would probably rule that I am cumulative, and dispense with me. But I do appreciate --

CHAIRMAN WHITE: Oh, I know. But cumulation means sometimes convincing.

JUDGE ROTHSTEIN: I hope so. I appreciate the opportunity to be able to speak to you. Many of us judges haven't had a chance to argue a point for many years, so this is a good occasion for us to do that.

CHAIRMAN WHITE: Uh-huh.

JUDGE ROTHSTEIN: I'd like to address some of the questions that you have asked concerning the regionalism, and whether they're -- that should be a factor that counts for or against the splitting of the circuit.

I would proffer that regionalism is a poor idea in splitting the circuit. The idea that we could have a Northwest circuit that, either through its judges, or its considerations, is fitted to the needs of a small section of the country, is something that should not recommend itself to this panel.

We on the West Coast, as Judge Holland
pointed out, are increasingly facing a number of legal matters that impact the region as a whole. It's not just international law, and the fact that we as the Pacific rim are constantly dealing in an area where it's a great advantage to have a common body of law.

But there's admiralty law, where the trade is going up and down the coast. And of course, there's environmental law. As I pointed out in my statement, migrating species have very little regard for state lines, or circuit lines. And indeed, the Commissions and administrative needs for dealing with these have been on a broad geographical basis.

The Fisheries Commission is a Pacific Coast Fisheries Commission. It isn't divided in some arbitrary manner between the Northwest and the Southwest.

Fragmenting the circuit runs counter to these needs. Our Supreme Court is the ultimate decision maker. It's already faced with countless legal disputes among many circuits. And additional conflicts, by putting in an additional circuit, is not going to lessen those conflicts. Or, it's not going
to make the law any more certain.

The function of the federal courts, I would submit, is to fashion a uniform national law. And sectionalism is not an advantageous quality in advancing that uniform body. Historically, the Ninth Circuit has been a common geographic area. Its legal tradition has developed with the entire picture of the circuit.

In some areas of the country, history and geography have dictated the creation of smaller circuits. And so be it, they have their smaller circuits. But our legal history and tradition, and that of the West, has shaped itself around a larger circuit.

I think it's a fine history, and I think we should maintain. And I do think it's working well. The idea that multiple panels creates an uncertain body of law, I suppose multiple circuits, it's inherent that there is going to be an uncertain body of law, as long as it's not going to lessen it to have an additional circuit.

You're just going to have another
possibility of a split between the circuits, and create more law for the Supreme Court. Which I suppose may be fine, but I don't think is going to -- uncertainty is part of the law, part of the development of the law.

I do not think that -- the fact that there are so many panels has made that big a difference. The circuit has made a concerted effort to keep track of its decisions, to circulate those decisions among its judges. And as technology increases, the facility with which that can be done, I think that kind of problem can be resolved within the circuit as it now stands.

Any questions?

CHAIRMAN WHITE: Thank you. If we do have, it will be after this young man.

JUDGE ROTHSTEIN: Okay.

UNIDENTIFIED: (Pause.) Do you want Judge Dwyer to start?

CHAIRMAN WHITE: Yes.

JUDGE DWYER: May it please the Commission. It's been a while since I've had a chance
to utter a phrase like that. But I did have good 
fortune to practice law as a trial lawyer in Seattle 
for thirty years. And I've had the more recent good 
fortune to serve as a district judge here in this 
building for ten and a half years.

Neither of these jobs automatically 
influence admiration for the court of appeals, which 
after all, can take away what you've won as a trial 
lawyer, or reverse a judgment that you've labored over 
as a trial judge.

And yet, I do admire the Ninth Circuit, 
and I believe for good reason. In my experience, 
which includes sitting occasionally as a member of a 
three-judge panel in the court of appeals, this court 
of appeals functions very well.

It's been mentioned today that there are 
28 judges, or there would be 28 judges if the 
vacancies were filled. I see that as a strength, 
rather than a weakness. This group of judges, drawn 
from all over the far West is a diverse, multi-
talented, and highly dedicated group.

It's been asked, does it depend on what
panel you get? I think, really in most cases, and this was my observation as a trial lawyer, as well as now, in most cases, it does not depend on what panel you get.

Occasionally, of course, that can make an important difference. But that's true in almost every court. Starting in the trial court, something may depend on what trial judge you get. And in any appellate court of any size at all, the outcome may have something to do with who is on the panel.

But I, for one, would rather be reversed by a diverse court with an ample supply of judges from various backgrounds and inclinations, than by a smaller monolithic court.

I think those who favor a small circuit may be forgetting the ancient wisdom, be careful what you ask for, because you might get it. These things can change very rapidly. And those who expect a more favorable result eventually from a smaller court could easily find the tables turned very quickly. And that kind of outcome is not going to fit anyway.

It's been asked if this court is
collegial. If by collegiality, we mean respect for precedent, respect for each other's views, the answer, by and large, in my experience, is yes.

Does this circuit produce a coherent body of law? Again, I say yes. Now, by no means can I take full credit for this, since I am helped by law clerks who are brilliant with computerized research, which is beyond me. But I find it not difficult to nail down the circuit's answer to a particular point of law, as well as can be done with any other circuit.

Obviously, there are ambiguities and difficulties. If there were no ambiguities or difficulties, we would now be out of business, or at least have very little to do. But coherence I think is a value maintained very well with the Ninth Circuit.

There is the question of timeliness. I think by national standards, and national comparisons, the Ninth Circuit does well, particularly given its short-handedness. But I do think also that all circuits need to improve. I think lack of timeliness is a chronic shortcoming in the entire federal
I seized upon one word in the Commission's invitation to comments. It was the word processes. The Commission invited comments on processes, as well as structure. And seizing on that, I included in my written submission a suggestion as to process.

Which is very simple. It's that we take a page from the British appellate book, and decide some appeals where the outcome is clear, and simple, and unanimous, from the bench, rather than retiring, taking things under advisement, going home, drafting, re-drafting, circulating, et cetera. Which is time consuming, and in a non-precedential case, I think is very unnecessary.

I believe that kind of reform could make a big improvement in our work, that is, in the court of appeals work. And of course, that's just one suggestion of many that could be made.

In the future, it seems clear that all circuits will grow in terms of the number of judges. The supply and demand for justice will assure that no matter how much any of us may wish for a small group
of federal judges, limited either by a cap, or by some
other means, I simply don't think it's possible, given
the public demand for federal justice in this country.

And faced with that, we will not solve
anything by chopping up circuits. The states of the
far West have a great deal in common: history,
culture, economics, commerce. And in regard to five
of them, a sharing of the Pacific rim.

These states need a unified body of
federal law. I'm speaking today only for myself. But
I do not believe that there is any widespread
sentiment among the public or the bar to split off the
Northwest from the rest of the circuit.

Of course, I respect fully the views of my
colleagues and others who disagree. But in terms of
public opinion, and sentiment of the bar, I do not
think there is any strong movement, or even any
majority movement in that direction, nor should there
be. And I think what sentiment there is, at least as
expressed through Members of Congress, derives chiefly
from disagreement or dissatisfaction, with the very
small number of decisions, out of thousands recently
decided by the Ninth Circuit.

It's hard to imagine a poorer reason to break up a judicial circuit. This brings to mind an historic event of 60 years ago, when out of dissatisfaction with some decisions of the Supreme Court over measures of the New Deal, President Roosevelt made a very determined effort to change the structure of the Supreme Court.

History has vindicated the judgment of the majority who rejected that, and stayed with the existing structure. And of course, time took care of the problem. Just as it will take care of anyone's dissatisfaction problem with particular decisions of this circuit, or any other circuit.

Every judge, every court of appeals judge, every district judge, even every Supreme Court judge, has only a brief lease on office. And time will soon resolve these disputes or disagreements over particular cases.

And I think it's important to note that that is all the more true in a large circuit. In a small circuit, or in a one-judge county court, it is
much easier to get stuck with a cast of characters
that breed widespread unhappiness.

In a larger circuit, we have a better
chance, and I think we have a demonstrated record of
being able to improve any areas of judicial decision
making through the normal traditional appointment
process, the appointment and replacement process,
without trying to divide circuits.

I do not believe we should divide circuits
at this point in history. Rather, we should try to
make them work better. And I'm convinced that we can
do that.

Thank you very much, and I'd be glad to
respond to any questions.

COMMISSIONER: I have no questions.

PROFESSOR MEADOR: Do you -- Judge Holland
a while ago talked about the perception of lawyers,
and even himself, that the decision you get on appeal
depends on the panel you happen to draw. Does either
one of you sense that perception among the lawyers in
your districts? Among the judges on your district
courts?
JUDGE DWYER: I've heard that said, Professor Meador. But it always collapses under cross examination.

PROFESSOR MEADOR: You mean the decision does not depend on the panel you get?

JUDGE DWYER: In most cases, I'm convinced it does not. There are some cases, cases of particular difficulty, or the cutting edge of the law in some respect, where who is on the panel certainly does make a difference.

But I think that is an inherent condition of life in any court where you have more than one judge assigned to the case?

PROFESSOR MEADOR: Well, does it follow from that the lawyer -- the number of possible panels, the greater the degree of uncertainty there will be about outcomes?

JUDGE DWYER: I don't think so. Because there are so -- only so many basic judicial points of view. Sometimes they're called conservative and liberal. These are two terms of doubtful clarity, in my opinion. But perhaps we all have a rough idea of
what -- there are not 3,000 orientations. There are not even 28 different fundamental orientations. There are a very few.

And the combinations of judges that we get I think bring a richness, and a diversity to the process. And a freshness to the process that easily becomes lacking if a court becomes too small. Something like the jury system, in a way, I am a great fan of the jury system. And one reason I am is that it brings freshness and newness to every case.

Although a large court doesn't bring newness to every case, but in a sense, it does bring freshness. And I think that is a tremendous advantage we have. And I think those who would prefer, say, a five judge circuit, or a six judge circuit, to a 28 judge circuit, if they were to realize that goal, would soon become very disappointed.

CHAIRMAN WHITE: I think -- I think that is all.

JUDGE DWYER: I thank the Commission.

CHAIRMAN WHITE: Thank you. And thank you, Judge Rothstein. (Pause.) You may go ahead.
MR. TRUE: And I'm pleased to be here this afternoon to speak with you for a few minutes about a court that I spend a good deal of time working for.

I am an attorney for the Earthjustice Legal Defense Fund. We are a public interest law firm. We practice in the area of environmental and natural resources law. We have a number of offices around the Ninth Circuit, four. And we have handled cases that have arisen in just about all parts of the circuit, from Guam to Alaska, Southern California, to Montana, Arizona, and just about any point in between.

We have also followed the issue of restructuring the Ninth Circuit for at least the last half dozen years. Because in the late 1980's and early 1990's some of the environmental cases we were involved in appeared to provoke a response in Congress that the circuit should be divided, because one part of the circuit didn't understand another part.

So, it's an issue that I have some small familiarity with, certainly not as deep as many of the people that you've heard from today. And my familiarity with the court, and with the issue of re-
structuring the court, leads me to have three points that I would like to offer you today.

The first is, that the court, as it's structured now, is working fine. That is the perspective of a lawyer to writing briefs, filing cases, filing motions, speaking with the clerk's office, and dealing with the court on essentially a weekly basis, sometimes more often.

The motions we file get responded to. The clerk's office is very helpful, it's very prompt. Calendaring of matters is handled well. We are not -- we haven't experienced having cases lost, or things disappear into that large Ninth Circuit. They are -- they know when things come in, and they respond to them.

I think if there is any problem that I see in the court today, it is that the current number of vacancies on the court has somewhat delayed the time, my perception is, has somewhat delayed the time between completion of the hearing and calendaring of argument. But I believe that the problem with vacancies on the court lies somewhere else than with
the structure of the court itself.

The court has over the years done quite a good job of taking advantage of technology to work with and track the many appeals that are filed in front of it. I can only recall one occasion in the last ten years when on a point of law, under the National Environmental Policy Act, two panels were considering the same issue.

Opinions that took a different position on that issue initially came out, but that was immediately recognized by the court. The two opinions were withdrawn. The panels concurred. And a common position on that particular point of law was adopted by the circuit, and has worked fine ever since.

I think where I come out on this point is that just because it's big doesn't mean it needs to be broken up. The court of appeals is not MicroSoft. It's not a division of MicroSoft. It is an institution that has served this region extremely well for over 100 years.

And its innovation, and management of its diverse caseload should be allowed to continue. And
it should be allowed to pioneer, essentially, the future of large circuits. Because at some point, we may want more of those, rather than fewer.

The second point I think I would make is that in the area where I work, there are actually advantages of the current size of the Ninth Circuit. In the natural resources area, we are often dealing with large eco-systems, large geologic formations, river systems that cover several states.

And there are advantages to having one court that announces a rule of law for that whole system, rather than potentially two courts that would go in different directions. There are some examples of that that come to mind. Recently we have been involved in cases of the protection of habitat for a number of birds that have -- that live from San Francisco to the Canadian border.

We are involved now in litigation over the protection of salmon which range up and down the West Coast. Having those kinds of natural eco-systems divided between two courts of appeals could raise difficult issues for agencies and litigants to deal
with.

For example, right now, the Ninth Circuit and the Tenth Circuit, have a different view on whether an environmental impact statement is required for the designation of critical habitat under the *Endangered Species Act*.

The current division, the current geographic division between the Ninth and Tenth Circuit, has not, to my knowledge, created a situation where that difference of views has caused an agency to wonder whether it should prepare an environmental impact statement or not because part of the species ranges in one circuit, and part in another.

If you were to divide the Ninth Circuit, you would have that problem immediately. Because the salmon, for example, are listed from California to Washington. And you have a question of whether the designation of critical habitat for that species requires an EIS. Perhaps it would in Washington, and not in California. What does the agency that covers both of those states do in that situation?

Those problems certainly are not
unsolvable. But it seems to me that there is no reason to go out and buy that set of problems when you have a court that is working perfectly well.

There has been, at least in the past, some suggestion that part of the court, as I mentioned earlier, take different views on legal issues than other parts. And that has been suggested in particular in the environmental area, when the division of the circuit was proposed in the early 90's. The suggestion was that some of the judges from California didn't understand natural resource issues in the Northwest, and were imposing their views.

Twice we have looked at three or four year sets of opinions of the court in the environmental area. And we are unable to find that difference in views, if it exists. We have looked at anywhere from 75 to 100 cases over those periods. And in cases where there are two California judges on the panel, a successful environmental ruling is just as likely to be reversed as it is when there are not two California judges on the panel.

I don't think you can draw a conclusion
that there are geographic prejudices within the court. Certainly not in the environmental area.

I guess I would add also a point that Judge Dwyer made earlier. It seems to me that if that restructuring a court to change the outcome and opinions, to change the substantive outcome of opinions, is a poor way to run a railroad. It is not consistent with the kind of independent judiciary I think we all enjoy in this country.

And as Judge Dwyer pointed out, the first experience with that, court packing, in the 30's was rejected. And I think anything that even hints of that approach should be questioned very, very closely. It's -- court packing is not something that we need in any form.

I think the last point I would make is the one that I ended up with in my written statement, which is that there are important institutional, or important issues of institutional, inter-institutional respect, at issue in the question of whether to divide the Ninth Circuit.

The courts have been very careful of
interfering in the internal self-regulation of the Congress. The Congress has been very careful about interfering in the internal self-regulation of the courts. And I think that's reflected in prior legislation that allowed courts to seek to split if they wanted to, but didn't seek to command to that. And it's reflected in a number of judicial opinions regarding the legislature.

I think it would take extraordinary compelling evidence for one branch of the government to go in, and re-structure another, over the objections of the people serving in that branch. And I think for that reason, almost alone, the views of the judges of the Ninth Circuit of the attorneys that practice before it, and those who work with the court, should carry tremendous weight in the deliberations of the Commission.

And those views currently are in favor of allowing the court to continue its good work, and its experimentation with making a large circuit effective, and responsive to the people in the region that it serves.
Thank you.

CHAIRMAN WHITE: Thank you very much.

MR. TRUE: I'd be happy to respond to questions, or wait. However you like.

CHAIRMAN WHITE: Thomas Hillier?

MR. HILLIER: Hillier. Thank you, Justice White, and honorable Commission.

CHAIRMAN WHITE: Hillier --

MR. HILLIER: The Irish in my family took away that French flourish that might otherwise have been there. So, Hillier it is.

As I have listened to many of the conversations this morning, and this afternoon, I am probably going to have to struggle to say something new. And stand here looking for the back door in case I get too repetitive.

So, to make sure there is something a little new, let me begin by saying that I speak on behalf of federal public defenders for the entire Ninth Circuit, although you will hear from other defenders in two days, down in San Francisco.

I also speak as a third generation
Washingtonian. I was born here in Spokane, Washington. My great-great-uncle, John Earls, was the first state senator from Bellingham, sat on the first state legislature in this state in 1889.

Thus, to use Senator Gorton's phrase, I have parochial feelings, indeed, roots that run generations deep. I have an affection for the State of Washington and the Pacific Northwest that is truly immeasurable. And I'm also a public defender. Which is another way of saying, I lose in the Ninth Circuit probably more often than the Ninth Circuit loses in the Supreme Court.

So, I should be afraid of the Ninth Circuit, in favor of the split, given that pedigree. The reality is, I strongly, as a personal matter, and on behalf of defenders oppose the notion of dividing the Ninth Circuit.

I'm not anxious about California. I heard that phrase earlier this morning. In fact, I don't know what that phrase means. I don't understand it. I don't get it. In fact, I would join what were truly eloquent comments of Governor Locke earlier today, if
I might. We share with California, and indeed, with all the states that occupy this circuit, a common cultural, commercial, and coastal identity.

And for the purposes of my comments, I will call it the Western Pacific identity. And a huge part of that identity is the Ninth Circuit court of appeals. And in trying to understand why the circuit should be divided, what I did first in preparing for this opportunity was, try to think about what the Ninth Circuit is.

And what I see is decades of tradition, an illustrious and truly lively history. A rich, full-bodied, cohesive stew of Western jurisprudence, a whole bunch of dedicated judges, very helpful judges, respectful and collegial judges.

Thousands, literally, when you take into consideration the entire circuit, and its judicial infra-structure, thousands of staff. Institutions, and courtrooms, and court houses, and literally dozens of innovative and successful programs and initiatives that were begun by the judges in this circuit, to make it more efficient in its administration of justice.
So, when I think about what it is, I wonder why it should be disassembled. But more importantly, if it is going to be disassembled, what standard judges such a huge decision? It's obviously got to be a decision that's as large as the institution we're talking about.

In that regard, in the paper we submitted, I quoted a phrase that Judge -- Chief Judge Hugg put in his statement to you. And it says, "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court, so that it cannot continue to deliver quality justice, and coherent, consistent circuit law, in the face of an increasing workload."

And I agree with Judge Holland in that -- in that that such evidence simply does not exist. There is not evidence that this circuit is dysfunctional, that it is able to do what it is charged to do.

Indeed, Chief Judge Hugg, and his predecessors, one of whom was here today, and two of
whom you'll hear from later this week, offer very
persuasive empirical data, and a lot of statistics
that speak to the efficiency of the court of appeals,
and its favorable comparative status with the other
circuits of the country.

I don't have a grasp of all that
information. It's not my stick. I do have a whole
lot of experience in the Ninth Circuit, however, as to
the other federal public defenders. We're not
occasional visitors. We're not outsiders looking in.
We have daily business in the Ninth Circuit. We
litigate literally hundreds of cases before the Ninth
Circuit on a yearly basis, as a group.

And I speak for the other defenders in
saying that the service that we receive, the justice
that we see, is fast. And it's exceptionally
efficient. We see staff that is courteous, and
available, and personally acquainted with ourselves,
and the other litigants that come before it, and a
court which radiates, radiates respect for the
litigators and the litigants.

And as a small example of that, in the
submission that we provided for you, is the notion that this circuit, unlike many, publishes virtually, well, the vast majority of its opinions, and issues written memoranda on those that are unpublished, explaining to the litigants, the people who we represent, why it is that the court has decided what it has decided.

And when we represent the people that we do, that sort of show of respect for the litigants is terribly important. It demonstrates to the people who we represent that this court is concerned with the notion of justice, and explaining what that justice is.

I suppose that I should say that, sadly, and often what we see is an all too coherent and cohesive body of law coming from the Ninth Circuit. We lose, and we lose regularly. And that's because this circuit does see what the case law is.

I don't agree at all with this notion that because we have so many judges that we risk inconsistency. I agree whole-heartedly with Judge Dwyer, that risk is minimal. If I can find a case
that supports the proposition I am presenting to the Ninth Circuit court of appeals, I win. If my opponent does, my opponent wins.

It's only in those cases that are cutting edge, or that are fact driven, that there might be some indecision on the part -- or some room to wiggle. I agree with somebody who spoke here earlier, I believe it was Judge Dwyer, who said that he does not find difficulty in identifying controlling Ninth Circuit law.

I work daily with the sentencing guidelines, which are an exceptionally gray area of the law, with a lot of complexity. I can read the guidelines. I can read the cases. And I can predict for my clients with a lot of success or a high degree of probability. And where there is gray area, that's going to be a fact -- fact driven sort of situation.

I'm not afraid of those facts. I'm -- in fact, as you may note from the judges that have appeared before you, I am delighted to appear before this court, and argue to them information that I feel should mitigate a particular sentence.
But it's not the sort of risk that translates into a reality of indecision, or incoherence, or anything that would show an empirical basis for dismantling the Ninth Circuit court of appeals.

That standard, I think, should judge the recommendations that this Commission makes, whether or not judges -- Congress' ultimate decision, we don't know. But that -- but it does serve, hopefully, as to identify a hedge against the politics that many of the speakers have talked about, that seems to be at play here.

And in that regard, I think a little look at history is helpful. I've read a little bit about the split of the Eleventh and the Fifth. And it seems to me that, in reading that, the judges and litigators wanted that split, because there were problems in the Fifth Circuit at the time. And they needed the split.

So, the judges came forward, and said, here are some problems. How can we address them? Can we address them this way? In the Ninth Circuit, back in the very late 40's and early 50's, there was a big
time move to split the circuit, and that move was prompted by the circuit judges, because they didn't have enough judges to do the work efficiently. And they didn't have the transportation and technology then to do it efficiently.

Congress was getting on top of that ride. And there was a bill presented to Congress to split the circuit. Shortly thereafter, more judges were appointed. The court created some -- to deal with its docket. And their efficiency went up. And the court withdrew its request for a circuit split, and it was done.

So, I think it's important to listen to who's asking for the split when making that decision, and I hope the Congress will.

Have I gone on too long?

JUSTICE WHITE: I don't know if you've gone on too long, but you're over your time.

(Laughter.)

MR. HILLIER: Okay. Well, I -- if I -- I wanted, if I could, just to talk for a second about the collegiality that I see in the circuit. And you
know, I guess everybody has a different definition of that.

But we met last week with Judge Syd Thomas from Montana, and three other circuit judges, we, the defenders from the Ninth Circuit, and the Montana School of Law, and the Montana Bar Association, in Missoula, Montana, where the court sat to answer some questions of law presented from that district, in front of people from that district, and students at the Montana Law School.

Thereafter, the judges sat at a CLE for a day and a half with defenders, and kids from the law school, and people from the bar association. They ate with us, they talked with us, they argued with us. They debated with us.

I was sitting with people who I'm probably an ideological opposite of, kept coming away loving the person that I spoke with, and feeling good about the conversations I had with them. Learning from them. And I think it's that sort of mix, that collegiality, that creates the diversity that so many of the speakers have talked about, and is what being
in the Ninth Circuit is all about.

And I respectfully urge this committee to stand behind the circuit when it comes time to make its recommendations.

CHAIRMAN WHITE: Thank you. Which one of you is Howard Goodfriend?

MR. GOODFRIEND: That's me, Your Honor.

CHAIRMAN WHITE: All right. You may proceed.

MR. GOODFRIEND: Thank you, Your Honor. May it please the Commission. I am Howard Goodfriend. I am in private practice here in Seattle. My practice concentrates in appellate practice, both in the federal courts, specifically the Ninth Circuit, as well as the state courts.

And I really appreciate the opportunity to present my views today. I appreciate your taking this long day to listen to the variety of speakers who have appeared before you.

I don't really have a whole lot of new things to add, so I'm going to make my remarks brief.

I also oppose splitting the Ninth Circuit. I believe
the fundamental problem facing this circuit, as well as other courts of appeals around the country, is inadequate resources, inadequate staffing, to keep up with burgeoning caseloads.

I believe that splitting the Ninth Circuit would not address these problems. And in fact, it would create more problems than it would solve.

I have been very active in professional associations and committees that focus on the process and the quality of appellate decision making. And I believe that the focus of this Commission should be on finding the means to improve the quality of the administration of justice in the Ninth Circuit, as well as other circuits.

And to do this, it should focus really on advocating the measures that would enhance the court's legitimacy, and increase the efficiency of the court, as well as the public perception that it is fair in adherence, even handed, as well as efficient.

In order to do that, the most important factor that I think undermines the legitimacy of the delivery of justice is delay. The delay from --
particularly, the delay in filing, in considering a
case after the filing of a notice of appeal.

And that is more a function of inadequate
resources, a function of not filling existing
vacancies. And if necessary, creating additional
judicial positions.

I think the Commission should also study
the issue of the use of visiting and district court
judges, which have been sitting by designation on
Ninth Circuit panels for some time now. And should
formalize the process, or study the issue of whether
this process should be formalized to add to the
resources of the federal courts of appeals.

Visiting, and district court judges
sitting by designation have been used very effectively
to meet the crisis in this circuit that has been
caused by a 35 percent vacancy rate. I think it
should be further studied, even if those vacancies are
filled, in order to meet the future challenges of all
the federal courts of appeals. Much as Professor
Resnick has advocated in prior testimony before this
Commission.
It would enhance the legitimacy of the court if litigants and counsel had the expectation each time they appeared, that there would be a district court judge sitting by designation on the panel in virtually every case.

And I think it would also help the delivery of justice in the district courts by formalizing their mixing with appellate court judges on a regular basis.

It would also help meeting the greatest challenge in the court's legitimacy, if you will, and that is granting oral argument in an even greater number of cases. This circuit has -- I have submitted my written materials, done extremely well, in carefully screening cases for oral argument, given the woeful lack of resources that it has faced over the last decade.

But to litigants, and to counsel, and to the public at large, oral argument is far and away the single most important event in the appellate process. It is the only time that the public gets to see the appellate process in action. And to the extent that
it can be delivered, in more cases, that is a goal that the court should strive for.

Also, additional resources, and filling vacancies, and allowing district court judges to sit more frequently, would allow the court to issue more detailed, and well-reasoned memoranda, and written opinions.

Again, the Ninth Circuit I think has done an exceptionally good job, given the resources at hand, in publishing the opinions that are in cases of complex legal issues, or novel legal issues, and not publishing the ones that don't meet those criteria.

I don't believe that dividing the court in two or three circuits will address any of these problems. And as I have said, it's going to create a host of others. By simply assigning existing judges to a new circuit, without increasing the resources, you in fact detract from the available resources at hand.

And other judges who have appeared today have testified about the economies of scale, and the duplication of administrative cost. I think Judge
Thomas testified to that this morning. It will not necessarily enhance collegiality. And I firmly believe collegiality is also more a function of attitude, than it is of size, as Judge Boochever so well testified before.

Further, it's going to reduce the available pool of judges sitting on cases from this state. And thus, reduce the diversity of views that might be brought to bear on a particular issue.

And I'm not just talking about diversity for diversity's sake. I also believe that it is an advantage to have a more diverse, large court. Not just because it increases the variety of cultural, political, and philosophical views, that more accurately reflect the constituencies of an increasing diverse Western Pacific region.

But also because the heart and soul of the appellate process is the intellectual debate, the give-and-take that not only occurs between counsel and the court in oral argument, but occurs among the judges themselves. And a diversity of views among panels I believe makes for better, well-reasoned
judicial opinions, by honing debate, and focusing the issues.

Finally, I'm going to repeat the view that adding more circuits will only burden the Supreme Court further, increase the instability of the law. And another important factor I think which hasn't been mentioned is, basically lead to increasing balkanization among appellate courts in this country.

And we've seen with each circuit vastly different procedural rules, local rules being adopted. That makes it harder and harder for practitioners in an increasing national bar to move from circuit to circuit.

I think uniformity in those rules is important. And to the extent that you increase the number of circuits, you detract from that.

Again, I want to thank the Commission for its time today. And I'll wait -- further testimony, to see if you have any questions.

CHAIRMAN WHITE: All right.

MR. GOODFRIEND: Thank you very much.

CHAIRMAN WHITE: Mike Brown?
MR. BROWN: Thank you, Your Honor. Low
man on the totem pole, but that's okay, because it's
been educational.

I'm not here about the circuit split. I'm
here about consistent decisions among the appellate
panels in the Ninth Circuit. And as Judge Broomfield
pointed out, it's important to law uncertainty.
Incidentally, most of what I'm doing extemporaneously
here is not from the paper that I prepared, it's from
what I learned here today.

And one of the things that Professor --
pointed out, in addition to consistency, delivering
consistent ruling in a case that appears the same is
what defines a successful legal system.

Now, when I was first here this morning,
I want to give a special thanks to Chief Judge --
because I told him some of what I observed about the
Ninth Circuit. And he said, "Stick around, you'll see
why." And I did.

As the United States Senator who was here
pointed out, you have 28 appellate judges, or at least
openings for that many. Which means you 3,276
combinations of personalities. And I'm not the only one to notice the inconsistency in Ninth Circuit appellate rulings. If you'll go to the second page of the almanac of the federal judiciary, you'll see there are quite a few lawyers in this circuit that basically have the same complaint.

And one of the reasons that there's a lot of public confidence being eroded is simply because, let's face it, the average person, no matter what his Congressman does, he never finds it out. On the other hand, he goes in front of a judge. And the first thing he's done is saying, "Hey that guy shafted me, but he did something different in another case."

Now, the courts are what people come in contact with, more than anything else. The fact is, the average guy out there, you say, "When is the last time your Representative, state or federal, did anything to you, or for you?" He doesn't know.

All right. When is the last time you had a run-in with a judge, federal, state, or whatever? You have to listen to the tirade. And what I'm saying here, and I'm just about wound up, believe it or not.
Because most of what I already pointed out, there are specific examples of contradictory Ninth Circuit case law, which I find kind of unusual.

Because you have some federal judges who spoke here today, who say there isn't any. And then, you have other federal judges who said, well, yeah, that is the perception. Well, the perception is right there in the work that I did.

Anyway, thank you for listening to me.

CHAIRMAN WHITE: Yes. We haven't heard you, Eric Redman.

MR. REDMAN: Thank you very much. I'm sorry to be late. I thought I was going to be early, but you've been proceeding quickly.

My name is Eric Redman. I am a lawyer with the law firm of -- White and McCullough, here in Seattle, and a lifelong resident of Seattle. I testified before the United States Senate in opposition to a bill to split the Ninth Circuit in 1990. And I have a copy of my testimony which I have submitted to you. And I brought copies today.
This is really the only topic that I want to address. And I'm looking back to the 1990 testimony, I'm afraid I can't really improve on it very much, even today. I think what I said then is what I still believe, and what the members of my firm believe.

I would just comment, or try to divide this into two thoughts, or two perspectives. As a practitioner in front of the Ninth Circuit, about splitting the Ninth Circuit, and then as a Northwesterner.

First, I think that you'll find, and I'm sure you have heard today, that the idea of splitting the Ninth Circuit doesn't come primarily, or even in any significant part, from the lawyers who actually practice in front of the Ninth Circuit.

I think those of us who do could come up with a long list of things we'd like to see to improve the Ninth Circuit, but splitting it isn't what we would have thought of as very high on the list. The idea comes from government officials, and political leaders. And it's natural that people wish to support
their political leaders in efforts like that. But I
don't think it comes from the practitioners.

Secondly, it's not really responsive to
any of the problems the practitioners face, or the
judges face. And I haven't heard any of the testimony
today, but I'd be surprised if any of them said very
much different from that.

The problems of congestion, of workload,
of overload on the court, aren't cured by splitting
it. I've heard people go down that road a while
without really thinking it through. And I've tried to
say, you know, our highways in Washington States are
also congested, and over-crowded. And splitting
Washington State into two states would not reduce the
congestion on our highways. The sources of those
problems can't be solved by more jurisdictions.

I have also heard interesting academic
debates I think about the value of en banc opinion
from a circuit where you can't -- the en banc panel
can't represent a majority of the circuit. A starting
point I think is mathematically, just the logic of
that. You're going to create more and more circuits
as the country grows, until we have just a huge number
of circuits, this will be the problem in circuits
generally, if you think of it as a problem.

And in any event, in any circuit, the
majority opinion of the en banc panel may not
represent a majority of the circuit, either. This is
really an issue about respect for precedent, about --
and about abiding with an en banc decision, respecting
it. Not about the number of members of the court who
are on it.

And similarly, I think if you go down a
list of supposed problems of the circuit that
splitting would address, you find that they go into
three categories. They either aren't problems that
the practitioners are concerned about, although
practitioners are concerned about plenty of other
problems.

They don't result from the size of the
court, as opposed to its workload, or the number of
judges. Or, they really apply to every circuit, and
not just the Ninth Circuit. There's no general --
they're general arguments, not specific ones.
Others know a lot more about those points than I do, and I'm sure you've heard from them. So, I would move quickly to what I think is more important. And that is, as a Northwesterner. I've lived all my life in the Pacific Northwest.

Almost exactly thirty years ago to the day, I went to work one floor above us for Senator Warren Magnuson, who is often cited as the father of this idea to split the Ninth Circuit. I can tell you that I worked for him for many years. I knew him very closely in office, and in retirement, for the remainder of his entire life.

I can think of hundreds of topics that he raised, and that were discussed. And I never once heard quality -- brought up. I know that there are quotes and efforts attributable to him. But I have to tell you, I think I can say, and anyone who worked for him, this was never near and dear to his heart. And had it been I don't know what significance that should have today, in any event.

If it was an idea that he promoted, I suspected it was because his good friends were on the
Ninth Circuit from Seattle in those days, beginning in the 1940's probably complained about the difficulty of the travel that was imposed upon them. And he may have thought that he was helping them out. I don't know. Research might show that.

But the problems that this circuit splitting proposal is designed to address are really not problems in the court. They're problems in our region. They're problems about political issues in our region, interpretations of statutes that are made, and come to the courts, and have to be made by judges in the region, by judges here.

And the sort of -- the sort of theme is that the Northwest should somehow have its own court, its own federal court. And I think that is just plain wrong for five basic reasons.

The first of all is, it's a federal court. We're talking about federal law. We're not talking about state law. And we need uniform application of the federal statutes.

The second is, it's a ridiculous fallacy to suggest that where people live determines how
they're going to think, or how they're going to decide cases. Geography is not philosophy. All of the judges of the D.C. circuit live within a few miles of one another, I suspect. And yet we all know that the D.C. circuit can be very sharply split.

And you wouldn't say, "Well, maybe let's take the Virginia ones, and keep them separate from the Maryland ones." It doesn't make any sense.

Finally, we have plenty of environmentalist judges in the Pacific Northwest, or judges with environmental meanings, if that's where the concern is. The decisions that really caused the firestorm that led to this proposal being revived were made not at the Ninth Circuit level, but at the district court level, by judges right in this courthouse.

I also believe for the interest of the Northwest that having Northwest - Southwest issues resolved in courts that are Northwest and Southwest combined, gives us a lot of protection in the Northwest. And we should be happy about it. It legitimizes the outcome of these disputes.
The ones that are most important to me, that I know most about, are electric power disputes. And between the Northwest and the Southwest, these are very fierce. They involve hundreds of millions of dollars.

And in the twenty years that we've been litigating them, the Northwest interests have prevailed in every single case in the Ninth Circuit against Californians. And the California judges have always been a majority of the panel.

Now, the court has worked very well in inter-regional disputes. It's worked out to the benefit of the Northwest. I submit that if those decisions had instead been made by Northwest judge in Northwest court, by now they would have been overturned in Congress very quickly, simply because the Californians have so much more representation.

So, to think that we are harmed by being yoked with this populous state in a court system seems to me very short sighted. And to select certain issues, and not look at other ones, where we've been tremendously protected by that.
And then there's the whole issue of the West coast itself. I would think that the West coast is an economic region. From Southern California to the tip of Alaska, we've got a coastline twice as long as the East coast of the United States.

We have only four states. They are really economically integrated in a way the East coast isn't, couldn't be, for historical reasons. And there's a big benefit to the less populous and more northerly of the states of having that integration.

We all face the Pacific rim. We're a part of the Pacific rim. And when we go to the other side of the ocean, look back, the idea that there's uniform federal law up and down this coast is a tremendous benefit, I think, to other parts of the coast and California, who would like to attract foreign investment and foreign confidence.

So, I remember when I gave the testimony in 1990, Judge Goodwin said that the splitting the circuit was a time whose time had not come. I would say it's an idea has passed -- it's not responsive to any problems that have been faced. It's not in the
interest of the Pacific Northwest. And I hope that it will not be recommended.

Thank you very much.

CHAIRMAN WHITE: Thank you very much. Any questions?

COMMISSIONER: I have one I think I'd like to ask. I have a question for Mr. Hillier. As I understood you, you said you have no particular problem with consistency and coherency in the decisional law of the circuit. And then you went on to say something that seemed on its face to be inconsistent with that.

And that is that you repeatedly and frequently lose on appeal. If the law of the circuit is predictable and consistent, why should that be the case? Why are you taking appeals, and you can predict you would lose?

MR. HILLIER: Well, there's -- the main reason for the one mass record, well, I mean there's a lot of reasons, some of which are more philosophical, and not responsive to your question.

But appeal is a matter of right, even --
appeals in the federal court system. And the federal sentencing -- and then, that's why a lot of cases go forward that perhaps don't have the merit that I would prefer when I took the case up on appeal.

And you know, frankly, I was being a bit facetious. We don't lose quite as often as I suggested. But --

COMMISSIONER: When you lose, could you reasonably predict that you would lose?

MR. HILLIER: Yes. Yes. You know, I go in optimistic on every one. By the time I've finished oral argument I think I've won. But when I stand back, and I look at the facts and the law, in certain cases, I can see that I'm simply not going to win, given that fact pattern, and given the law that exists.

I'm arguing a point that's usually, that the court has abused its discretion in deciding on these facts, that this particular sentencing application --

COMMISSIONER: Why?

MR. HILLIER: -- and as you know, those
sorts of standards are very difficult to jump over and win at the court of appeals level.

COMMISSIONER: Mr. Hillier, Professor Meador's question, criminal cases, of course, are different than civil cases. And surely you have clients who you advise don't go to trial before this district judge, or any district judge; this case is a terrible case to take to trial.

And they look at the sentencing consequences and say, "What have I got to lose? I might get lucky in the district court." That same client, if he loses in the district court, is, by law, the district judge is required to advise him in some detail about his right to appeal. And -- but it is an absolute right that he can exercise it, whether his lawyer thinks it's a good idea or not.

Do you think in both of those cases, the criminal case is different from the civil case, in terms of why cases proceed to trial, or why cases go up on appeal? Is my question clear?

MR. HILLIER: Well, I think there are probably huge, fundamental differences. And the
nothing to lose phrase attaches to both. And I think there's a lot to lose, probably, in the civil litigation, if you take an appeal that's frivolous, and you've got a bond that's developing interests, and those sorts of --

I mean, I don't do that, Judge, and you know better than I. But it would seem to me that there are economic factors that militate against a frivolous appeal. Whereas, when somebody is looking at ten years, and they're going to be sitting there, wondering, well, what if I -- you know, I don't like what the judge said.

The judge said, "I don't want to give this sentence, it's unfair." I mean, that defendant is going to want to appeal that. The judge said it was unfair, you know? He said his hands were tied, and -- but he said it was unfair. And maybe the law will change some day, so let's go forward.

So, that motivates a lot of those appeals. But the case law, you know, it's there, and we're faced with it. And we try to --

COMMISSIONER: Same problem we district
judges have.

CHAIRMAN WHITE: Thank you very much. We do appreciate all of your help to the Commission. And we will see you down in -- what's the name of that city? (Laughter.)

UNIDENTIFIED: San Francisco.

(Whereupon, the hearing was adjourned at 5:35 p.m.)