United States House of Representatives
Committee on the Judiciary
Subcommittee on Courts, the Internet, and Intellectual Property

Hearing on H.R. 1203, the Ninth Circuit Court of Appeals Reorganization Act of 2001

Tuesday, July 23, 2002, 10:00 a.m.

Room 2141, Rayburn House Office Building
Washington, D.C.

Written Testimony of
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Good morning, Chairman Coble and Members of the Subcommittee. My name is Diarmuid O'Scannlain, and I am a judge on the United States Court of Appeals for the Ninth Circuit with chambers in the Pioneer Courthouse in Portland, Oregon, although the vast majority of my assignments have been on panels in Pasadena and San Francisco, California. Thank you for inviting me to appear before you today to discuss the future of the Ninth Circuit and specifically H.R. 1203, an issue of great significance to the federal judiciary as a whole.

I

Having served as a federal appellate judge for over a dozen years on what has long been the largest court of appeals[1] in the federal system (now 46 judges, soon to be 50) and having written and spoken repeatedly on issues of judicial administration,[2] I welcome the chance to offer my perspectives as a member of the

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

[2] See Statement of Diarmuid F. O'Scannlain, Hearing Before the Committee on the Judiciary, United States Senate, Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and S. 253, The Ninth Circuit Reorganization Act (July 16, 1999); Statement of Diarmuid F. O'Scannlain, Hearing Before the Committee on the Judiciary, United States House of Representatives, Oversight Hearing on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (July 22, 1999); Diarmuid F. O'Scannlain, Should the Ninth Circuit be Saved?, 15 J.L. & Pol. 415 (1999); Diarmuid F. O'Scannlain, A Ninth Circuit Split Commission: Now What?, 57 Mont. L. Rev. 313 (1996); Diarmuid F. O'Scannlain, A Ninth Circuit Split is Inevitable, But Not Imminent, 56 Ohio St. L. J. 947 (1995).

court in this never-ending saga of "what to do about that judicial Goliath," the Ninth Circuit.

My court, never immune from controversy, has been the subject of a great deal of recent public attention. Perhaps this heightened profile has been a fortunate development in that it has sparked a renewed interest in how the Ninth Circuit conducts its business.[3] However, I wish to emphasize that I have supported a fundamental restructure of the Ninth Circuit for many years, and I do support a split like H.R. 1203, but based solely on judicial administration grounds – not premised on reaction to unpopular decisions or Supreme Court batting averages.

The Ninth Circuit's judicial epic, which has been ongoing since at least World War II, must be brought to closure, and decisively. The White Commission of 1998,[4] like the Hruska Commission of 1973, came to the same conclusion. Regardless of which party controlled Congress, when each was authorized, each study commission concluded that the Ninth Circuit needs restructuring. Congress can no longer afford to luxuriate in passivity over the future of this lumbering judicial entity.

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[3] See, e.g., Adam Liptak, Court That Ruled on Pledge Often Runs Afoul of Justices, The N.Y. Times, June 30, 2002.

[4] See Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (Dec. 18, 1998) [hereafter "White Commission Report"].

I first became interested in judicial administration issues when I was studying for my LL.M. in judicial process at the University of Virginia in studies between 1990 and 1992. When I was appointed in 1986, however, I was opposed to any change whatsoever. As former Senators Hatfield and Gorton would recall, I refused to support their efforts throughout the 1980s to split our court because of the widespread perception that they were in response to dissatisfaction with some environmental law case decisions. Mr. Chairman, we have moved beyond those inappropriate concerns. The more I consider the issue from the judicial administration perspective today, the more I appreciate the benefits of restructuring our circuit. Creating two smaller, more workable circuits, will promote consistency in law, predictability, and collegiality in both the new Twelfth and the new Ninth. This is exactly what we need now and is essentially the solution embodied in H.R. 1203.

When the circuit courts of appeals were created over one hundred years ago by the Evarts Act of 1891, there were only nine regional circuits. Today, there are twelve. For a long time, each court of appeals had at most three judges; indeed, the First Circuit was still a three-judge court when I was in law school. Over time, courts grew to six, seven, seventeen, and eventually, to a high of twenty-eight judges for my court. As circuits became unwieldy because of size, they were

restructured. The District of Columbia Circuit can trace its origin as a separate circuit to a few years after the Evarts Act was passed.[5] The Tenth Circuit was split off from the Eighth in 1929. The Eleventh Circuit was split off from the Fifth Circuit in 1981.[6] And, in due course, I have absolutely no doubt that a new Twelfth Circuit will be created out of the Ninth, hopefully through legislation like H.R. 1203.

And there is nothing sinister, immoral, fattening, politically incorrect, or unconstitutional about the restructuring of judicial circuits. This is simply the natural evolution of the federal appellate court structure responding to population changes. As courts grow too big, they evolve into more manageable judicial units. No circuit, not even mine, has a God-given right to an exemption from the laws of nature. There is nothing sacred about the Ninth Circuit's keeping essentially the same boundaries for over one hundred years. The only legitimate consideration is the optimal size and structure for judges to perform their duties. We certainly have no vested interest in retaining a structure that may not function effectively, and Congress has a responsibility through its oversight to prod the judiciary to keep up

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[5] The original name of this court was the Court of Appeals for the District of Columbia. In 1934, this court was renamed the United States Court of Appeals for the District of Columbia.

[6] This is not to mention the Federal Circuit, which was created in 1982.

with the changing times. I am mystified by the relentless refusal of some of my colleagues,[7] to contemplate the inevitable. As loyal as I am to my own circuit, I cannot oppose the logical evolution of our judicial structure as we grow to colossus size.

The problem with the Ninth Circuit can be stated quite simply: we are too big now, and getting bigger every day. This is so whether you measure size in terms of number of judges, caseload, or population. Even though we are officially allocated 28 judges, we currently have 24 active judges[8] and 22 senior judges. In other words, regardless of our allocation, there are forty-six judges on our court today. And when the four existing vacancies are filled, our court will have 50 judges.[9]

I have compiled a roster of Ninth Circuit judges in Exhibit C, page 23, which you may find quite revealing. To put the figure of 50 in perspective, consider the fact that this is almost double the number of total judges of the next

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

[8] I am including Richard Clifton of Hawaii, who was confirmed last Thursday by the Senate, although he has not yet taken his oath to enter on duty.

[9] See Exhibit C. Most of our senior judges carry a substantial load ranging from 100 percent to 25 percent of a regular active judge's load.

largest circuit (the Sixth Circuit) and more than quadruple that of the smallest (the First Circuit).[10] As you can see from Charts 1 and 2, pages 26-27, it is a remarkable array of judge power -- more judges on one court than the entire federal judiciary when the circuit courts of appeals were created. With every additional judge that takes senior status, we grow even larger. Indeed, if we get the five new judgeships we have asked for, there will be 55 judges on the circuit, while the average size of all other circuits today is 19 judges.

Chart 3, page 28, gives a sense of the enormity of the Circuit's population relative to other circuits, and caseload tracks population quite closely. Last year, we handled 10,342 appeals -- over double the average and 1,700 more than the next busiest court (the Fifth Circuit).[11] Unfortunately, these numbers are probably only going to get worse. For example, we are receiving a higher than usual number of immigration cases, primarily because the Board of Immigration Appeals has streamlined its review procedures, which is allowing it to clear its backlog more quickly. Because we hear BIA appeals directly from the Board, we are

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[10] See Table 1; Chart 2.

[11] See Table 2; Charts 6 and 7. There may be slight variations in terms of the summary statistics reported here and those reported elsewhere as a result of differences in sources. I use caseload statistics provided by the Administrative Office of the United States Courts in a report entitled Judicial Business of the United States Courts: 2001 Annual Report of the Director and population statistics compiled by the United States Census Bureau.

feeling the crunch of their increased volume. We now receive around one hundred immigration appeals per week; if this rate continues until the end of 2002, immigration cases will make up almost half of the Ninth Circuit's docket.[12]

Looking at population, the Ninth Circuit's nine states and two territories, which range from the Rocky Mountains to the Sea of Japan and from the Mexican Border to the Arctic Circle, contain almost 56 million people -- or 24 million more than the next largest circuit (the Sixth).[13] Together the charts reveal that the Ninth Circuit has double the average number of judgeships, handles double the average number of appeals, and has double the average population.[14] In essence, the Ninth Circuit already is two circuits in one.

Is the extraordinarily large size of our court of appeals and of our population a cause for concern? Undoubtedly, yes. After careful analysis, the White Commission concluded that any court with more than eleven to seventeen judges lacks the ability to render clear, circuit-consistent, and timely decisions. This is the central finding of the Commission. Incidentally, you may wish to hear from my colleague and White Commission member Judge Pamela Rymer of California, who

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[12] See Jason Hoppin, Crowding the Docket: A Surge in Immigration Appeals Threatens to Swamp the Ninth Circuit, The Recorder, July 10, 2002.

[13] See Table 2; Charts 3 and 4.

[14] See Tables 1 and 2.

would be willing to offer written testimony, I'm sure, to elaborate on the importance of this finding. I agree that a court with as many judges as the Ninth cannot continue to function well. Courts of appeals have two principal functions: correcting errors on appeal and declaring the law of the circuit. Having more judges may help us keep up with our error-correcting duties, but it severely hampers our law-declaring role by making it more difficult to render clear and consistent decisions.

We need smaller decision-making units. Consistency of law in the appellate context requires an environment in which a reasonably small body of judges has the opportunity to sit together frequently. Such interaction enhances understanding of one another's reasoning and decreases the possibility of misinformation and misunderstandings. Because the Ninth Circuit has so many judges, the frequency with which any pair of judges hears cases together is quite low, thus making it difficult to establish effective working relationships in developing the law. Unlike a legislature, a court is expected to speak with one consistent authoritative voice in declaring the law; the Ninth Circuit's size creates the danger, however, that our deliberations will start to resemble those of a legislative rather than a judicial body.

Having a smaller body of judges also allows three-judge panels to circulate opinions to the entire court before publication, which is the practice of most, if not all, other circuits. Pre-circulation not only prevents intra-circuit conflicts, but it also fosters a greater awareness of the body of law created by the court. As it now stands, I read the full opinions of my court no earlier than when the public does and frequently later, which can lead to some unpleasant surprises. For example, some of my colleagues were caught unaware by a recent decision of one of our three-judge panels, which seemed to receive an unusual amount of media attention. Even with our pre-publication report system, we don't get the full implications of what another panel is about to do.

Furthermore, as several Supreme Court Justices have commented, the risk of intracircuit conflicts is heightened in a court which publishes as many opinions as the Ninth.[15] In addition to handling his or her own share of the 10,000 plus appeals filed last year, each judge is faced with the Sisyphean task of keeping up with all his or her colleagues' opinions, which last year numbered 801, compared, for example, with the Supreme Court's output of only 85 opinions last term and 83 this term. Frankly, we are losing the ability to keep track of our own precedents, which is as embarrassing as it is intolerable. None of us can read all the opinions from

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[15] See White Commission Report at 38.

the other panels. It is imperative that judges read opinions as they are published at least, since this is the only way to stay abreast of circuit developments as well as to ensure that no intra-circuit conflicts develop and that, when they do (which, alas, is inevitable as we continue to grow), they be reconsidered en banc. This task is too important to delegate to staff attorneys.

As consistency of law falters, predictability erodes as well. The Commission pointed out that a disproportionately large number of lawyers indicated that the difficulty of discerning circuit law due to conflicting precedents was a "large" or "grave" problem in the Ninth Circuit. From my own experience since 1986, I can tell you that this problem has worsened notably as the court has grown in size. Predictability is difficult enough with 28 active judgeships. But this figure understates the problem because it does not count either the senior judges who participate in the court's work (most very productively) or the large numbers of visiting district and out-of-circuit judges who are not counted in our present 46-judge roster.

The en banc process -- often pointed to as a solution for some of these problems -- is simply a band-aid. As a member of the court, I can tell you that, although the en banc process, in theory, promotes consistency in adjudication by resolving intra-circuit conflicts once and for all, this has not been the case in the

Ninth Circuit. Initially, as a practical matter, only a fraction of our published opinions can receive en banc review. Last year we published 801 opinions, but we agreed to hear only 18 cases en banc out of the 40 voted upon by the full court. Furthermore, all courts of appeals other than the Ninth Circuit convene en banc panels consisting of all active judges. The Ninth, however, uses limited en banc panels comprised of eleven of the twenty-eight active judgeships. This limited en banc system appears to work less well than other circuits' en banc systems. Because each en banc panel contains fewer than half of the circuit's judges and consists of a different set of judges, en banc decisions do not incorporate the views of all judges and thus may not be as effective in settling conflicts or promoting consistency.[16]

The Ninth Circuit's problems do not just hinder judicial decision-making, but they also create administrative difficulties and waste. In my court, the median time from when a party files its notice of appeal to when it receives a disposition is

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[16] A good example of this limitation is United States v. Hayes, 190 F.3d 939 (9th Cir. 1999), aff'd, 231 F.3d 663 (9th Cir. 2000) (en banc), in which the original three-judge panel affirmed (2 to 1) the district court and upheld the defendant's conviction. On rehearing en banc, an 11-judge panel also affirmed the district court, but by a 7 to 4 margin. Thus, despite the fact that a majority of the then 22 active judges on the Ninth Circuit voted to rehear the case en banc, presumably because they thought the three-judge panel got it wrong, the end result after en banc rehearing remained the same.

15.8 months (the slowest of all the circuits);[17] the average median time for the rest of the Courts of Appeals is 10.9 months. More disturbingly, in 2001, 116 appeals were under submission for one year or more in the Ninth Circuit, which is almost four times more than the next slowest circuit. Judges need time to deliberate and to ensure that they are making the correct decision, but this backlog unfortunately increases the pressure on us to dispose of cases quickly, which, in turn, increases the chance of error and inconsistencies.

Also, because of the circuit's geographical reach, judges must travel, on a regular basis, from faraway places throughout the circuit to attend court meetings and hearings. For example, in order to hear cases, my colleague Judge Kleinfeld must, many times a year, fly from Fairbanks, Alaska to distant cities including San Francisco and Pasadena. In addition, he must travel on a quarterly basis to attend court meetings generally held in San Francisco. Obviously, all this travel entails not only time, but a considerable amount of cost. A circuit split would do much to curtail this extensive travel and expense.

II

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[17] See Judicial Business of the United States Courts: 2001 Annual Report of the Director, Table B-4, at 95.

At almost 56 million people and counting, we are faced with a fundamental choice: either do nothing and let the court of appeals become even more unwieldy, or carve out a new Twelfth Circuit with a resulting smaller, more manageable Ninth Circuit. The first option is not responsible, and the latter option is inevitable. On this point, however, my Chief Judge and I appear to disagree, although with the greatest of respect.

Importantly, the White Commission's principal findings told us:

1. that a federal appellate court cannot function effectively with more than eleven to seventeen judges;
2. that decision-making collegiality and the consistent, predictable, and coherent development of the law over time is best fostered in a decision-making unit smaller than what we now have;

3. that a disproportionately large proportion of lawyers practicing before the Ninth Circuit deemed the lack of consistency in the case law to be a "grave" or "large" problem;

4. that the outcome of cases is more difficult to predict in the Ninth Circuit than in other circuits; and

5. that our limited en banc process has not worked effectively.

In light of these many problems -- and notwithstanding the Ninth Circuit's longstanding official position that everything is working just fine -- a substantial restructuring of the circuit's adjudicative operations is sorely needed.

The common argument that keeping the Ninth Circuit together is necessary to retain a consistent law for the West generally, and the Pacific Coast specifically, is a red herring. Mr. Chairman, you live on the Atlantic Coast, where there are five separate circuits. Have you noticed whether freighters are colliding more frequently off Cape Hatteras or Long Island than along the Pacific Coast because of the claimed uncertainties of maritime law on the East Coast? Frankly, but with respect, the need to preserve a single circuit for the Pacific Coast is absurd. The same goes for the call for a single circuit to adjudicate the law of the West. What about the law of the South? Mr. Chairman, you live in the Fourth Circuit, and the Fifth and Eleventh Circuits are also in the South. I simply cannot imagine that having three circuits has been deleterious to the development of the law of the South.

As a judge on the Ninth Circuit, I must also take issue with any assertion that an overwhelming majority of the judges on the Ninth Circuit believe that the disadvantages of splitting the circuit outweigh the advantages. A large proportion of judges on our court favor some kind of restructuring, many strongly so, and I have reason to believe that there are many Ninth Circuit judges, including Californians, who, if given the opportunity, would vote <u>today</u> for an outright split

off of five Northwestern states into their own circuit.[18] And while we're at it, I should mention that many district court judges agree as well. Finally, I would also note that the five Supreme Court Justices who commented on the Ninth Circuit in letters to the Commission "all were of the opinion that it is time for a change."[19] The Commission itself reported that, "[i]n general, the Justices expressed concern about the ability of judges on the Ninth Circuit Court of Appeals to keep abreast of the court's jurisprudence and about the risk of intracircuit conflicts in a court with an output as large as that court's."[20]

After denying that anything is wrong, our official court position straddles the fence by arguing that we can alleviate any problems we have simply by making changes at the margin. I must disagree, respectfully once again, that any problems with our circuit can be solved by tinkering at the edges. The time has come when cosmetic changes will no longer suffice and a significant restructuring is necessary. I am not, however, saying that our circuit as a whole is already broke. I would emphasize that our Chief Judge and the Clerk of the Court are presently doing a

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[18] I have been authorized to report that my colleagues Judges Sneed, Beezer, Hall, Fernandez, T.G. Nelson, and Kleinfeld, among others, support the restructuring of the Ninth Circuit.

[19] White Commission Report at 38.

[20] Id.

marvelous job of administering this circuit as a whole, but my instant focus is on where we go from here. If the Ninth Circuit Court of Appeals is not yet broke, it's certainly on the verge.

III

How, then, should Congress restructure the Ninth Circuit? H.R. 1203 would create a new Twelfth Circuit comprised of the Northwestern states and the Pacific Islands (Washington, Oregon, Idaho, Montana, Alaska, Hawaii, Guam, and the Northern Mariana Islands), which would leave the reconfigured Ninth Circuit with California, Nevada, and Arizona.[21] This solution requires no new judgeships; total active judges remain at 28, with 20 allocated to the reconfigured Ninth Circuit and 8 to the new Twelfth Circuit.[22]

The restructuring provided by H.R. 1203 corrects many of the problems currently facing my court that I explained earlier. It creates smaller decision-making units, which will foster collegiality among judges, greater decisional consistency, increased accountability, and responsiveness to regional concerns. As

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[21] See Exhibit B. The restructuring provisions provided by H.R. 1203 are identical to S. 346, a bill introduced in the Senate on February 15, 2001.

[22] See Exhibit D.

it moves forward, the new Twelfth Circuit would still be bound by pre-split Ninth Circuit precedent, which will help minimize confusion in interpreting the law.

This is not to say that H.R. 1203 could not be improved. Instead of 20 and 8 authorized judgeships, perhaps the ratio of judgeships should be 19 and 9 to reflect existing positions; better still, the total number of judges for the new Ninth should be increased by creation of new judgeships to reflect the more rapid caseload growth of the Southwest. The new Ninth Circuit would still have a disproportionate share of the country's population and case filings. This raises the question of what to do with California, which currently accounts for 60 percent of our court's caseload.[23] Possible ideas are to make California its own free-standing circuit or maybe even divide California in half as parts of new Southwest and Northwest Circuits.[24] Another issue is what to do with Arizona. Might it be better aligned with the Tenth Circuit instead of the reconfigured Ninth? The effective date of the split should be revised appropriately, as well.[25] It also may be

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[23] See Chart 8; Tables 3 and 4.

[24] Incidentally, this was the recommendation of the Hruska Commission in 1973. See supra at 2.

[25] I note that H.R. 1203's effective date is October 1, 2001, which, of course, would need to be changed, presumably to October 1, 2003. The effective date of the Eleventh Circuit's split from the Fifth Circuit was October 1, 1981.

appropriate to grandfather free inter-circuit judicial assignments and to permit joint Ninth-Twelfth Circuit Judicial Conferences for an interim period.

These are all potential courses of action for your consideration. Ultimately, however, you must restructure the Ninth Circuit. This task has been delayed for far too long, and we are almost at our breaking point.

IV

Unfortunately, the Ninth Circuit's problems won't go away -- they will only get worse. We've been engaged in guerilla warfare on this circuit split issue for much too long. What we need to do is get back to judging. I ask that you force us to restructure now, one way or another, so that we can concentrate on our sworn duties and end the distractions caused by this never-ending controversy. I urge you to give serious consideration to H.R. 1203.

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

APPENDIX

Exhibit A
The Current Regional Circuits
The largest by far is the Ninth Circuit

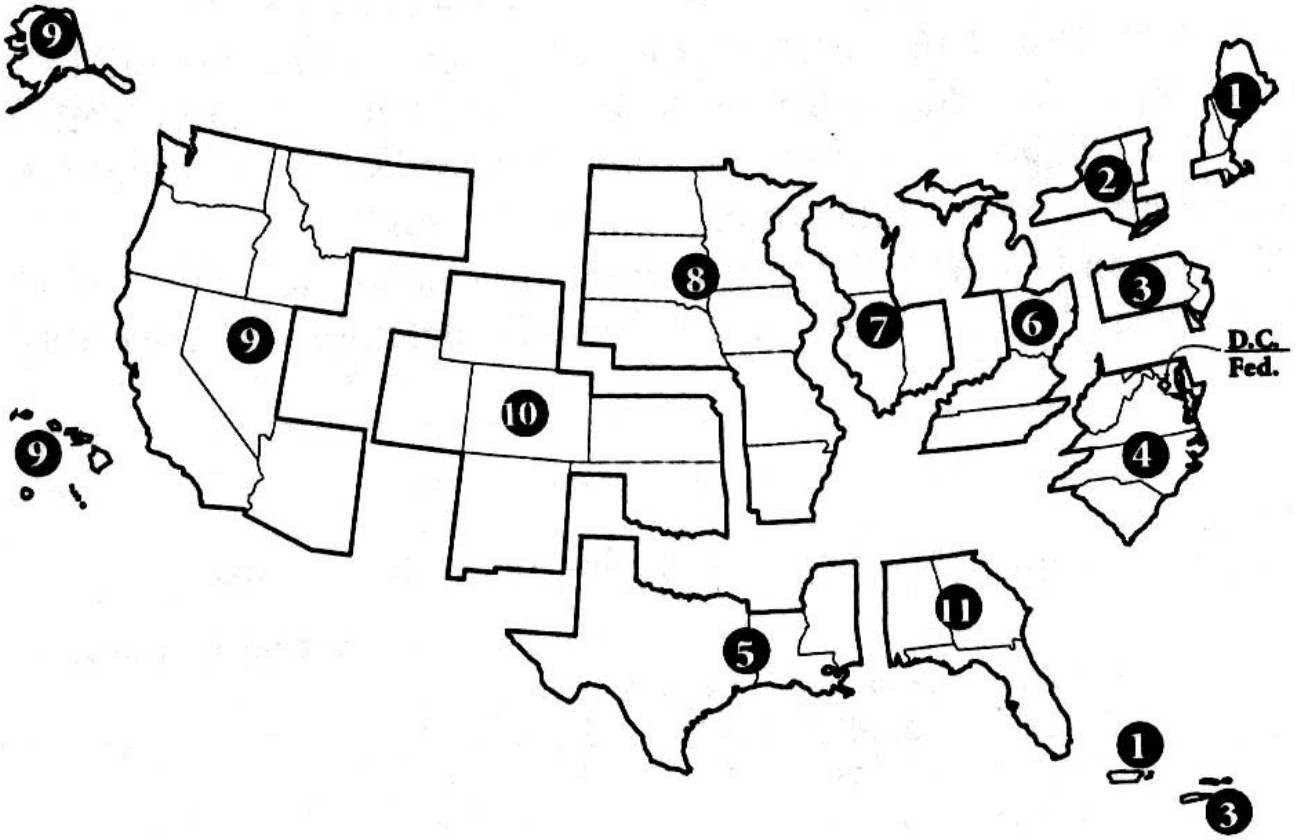


Exhibit B
The Circuits after the Restructuring Proposed by HR 1203

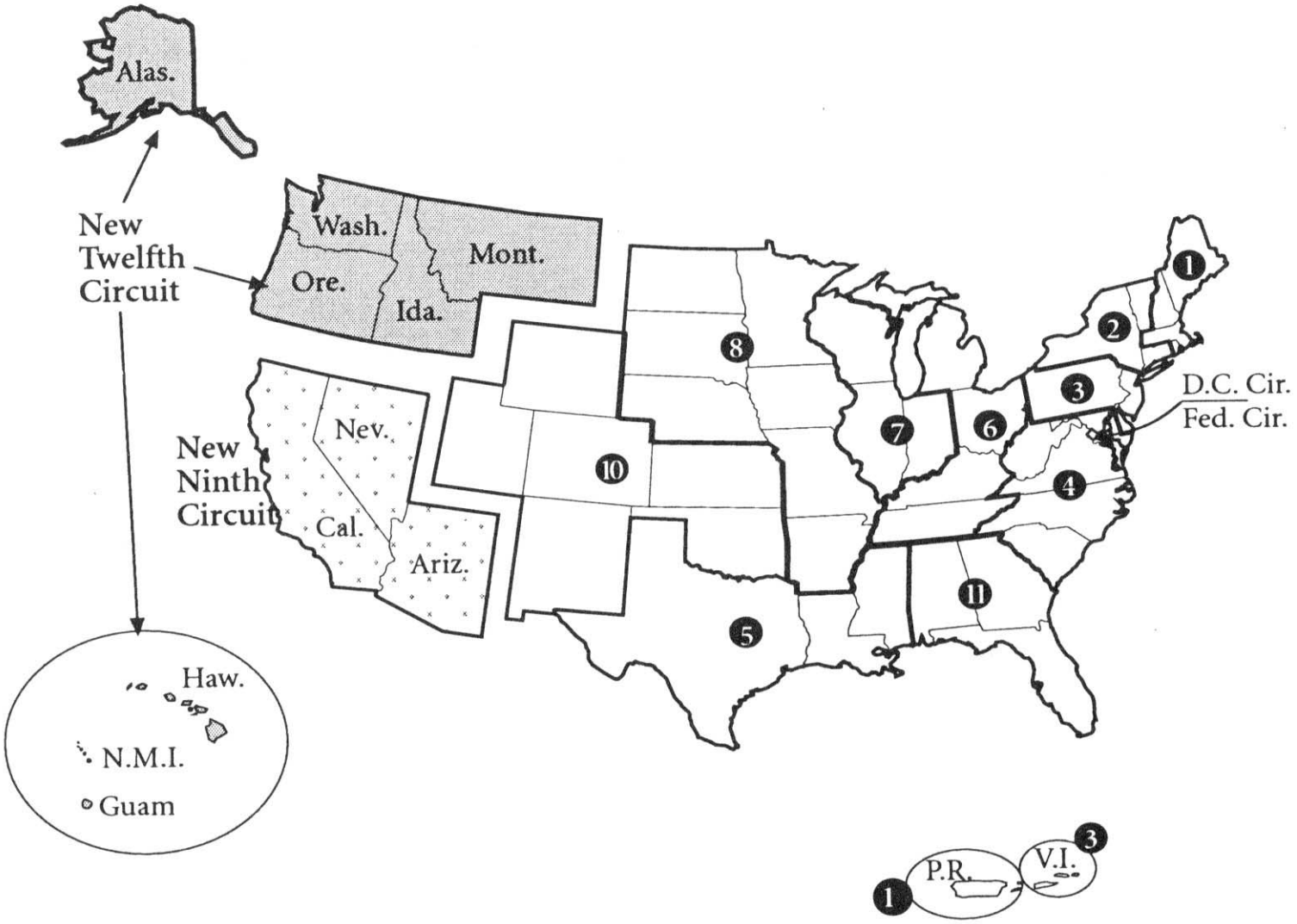


EXHIBIT C
ALL NINTH CIRCUIT JUDGES BY SENIORITY
(as of July 18, 2002)

Judge	Appointed by	State	City	Status (Active/Senior)
1. Browning	Kennedy	California	San Francisco	Senior
2. Wright	Nixon	Washington	Seattle	Senior
3. Choy	Nixon	Hawaii	Honolulu	Senior
4. Goodwin	Nixon	California	Pasadena	Senior
5. Wallace	Nixon	California	San Diego	Senior
6. Sneed	Nixon	California	San Francisco	Senior
7. Hug	Carter	Nevada	Reno	Senior
8. Skopil	Carter	Oregon	Portland	Senior
9. Schroeder (Chief Judge)	Carter	Arizona	Phoenix	ACTIVE
10. Fletcher, B.	Carter	Washington	Seattle	Senior
11. Farris	Carter	Washington	Seattle	Senior
12. Pregerson	Carter	California	Woodland Hills	ACTIVE
13. Alarcon	Carter	California	Los Angeles	Senior
14. Ferguson	Carter	California	Santa Ana	Senior
15. Nelson, D.	Carter	California	Pasadena	Senior
16. Canby	Carter	Arizona	Phoenix	Senior
17. Boochever	Carter	California	Pasadena	Senior
18. Reinhardt	Carter	California	Los Angeles	ACTIVE
19. Beezer	Reagan	Washington	Seattle	Senior
20. Hall	Reagan	California	Pasadena	Senior
21. Brunetti	Reagan	Nevada	Reno	Senior
22. Kozinski	Reagan	California	Pasadena	ACTIVE
23. Noonan	Reagan	California	San Francisco	Senior
24. Thompson	Reagan	California	San Diego	Senior
25. O'Scannlain	Reagan	Oregon	Portland	ACTIVE
26. Leavy	Reagan	Oregon	Portland	Senior
27. Trott	Reagan	Idaho	Boise	ACTIVE
28. Fernandez	Bush	California	Pasadena	Senior
29. Rymer	Bush	California	Pasadena	ACTIVE
30. Nelson, T.	Bush	Idaho	Boise	ACTIVE
31. Kleinfeld	Bush	Alaska	Fairbanks	ACTIVE
32. Hawkins	Clinton	Arizona	Phoenix	ACTIVE
33. Tashima	Clinton	California	Pasadena	ACTIVE
34. Thomas	Clinton	Montana	Billings	ACTIVE
35. Silverman	Clinton	Arizona	Phoenix	ACTIVE
36. Graber	Clinton	Oregon	Portland	ACTIVE
37. McKeown	Clinton	California	San Diego	ACTIVE
38. Wardlaw	Clinton	California	Pasadena	ACTIVE
39. Fletcher, W.	Clinton	California	San Francisco	ACTIVE
40. Fisher	Clinton	California	Pasadena	ACTIVE
41. Gould	Clinton	Washington	Seattle	ACTIVE
42. Paez	Clinton	California	Pasadena	ACTIVE
43. Berzon	Clinton	California	San Francisco	ACTIVE
44. Tallman	Clinton	Washington	Seattle	ACTIVE
45. Rawlinson	Clinton	Nevada	Las Vegas	ACTIVE
46. Clifton	Bush	Hawaii	Honolulu	CONFIRMED
47. [Kuhl]	Bush	California	Los Angeles	Nominee
48. [Bybee]	Bush	Nevada	Las Vegas	Nominee
49. [Open seat]	Bush	- -	- -	Nominee
50. [Open seat]	Bush	- -	- -	Nominee

SUMMARY:	**Authorized Judgeships**	**28**
	ACTIVE/CONFIRMED Judges	**24**
	Senior Judges	**+ 22**
	Sitting Judges	**46**
	Vacancies	**4**
	Total, including nominees	**50**

EXHIBIT D
JUDGES BY CIRCUIT AFTER SPLIT
(as of July 18, 2002)

I. Court of Appeals for the Twelfth Circuit

Judge	Appointed by	State	City	Status (Active/Senior)
1. Wright	Nixon	Washington	Seattle	Senior
2. Choy	Nixon	Hawaii	Honolulu	Senior
3. Skopil	Carter	Oregon	Portland	Senior
4. Fletcher, B.	Carter	Washington	Seattle	Senior
5. Farris	Carter	Washington	Seattle	Senior
6. Beezer	Reagan	Washington	Seattle	Senior
7. O'Scannlain	Reagan	Oregon	Portland	ACTIVE
8. Leavy	Reagan	Oregon	Portland	Senior
9. Trott	Reagan	Idaho	Boise	ACTIVE
10. Nelson, T.	Bush	Idaho	Boise	ACTIVE
11. Kleinfeld	Bush	Alaska	Fairbanks	ACTIVE
12. Thomas	Clinton	Montana	Billings	ACTIVE
13. Graber	Clinton	Oregon	Portland	ACTIVE
14. Gould	Clinton	Washington	Seattle	ACTIVE
15. Tallman	Clinton	Washington	Seattle	ACTIVE
16. Clifton	Bush	Hawaii	Honolulu	CONFIRMED

SUMMARY:

ACTIVE/CONFIRMED Judges	**9**
Senior Judges	**+ 7**
Sitting Judges	**16**
Vacancies	**+ 0**
Total, including nominees	**16**

EXHIBIT D (CONT.)

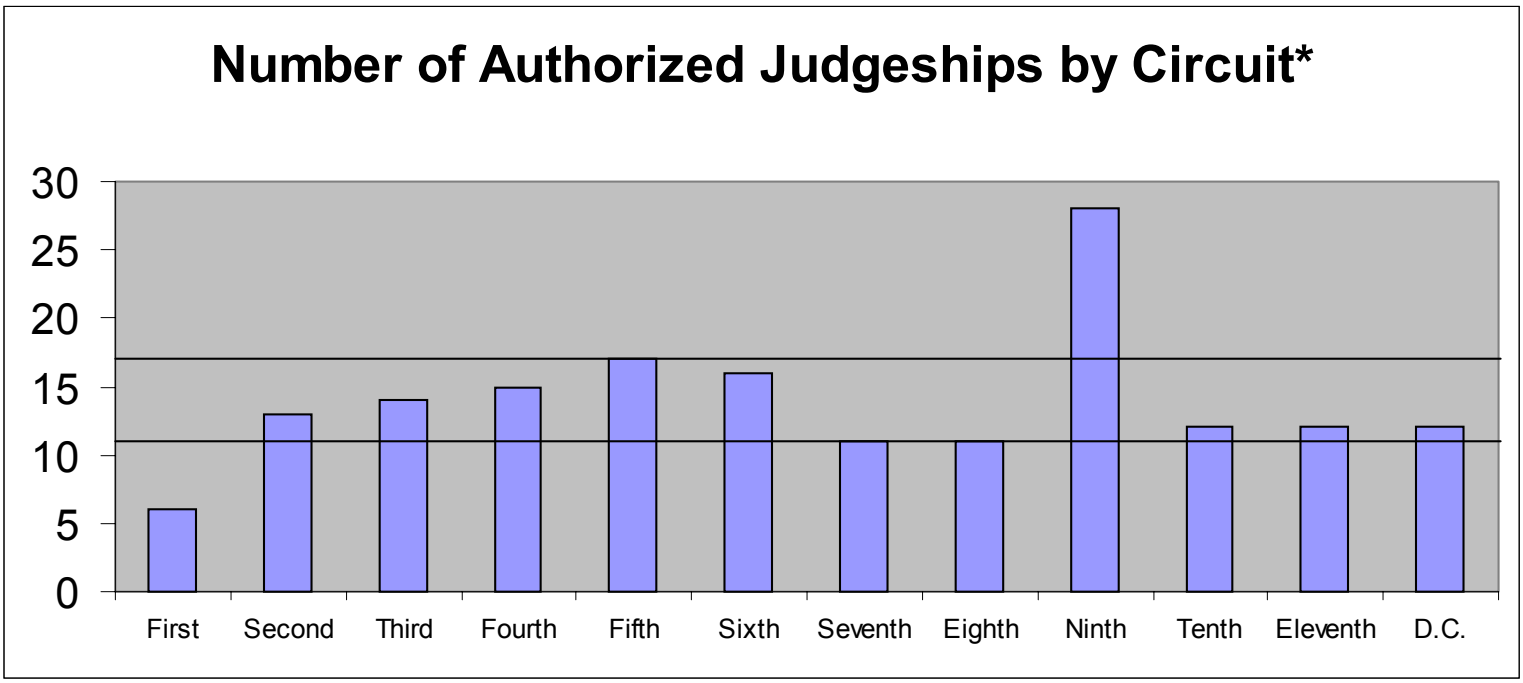
II. Court of Appeals for the "New" Ninth Circuit

Judge	Appointed by	State	City	Status (Active/Senior)
1. Browning	Kennedy	California	San Francisco	Senior
2. Goodwin	Nixon	California	Pasadena	Senior
3. Wallace	Nixon	California	San Diego	Senior
4. Sneed	Nixon	California	San Francisco	Senior
5. Hug	Carter	Nevada	Reno	Senior
6. Schroeder (Chief Judge)	Carter	Arizona	Phoenix	ACTIVE
7. Pregerson	Carter	California	Woodland Hills	ACTIVE
8. Alarcon	Carter	California	Los Angeles	Senior
9. Ferguson	Carter	California	Santa Ana	Senior
10. Nelson, D.	Carter	California	Pasadena	Senior
11. Canby	Carter	Arizona	Phoenix	Senior
12. Boochever	Carter	California	Pasadena	Senior
13. Reinhardt	Carter	California	Los Angeles	ACTIVE
14. Hall	Reagan	California	Pasadena	Senior
15. Brunetti	Reagan	Nevada	Reno	Senior
16. Kozinski	Reagan	California	Pasadena	ACTIVE
17. Noonan	Reagan	California	San Francisco	Senior
18. Thompson	Reagan	California	San Diego	Senior
19. Fernandez	Bush	California	Pasadena	Senior
20. Rymer	Bush	California	Pasadena	ACTIVE
21. Hawkins	Clinton	Arizona	Phoenix	ACTIVE
22. Tashima	Clinton	California	Pasadena	ACTIVE
23. Silverman	Clinton	Arizona	Phoenix	ACTIVE
24. McKeown	Clinton	California	San Diego	ACTIVE
25. Wardlaw	Clinton	California	Pasadena	ACTIVE
26. Fletcher, W.	Clinton	California	San Francisco	ACTIVE
27. Fisher	Clinton	California	Pasadena	ACTIVE
28. Paez	Clinton	California	Pasadena	ACTIVE
29. Berzon	Clinton	California	San Francisco	ACTIVE
30. Rawlinson	Clinton	Nevada	Las Vegas	ACTIVE
31. [Kuhl]	Bush	California	Los Angeles	Nominee
32. [Bybee]	Bush	Nevada	Las Vegas	Nominee
33. [Open seat]	Bush	- -	- -	Nominee
34. [Open seat]	Bush	- -	- -	Nominee

SUMMARY:

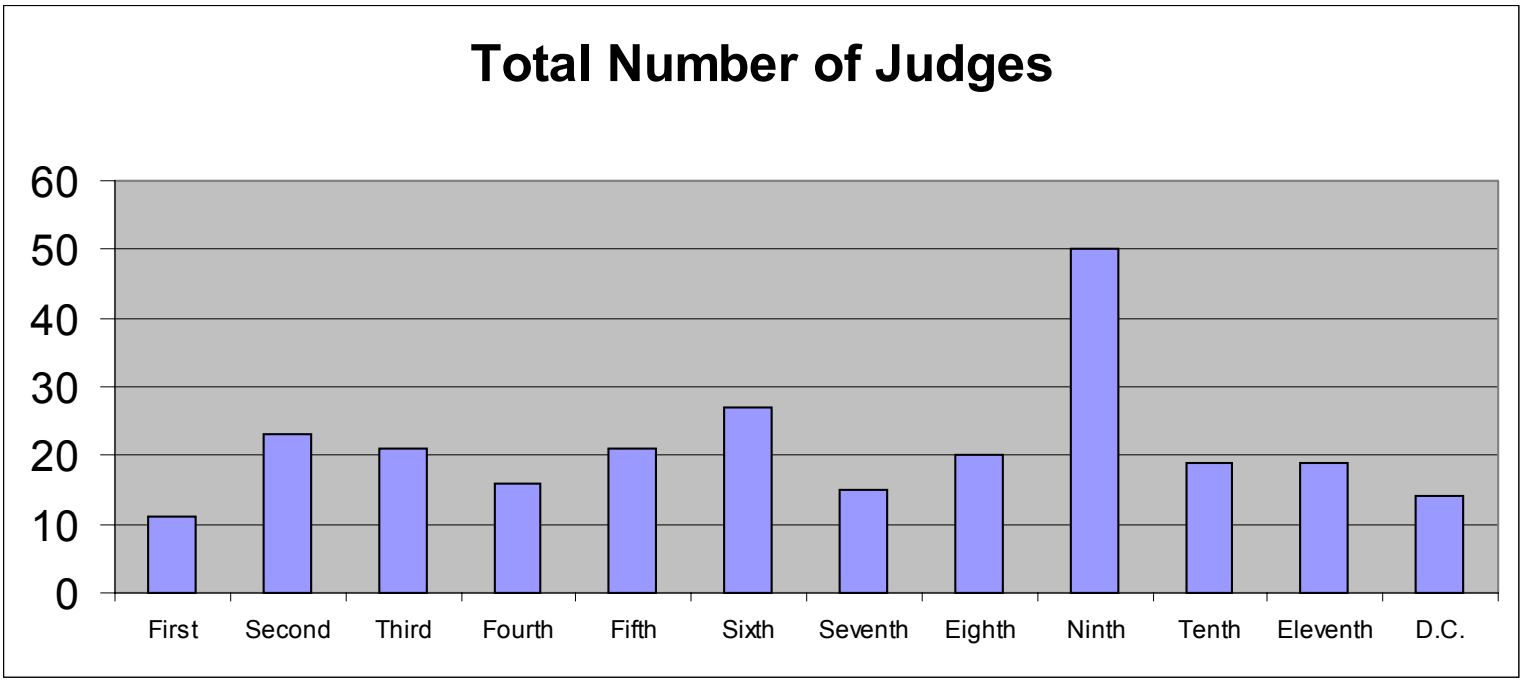
ACTIVE Judges	**15**
Senior Judges	**+ 15**
Sitting Judges	**30**
Vacancies	**4**
Total, including nominees	**34**

Chart 1



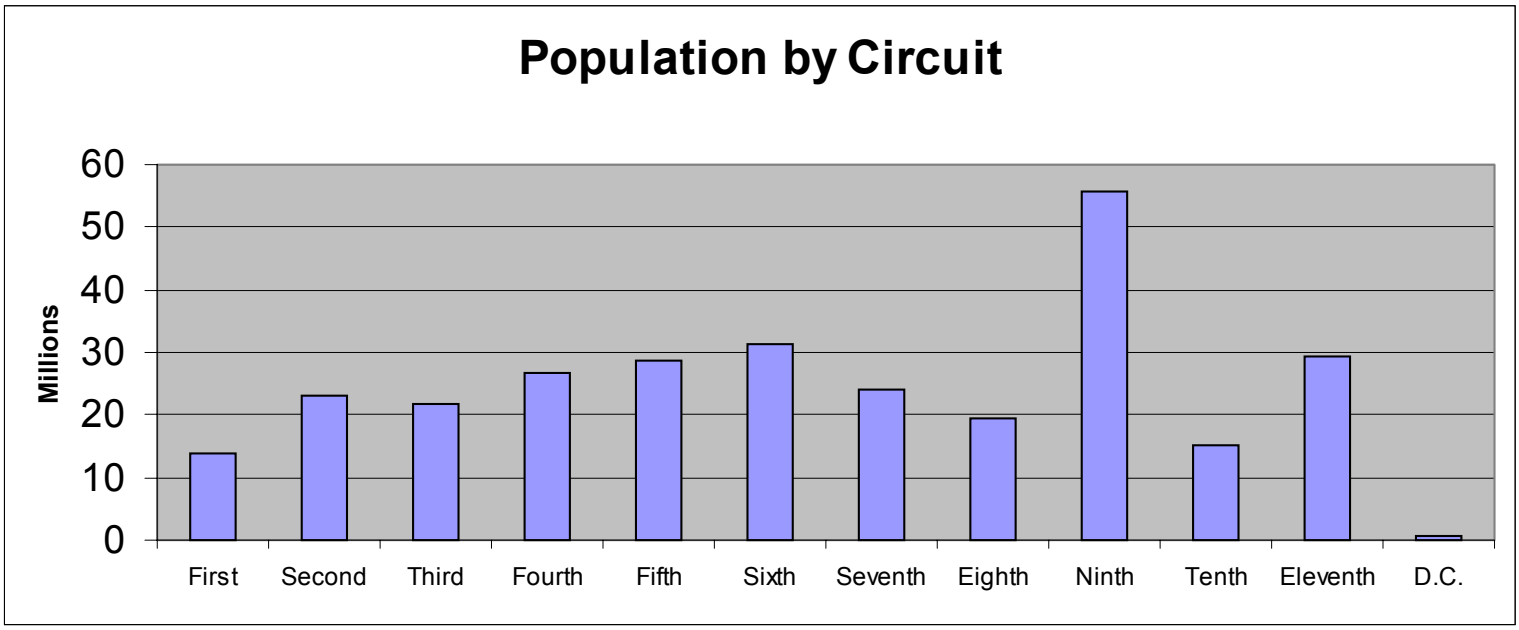
*** The area blocked by the parallel lines reflects the White Commission's finding that an appellate court cannot function effectively with more than eleven to seventeen judges.**

Chart 2



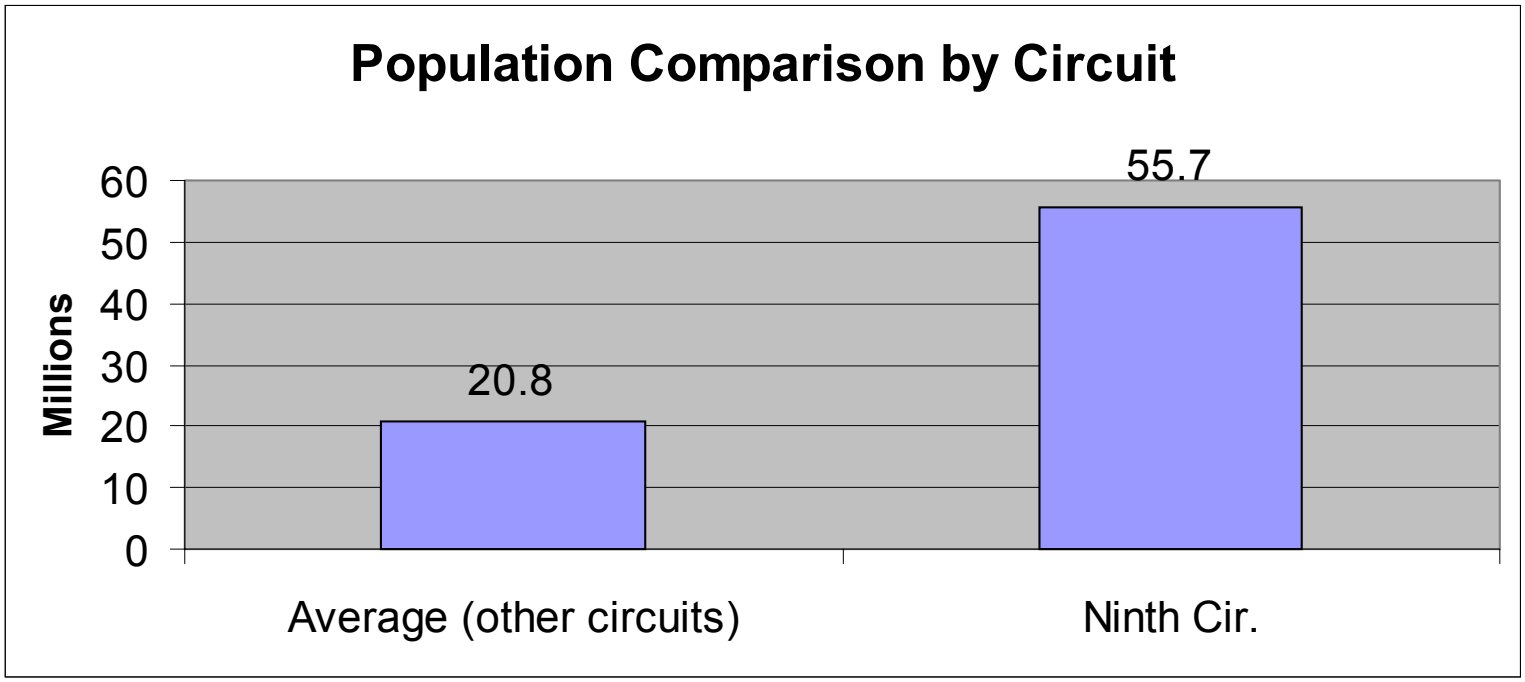
*** "Total Judges" Means Authorized Judgeships + Senior Judges**

Chart 3



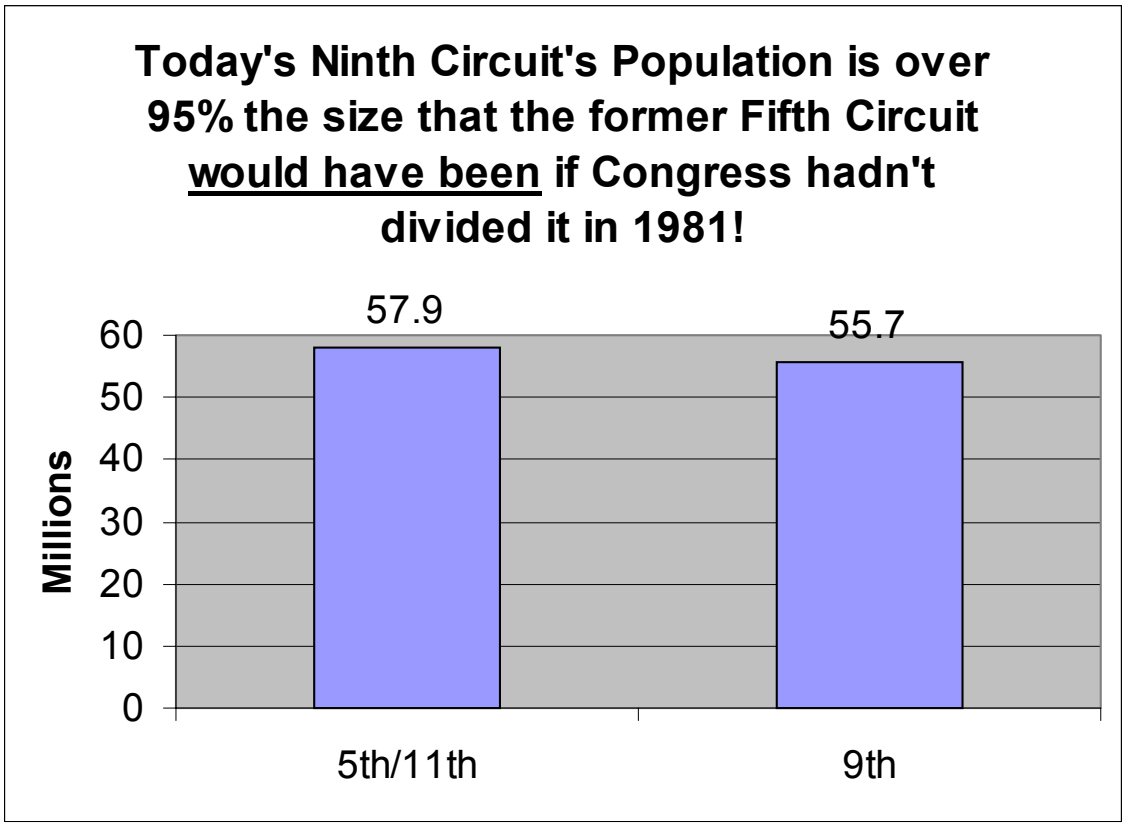
***2001 Census Bureau Data**

Chart 4



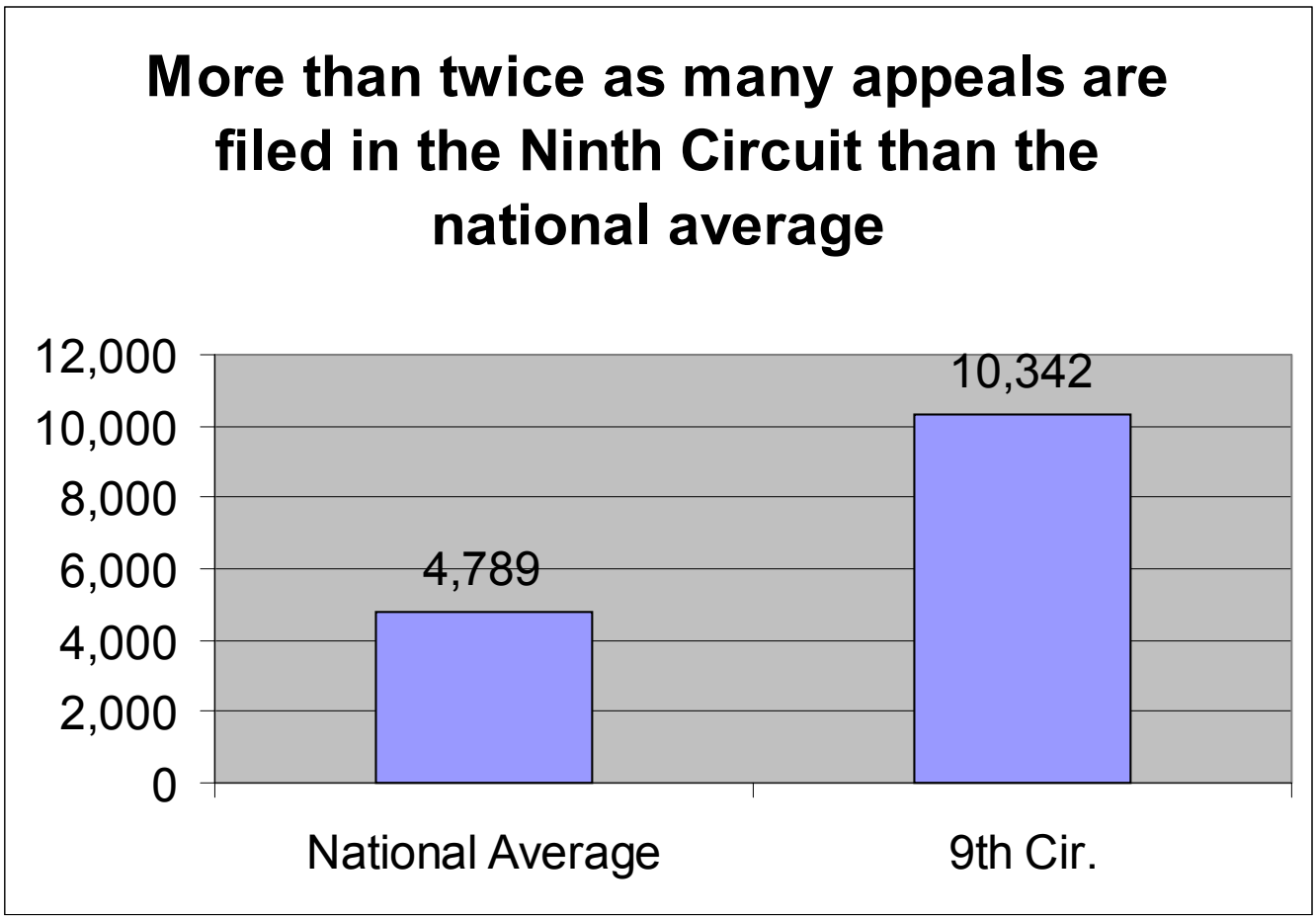
*** 2001 Census Bureau Data**

Chart 5



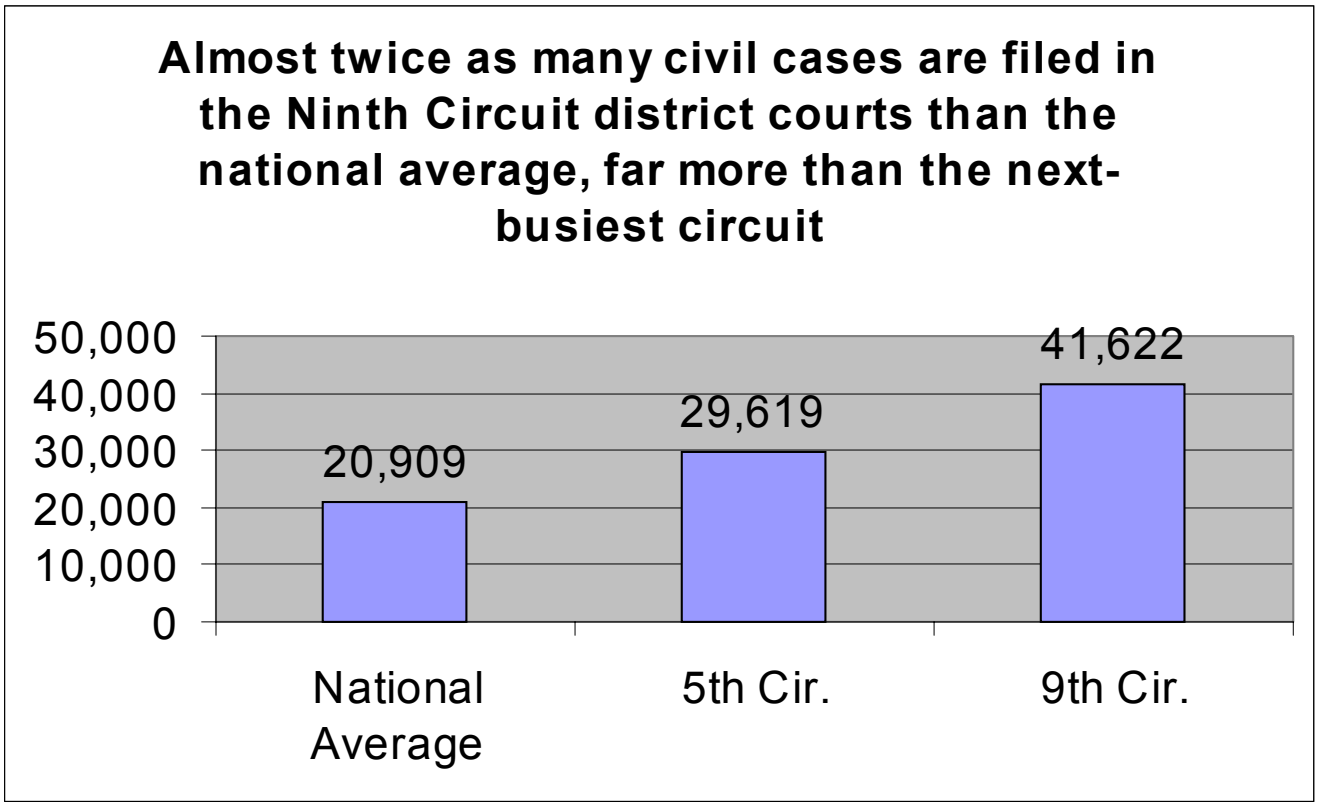
*** 2001 Census Bureau Data**

Chart 6



*** Appeals filed October 2000 - September 2001 (Source: Judicial Business of the United States Courts: 2001 Annual Report of the Director)**

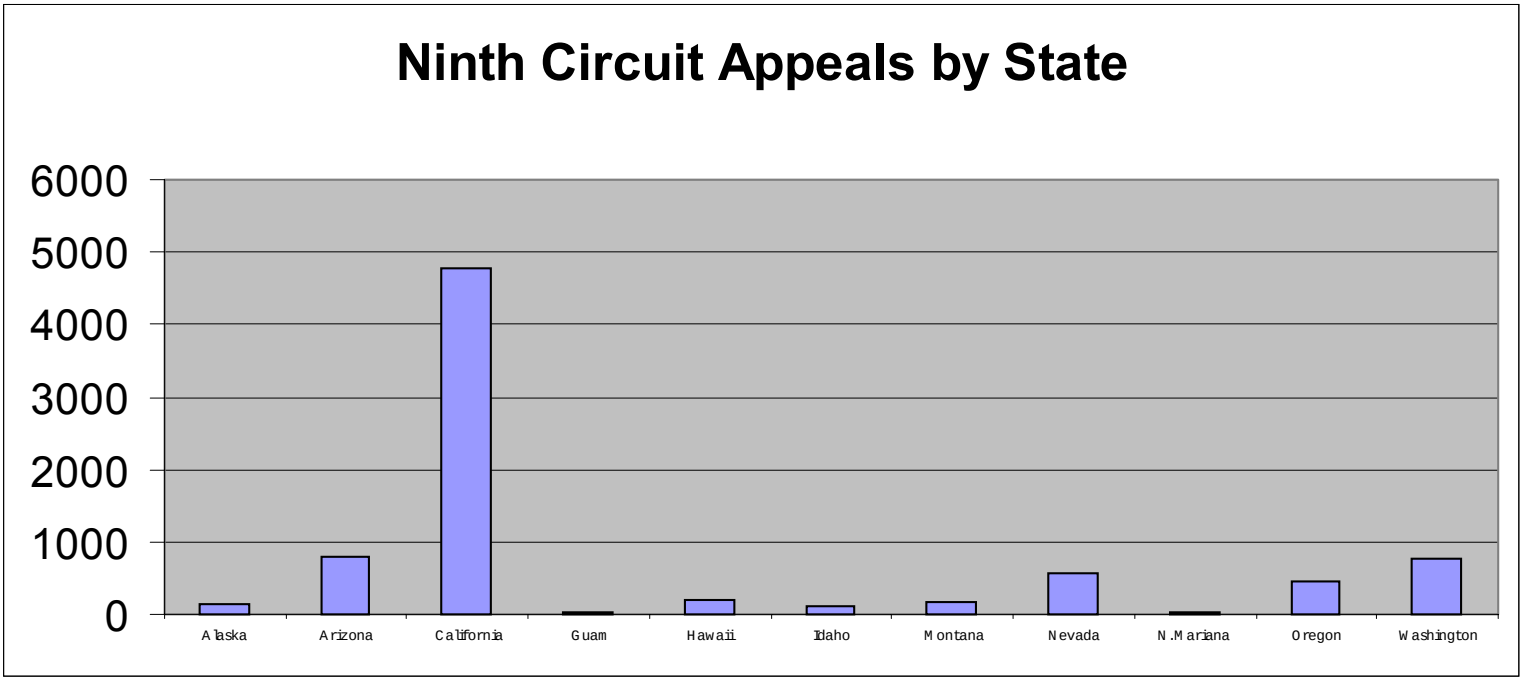
Chart 7



*** Source: Judicial Business of the United States Courts: 2001 Annual Report of the Director**

Chart 8

*** Source: Judicial Business of the United States Courts: 2001**



Annual Report of the Director

TABLE 1
NUMBER OF JUDGES
BY CIRCUIT
(as of June 2002)

Court	Headquarter City	Appellate Judgeships	%	Senior Judges	%	Total Judges*	% U.S.
First	Boston, MA	6	3.6%	5	5.7%	11	4.3%
Second	New York, NY	13	7.8%	10	11.4%	23	9.0%
Third	Philadelphia, PA	14	8.4%	7	8.0%	21	8.2%
Fourth	Richmond, VA	15	9.0%	1	1.1%	16	6.3%
Fifth	New Orleans, LA	17	10.2%	4	4.5%	21	8.2%
Sixth	Cincinnati, OH	16	9.6%	11	12.5%	27	10.5%
Seventh	Chicago, IL	11	6.6%	4	4.5%	15	5.9%
Eighth	St. Louis, MO	11	6.6%	9	10.2%	20	7.8%
Ninth	San Francisco, CA	28	16.8%	22	25.0%	50	19.5%
Tenth	Denver, CO	12	7.2%	7	8.0%	19	7.4%
Eleventh	Atlanta, GA	12	7.2%	7	8.0%	19	7.4%
D.C.	Washington, DC	12	7.2%	2	2.3%	14	5.5%
Total		**167**	**100%**	**88**	**100%**	**256**	**100%**

* Total judges includes authorized judgeships and senior judges.

SOURCE: 28 U.S.C. § 44; Federal Reporter.

TABLE 2
POPULATION AND CASELOAD
BY CIRCUIT

Court	Population*	% Pop.	Number of Appeals (10/1/00-9/30/01)	% Appeals
First	13,799,968	4.8%	1,762	3.0%
Second	23,049,542	8.1%	4,519	7.8%
Third	21,733,649	7.6%	3,860	6.7%
Fourth	26,614,085	9.3%	5,303	9.2%
Fifth	28,648,477	10.0%	8,642	15.0%
Sixth	31,169,935	10.9%	4,853	8.4%
Seventh	23,998,952	8.4%	3,455	6.0%
Eighth	19,321,553	6.8%	3,034	5.3%
Ninth	55,683,130	19.6%	10,342	18.0%
Tenth	15,165,810	5.3%	2,758	4.8%
Eleventh	29,244,786	10.3%	7,535	13.1%
D.C.	571,822	0.2%	1,401	2.4%
Total	**284,796,887**	**100%**	**57,464**	**100%**

* State figures as of July 1, 2001; territorial figures as of April 1, 2000.

SOURCE: Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2001 Annual Report of the Director, Table B: U.S. Courts of Appeals -- Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2000 and 2001, http://www.uscourts.gov/judbus2001/contents.html (visited July 16, 2002); U.S. Census Bureau, States Ranked by Estimated July 1, 2001 Population, http://eire.census.gov/popest/data/states/tables/ST-EST2001-04.php (visited July 16, 2002); U.S. Census Bureau, Census 2000 Results for the Island Areas, http://www.census.gov/population/www/cen2000/islandareas.html

TABLE 3
POPULATION AND NUMBER OF APPEALS BY DISTRICT WITHIN NINTH CIRCUIT

Court	City	Authorized District Judgeships	Population (2000 figures)	% Pop.	Appeals (10/1/00 - 9/30/01)	% Appeals
D. Alaska	Anchorage	3	626,932	1.1%	135	1.7%
D. Arizona	Phoenix	13	5,130,632	9.4%	791	9.9%
C.D. California	Los Angeles	27	17,019,673	31.2%	2365	29.6%
E.D. California	Sacramento	7*	6,497,366	11.9%	934	11.7%
N.D. California	San Francisco	14	7,398,415	13.6%	852	10.7%
S.D. California	San Diego	8	2,956,194	5.4%	621	7.8%
D. Guam	Agana	1	154,805	0.3%	17	0.2%
D. Hawaii	Honolulu	4*	1,211,537	2.2%	190	2.4%
D. Idaho	Boise	2	1,293,953	2.4%	113	1.4%
D. Montana	Helena	3	902,195	1.7%	165	2.1%
D. Nevada	Las Vegas	7	1,998,257	3.7%	571	7.1%
D. N. Mariana Is.	Saipan	1	69,221	0.1%	18	0.2%
D. Oregon	Portland	6	3,421,399	6.3%	466	5.8%
E.D. Washington	Spokane	4	1,306,948	2.4%	232	2.9%
W.D. Washington	Seattle	7	4,587,173	8.4%	529	6.6%
TOTAL		**107**	**54,574,700**	**100%**	**7,999****	**100%**

* Includes one temporary judgeship.
** Excludes the following cases: bankruptcy (260), tax court (53), NLRB (34), administrative agencies (1,063), and original proceedings (933).

SOURCE: 28 U.S.C. § 133; Administrative Office of the United States Courts, Judicial Business of the United States Courts: 2001 Annual Report of the Director, Table B-3A: U.S. Courts of Appeals -- Sources of Appeals in Civil and Criminal Cases From U.S. District Courts During the 12-Month Period Ending September 30, 2001, http://www.uscourts.gov/judbus2001/contents.html (visited July 16, 2002); U.S. Census Bureau, States Ranked by Estimated July 1, 2001 Population, http://eire.census.gov/popest/data/states/tables/ST-EST2001-04.php (visited July 16, 2002); U.S. Census Bureau, Census 2000 Results for the Island Areas, http://www.census.gov/population/www/cen2000/islandareas.html

TABLE 4
POPULATION AND NUMBER OF APPEALS BY STATE WITHIN NINTH CIRCUIT

State	Authorized District Judgeships	Population	% Pop.	Appeals	% Appeals
Alaska	3	626,932	1.1%	135	1.7%
Arizona	13	5,130,632	9.4%	791	9.9%
California	56*	33,871,648	62.1%	4,772	60.0%
Guam	1	154,805	0.3%	17	0.2%
Hawaii	4*	1,211,537	2.2%	190	2.4%
Idaho	2	1,293,953	2.4%	113	1.4%
Montana	3	902,195	1.7%	165	2.1%
Nevada	7	1,998,257	3.7%	571	7.1%
N. Mariana Islands	1	69,221	0.1%	18	0.2%
Oregon	6	3,421,399	6.3%	466	5.8%
Washington	11	5,894,121	10.8%	761	9.5%
TOTAL	**107**	**54,574,700**	**100%**	**7,999****	**100%**

* Includes one temporary judgeship.

** Excludes the following cases: bankruptcy (260), tax court (53), NLRB (34), administrative agencies (1,063), and original proceedings (933).