

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

**Hearing
Bringing Justice Closer to the People:
Examining Ideas for Restructuring the Ninth Circuit**

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**Written Testimony of
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Good morning Mr. Chairman and members of the subcommittee and thank you for making time to hear the views of judges of the Ninth Circuit on proposals to restructure our Circuit.

I have served on the Ninth Circuit since October, 2003, when my nomination by President George W. Bush was confirmed by the Senate.

Based on my 13 years of experience on the circuit court, I am opposed to the geographical divisions proposed by the several Bills now in the Senate and House hoppers. I would like to discuss three topics regarding the advantages of the present Circuit and to answer a couple of criticisms.

First, I point to the great advantage to our business and professional communities in having a uniform body of law which covers the nine Western states and the Pacific Islands.

A decision by our Court binds courts and litigants in the whole Western area. This minimizes the risk that the law of intellectual property –copyrights and trademarks, for instance–maritime trade, labor relations, employment discrimination, for instance–will be different in Phoenix, San Francisco or Seattle.

You can easily grasp this is not an abstract advantage. Who has standing to sue on a copyright infringement claim is now uniform in Washington State, home of Microsoft Corporation and California, home of Google. *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881 (9th Cir. 2005) (en banc). Whether an employee qualifies as a “whistleblower” if he has informed his superiors but not the Securities and Exchange Commission, calls for the same elements of proof in San Francisco and in Tucson. *Somers v. Digital Realty Trust Inc.*, No. 15-17352, ___ F.3d ___, 2017 WL 908245 (9th Cir. Mar. 8, 2017).

In the Ninth Circuit, we vigorously apply the precedent established by our published decisions. If a panel issues a decision which conflicts with earlier precedent, our staff and our judges speedily and regularly point out any such tensions so that the decision about to be issued can be modified to conform with our precedent. That allows our law to be predictable, a critical element which supports innovation and economic strength in our business communities.

Mr. Neukom, the general counsel for Microsoft, pointed out the practical effect of this predictability in his opposition to splitting the Circuit back in 2006:

A practical illustration of the advantages of a single western circuit would be the intellectual property rights litigation over the past 30 years between Microsoft based in Seattle and companies such as Apple Computer and Sun Microsystems based in Silicon Valley. While this litigation proceeded before trial courts in the Northern District of California, we were reassured by the fact that the district court there would apply the same interpretations of copyright law that a district court in Seattle would apply because they are both part of a single federal circuit.

Examining the Proposal to Restructure the Ninth Circuit: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of William H. Neukom, Partner, Preston Gates & Ellis, LLP).

That the law of intellectual property is the same for the Silicon Valley of California or the Silicon Forest of Washington State makes it easier for our trading partners across the Pacific to plan and manage their negotiations with businesses in the West.

The advantage of uniformity of law across a good portion of the trade globe was recognized by the White Commission which recommended against splitting up the Ninth Circuit in 1998:

Maintaining the court of appeals for the Ninth Circuit as currently aligned respects the character of the West as a distinct region. Having a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with other states on the Pacific Rim is a strength of the circuit that should be maintained. The Atlantic seaboard and Gulf Coast are governed by law determined by courts of appeal in six separate circuits, which gives rise to complaints about intercircuit conflicts from practitioners in the maritime bar.

White Commission Report at 49-50.

The very size of the Ninth Circuit gives foreign and domestic traders confidence against the perception that they will be “home towned” in our district courts. Although district courts often have their own characteristics and differences amongst each other, they all must follow the uniform law of the Circuit. This helps give planners and litigants a sense of the neutrality of adjudication which is the basis of the Rule of Law. It can even effect fishermen. If the Circuit is split, what law will rule Lake Tahoe, evenly split between California and Nevada? Will the tackle used by a Nevada fisherman be an illegal lure if his boat drifts into California waters?

Indeed, the advantages of a large circuit may point to a different sort of restructuring of the appellate courts nationwide: concentration of circuits rather than their dispersal. The best size for the Circuit depends a great deal upon the issue framed. Uniformity of tax laws is best achieved by a large circuit. But if one is concerned with optimal local zoning regulations, a smaller circuit may be best. Federal law doesn’t deal much with zoning regulations.

A second reason why I favor retaining our present structure is that we sit on panels with judges of other states, who come to the Circuit with many different backgrounds and experiences. This is especially important in environmental law cases, where the judgment of someone who has lived and practiced and judged where the trees involved actually grow, or the streams affected actually flow—and the jobs of harvesting the trees and controlling the streams are affected—helps determine the analysis and outcome.

This predictability and uniformity of law based on diversity of thought and backgrounds of the judges would suffer under any balkanization of the circuit.

A couple of words on two other points:

1. The most frequently heard criticism of the Ninth Circuit is based on its large geographic size. But a mere look at a map doesn’t tell one how the Circuit works to overcome what in days past would be the tolls of such size. We are no longer in a world where judges took night trains between their Chambers and the courthouses for hearings. We no longer wait for the postman to learn what our colleagues think of draft opinions we have circulated. The world of air travel and email communications has changed all that. The Ninth Circuit, in particular, leads

with technological innovations which make the administration of justice easier and cheaper and thus more available. Just two weeks ago, Judge Kozinski and I sat in Hawaii on a case where the immigrant's attorney in Saipan of the Northern Mariana Islands had requested to appear by court television, because his client could not afford to send him to Honolulu. Given the size and resources we have in the Ninth Circuit, we were able to accommodate the client and the attorney.

2. The additional costs to creation of proposed Twelfth Circuit are unnecessary. As the Circuit stands now, we have very adequate headquarters in San Francisco. We have a superb central staff and quarters for traveling and visiting judges. The proposed Twelfth Circuit would have neither. It has been estimated that building a headquarters for the new Circuit would cost \$130 million and the annual cost of additional staff would be \$16 million. Those are unnecessary expenditures for the taxpayers.

In conclusion, I think you should take into consideration of the views people on the ground—the litigants practitioners and judges in the circuit. The overwhelming majority of the people directly involved is against a split of the Circuit. Talk to the people who deal with the issue daily, and I think you will come around to agreement with them.

Thank you for giving me this opportunity to share my thoughts with you.