



**STATEMENT**

**of the**

**AMERICAN BAR ASSOCIATION**

**for the**

**SUBCOMMITTEE ON COURTS, INTELLECTUAL  
PROPERTY, AND THE INTERNET**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES HOUSE OF REPRESENTATIVES**

**on**

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

**Submitted for Hearing**

**on**

**March 16, 2017**

The American Bar Association appreciates the opportunity to present this written statement for the hearing record of the House Judiciary Subcommittee on the Courts, Intellectual Property, and the Internet to examine the proposition – as captured in the title of this hearing – that restructuring of the Ninth Judicial Circuit will bring justice closer to the people.

One of the primary goals of the American Bar Association is to promote improvements in the administration of justice. It therefore is not surprising that the ABA has examined the issue of restructuring the Ninth Circuit on multiple occasions over the past 50 years. Originally supportive of realignment of the Ninth Circuit in the 1970s, the ABA continued to examine the issue over the next several decades in light of the emergence of technological developments that increasingly bridged geographical distances, the successful use of limited *en banc* review panels, and the Circuit’s innovative use of case management techniques. This culminated in the ABA rescinding its earlier position and adopting policies in the 1990s opposing division of the Ninth Circuit. Since then, the ABA periodically has reviewed new proposals to split the Circuit. We are pleased to submit this statement for the hearing record to affirm our opposition to current legislative efforts to restructure the Ninth Judicial Circuit.<sup>1</sup>

## **I. Past Congressional Inquiries and Legislative Proposals to Restructure the Ninth Circuit**

The federal courts of appeals have long been the subject of intense study and debate, primarily because of concerns generated by the dramatic and persistent growth in federal appellate caseload.<sup>2</sup> The Ninth Circuit – the largest circuit in terms of geographic size, population served, number of authorized judgeships, and total annual caseload – has often been at the vortex of the debate. It is worth quickly reviewing prior congressional activity to provide context for evaluating current restructuring efforts.

In 1972, Congress created the Hruska Commission, formally called the Commission on Revision of the Federal Court Appellate System, to study the federal appellate system. The Commission’s final report included recommendations for dividing both the Fifth and Ninth Circuits, then composed of 15 and 13 judges respectively, on the basis of an announced preference for smaller circuits.<sup>3</sup> The ABA endorsed those recommendations.

Congress declined to divide the circuits and instead implemented other Commission recommendations. This included substantially increasing the number of authorized judgeships in both circuits and authorizing any circuit with 15 or more judges to use limited *en banc panels* or to divide into

---

<sup>1</sup> The Association last expressed opposition to circuit restructuring in a statement submitted to Senate Judiciary Committee on September 20, 2006, for a hearing on proposals to split the Ninth Circuit.

<sup>2</sup> To understand the dynamic growth of the appellate courts, consider these facts: In 1960, almost 4,000 appeals were filed in the regional courts of appeals comprised of 68 judges. In 1970, almost 12,000 cases were filed and authorized judgeships increased to 97. By 1980, appeals almost doubled and authorized judgeships increased to 132. In 1990, there were 40,898 appeals filed and 156 judgeships. The total number of authorized judgeships increased to 167 in 1991, due to enactment of an omnibus judgeship bill. No additional judgeships have been created since then, despite the continued growth in caseload. In 2016, over 61,000 appeals were filed.

<sup>3</sup> COMM’N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 131 (1975).

administrative units to deal with rising caseloads.<sup>4</sup> The Ninth Circuit chose to adopt these new procedures; the judges of the Fifth Circuit preferred division.

In 1980, Congress complied with the request of the Fifth Circuit judges and enacted legislation to divide the Circuit by placing Florida, Georgia, and Alabama into a new Eleventh Circuit.<sup>5</sup> This was the second – and last – time that Congress has divided a circuit since 1891, when it created the system of regional circuit courts of appeals as we know them today.<sup>6</sup>

Although the ABA originally supported the Hruska Commission’s recommendation to split both the Fifth and Ninth Circuits, it rescinded that position in 1990 with respect to the Ninth Circuit, stating that procedural changes implemented during the preceding decade, in conjunction with other court management innovations, gave the Circuit the tools it needed to handle rising caseloads without sacrificing quality or timeliness.

In 1993, at the behest of the Federal Courts Study Committee, which had been established three years earlier by Congress, the Federal Judicial Center undertook a 15-month examination of the appellate court system and issued a report titled *Structural and Other Alternatives for the Federal Courts of Appeals*. The Federal Judicial Center concluded that the expansion of federal jurisdiction without a concomitant increase of resources was creating a burden for the federal courts of appeals and that it did not appear to be a stress that would be significantly relieved by structural changes to the appellate system. It further stated that it could “not conclude, as some assert, that the justness of appellate outcomes has been detrimentally affected by caseload volume.”<sup>7</sup> It advocated non-structural efforts to deal with the problem of increased volume.

In 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by the late Justice Byron R. White, to study the structure and alignment of the federal appellate system, with particular reference to the Ninth Circuit, and to submit its final recommendations regarding changes in circuit boundaries or structure to the President and Congress by December 1998.<sup>8</sup> The “White Commission,” as it was popularly known, concluded that the Ninth Circuit should not be split. In its final report, released at the end of the 105<sup>th</sup> Congress, the Commission stated:

There is no persuasive evidence that the Ninth Circuit (or any other circuit for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the Circuit would impose substantial costs of

---

<sup>4</sup> Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1633 (1978).

<sup>5</sup> Pub. L. No. 96-452, 94 Stat. 1994.

<sup>6</sup> The first split occurred in 1929, only after almost unanimous consensus was reached among Members of Congress and judges on how to divide the circuit: a new Tenth Circuit was carved out of five contiguous western-most states of the existing 8<sup>th</sup> Circuit. Pub. L. 71-840, 45 Stat. 11407. The ABA supported the division.

<sup>7</sup> FED. JUDICIAL CTR., *STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES* 155 (1993).

<sup>8</sup> Pub. L. No. 105-119.

administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the Circuit.<sup>9</sup>

The White Commission also acknowledged that certain benefits derived from the current alignment of the Ninth Circuit, including the development of a consistent body of law that applies to the entire far western region of the United States and governs relations with the other nations of the Pacific Rim. It also recognized the financial and practical advantages of the Circuit's administrative structure.

Despite these findings and conclusions, the White Commission recommended that Congress restructure the Ninth Circuit into three regionally based adjudicative divisions. The ABA opposed this recommendation, asserting that the only rationale the Commission offered for the recommendation – its stated subjective preference for smaller decisional units – was an insufficient basis for restructuring a judicial circuit.<sup>10</sup> Congressional reaction to the final report of the White Commission was tepid, and implementing legislation introduced during the 106<sup>th</sup> Congress by Senator Frank Murkowski (R-AK) received minimal attention.

During the 107<sup>th</sup> Congress, bills were introduced in the House and Senate by Representative Simpson (R-ID) and Senator Murkowski (R-AK) to split the Ninth Circuit into two circuits, with Arizona, California and Nevada remaining in the Ninth Circuit and Alaska, Hawaii, Oregon, Washington, Idaho, and Montana forming a new Twelfth Circuit.<sup>11</sup> Hearings were held, but no further action was taken.

During the 108<sup>th</sup> Congress, bills proposing three different strategies for dividing the Circuit were introduced. Representative Simpson reintroduced the previous Congress's bill; he and Senator Ensign (R-NV) introduced identical bills with only California and Nevada remaining in the Ninth Circuit; and Senator Lisa Murkowski (who replaced her father as senator after he became governor) and Representative Renzi (R-AZ) introduced bills containing a novel three-way split. Even though the House Judiciary Committee had not held a hearing to examine this novel circuit restructuring proposal, House members attempted to secure the bill's passage by attaching it to an omnibus judgeship bill that had already passed the Senate. The strategy succeeded in the House, but failed in the Senate, ultimately dooming both pieces of legislation.

During the 109<sup>th</sup> Congress, seven circuit restructuring bills were introduced. Three bills, introduced by Senators Murkowski and Ensign and Representative Simpson, proposed keeping California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and placing the remaining states in the new Twelfth Circuit. A separate House bill, introduced by Representative Sensenbrenner (R-WI), combined Representative Simpson's bill with the omnibus judgeship from the previous Congress. With

---

<sup>9</sup> COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 29 (1998).

<sup>10</sup> The ABA House of Delegates adopted policy in August 1999 opposing the recommendations of the White Commission.

<sup>11</sup> See Appendix A for a visual representation of the circuit realignments proposed by the bills discussed in this report.

10 cosponsors – more than any other circuit-splitting bill has garnered to this day – it was reported to the House, but never scheduled for a vote.

During the 110<sup>th</sup> – 114<sup>th</sup> Congresses, similar bills were introduced by many of the same Members, but none received any action.

## **II. Current Congressional Activity**

This Congress, four circuit restructuring bills have been introduced. S. 295 and H.R. 196, introduced by Senator Daines (R-MT) and Representative Simpson respectively, share the same circuit reconfiguration but differ in other details. These bills would retain California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and assign the rest to the new Twelfth Circuit. H.R. 250 (Biggs, R-AZ) would include Oregon and Washington along with California, Guam, Hawaii, and the Northern Mariana Islands in the new Ninth Circuit. S. 276, introduced by Senator Flake (R-AZ), would tweak that arrangement a bit by assigning Washington to the Twelfth rather than the Ninth Circuit. In addition to these realignment bills, legislation to establish a new Commission on Structural Alternatives for the Federal Courts of Appeals has been introduced by Senator Sullivan (R-AK).

We have provided this historical context and described with particularity the various circuit reconfigurations proposed since 2001 to make four important points:

- First, even though the operational definition of what constitutes a “large” circuit has changed over the decades, there has been a consistent historical presumption favoring small circuits that dates back to the first circuit division in 1929. At the time, it was a logical – even intuitive – presumption, given the state of private and public transportation and the absence of electronic forms of communication outside of telephone or wire services. This presumption informed the conclusions of the Hruska Commission but was rebutted in later scholarly reports. Nonetheless, it appears to have become so accepted by the public over the decades that it has taken on the aura of a “truism,” even though no empirical evidence exists to support the conclusion in today’s world of rapid transit and technological wizardry.
- Second, the concept of splitting the Ninth Circuit has been studied and rejected. No comprehensive evaluation of the federal courts that has been undertaken in the past 25 years at the request of Congress has concluded that the Ninth Circuit’s size has compromised its ability to deliver justice.
- Third, even the most ardent proponents of Ninth Circuit restructuring do not concur over how to split it. In fact, most do not appear to be committed to any one methodology. This stands in stark contrast to the congressional bipartisanship and solidarity that existed with regard to division of the Eighth and Fifth Circuits.

- Fourth, while circuit restructuring bills surface every year, most are reintroductions of bills from prior years. A handful of Members from the affected states persist in trying to split the Ninth Circuit despite the fact that neither the public, the legal community, nor the judiciary has rallied in support of any of the bills. Some Members are so determined to split the Ninth Circuit that they have tied the fate of legislation to authorize new judgeships to enactment of legislation to divide the Ninth. Given these circumstances it is not unreasonable to question what Members hope to achieve by division.

### **III. Circuit Restructuring Should Occur Only if Compelling Evidence Demonstrates Dysfunction**

The standard by which the ABA assesses the need for circuit restructuring states: “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 increasing workload.”<sup>12</sup> This standard, first suggested by the Judicial Conference of the United States in its *Proposed Long Range Plan for the Federal Courts*,<sup>13</sup> clearly embodies the principle that circuit restructuring is a remedy of last resort and should only be used if there is compelling evidence that justice is being denied to individual litigants and the integrity of the law of the circuit is threatened. Furthermore, circuit realignment should be supported only if there is broad bipartisan consensus that it is the best solution and that the benefits of the proposed reconfiguration will outweigh any negative consequences.

Congress should adhere to this very stringent standard because any circuit restructuring profoundly affects every component of the justice system and creates its own set of serious issues, including substantial start-up expenses, administrative disruption, and unpredictability of case law in the reconfigured circuits.

### **IV. No Compelling Evidence Exists that the Ninth Circuit Needs Restructuring**

We remain steadfast in our assessment that no compelling evidence exists to support claims that the Ninth Circuit is failing to deliver quality justice. The perceived problems identified by supporters of the legislation do not justify restructuring and would not be remedied by any of the various proposed circuit divisions. Two examples will demonstrate this disconnect between perception and intent.

#### **A. Delay and Backlog**

Critics often complain that the Circuit has a backlog of pending cases and is slow to process new cases. Even if true, neither of these concerns would be resolved by realignment. Circuit division does not reduce caseload or eliminate backlog; it only reallocates it. Circuit size is not the critical factor in

---

<sup>12</sup> This policy was adopted by the ABA Board of Governors on April 24, 1998. The Board is authorized to act between the semi-annual meetings of the House of Delegates when necessary to enable the ABA to contribute to a timely and important policy discussion.

<sup>13</sup> JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLANS FOR THE FEDERAL COURTS 44 (1995).

appellate delay; too many vacancies, too few authorized judgeships, and national policy decisions that increase workload without providing concomitant resources are the prime causes of delay and backlog.

The Ninth Circuit does indeed have the slowest median processing time for cases terminated on their merits, but that one statistic does not convey very much about the way the Ninth Circuit is handling its caseload. Statistics compiled by the Administrative Office of the U.S. Courts (AO) for the 12-month period ending June 30, 2016,<sup>14</sup> show that in recent years the Ninth Circuit has been getting ahead of curve by terminating more cases than are commenced. It is also notable that the Circuit's disposition times have steadily improved over the past decade; in fact, according to Judge Sidney Thomas, Chief Judge of the Ninth Circuit, case processing time has been reduced by almost 35%. Furthermore, while the Circuit may lag behind others in the median time from the date of filing to final disposition, once cases are ready for oral argument they move expeditiously through the system and are closed in record time. The Ninth Circuit was the second fastest circuit in terms of median time from the date of the oral argument to final disposition – 1.1 months. It also shared with four other circuits the distinction of having the fastest median time from submission on the briefs to disposition – a record-breaking 0.2 months.

One of the reasons that the Ninth Circuit has been able to function so well even though its caseload keeps growing is because it has been on the forefront of utilizing technology to enhance administrative efficiency. In fact, the Ninth Circuit was the first to institute automated docketing and electronic web-based filing. It also developed and uses to great advantage an automated issue identification system that inventories cases in a way that flags potential conflicts for early resolution and facilitates efficient resolution of cases that share the same central issue. The system also enables the Court to issue pre-publication reports to Court members to advise them in advance of the filing of every published opinion and to identify pending cases that might be affected by the lead opinion. In addition to using technology effectively, the Ninth Circuit has introduced case management techniques such as the creation of the positions of Appellate Commissioner and Circuit Mediator to help resolve cases that do not require resolution by an Article III judge. These programs, available to the Circuit because of its aggregate resources, have produced administrative efficiencies that have improved case management and increased productivity.

#### B. Reversal Rate

Contrary to often-repeated statements, the rate of reversal of Ninth Circuit decisions by the Supreme Court is not the highest of all the circuits, and, even if it were, there is no evidence that size has any bearing on reversal rates.

The Supreme Court, not surprisingly, reverses more cases than it affirms. According to an analysis by Politifact, between 2010 and 2015, the Supreme Court reversed about 70% of the cases it reviewed.

---

<sup>14</sup> The AO's statistical tables are available on its website at <http://www.uscourts.gov/statistics-reports>.

During the same time period, 79% of the Ninth Circuit cases were reversed, and the Sixth Circuit, with a reversal rate average of 87%, had the highest reversal rate.<sup>15</sup> Our review of reversal rates, as reported by SCOTUSblog, confirms these statistics.<sup>16</sup> Further proof that reversal rate has nothing to do with the size or volume of cases decided by a circuit is readily apparent when one reviews reversal rates year-by-year; there simply is no discernable correlation.

### **Views of Judges and Lawyers of the Ninth Circuit Court**

We believe that the views of judges and the lawyers who practice daily before the courts in the Ninth Circuit should be accorded great deference. In the past, Congress has agreed that the views of the affected legal community carry great weight and has refrained from using its power to restructure a circuit unless there was consensus within Congress and the affected legal community that it was absolutely necessary and there was agreement over how best to reconfigure the circuit.

There are, of course, some judges in the Circuit who support division, but we surmise they comprise a scant minority. While we do not know the exact number of judges of the Ninth Circuit that oppose division, we do know that the past three chief judges of the Ninth Circuit, spanning back to 2000, have been categorical in their opposition to division of the Ninth Circuit and vocal in their support for the benefits derived from the Circuit's size. We also know that neither the Judicial Council of the Ninth Circuit nor the Judicial Conference of the United States supports realignment. These facts strongly suggest that there is no groundswell of support among the judges of the Ninth Circuit for division.

In addition to the ABA and its thousands of members who practice daily before the courts of the Ninth Circuit, many other segments of the organized bar also have spoken out in opposition to splitting the Ninth. Ten years ago, all but one of the state bar associations that had adopted a policy position on the issue opposed division of the Ninth Circuit, and several specialty bars, including the Federal Bar Association, likewise opposed division. We do not have statistics with regard to the current positions of the organized bar in the Ninth Circuit but we are in the process of updating our information and will share the results with the Committee as soon as possible.

Critics often mention that large circuits suffer from a loss of collegiality and cite it as a reason to divide the Ninth Circuit. While one could just as easily argue that collegiality is fostered by the diversity of voices in a large circuit, the judges of the Ninth Circuit are in the best position to comment on their working relationships.

---

<sup>15</sup> The analysis is available at [www.politifact.com/punditfact/statements/2017/feb/10/sean-hannity/no-9th-circuit-isnt-most-overturned-court-country/](http://www.politifact.com/punditfact/statements/2017/feb/10/sean-hannity/no-9th-circuit-isnt-most-overturned-court-country/).

<sup>16</sup> Circuit Scorecard, SCOTUSblog at [www.scotusblog.com/statistics](http://www.scotusblog.com/statistics).



## **Circuit Restructuring is a Costly Proposition**

This is not a minor point, especially at a time when budgets continue to be slashed and the national deficit continues to grow. Splitting the Circuit would not only result in the loss of efficiencies mentioned earlier, it would also result in steep start-up costs, especially if new courthouses needed to be constructed, and duplicative overhead costs. In 2006, the Administrative Office of the U.S. Courts estimated that start-up costs for a two-way split could run as much as \$96 million, with recurring annual costs ranging from \$13 - \$16 million, and that a three-way split could cost as much as \$134 million initially and an additional \$22 million annually thereafter. The potential cost of circuit restructuring, alone, counsels against division, absent verifiable compelling evidence of dysfunction.

## **Conclusion**

The ABA applauds the Ninth Circuit's initiative, willingness to innovate, and determination to reduce its case backlog. The Ninth Circuit continues to cope admirably with its rising caseload without jeopardizing the quality or consistency of justice rendered.

Congress can bring justice closer to the people served by the Ninth Circuit by promptly filling existing vacancies, authorizing new and temporary judgeships as needed, and providing concomitant resources when federal jurisdiction is expanded or national policies are implemented that result in significant increases in the work of the federal courts. We therefore urge the House Judiciary Subcommittee on the Courts, Intellectual Property, and the Internet to refocus its efforts on assuring that the Ninth Circuit (and the entire federal judiciary) has the resources it needs to perform its adjudicatory functions efficiently and impartially and in a manner that offers litigants timely access to the courts.

For more information regarding the position of the ABA, please contact: Denise Cardman, Deputy Director, Governmental Affairs Office at: [denise.cardman@americanbar.org](mailto:denise.cardman@americanbar.org).

Thank you for this opportunity to present the ABA's views. We stand ready to assist you in whatever way we can.

# APPENDIX A

## Current Proposals to Divide the 9<sup>th</sup> Circuit



### 115<sup>th</sup> Congress

H.R. 250

(Biggs, R-AZ)

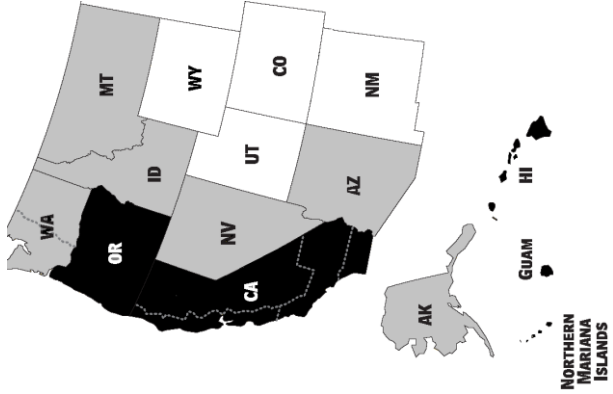
### 114<sup>th</sup> Congress

H.R. 4457

(Salmon, R-AZ)

S.2490

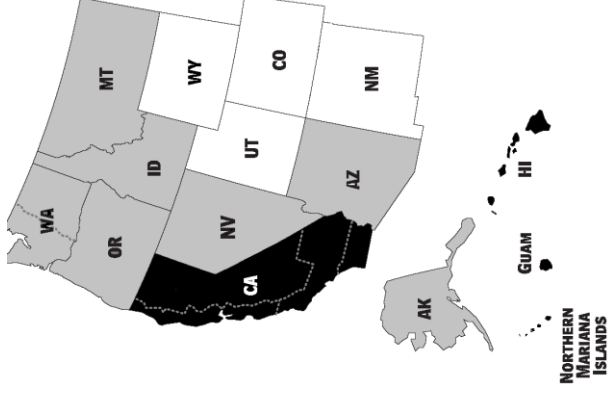
(Flake, R-AZ)



### 115<sup>th</sup> Congress

S. 276

(Flake, R-AZ)



### 115<sup>th</sup> Congress

S. 295 (Daines, R-MT)

20/14 Judgeships split

H.R. 196 (Simpson, R-ID)

25/9 Judgeships split

### 114<sup>th</sup> Congress

H.R.166 (Simpson, R-ID)

S. 2477 (Daines, R-MT)

### 113<sup>th</sup> Congress

H.R.144 (Simpson, R-ID)

### 112<sup>th</sup> Congress

H.R.162 (Simpson, R-ID)

### 111<sup>th</sup> Congress

H.R.191 (Simpson, R-ID)

S. 1727 (Ensign, R-NV)

### 110<sup>th</sup> Congress

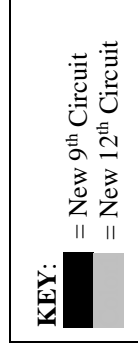
H.R.221 (Simpson, R-ID)

### 109<sup>th</sup> Congress

H.R.3125 (Simpson, R-ID)

S. 1845 (Ensign, R-NV)

S. 1296 (Murkowski, R-AK)



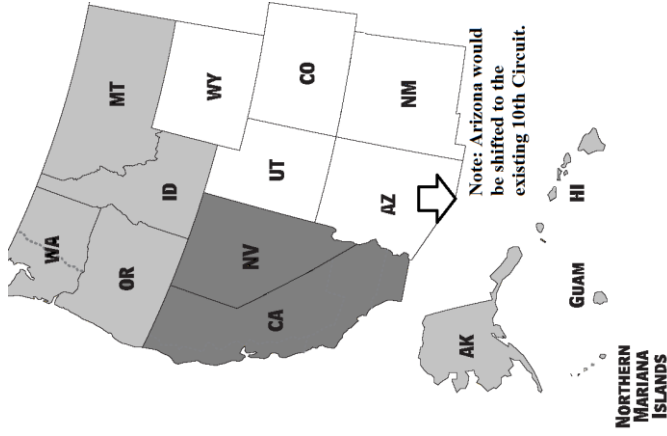
# Earlier Proposals to Divide the 9<sup>th</sup> Circuit



109<sup>th</sup> Congress  
H.R. 212  
(Simpson, R-ID)

108<sup>th</sup> Congress  
H.R. 2723  
(Simpson, R-ID)

107<sup>th</sup> Congress  
H.R. 1203  
(Simpson, R-ID)  
S.346  
(Murkowski, R-AK)



108<sup>th</sup> Congress  
H.R. 1033  
(Simpson, R-ID)

**KEY:**

- = New 9<sup>th</sup> Circuit
- = New 12<sup>th</sup> Circuit
- = New 13<sup>th</sup> Circuit



108<sup>th</sup> Congress  
S. 562  
(Murkowski, R-AK)



109<sup>th</sup> Congress  
H.R. 211 (Simpson, R-ID)  
S. 1301 (Ensign, R-NV)

108<sup>th</sup> Congress  
H.R. 4247 (Renzi, R-AZ)  
S. 2278 (Ensign, R-NV)