

106TH CONGRESS
1ST SESSION

S. 186

To provide for the reorganization of the Ninth Circuit Court of Appeals,
and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 19, 1999

Mr. MURKOWSKI (for himself and Mr. GORTON) introduced the following bill;
which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for the reorganization of the Ninth Circuit Court
of Appeals, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Federal Ninth Circuit
5 Reorganization Act of 1999”.

6 **SEC. 2. DIVISIONAL ORGANIZATION OF THE COURT OF AP-**
7 **PEALS FOR THE NINTH CIRCUIT.**

8 (a) REGIONAL DIVISIONS.—Effective 180 days after
9 the date of enactment of this Act, the United States Court
10 of Appeals for the Ninth Circuit shall be organized into

1 3 regional divisions designated as the Northern Division,
 2 the Middle Division, and the Southern Division, and a
 3 nonregional division designated as the Circuit Division.

4 (b) REVIEW OF DECISIONS.—

5 (1) NONAPPLICATION OF SECTION 1294.—Sec-
 6 tion 1294 of title 28, United States Code, shall not
 7 apply to the Ninth Circuit Court of Appeals. The re-
 8 view of district court decisions shall be governed as
 9 provided in this subsection.

10 (2) REVIEW.—Except as provided in sections
 11 1292(c), 1292(d), and 1295 of title 28, United
 12 States Code, once the court is organized into divi-
 13 sions, appeals from reviewable decisions of the dis-
 14 trict and territorial courts located within the Ninth
 15 Circuit shall be taken to the regional divisions of the
 16 Ninth Circuit Court of Appeals as follows:

17 (A) Appeals from the districts of Alaska,
 18 Guam, Hawaii, Idaho, Montana, the Northern
 19 Mariana Islands, Oregon, Eastern Washington,
 20 and Western Washington shall be taken to the
 21 Northern Division.

22 (B) Appeals from the districts of Eastern
 23 California, Northern California, and Nevada
 24 shall be taken to the Middle Division.

1 (C) Appeals from the districts of Arizona,
2 Central California, and Southern California
3 shall be taken to the Southern Division.

4 (D) Appeals from the Tax Court, petitions
5 to enforce the orders of administrative agencies,
6 and other proceedings within the court of ap-
7 peals' jurisdiction that do not involve review of
8 district court actions shall be filed in the court
9 of appeals and assigned to the division that
10 would have jurisdiction over the matter if the
11 division were a separate court of appeals.

12 (3) ASSIGNMENT OF JUDGES.—Each regional
13 division shall include from 7 to 11 judges of the
14 court of appeals in active status. A majority of the
15 judges assigned to each division shall reside within
16 the judicial districts that are within the division's ju-
17 risdiction as specified in paragraph (2). Judges in
18 senior status may be assigned to regional divisions
19 in accordance with policies adopted by the court of
20 appeals. Any judge assigned to 1 division may be as-
21 signed by the chief judge of the circuit for tem-
22 porary duty in another division as necessary to en-
23 able the divisions to function effectively.

24 (4) PRESIDING JUDGES.—Section 45 of title
25 28, United States Code, shall govern the designation

1 of the presiding judge of each regional division as
 2 though the division were a court of appeals, except
 3 that the judge serving as chief judge of the circuit
 4 may not at the same time serve as presiding judge
 5 of a regional division, and that only judges resident
 6 within, and assigned to, the division shall be eligible
 7 to serve as presiding judge of that division.

8 (5) PANELS.—Panels of a division may sit to
 9 hear and decide cases at any place within the judi-
 10 cial districts of the division, as specified by a major-
 11 ity of the judges of the division. The divisions shall
 12 be governed by the Federal Rules of Appellate Pro-
 13 cedure and by local rules and internal operating pro-
 14 cedures adopted by the court of appeals. The divi-
 15 sions may not adopt their own local rules or internal
 16 operating procedures. The decisions of 1 regional di-
 17 vision shall not be regarded as binding precedents in
 18 the other regional divisions.

19 (c) CIRCUIT DIVISION.—

20 (1) IN GENERAL.—In addition to the 3 regional
 21 divisions specified under subsection (a), the Ninth
 22 Circuit Court of Appeals shall establish a Circuit Di-
 23 vision composed of the chief judge of the circuit and
 24 12 other circuit judges in active status, chosen by lot
 25 in equal numbers from each regional division. Ex-

1 cept for the chief judge of the circuit, who shall
 2 serve ex officio, judges on the Circuit Division shall
 3 serve nonrenewable, staggered terms of 3 years each.
 4 One-third of the judges initially selected by lot shall
 5 serve terms of 1 year each, one-third shall serve
 6 terms of 2 years each, and one-third shall serve
 7 terms of 3 years each. Thereafter all judges shall
 8 serve terms of 3 years each. If a judge on the Cir-
 9 cuit Division is disqualified or otherwise unable to
 10 serve in a particular case, the presiding judge of the
 11 regional division to which that judge is assigned
 12 shall randomly select a judge from the division to
 13 serve in the place of the unavailable judge.

14 (2) JURISDICTION.—The Circuit Division shall
 15 have jurisdiction to review, and to affirm, reverse, or
 16 modify any final decision rendered in any of the
 17 court's divisions that conflicts on an issue of law
 18 with a decision in another division of the court. The
 19 exercise of such jurisdiction shall be within the dis-
 20 cretion of the Circuit Division and may be invoked
 21 by application for review by a party to the case, set-
 22 ting forth succinctly the issue of law as to which
 23 there is a conflict in the decisions of 2 or more divi-
 24 sions. The Circuit Division may review the decision
 25 of a panel within a division only if en banc review

1 of the decision has been sought and denied by the
2 division.

3 (3) PROCEDURES.—The Circuit Division shall
4 consider and decide cases through procedures adopt-
5 ed by the court of appeals for the expeditious and
6 inexpensive conduct of the division’s business. The
7 Circuit Division shall not function through panels.
8 The Circuit Division shall decide issues of law on the
9 basis of the opinions, briefs, and records in the con-
10 flicting decisions under review, unless the Circuit Di-
11 vision determines that special circumstances make
12 additional briefing or oral argument necessary.

13 (4) EN BANC PROCEEDINGS.—Section 46 of
14 title 28, United States Code, shall apply to each re-
15 gional division of the Ninth Circuit Court of Appeals
16 as though the division were the court of appeals.
17 Section 46(c) of title 28, United States Code, au-
18 thorizing hearings or rehearings en banc, shall be
19 applicable only to the regional divisions of the court
20 and not to the court of appeals as a whole. After a
21 divisional plan is in effect, the court of appeals shall
22 not order any hearing or rehearing en banc, and the
23 authorization for a limited en banc procedure under
24 section 6 of Public Law 95–486 (92 Stat. 1633),
25 shall not apply to the Ninth Circuit. An en banc pro-

ceeding ordered before the divisional plan is in effect
 may be heard and determined in accordance with ap-
 plicable rules of appellate procedure.

(d) CLERKS AND EMPLOYEES.—Section 711 of title
 28, United States Code, shall apply to the Ninth Circuit
 Court of Appeals, except the clerk of the Ninth Circuit
 Court of Appeals may maintain an office or offices in each
 regional division of the court to provide services of the
 clerk's office for that division.

(e) STUDY OF EFFECTIVENESS.—The Federal Judi-
 cial Center shall conduct a study of the effectiveness and
 efficiency of the divisions in the Ninth Circuit Court of
 Appeals. No later than 3 years after the effective date of
 this Act, the Federal Judicial Center shall submit to the
 Judicial Conference of the United States a report summa-
 rizing the activities of the divisions, including the Circuit
 Division, and evaluating the effectiveness and efficiency
 of the divisional structure. The Judicial Conference shall
 submit recommendations to Congress concerning the divi-
 sional structure and whether the structure should be con-
 tinued with or without modification.

**SEC. 2. ASSIGNMENT OF JUDGES; PANELS; EN BANC PRO-
 CEEDINGS; DIVISIONS; QUORUM.**

(a) IN GENERAL.—Section 46 of title 28, United
 States Code, is amended to read as follows:

1 **“§ 46. Assignment of judges; panels; en banc proceed-**
2 **ings; divisions; quorum**

3 “(a) Circuit judges shall sit on the court of appeals
4 and its panels in such order and at such times as the court
5 directs.

6 “(b) Unless otherwise provided by rule of court, a
7 court of appeals or any regional division thereof shall con-
8 sider and decide cases and controversies through panels
9 of 3 judges, at least 2 of whom shall be judges of the
10 court, unless such judges cannot sit because recused or
11 disqualified, or unless the chief judge of that court cer-
12 tifies that there is an emergency including, but not limited
13 to, the unavailability of a judge of the court because of
14 illness. A court may provide by rule for the disposition
15 of appeals through panels consisting of 2 judges, both of
16 whom shall be judges of the court. Panels of the court
17 shall sit at times and places and hear the cases and con-
18 troversies assigned as the court directs. The United States
19 Court of Appeals for the Federal Circuit shall determine
20 by rule a procedure for the rotation of judges from panel-
21 to-panel to ensure that all of the judges sit on a represent-
22 ative cross section of the cases heard and, notwithstanding
23 the first sentence of this subsection, may determine by
24 rule the number of judges, not less than 2, who constitute
25 a panel.

1 “(c) Notwithstanding subsection (b), a majority of
2 the judges of a court of appeals not organized into divi-
3 sions as provided in subsection (d) who are in regular ac-
4 tive service may order a hearing or rehearing before the
5 court en banc. A court en banc shall consist of all circuit
6 judges in regular active service, except that any senior cir-
7 cuit judge of the circuit shall be eligible to participate,
8 at that judge’s election and upon designation and assign-
9 ment pursuant to section 294(c) and the rules of the cir-
10 cuit, as a member of an en banc court reviewing a decision
11 of a panel of which such judge was a member.

12 “(d)(1) A court of appeals having more than 15 au-
13 thorized judgeships may organize itself into 2 or more ad-
14 judicative divisions, with each judge of the court assigned
15 to a specific division, either for a specified term of years
16 or indefinitely. The court’s docket shall be allocated
17 among the divisions in accordance with a plan adopted by
18 the court, and each division shall have exclusive appellate
19 jurisdiction over the appeals assigned to it. The presiding
20 judge of each division shall be determined from among the
21 judges of the division in active status as though the divi-
22 sion were the court of appeals, except the chief judge of
23 the circuit shall not serve at the same time as the presid-
24 ing judge of a division.

1 “(2) When organizing itself into divisions, a court of
2 appeals shall establish a circuit division, consisting of the
3 chief judge and additional circuit judges in active status,
4 selected in accordance with rules adopted by the court, so
5 as to make an odd number of judges but not more than
6 13.

7 “(3) The circuit division shall have jurisdiction to re-
8 view, and to affirm, reverse, or modify any final decision
9 rendered in any of the court’s divisions that conflicts on
10 an issue of law with a decision in another division of the
11 court. The exercise of such jurisdiction shall be within the
12 discretion of the circuit division and may be invoked by
13 application for review by a party to the case, setting forth
14 succinctly the issue of law as to which there is a conflict
15 in the decisions of 2 or more divisions. The circuit division
16 may review the decision of a panel within a division only
17 if en banc review of the decision has been sought and de-
18 nied by the division.

19 “(4) The circuit division shall consider and decide
20 cases through procedures adopted by the court of appeals
21 for the expeditious and inexpensive conduct of the circuit
22 division’s business. The circuit division shall not function
23 through panels. The circuit division shall decide issues of
24 law on the basis of the opinions, briefs, and records in
25 the conflicting decisions under review, unless the division

1 determines that special circumstances make additional
2 briefing or oral argument necessary.

3 “(e) This section shall apply to each division of a
4 court that is organized into divisions as though the divi-
5 sion were the court of appeals. Subsection (c), authorizing
6 hearings or rehearings en banc, shall be applicable only
7 to the divisions of the court and not to the court of appeals
8 as a whole, and the authorization for a limited en banc
9 procedure under section 6 of Public Law 95–486 (92 Stat.
10 1633), shall not apply in that court. After a divisional plan
11 is in effect, the court of appeals shall not order any hear-
12 ing or rehearing en banc, but an en banc proceeding al-
13 ready ordered may be heard and determined in accordance
14 with applicable rules of appellate procedure.

15 “(f) A majority of the number of judges authorized
16 to constitute a court, a division, or a panel thereof shall
17 constitute a quorum.”.

18 (b) TECHNICAL AND CONFORMING AMENDMENT.—
19 The table of sections for chapter 3 of title 28, United
20 States Code, is amended by amending the item relating
21 to section 46 to read as follows:

“46. Assignment of judges; panels; en banc proceedings; divisions; quorum.”.

22 (c) MONITORING IMPLEMENTATION.—The Federal
23 Judicial Center shall monitor the implementation of sec-
24 tion 46 of title 28, United States Code (as amended by
25 this section) for 3 years following the date of enactment

1 of this Act and report to the Judicial Conference such in-
 2 formation as the Center determines relevant or that the
 3 Conference requests to enable the Judicial Conference to
 4 assess the effectiveness and efficiency of this section.

5 **SEC. 3. DISTRICT COURT APPELLATE PANELS.**

6 (a) IN GENERAL.—Chapter 5 of title 28, United
 7 States Code, is amended by adding after section 144 the
 8 following:

9 **“§ 145. District Court Appellate Panels**

10 “(a) The judicial council of each circuit may establish
 11 a district court appellate panel service composed of district
 12 judges of the circuit, in either active or senior status, who
 13 are assigned by the judicial council to hear and determine
 14 appeals in accordance with subsection (b). Judges as-
 15 signed to the district court appellate panel service may
 16 continue to perform other judicial duties.

17 “(b) An appeal heard under this section shall be
 18 heard by a panel composed of 2 district judges assigned
 19 to the district court appellate panel service, and 1 circuit
 20 judge as designated by the chief judge of the circuit. The
 21 circuit judge shall preside. A district judge serving on an
 22 appellate panel shall not participate in the review of deci-
 23 sions of the district court to which the judge has been ap-
 24 pointed. The clerk of the court of appeals shall serve as
 25 the clerk of the district court appellate panels. A district

1 court appellate panel may sit at any place within the cir-
2 cuit, pursuant to rules promulgated by the judicial council,
3 to hear and decide cases, for the convenience of parties
4 and counsel.

5 “(c) In establishing a district court appellate panel
6 service, the judicial council shall specify the categories or
7 types of cases over which district court appellate panels
8 shall have appellate jurisdiction. In such cases specified
9 by the judicial council as appropriate for assignment to
10 district court appellate panels, and notwithstanding sec-
11 tions 1291 and 1292, the appellate panel shall have exclu-
12 sive jurisdiction over district court decisions and may exer-
13 cise all of the authority otherwise vested in the court of
14 appeals under sections 1291, 1292, 1651, and 2106. A
15 district court appellate panel may transfer a case within
16 its jurisdiction to the court of appeals if the panel deter-
17 mines that disposition of the case involves a question of
18 law that should be determined by the court of appeals.
19 The court of appeals shall thereupon assume jurisdiction
20 over the case for all purposes.

21 “(d) Final decisions of district court appellate panels
22 may be reviewed by the court of appeals, in its discretion.
23 A party seeking review shall file a petition for leave to
24 appeal in the court of appeals, which that court may grant
25 or deny in its discretion. If a court of appeals is organized

1 into adjudicative divisions, review of a district court appel-
 2 late panel decision shall be in the division to which an ap-
 3 peal would have been taken from the district court had
 4 there been no district court appellate panel.

5 “(e) Procedures governing review in district court ap-
 6 pellate panels and the discretionary review of such panels
 7 in the court of appeals shall be in accordance with rules
 8 promulgated by the court of appeals.

9 “(f) After a judicial council of a circuit makes an
 10 order establishing a district court appellate panel service,
 11 the chief judge of the circuit may request the Chief Justice
 12 of the United States to assign 1 or more district judges
 13 from another circuit to serve on a district court appellate
 14 panel, if the chief judge determines there is a need for
 15 such judges. The Chief Justice may thereupon designate
 16 and assign such judges for this purpose.”.

17 (b) TECHNICAL AND CONFORMING AMENDMENT.—
 18 The table of sections for chapter 5 of title 28, United
 19 States Code, is amended by adding after the item relating
 20 to section 144 the following:

“145. District court appellate panels.”.

21 (c) MONITORING IMPLEMENTATION.—The Federal
 22 Judicial Center shall monitor the implementation of sec-
 23 tion 145 of title 28, United States Code (as added by this
 24 section) for 3 years following the date of enactment of this
 25 Act and report to the Judicial Conference such informa-

1 tion as the Center determines relevant or that the Con-
2 ference requests to enable the Conference to assess the
3 effectiveness and efficiency of this section.

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