

106TH CONGRESS
1ST SESSION

S. 253

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 Idaho, Montana, Oregon, Eastern Washington,
 19 and Western Washington shall be taken to the
 20 Northern Division.

21 (B) Appeals from the districts of Eastern
 22 California, Northern California, Guam, Hawaii,
 23 Nevada, and the Northern Mariana Islands
 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), except that
18 judges may be assigned to serve for specified, stag-
19 gered terms of 3 years or more, in a division in
20 which they do not reside. Such judges shall be as-
21 signed at random, by means determined by the
22 court, in such numbers as necessary to enable the
23 divisions to function effectively. Judges in senior sta-
24 tus may be assigned to regional divisions in accord-
25 ance with policies adopted by the court of appeals.

1 Any judge assigned to 1 division may be assigned by
2 the chief judge of the circuit for temporary duty in
3 another division as necessary to enable the divisions
4 to function effectively.

5 (4) PRESIDING JUDGES.—Section 45 of title
6 28, United States Code, shall govern the designation
7 of the presiding judge of each regional division as
8 though the division were a court of appeals, except
9 that the judge serving as chief judge of the circuit
10 may not at the same time serve as presiding judge
11 of a regional division, and that only judges resident
12 within, and assigned to, the division shall be eligible
13 to serve as presiding judge of that division.

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

25 (c) CIRCUIT DIVISION.—

1 (1) IN GENERAL.—In addition to the 3 regional
2 divisions specified under subsection (a), the Ninth
3 Circuit Court of Appeals shall establish a Circuit Di-
4 vision composed of the chief judge of the circuit and
5 12 other circuit judges in active status, chosen by lot
6 in equal numbers from each regional division. Ex-
7 cept for the chief judge of the circuit, who shall
8 serve ex officio, judges on the Circuit Division shall
9 serve nonrenewable, staggered terms of 3 years each.
10 One-third of the judges initially selected by lot shall
11 serve terms of 1 year each, one-third shall serve
12 terms of 2 years each, and one-third shall serve
13 terms of 3 years each. Thereafter all judges shall
14 serve terms of 3 years each. If a judge on the Cir-
15 cuit Division is disqualified or otherwise unable to
16 serve in a particular case, the presiding judge of the
17 regional division to which that judge is assigned
18 shall randomly select a judge from the division to
19 serve in the place of the unavailable judge.

20 (2) JURISDICTION.—The Circuit Division shall
21 have jurisdiction to review, and to affirm, reverse, or
22 modify any final decision rendered in any of the
23 court's divisions that conflicts on an issue of law
24 with a decision in another division of the court. The
25 exercise of such jurisdiction shall be within the dis-

1 cretion of the Circuit Division and may be invoked
2 by application for review by a party to the case, set-
3 ting forth succinctly the issue of law as to which
4 there is a conflict in the decisions of 2 or more divi-
5 sions. The Circuit Division may review the decision
6 of a panel within a division only if en banc review
7 of the decision has been sought and denied by the
8 division.

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

19 (4) EN BANC PROCEEDINGS.—Section 46 of
20 title 28, United States Code, shall apply to each re-
21 gional division of the Ninth Circuit Court of Appeals
22 as though the division were the court of appeals.
23 Section 46(c) of title 28, United States Code, au-
24 thorizing hearings or rehearings en banc, shall be
25 applicable only to the regional divisions of the court

1 and not to the court of appeals as a whole. After a
2 divisional plan is in effect, the court of appeals shall
3 not order any hearing or rehearing en banc, and the
4 authorization for a limited en banc procedure under
5 section 6 of Public Law 95–486 (92 Stat. 1633),
6 shall not apply to the Ninth Circuit. An en banc pro-
7 ceeding ordered before the divisional plan is in effect
8 may be heard and determined in accordance with ap-
9 plicable rules of appellate procedure.

10 (d) CLERKS AND EMPLOYEES.—Section 711 of title
11 28, United States Code, shall apply to the Ninth Circuit
12 Court of Appeals, except the clerk of the Ninth Circuit
13 Court of Appeals may maintain an office or offices in each
14 regional division of the court to provide services of the
15 clerk’s office for that division.

16 (e) STUDY OF EFFECTIVENESS.—The Federal Judi-
17 cial Center shall conduct a study of the effectiveness and
18 efficiency of the divisions in the Ninth Circuit Court of
19 Appeals. No later than 8 years after the effective date of
20 this Act, the Federal Judicial Center shall submit to the
21 Judicial Conference of the United States a report summa-
22 rizing the activities of the divisions, including the Circuit
23 Division, and evaluating the effectiveness and efficiency
24 of the divisional structure. The Judicial Conference shall
25 submit recommendations to Congress concerning the divi-

1 sional structure and whether the structure should be con-
 2 tinued with or without modification.

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

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

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

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

12 “(b) Unless otherwise provided by rule of court, a
 13 court of appeals or any regional division thereof shall con-
 14 sider and decide cases and controversies through panels
 15 of 3 judges, at least 2 of whom shall be judges of the
 16 court, unless such judges cannot sit because recused or
 17 disqualified, or unless the chief judge of that court cer-
 18 tifies that there is an emergency including, but not limited
 19 to, the unavailability of a judge of the court because of
 20 illness. A court may provide by rule for the disposition
 21 of appeals through panels consisting of 2 judges, both of
 22 whom shall be judges of the court. Panels of the court
 23 shall sit at times and places and hear the cases and con-
 24 troversies assigned as the court directs. The United States
 25 Court of Appeals for the Federal Circuit shall determine

1 by rule a procedure for the rotation of judges from panel-
2 to-panel to ensure that all of the judges sit on a represent-
3 ative cross section of the cases heard and, notwithstanding
4 the first sentence of this subsection, may determine by
5 rule the number of judges, not less than 2, who constitute
6 a panel.

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

18 “(d)(1) A court of appeals having more than 15 au-
19 thorized judgeships may organize itself into 2 or more ad-
20 judicative divisions, with each judge of the court assigned
21 to a specific division, either for a specified term of years
22 or indefinitely. The court’s docket shall be allocated
23 among the divisions in accordance with a plan adopted by
24 the court, and each division shall have exclusive appellate
25 jurisdiction over the appeals assigned to it. The presiding

1 judge of each division shall be determined from among the
2 judges of the division in active status as though the divi-
3 sion were the court of appeals, except the chief judge of
4 the circuit shall not serve at the same time as the presid-
5 ing judge of a division.

6 “(2) When organizing itself into divisions, a court of
7 appeals shall establish a circuit division, consisting of the
8 chief judge and additional circuit judges in active status,
9 selected in accordance with rules adopted by the court, so
10 as to make an odd number of judges but not more than
11 13.

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

24 “(4) The circuit division shall consider and decide
25 cases through procedures adopted by the court of appeals

1 for the expeditious and inexpensive conduct of the circuit
 2 division's business. The circuit division shall not function
 3 through panels. The circuit division shall decide issues of
 4 law on the basis of the opinions, briefs, and records in
 5 the conflicting decisions under review, unless the division
 6 determines that special circumstances make additional
 7 briefing or oral argument necessary.

8 “(e) This section shall apply to each division of a
 9 court that is organized into divisions as though the divi-
 10 sion were the court of appeals. Subsection (c), authorizing
 11 hearings or rehearings en banc, shall be applicable only
 12 to the divisions of the court and not to the court of appeals
 13 as a whole, and the authorization for a limited en banc
 14 procedure under section 6 of Public Law 95–486 (92 Stat.
 15 1633), shall not apply in that court. After a divisional plan
 16 is in effect, the court of appeals shall not order any hear-
 17 ing or rehearing en banc, but an en banc proceeding al-
 18 ready ordered may be heard and determined in accordance
 19 with applicable rules of appellate procedure.

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

23 (b) TECHNICAL AND CONFORMING AMENDMENT.—
 24 The table of sections for chapter 3 of title 28, United

1 States Code, is amended by amending the item relating
 2 to section 46 to read as follows:

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

3 (c) MONITORING IMPLEMENTATION.—The Federal
 4 Judicial Center shall monitor the implementation of sec-
 5 tion 46 of title 28, United States Code (as amended by
 6 this section) for 8 years following the date of enactment
 7 of this Act and report to the Judicial Conference such in-
 8 formation as the Center determines relevant or that the
 9 Conference requests to enable the Judicial Conference to
 10 assess the effectiveness and efficiency of this section.

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

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

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

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

23 “(b) An appeal heard under this section shall be
 24 heard by a panel composed of 2 district judges assigned
 25 to the district court appellate panel service, and 1 circuit

1 judge as designated by the chief judge of the circuit. The
2 circuit judge shall preside. A district judge serving on an
3 appellate panel shall not participate in the review of deci-
4 sions of the district court to which the judge has been ap-
5 pointed. The clerk of the court of appeals shall serve as
6 the clerk of the district court appellate panels. A district
7 court appellate panel may sit at any place within the cir-
8 cuit, pursuant to rules promulgated by the judicial council,
9 to hear and decide cases, for the convenience of parties
10 and counsel.

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

1 The court of appeals shall thereupon assume jurisdiction
 2 over the case for all purposes.

3 “(d) Final decisions of district court appellate panels
 4 may be reviewed by the court of appeals, in its discretion.
 5 A party seeking review shall file a petition for leave to
 6 appeal in the court of appeals, which that court may grant
 7 or deny in its discretion. If a court of appeals is organized
 8 into adjudicative divisions, review of a district court appel-
 9 late panel decision shall be in the division to which an ap-
 10 peal would have been taken from the district court had
 11 there been no district court appellate panel.

12 “(e) Procedures governing review in district court ap-
 13 pellate panels and the discretionary review of such panels
 14 in the court of appeals shall be in accordance with rules
 15 promulgated by the court of appeals.

16 “(f) After a judicial council of a circuit makes an
 17 order establishing a district court appellate panel service,
 18 the chief judge of the circuit may request the Chief Justice
 19 of the United States to assign 1 or more district judges
 20 from another circuit to serve on a district court appellate
 21 panel, if the chief judge determines there is a need for
 22 such judges. The Chief Justice may thereupon designate
 23 and assign such judges for this purpose.”.

24 (b) TECHNICAL AND CONFORMING AMENDMENT.—
 25 The table of sections for chapter 5 of title 28, United

1 States Code, is amended by adding after the item relating
2 to section 144 the following:

“145. District court appellate panels.”.

3 (c) MONITORING IMPLEMENTATION.—The Federal
4 Judicial Center shall monitor the implementation of sec-
5 tion 145 of title 28, United States Code (as added by this
6 section) for 8 years following the date of enactment of this
7 Act and report to the Judicial Conference such informa-
8 tion as the Center determines relevant or that the Con-
9 ference requests to enable the Conference to assess the
10 effectiveness and efficiency of this section.

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