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## *Why The Ninth Circuit Works: A Tribute To Judge Sidney R. Thomas*

The Honorable Morgan B. Christen

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## WHY THE NINTH CIRCUIT WORKS: A TRIBUTE TO JUDGE SIDNEY R. THOMAS

**The Honorable Morgan B. Christen\***

Thank you very much for that kind introduction, Judge Smith. And many thanks to the *Montana Law Review* and to the Deans of the law school for the invitation to join you this evening. It is always a pleasure to come to Montana, but my husband Jim and I are particularly happy to be here for this gathering in honor of Judge Sidney Thomas.

I must acknowledge Judge Randy Smith's heroic effort to drive more than six hours through an unseasonably late snowfall to get here from Pocatello, Idaho. Judge Smith is my morning walking buddy when we are in the same city at the same time. He is also a dear friend and wonderful colleague on the Ninth Circuit. This evening would not be the same without you, Judge Smith, so thank you for joining us. I consulted many people for this talk, but I owe special thanks to Judge Dana Christensen, Judge Don Molloy, and Martha Sheehy. All three were important sources and co-conspirators. Finally, I want to say that I am honored so many members of Montana's judiciary are present this evening.

As you just heard, I was a state court judge for ten years before being appointed to the Ninth Circuit, and for several of those years, I served as the presiding judge in Alaska's largest trial court. When I had that job, I paid close attention to reports showing the number of cases filed and the number closed in the various court locations for which I was responsible. It was a constant balancing act to allocate resources so the various court locations had what they needed to get their jobs done. I distinctly remember looking at the Ninth Circuit's statistics, all those years ago, and wondering how in the world the Circuit was able to handle its caseload, given the number of judgeships allotted to it.

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\* Judge, United States Court of Appeals for the Ninth Circuit.



The Ninth Circuit is the largest federal appellate court in our country. That is true whether the Circuit is measured geographically or by the size of its caseload. It handles over 21% of all federal appeals,<sup>1</sup> and yet it has just 29 active judgeships.<sup>2</sup>

It has been ten years since I was appointed to the Ninth Circuit, so I no longer have to wonder how the court accomplishes this feat. The answer is two-fold. The first part of the answer lies in the Circuit's case processing system, which is the product of years of innovations, experiments, and pilot projects. The system includes terrific staff attorneys who triage incoming appeals, assign weights to them, and group cases by issue to streamline the work done in chambers. When multiple appeals present the same issue, staff attorneys identify a lead case to ensure consistent treatment and to resolve the related cases as quickly as possible.<sup>3</sup> The system also includes mediators who settle, on average, over a thousand appeals each year.<sup>4</sup> By the way, those mediators make house calls, including to places like Alaska and Montana, so be sure to keep them in mind.

I appreciated the chance to answer questions about how the Ninth Circuit has adapted to handle its caseload at the law school this afternoon.

1. 2020 Annual Report, U.S. CTS. FOR THE NINTH CIR. 60 (2020), <https://perma.cc/585K-G3MX>.

2. 28 U.S.C. § 44(a).

3. Interview with Cathy Catterson and Molly Dwyer, Clerks of Court, Ninth Cir. Ct. of Appeals (Oct. 14, 2021). Ms. Catterson served as Clerk of Court for the Ninth Circuit Court of Appeals from 1985 to 2007, when she was selected to fill the newly created position of Circuit and Court of Appeals Executive. She remained in that post until her retirement on February 28, 2017. Public Information Office, *News Release: Ninth Circuit Executive Cathy Catterson to Retire*, U.S. CTS. FOR THE NINTH CIR. (Nov. 7, 2016), <https://perma.cc/K94L-RGMS>.

4. Mediation Statistical Report, U.S. CTS. FOR THE NINTH CIR. (internal statistics) (located on Court's intranet).

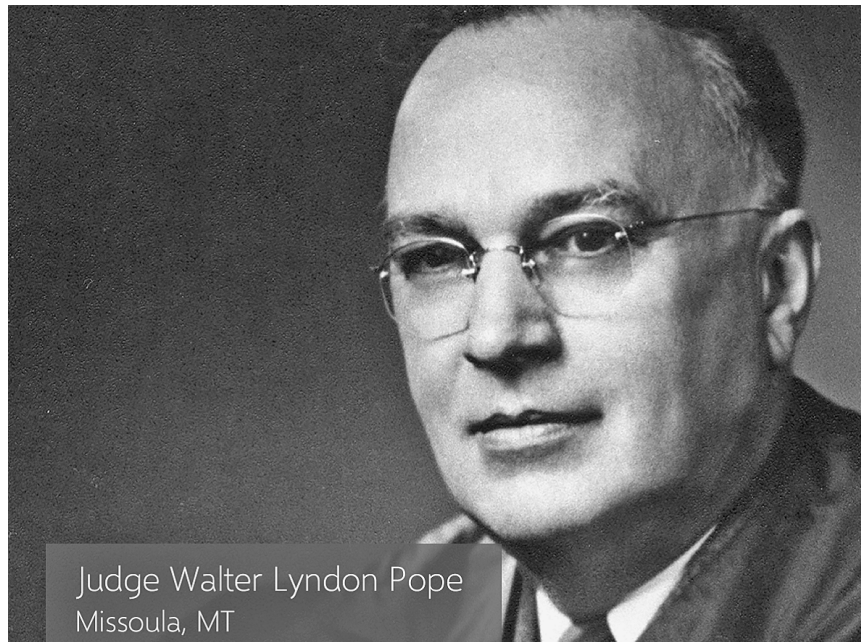
Tonight, I will talk about the *other* key part of the Ninth Circuit's success, which lies in a few truly remarkable leaders who dedicated their careers to creating the modern version of the Circuit.

It is my honor to be here to pay tribute to one of those leaders in particular and to do my best to explain the outsized role he has had on the Circuit Court. But adequately describing his contribution will not be easy because Judge Sidney Thomas has been indispensable to the Ninth Circuit Court of Appeals and his service spans over twenty-six years.

### I. INTRODUCTION

I begin by acknowledging how fitting it is that we have this conversation in Montana, because this state has seriously punched above its weight when it comes to producing chief judges of the Ninth Circuit Court of Appeals. I say that because Montana, like my home state of Alaska, contributes only a small part of the Ninth Circuit's caseload. About 1% of our cases come from Alaska, and about 2% come from Montana.<sup>5</sup> Yet three of the twelve people who have served as chief judge in the history of the Ninth Circuit have hailed from Montana.

Judge Walter Pope was the first of the Ninth Circuit's chief judges from Montana. He was from Missoula, and he served as chief in 1959. Judge Pope maintained his chambers and residence in San Francisco.



5. 2020 Annual Report, *supra* note 1, at 62.

The second chief from Montana was Judge Jim Browning, for whom this lecture is named. Judge Browning was raised in Belt, Montana; he served on the court for over 50 years and as chief for nearly twelve of those years.<sup>6</sup> Judge Browning was a kind and gentle soul—I am told that he had tea with Judge Pope every afternoon during the years they served on the court together—and the fact the Circuit’s San Francisco headquarters was named for Judge Browning speaks volumes about the esteem in which we hold him.



Judge Thomas delivered this address in Judge Browning’s honor in 2015. He spoke of Judge Browning’s kindness and described how Judge Browning took time to talk with people in and around the courthouse each day, checking in with them and really listening to hear how they were doing. The Circuit remains grateful to Judge Browning for many reasons, but especially for the model of collegiality that he established for all of us.

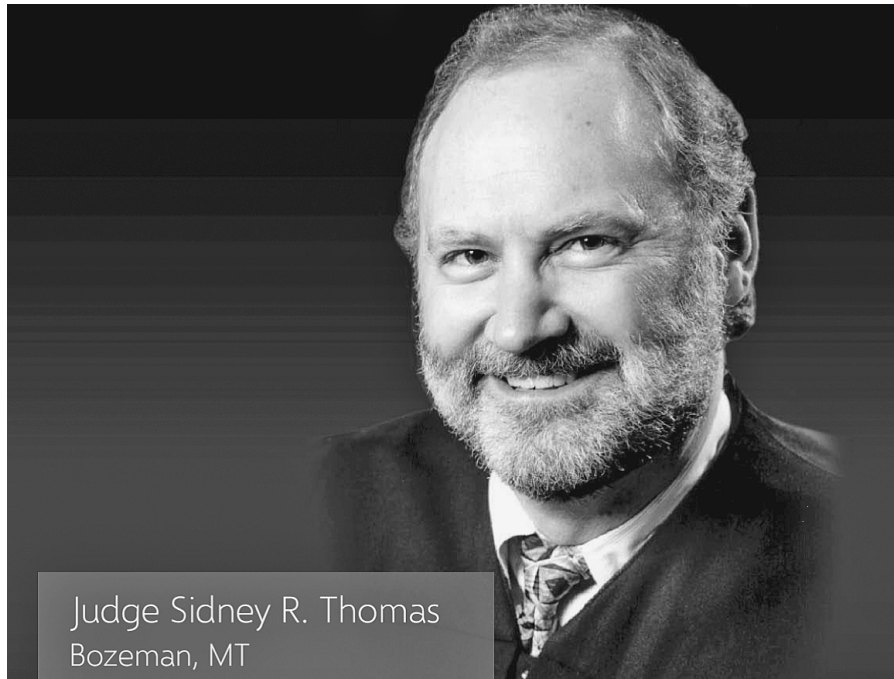
One day, back when Judge Don Molloy was still a law clerk, he was stunned to look up and see Chief Judge Browning standing in the doorway

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6. Judge Browning served as a member of the Ninth Circuit Court of Appeals from September 18, 1961, until his death on May 6, 2012, and as Chief Judge from June 30, 1976, until June 15, 1988. *Biographical Directory of Appellate Judges: Browning, James Robert*, FED. JUD. CTR., <https://perma.cc/F679-PAEQ>. In 1982, Congress set a term of seven years for the office and mandated that no one over 64 years of age, or who had previously served as a Chief Judge, is eligible to hold the office. 28 U.S.C. § 45 (2012) (amended 1982).

of his cubby-hole law clerk office in the old federal building in Billings. Chief Judge Browning was in Montana for his annual visit, and he came by to ask how the clerkship was coming along. Judge Molloy never forgot the time Judge Browning took to talk with him, and he beamed when he retold the story. “You know what?” he said, “Judge Browning was *just* like Sid Thomas. He was such a gentle man, and so full of integrity; he was just like Sid.” When Judge Thomas joined the Circuit, he and Judge Browning became fast friends. It was a friendship that Judge Molloy described as “a match made in heaven.”

That brings us to our third chief judge from Montana, Judge Sidney Thomas; and of course, he is the reason we are here tonight. Judge Thomas recently completed a seven-year term as Chief Judge, a job that requires a massive amount of travel, but he has always maintained his personal residence and his primary chambers in Billings.<sup>7</sup>



The judges and staff of the Ninth Circuit are deeply indebted to Judge Thomas for his service. As Chief, he shepherded the Ninth Circuit through an earthquake in Alaska, a typhoon in Saipan, multiple wildfires, and COVID-19.<sup>8</sup> Those are just the *natural* disasters that popped up on his

7. Interview with Sidney R. Thomas, Judge, Ninth Cir. Ct. of Appeals (Jan. 24, 2022).

8. John Roemer, *9th Circuit Chief Reflects on Accomplishments as Exit Looms*, THE DAILY J., Dec. 31, 2020.

watch. There were also three government shutdowns, cyber attacks, Twitter storms, and a ballistic missile alert in Hawaii. And years before he was Chief, Judge Thomas held other leadership roles from which he quite literally helped keep the Circuit glued together. He has improvised and innovated and done an amazing job of harnessing technology to improve the efficiency of court operations and the ability of the press and the public to access our proceedings. He is passionate about the court's mission and rarely misses a chance to engage in public outreach. In 2003, a Billings newspaper described Judge Thomas's appearance before a group of school teachers to explain a then-recent Ninth Circuit decision concerning the pledge of allegiance,<sup>9</sup> and he personally greeted and congratulated the high school students who participated in the Ninth Circuit's civics contests each year he served as Chief Judge.

## II. BACKGROUND

I first met Judge Thomas when he came to our home in Anchorage, Alaska in the summer of 2000. He was one member of a three-judge panel sitting in Anchorage that year. Judge Thomas was joined by Judge Dorothy Nelson, whom he introduced as our Circuit's "den mother,"<sup>10</sup> and the third member of the panel was Judge Stephen Reinhardt.<sup>11</sup> I remember thinking that the panel looked and acted like good friends, and I later learned that they were. Jim and I hosted the reception in our home because one of us was the lawyer representative for the Ninth Circuit that year. It was the only time I met Judge Thomas before I was appointed to the Ninth Circuit myself. Brief encounter or not, we received a handwritten thank you note from him after the reception, another note from him in 2002 congratulating me on being appointed to the superior court in Alaska, and yet another in 2009 after I had been appointed to the Alaska Supreme Court.

The notes he sent all those years ago were the first hint I had of Judge Thomas's ability to somehow keep track of the comings and goings of state and federal judicial officers in the nine western states. Judge Thomas became my mentor judge when I joined the Circuit, and that is when I learned firsthand why his attention to detail and unfailing courtesy are as legendary as his unmatched work ethic.

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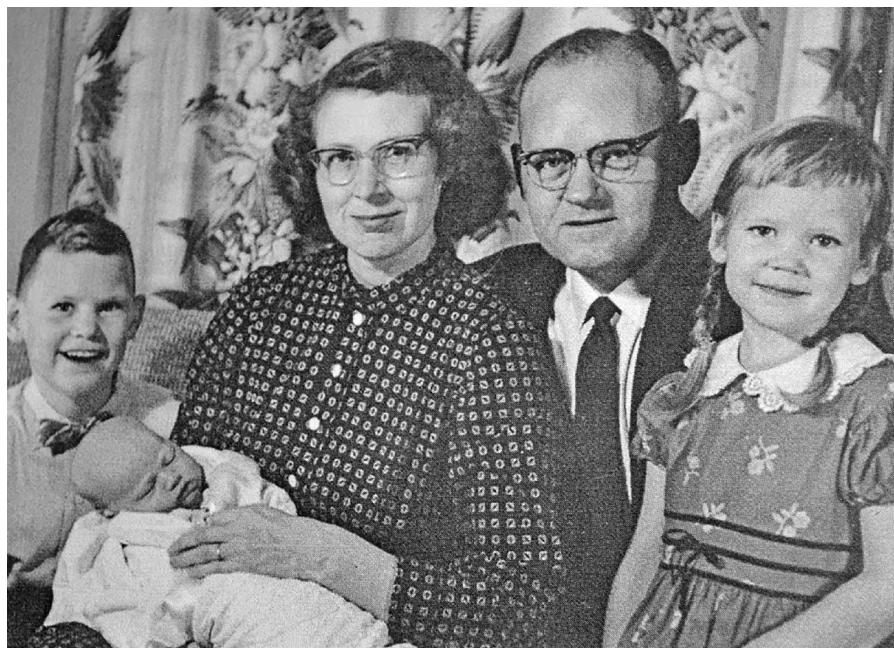
9. Judge Thomas began this talk to Montana teachers with a history lesson about the American flag. Susan Olp, *Judge Explains Pledge Appeal to Teachers*, THE BILLINGS GAZETTE, Oct. 16, 2003, at B1.

10. Judge Dorothy Nelson served in active status on the Ninth Circuit Court of Appeals from December 20, 1979, until January 1, 1995. She continues to serve as a senior judge. See *Biographical Directory of Appellate Judges: Nelson, Dorothy Wright*, FED. JUD. CTR., <https://perma.cc/C35C-TH7L>.

11. Judge Stephen Reinhardt served in active status on the Ninth Circuit Court of Appeals from September 11, 1980, until his death on March 29, 2018. See *Biographical Directory of Appellate Judges: Reinhardt, Stephen Roy*, FED. JUD. CTR., <https://perma.cc/G2XL-KMHY>.

A. *The Early Years*

Sidney Thomas was born in Bozeman in August of 1953 into a family that clearly valued education.



His mother Carol was from North Dakota. She was fluent in French, served at the American Embassy in Paris for two years after it was liberated in World War II, and won several writing competitions. Her writing prizes included a 1960 Ford station wagon, a matching children's car, and one of the first color television sets in Montana.<sup>12</sup> Judge Thomas is widely recognized as one of the most elegant writers on the Ninth Circuit, so it may be that he inherited that talent from his mother.

Judge Thomas's father was also very accomplished. He earned a doctoral degree in animal husbandry and was a Professor of Animal Nutrition for over thirty years. The Oscar Thomas Nutrition Center at Montana State University is named for him.<sup>13</sup>

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12. Carol Helgeson Thomas was a member of a scholastic honor society at North Dakota State University, where she took her degree in English. She taught high school and served as a principal before receiving an appointment to the Foreign Service. She later received a Master of Arts degree in English from Washington State University, joined the faculty at Western Carolina College, and won numerous national and regional writing competitions. *Obituary for Carol Helgeson Thomas*, THE BILLINGS GAZETTE, Jan. 1, 1999, <https://perma.cc/J9A3-RNFQ>.

13. Oscar Thomas received a bachelor's degree in agriculture from Oklahoma State University and served four years as a member of the Veterinary Corps of the United States Army before earning his Masters and Doctoral degrees. Dr. Thomas was selected by agriculture students as an outstanding



Judge Thomas is the big brother among three siblings who joke that black robes are the professional attire for all of them: his younger sister Susan is a minister, and his other sister, Karin, is a PhD-level choral director.

As a teenager, Judge Thomas attended public high school in Bozeman, where he studied French and endured his mother's correction of his pronunciation. He and his partner were among the top high school debaters, and he was elected student body president<sup>14</sup> and Secretary of State at Boys' State.<sup>15</sup> His friend Steve Corning was elected Governor of Boys' State that year, and Mr. Corning fondly remembers Judge Thomas as looking a little bookish at age sixteen or seventeen with black-rimmed glasses. Years later, when Judge Thomas was nominated to the bench, Mr. Corning recounted that he "has always been remarkable" and described Judge Thomas as "a living example that greatness often reveals itself at a young age."<sup>16</sup> Mr. Corning recalled, "It was amazing the way he could draft proposals and bills and resolutions and do it so quickly and intelligently. What an intellect! And he always had such a nice way about it."<sup>17</sup>

While he was an undergraduate at Montana State University, Judge Thomas worked on Max Baucus's 1974 congressional campaign and served the first of four terms as a student regent for Montana's university system.<sup>18</sup> He received his Bachelor of Arts degree in speech communications in 1975 and attended law school at the University of Montana from 1975 to 1978.<sup>19</sup> Professor Tobias praised what he described as Judge Thomas's wonderful efforts as a teaching assistant in an introduction to law course taught by Professor Tom Huff. According to Professor Tobias, Judge Thomas "answered all of the students' questions, corrected all of the teachers' mistakes," and allowed the teachers to take all the credit for a great class.<sup>20</sup>

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teacher four times and received a Fellow Award from the American Society of Animal Science. *Thomas's Death Evokes Sorrow*, EXPONENT, Apr. 26, 1983, at 6, <https://perma.cc/SE56-5JXR> (student newspaper of Montana State University, Bozeman, MT).

14. Clair Johnson, *Judge Sidney Thomas Praised by Friends, Colleagues*, THE BILLINGS GAZETTE, Nov. 23, 2014, <https://perma.cc/UZW3-R9TF>.

15. *Id.*

16. *Id.*

17. *Id.*

18. John Roemer, *Sidney Runyan Thomas, Next in Line as Chief Judge of the 9th U.S. Circuit Court of Appeals*, THE DAILY J., Jan. 5, 2010. Judge Thomas was the student member of the Montana Board of Regents of Higher Education while an undergraduate (1974–1975) and served three more terms as student regent while he was in law school (1975–1978). See *Board of Regents Past Members*, MONT. UNIV. SYSTEM, <https://perma.cc/4QP4-HBDB> (last visited May 5, 2022).

19. NOMINATION OF SIDNEY R. THOMAS TO BE U.S. CIRCUIT JUDGE, S. COMM. ON THE JUDICIARY, SUBMISSION FOR THE RECORD 950-52 (Oct. 24, 1995).

20. Carl W. Tobias is the Williams Professor of Law at University of Richmond School of Law. He taught at the University of Montana School of Law from 1975–1998. See Carl William Tobias, *Curriculum Vitae*, <https://perma.cc/F52Y-PXJQ>. Judge Thomas was Professor Tobias's teaching assistant in

Law student Thomas met Don Molloy—now District Court Judge Molloy—while both were law students here. It does not sound as though Judge Thomas was much of a partier in those days because his law school roommate wondered whether Judge Thomas was the person the professors were talking about when they explained the concept of “a reasonable man.”<sup>21</sup> But he was definitely very active during law school. He continued his service as the student regent during all three years of law school, co-chaired Law Week, won the Student Bar Association’s President’s Award, and graduated with honors.<sup>22</sup> By the way, I checked—and no one else has ever served as student regent for four years.<sup>23</sup>

The Law School’s placement office announced that Mr. Thomas would be available for hire in June of 1978 and specified that he preferred private practice in Western Montana.<sup>24</sup> Apparently, he had a change of heart because he accepted an offer to join the Moulton, Bellingham firm<sup>25</sup> and based his private practice in Billings.

### B. Private Practice

Judge Dana Christensen was then an associate at Moulton, Bellingham, and he was enlisted to help recruit Judge Thomas to join the firm. The two wound up working together there as associates for about three years.<sup>26</sup> Judge Christensen recalls that even as a new lawyer Judge Thomas “was an amazing writer and thinker” and a dream co-worker who was always willing to strategize, stress-test arguments, and edit briefs.<sup>27</sup> He was also a very loyal friend. In the days before hospitals provided beds for dads pulling all-nighters waiting for their children to be born, Judge Christensen was over-the-moon excited as he awaited the birth of his first child, but he knew he would have no place to go if the baby was born in the middle of the night. He took Judge Thomas’s offer to come over to his home, no matter the hour, after the baby was born. Judge Thomas greeted him on the doorstep, and Judge Christensen recalls that the three of them—Judge Thomas, Judge

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“Law and Society” in 1978–1979. Newsletter, *Class of 1978 Placement Issue*, at 18, UNIV. OF MONT. SCH. OF LAW (1978).

21. John Schwartz, *Long Shot for High Court Has Reputation for Compassion and Persuasion*, N.Y. TIMES NAT’L, May 6, 2010, at A15, <https://perma.cc/DH52-JUWX>.

22. *Class of 1978 Placement Issue*, *supra* note 20, at 18.

23. *Board of Regents Past Members*, *supra* note 18.

24. *Class of 1978 Placement Issue*, *supra* note 20, at 18.

25. Judge Thomas became an associate at Moulton, Bellingham, Longo and Mather in 1978 and was a senior partner at the same firm when he was appointed to the Ninth Circuit in 1996. Lorna Thackeray, *Potential Judge Deals With Complex Litigation*, THE BILLINGS GAZETTE, May 28, 1995.

26. Interview with Dana Christensen, Judge, U.S. Dist. Ct. for the Dist. of Mont. (Nov. 11, 2021).

27. *Id.*

Christensen, and Jack Daniels—celebrated together into the wee hours of the morning.<sup>28</sup>

In private practice, Judge Thomas hit the ground running. He specialized in commercial litigation, and future-Judges Molloy and Christensen agree that it took little time for him to become a magnet for complex litigation in Montana. His practice was exceptionally varied, and he litigated claims involving products liability,<sup>29</sup> mineral rights,<sup>30</sup> insurance bad faith,<sup>31</sup> secured transactions,<sup>32</sup> and toxic torts.<sup>33</sup> Several of his cases involved issues of first impression,<sup>34</sup> and he was appointed as trustee in approximately 1,500 bankruptcy cases.<sup>35</sup> As a trial attorney, Judge Thomas litigated forty-two cases to verdict or judgment and argued between ten and fifteen cases before the Ninth Circuit.<sup>36</sup>

Judge Thomas's work for media clients was both noteworthy and a harbinger of things to come. He litigated First Amendment issues for media clients that included CNN and NBC. In *Billings Gazette v. Justice Court of the Thirteenth Judicial District*,<sup>37</sup> Judge Thomas represented a newspaper denied access to a preliminary criminal hearing on the basis of a state statute that mandated closure of the courtroom at a defendant's request. He first petitioned the Montana Supreme Court on behalf of the newspaper.<sup>38</sup> When relief was denied there, he filed in federal district court and obtained a rul-

28. *Id.*

29. S. JUDICIARY QUESTIONNAIRE, SUBMISSION FOR THE RECORD 864 (Oct. 24, 1995). Judge Thomas represented public utilities and a pipeline company that sought damages when a rare form of PCBs was discovered in a sealant that the defendant manufactured between 1956 and 1962 and sold to the plaintiffs. Plaintiffs pressed claims for product liability, breach of warranty, and violation of the covenant of good faith and fair dealing.

30. *NRG Co. v. United States*, 31 Fed. Cl. 659 (1994); *NRG Co. v. United States*, 30 Fed. Cl. 460 (1994); *NRG Co. v. United States*, 24 Cl. Ct. 51 (1991). Judge Thomas represented plaintiffs seeking damages from the United States after passage of Public Law 96-401 cancelled the plaintiffs' mineral prospecting permits on the Northern Cheyenne Indian Reservation. The case was tried before the United States Court of Federal Claims, which held that a taking of property pursuant to the Fifth Amendment had occurred and the United States was liable for damages. The case involved significant and precedent-setting questions concerning the effect of Indian tribal sovereign immunity on private parties, and whether the United States could be held liable under the Fifth Amendment for cancelling a contract between a private party and an Indian Tribe at the request of the Tribe.

31. *Chubbuck v. Indus. Indem. Co.*, No. CV-86-146 PGH (D. Mont.), *aff'd*, 953 F.2d 1386 (9th Cir. 1992).

32. S. JUDICIARY QUESTIONNAIRE, SUBMISSION FOR THE RECORD 857 (Oct. 24, 1995).

33. *Id.* at 869-70.

34. *See, e.g.*, *St. Paul Fire & Marine Ins. Co., v. Am. Bank*, 33 F.3d 1159 (9th Cir. 1994); *see also* S. JUDICIARY QUESTIONNAIRE, SUBMISSION FOR THE RECORD 868.

35. Schwartz, *supra* note 21, at A15; Charley Roberts, *Auspicious Beginning: His Moderate Output Underscores Some Noteworthy Decisions*, LOS ANGELES DAILY J., July 28, 1997.

36. Roberts, *supra* note 35.

37. 771 F. Supp. 1062 (D. Mont. 1987).

38. S. JUDICIARY QUESTIONNAIRE, SUBMISSION FOR THE RECORD 867-68.

ing declaring the state statute unconstitutional.<sup>39</sup> In other First Amendment litigation, he secured important constitutional protections for the press that included striking down a Montana statute restricting exit polling as unconstitutional,<sup>40</sup> and establishing that newspapers have a protected privilege to report judicial pleadings.<sup>41</sup>

Some of his tort cases pitted his clients against clients represented by the future-Judge Don Molloy, who marveled at future-Judge Thomas's ability to schedule deposition trips to coincide with college and professional basketball games that they happily attended together. Though they engaged in some very high stakes litigation, including some that involved catastrophic damages,<sup>42</sup> Judge Molloy "honestly cannot recall him ever being angry." In Judge Molloy's estimation, listening was his "superpower," and he attributes Judge Thomas's success as a practitioner to his ability to listen to his clients, distill and synthesize their issues, and offer workable solutions.

Apparently, Judge Thomas never slept during the years he was in private practice because he found time to serve on several non-profit boards,<sup>43</sup> provided election night commentary on public television,<sup>44</sup> and most important of all, met his future wife, Martha Sheehy. The two married in Paris in 1992. Martha is a litigator with deep roots in Montana, and from the beginning, it was clear that she would be a significant presence in the bar and in community affairs.<sup>45</sup>

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39. *Billings Gazette*, 771 F. Supp. at 1064.

40. *Nat'l Broad. Co. v Colburg*, 699 F. Supp. 241 (D. Mont. 1988).

41. *Cox v. Lee Enters.*, 723 P.2d 238 (Mont. 1986).

42. *Miller v. Fallon County*, 721 P.2d 342 (Mont. 1986).

43. Judge Thomas is a former member of the board of directors and chair of the Strategic Planning Committee for St. Vincent Hospital. He also served as a director and president of the board for Montana Public Radio, and vice president of the board of Billings Community Cable Corporation, president of Eaglemount - Billings, which provides recreational opportunities for mentally and physically challenged individuals; President, Director, and Treasurer for the Alberta Blair Theater Corporation, Director of the Yellowstone Community Health Plan, Director of American Bank, and Director of Red Lodge Mountain, Inc. S. JUDICIARY QUESTIONNAIRE, SUBMISSION FOR THE RECORD 873; Interview with Sidney R. Thomas, Judge, Ninth Cir. Ct. of Appeals (Jan. 26, 2022).

44. S. JUDICIARY QUESTIONNAIRE, SUBMISSION FOR THE RECORD 850-52.

45. Martha is one of eleven siblings born to Rita and John C. "Skeff" Sheehy. Her father served in both houses of the Montana legislature and as an Associate Justice on the Montana Supreme Court. Rob Rodgers, *Retired Montana Supreme Court Justice Dies at 99*, THE BILLINGS GAZETTE, Apr. 7, 2017, <https://perma.cc/Y62H-MN3Z>. Martha started her career litigating at Moulton, Bellingham but she has had her own firm since 1999. She specializes in insurance coverage, media law and appellate litigation. She is a Fellow of the American College of Trial Lawyers, served as President, State Bar of Montana (1997-1998), and as Regent for the Montana University System (2014-2021). Martha is the recipient of numerous awards for her contributions to professional and civic organizations. *Recognition and Professional Affiliations: Martha Sheehy*, SHEEHY LAW FIRM, <https://perma.cc/7R4F-GDWB>.

### C. Confirmation to the Ninth Circuit

Twenty years after Judge Thomas worked on Max Baucus's first congressional campaign, Senator Baucus recommended him to serve on the Ninth Circuit Court of Appeals, even though Judge Thomas had not applied for the job.<sup>46</sup> Securing this nomination was a prize for Montana because the judge who had taken senior status on the Ninth Circuit was from California, and the expectation was that the seat would be filled by a nominee from California. But Senator Baucus saw things differently. He argued that Montana had been under-represented because it had not had a resident appointed to the Ninth Circuit since Walter Pope was appointed in 1947.<sup>47</sup>

Now, if you have been listening closely, you know that Judge Browning had been on the Ninth Circuit for about twenty-five years by the time Judge Thomas was nominated, and he had been Chief for nearly twelve of those years. But Senator Baucus reasoned that Judge Browning had been living and working in Washington, D.C., at the time he was appointed, and Judges Pope and Browning both resided in San Francisco after they joined the court. So although Judge Browning was a native *of* Montana, he had not really been appointed *from* Montana—at least not directly from Montana. As Senator Baucus saw it, Montana needed a resident on the court, and he urged President Clinton to rectify the situation.

Senator Baucus was clearly very persuasive, because by July of 1995, *The Billings Gazette* was reporting that the nomination was imminent.<sup>48</sup> There was just one problem: the senior senator from Montana, Senator Conrad Burns, was standing firm on his commitment to block all judicial nominees until the Ninth Circuit was split.<sup>49</sup> Senator Burns praised Senator Baucus' choice for the new circuit judge, but he urged that Judge Thomas should be confirmed to serve on a new Twelfth Circuit Court of Appeals, not on the Ninth.<sup>50</sup>

The editor of *The Billings Gazette* grew impatient as the stalemate wore on and complained: "Remember those signs that once marked city limits: Anywhere, U.S.A. 2,586 kind, generous people . . . and one curmudgeon."<sup>51</sup>

46. John Roemer, *Low-key Montana Jurist Set to Become 9th Circuit's Chief Judge*, THE DAILY J., Dec. 26, 2013.

47. Carl Tobias, *Sen. Baucus' Pick Absolutely Excellent*, THE BILLINGS GAZETTE, June 4, 1995.

48. Lorna Thackeray, *Thomas' Nomination Expected Soon*, THE BILLINGS GAZETTE, July 19, 1995, at 4C.

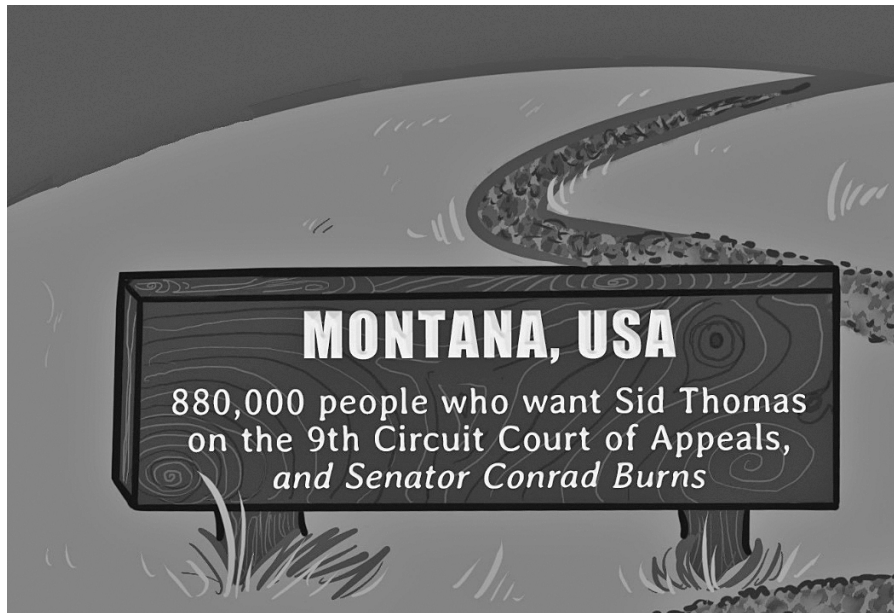
49. *Id.*

50. Lorna Thackeray, *Panel Gets Thomas Nomination*, THE BILLINGS GAZETTE, Oct. 25, 1995, at 4E.

51. Gazette Opinion, *Senator's Meddling Irksome; Sen. Conrad Burns' Stubbornness Endangers Thomas Nomination*, THE BILLINGS GAZETTE, June 28, 1995, at D1.



The editor suggested that Montana might put a similar sign up at each of its borders: “Montana, U.S.A. 880,000 people who want Sid Thomas on the U.S. 9th Circuit Court of Appeals . . . and Senator Conrad Burns.”



Senator Burns was outnumbered and he finally relented. Judge Thomas was confirmed by a voice vote on January 2, 1996.<sup>52</sup> He was 42 years old and one of fourteen judges nominated by President Bill Clinton whom some court watchers predicted would alter the character of the Circuit by bringing more “nuts-and-bolts legal experience and perhaps less ideology” than prior appointees.<sup>53</sup>

**Billings Gazette**  
WEDNESDAY  
January 3, 1996

SPORTS/1B  
Nebraska repeats, beating Florida 62-24

**FIESTA BOWL**

**BILLINGS FORECAST**  
36° CLOUDY  
10° Cloudy with flurries  
For your area forecast, see back page of section

c 110th year, No. 245 © 1996 Billings Gazette, a Lee Newspaper, 401 N. Broadway, Billings, Montana 59101. THE WEATHER SOURCE: (406) 657-1333

**THOMAS CONFIRMED**  
**Montanan joins court**

Senate acts quickly after Burns drops objection

By LORNA THACKERAY  
Of the Gazette Staff

Billings attorney Sidney R. Thomas, 42, was confirmed Tuesday to a seat on the U.S. 9th Circuit Court of Appeals, becoming Montana's first resident federal circuit judge in three decades.

He replaces California Judge Dorothy Nelson of Pasadena.

"Perhaps the most significant accomplishment in this whole process has been that Max [Baucus] was able to persuade President Clinton to give Montana the seat," Thomas told The Gazette Tuesday afternoon. "This was a California seat, not a Montana seat."

Sen. Baucus, D-Mont., recommended the Thomas nomination to Clinton last summer. At the time, Montana was the only state in the huge 9th Circuit without a resident circuit court judge.

His appointment and that of California nominee A. Wallace Tashima were approved by unanimous consent in the U.S. Senate about 10 a.m. EST in an unexpected turn of events.

"I had about an hour's notice of the Senate vote," Thomas, a University of Montana Law School graduate, said Tuesday. "I was surprised and certainly grateful."

Action on Thomas' nomination and those of others chosen to fill vacancies on the San Francisco-based appeals court had been postponed for months by Sen. Conrad

**LIFELINE**

Biographical information on Sidney R. Thomas:  
 ■ Age: 42  
 ■ Born: Aug. 14, 1953, Bozeman  
 ■ Home: Billings  
 ■ Occupation: attorney  
 ■ Spouse: Martha Sheehy  
 ■ Children: none  
 ■ Education: graduated from Bozeman Senior High School, 1971; bachelor's degree in education, Montana State University, 1975; law degree, University of Montana, 1978  
 ■ Employment: lawyer, firm of Moulton, Bellingham, Longo & Mather, Billings, 1978-present  
 ■ Military service: none  
 — The Associated Press

Sidney R. Thomas sits in his law firm's conference room.  
Quality photo by Larry Hooper  
(More on Thomas, Page 10A)

Judge Browning was delighted at news of the confirmation, and he greeted Judge Thomas with a bear hug and the Montana fight song, “Up with Montana, Boys, Down with the Foe.”<sup>54</sup> As it turned out, the song may have been an accurate reflection of the task that lay ahead: when Judge Thomas joined the court, there were four vacancies; less than two years later, ten of the court’s twenty-eight seats were vacant, the Chief Judge had been forced to postpone argument in 600 cases, and a significant backlog of appeals was mounting.<sup>55</sup>

There was some speculation that Judge Thomas and Martha might move to San Francisco after the investiture, but they were never tempted. Judge Thomas figured that every Ninth Circuit judge travels extensively given the size of the Circuit, and even though he was one of a few of the judges who had what he called “a much longer commute,” he reported that he managed it all with the help of technology. He did not find that the travel

52. Associated Press, *Appeals Court Judges Get OK, Montana Senator had Stalled Votes*, THE SACRAMENTO BEE Jan. 3, 1996.

53. Roemer, *supra* note 18.

54. Sidney R. Thomas, *Judge James R. Browning: His Legacy for Montana and the Future of the Federal Judiciary*, 76 MONT. L. REV. 207, 208, 222 (2015).

55. Lorna Thackeray, *Vacancies Hamper 9th Circuit*, THE BILLINGS GAZETTE, Aug. 7, 1997, at A1.

hindered his work unduly, and he agreed that it is important to have circuit judges living in their home states.<sup>56</sup> As Judge Thomas explained in a later interview, “Personally, I think it is a privilege to be able to live in Montana and work throughout the 9th Circuit.”<sup>57</sup>

Judge Thomas had taken a strong interest in law firm administration during the years he was in private practice, and when he joined the court, he volunteered to take on then-Chief Judge Hug’s toughest problem. This may have turned out to be a lesson in being careful what one wishes for because the Chief enlisted Judge Thomas to work on two committees to devise a strategy to eliminate the Circuit’s backlog,<sup>58</sup> appointed Judge Thomas as one of two circuit judges to serve on a national Appellate Advisory Committee, named Judge Thomas chair of what was then known as the Circuit’s Automation Committee (now the IT Committee), and added him to the Cameras in the Courtroom Committee.<sup>59</sup>

During his first year on the court, Judge Thomas wrote an opinion of first impression arising from the infamous Rodney King case. The opinion held that the City of Los Angeles was not required to pay for the defense of police officers who had acted with malice.<sup>60</sup> Judge Thomas was also assigned the task of writing a majority opinion in a high profile en banc case that year, *Jeffries v. Wood*.<sup>61</sup> *Jeffries* involved the Anti-Terrorism Effective Death Penalty Act, also known as “AEDPA.” The case was intensely litigated because the new statute significantly raised the bar for criminal defendants seeking post-judgment relief.<sup>62</sup> Judge Thomas’s en banc majority opinion held that the statute could not be applied retroactively to defendants who had been sentenced before Congress enacted the new legislation.<sup>63</sup> Several members of the court joined Judge Kozinski’s blistering dissent, but a majority of the judges on the panel agreed with Judge Thomas, and the United States Supreme Court later adopted his view.<sup>64</sup> Because committee

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56. Roemer, *supra* note 46.

57. Roemer, *supra* note 18.

58. The Long Range Planning Committee included Judges Wallace, Leavy and Thomas. The Ad Hoc Advisory Committee on Planning was chaired by Judge Schroeder.

59. In all, Chief Judge Hug appointed Judge Thomas to the following committees: member of the Circuit’s Advisory Committee on Planning (to address the Circuit’s backlog); chair of the newly created Court of Appeals Automation Committee and member of the Circuit’s IT Committee; member of the Administrative Office Human Resources Advisory Committee; member of the Administrative Office Advisory Committee on the Appellate Case Management System; member of the Conference Executive Committee; member of the Ad Hoc Committee to develop standards for courts of appeals to use cameras in the courtroom; and member of the Ad Hoc Committee to Review Visiting Judges.

60. *Allen v. City of Los Angeles*, 92 F.3d 842 (9th Cir. 1996).

61. 114 F.3d 1484 (9th Cir. 1997) (en banc).

62. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

63. *Jeffries*, 114 F.3d at 1499.

64. In *Lindh v. Murphy*, 521 U.S. 320 (1997), the United States Supreme Court held that 28 U.S.C. § 2254(d) may not be applied retroactively. *Id.* at 336.



work and the en banc opinion in *Jeffries* came on top of the normal caseload carried by every active Ninth Circuit judge, it is safe to say that Judge Thomas's first year on the bench was a very busy time.

Just four years after taking his oath, Chief Judge Schroeder asked Judge Thomas to serve as the Circuit's En Banc Coordinator, and he became the Circuit's coordinator of late-stage capital case appeals two years after that. Apart from the Chief Judge position, there are no other leadership roles on the Ninth Circuit that are as demanding, and Judge Thomas has served in both capacities—as En Banc Coordinator and as Capital Case Coordinator—for more than twenty years. To understand the magnitude of these positions and how critical they are to the smooth operation of the Circuit, it is necessary to briefly explain the en banc process.

#### D. Service as En Banc Coordinator

Ninth Circuit appeals are generally decided by three-judge panels, and those three judges must follow Ninth Circuit precedent unless it has been overruled by statute or by the United States Supreme Court.<sup>65</sup> Many people think of the en banc process as the reconsideration of opinions issued by three-judge panels, and that is an accurate description as far as it goes, but what makes the en banc process so critical is that it is the mechanism by which the Circuit may change its own precedent.<sup>66</sup> The extraordinary amount of time consumed by the en banc process is largely explained by the memos exchanged in the period leading up to each vote. Judges act as advocates in making and defending en banc calls, and they debate the pros and cons of whether a particular three-judge decision should be reheard in the memos exchanged during this period.<sup>67</sup> The memos can be as spirited as they are complex, and because the stakes are so high, the rules governing the en banc memo exchange period and voting process can sometimes become fodder for debate. When they do, the En Banc Coordinator's job is to resolve any differences. This sometimes requires acting as a mediator, and it sometimes requires acting as a referee. A judge must have a sterling reputation for fairness and impartiality to be selected as En Banc Coordinator. To do the job, the En Banc Coordinator must have keen administrative skills and round-the-clock availability.

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65. Typically, an en banc court is a court with all active judges present and participating. *En Banc Court*, BLACK'S LAW DICTIONARY (11th ed. 2019). But the Ninth Circuit uses a procedure unique among the circuits known as the "limited en banc court." Ninth Circuit en banc panels consist of eleven judges; the chief judge presides, and the other ten judges are drawn at random. 9TH CIR. R. 35-3.

66. See, e.g., *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc).

67. "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a case of exceptional importance." FED. R. APP. P. 35(a).

Judge Thomas has been unflappable in this role. He responds to his colleagues' inquiries by providing thorough answers grounded in the Circuit's rules and case precedent. When the rules do not address a particular situation, he recommends a course of action premised upon the court's precedent. His approach has ensured consistency and predictability, and when judges' interpretations of the rules differ, his ability to forge consensus is unmatched. Paul Keller is the Ninth Circuit staff attorney who works most closely with him to administer the en banc process. Despite some harried moments and many late hours, Paul echoes Judge Molloy's observation that he has never seen Judge Thomas lose his temper or treat anyone—staff or judges—with anything but courtesy and respect.

Judge Thomas has now served on approximately 225 eleven-judge panels reconsidering merits decisions en banc,<sup>68</sup> and, at last count, he has served as En Banc Coordinator on 728 en banc calls.<sup>69</sup>

#### *E. Service as Capital Case Coordinator*

Six years after his appointment, Judge Thomas also assumed the duties of the Circuit's Capital Case Coordinator of final-stage appeals in death penalty cases. Many people are surprised to learn the size of this part of the Circuit's caseload. As of January 2022, there were 942 inmates on death row in the states comprising the Ninth Circuit, 270 capital cases in district courts within the Circuit, and 71 capital cases pending in the Court of Appeals.<sup>70</sup>

The Capital Case Coordinator's job is to guide Circuit judges and the parties through the differing and complex procedures unique to these cases. The time constraints for these three-judge and en banc proceedings can be severe. The coordinator's communication with the Circuit's twenty-eight other active judges must be crystal clear to ensure that the parties have an opportunity to have their final points considered, and that sufficient time remains for the Supreme Court to review the Circuit's decision prior to the scheduled execution. Almost all of the work that goes into coordinating these appeals takes place without involvement by other members of the court. Margaret Epler is the staff attorney who works most closely with Judge Thomas on these cases, and she credits his unique combination of legal acumen, diplomacy, and reliably calm demeanor.

In the time available, this is the most complete description I can provide of the En Banc Coordinator and Capital Case Coordinator positions.

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68. Interview with Sidney R. Thomas, Judge, Ninth Cir. Ct. of Appeals (Jan. 19, 2022).

69. *Id.*

70. *State by State*, DEATH PENALTY INFORMATION CTR., <https://perma.cc/UD4D-4EKY>. To date, Judge Thomas has served as Capital Case Coordinator on twenty-six executions.

Both are critical to the court's operations, and Judge Thomas has served in both capacities for more than twenty years, longer than any other judge.

### *F. Raising a Family on the Court*

Judge Thomas is also unique among the judges on the Circuit because of the extent to which his family has been present and a part of the court. This has been true from the beginning because, in addition to launching a monumental judicial career in 1996, Judge Thomas also became a father that year. He and Martha welcomed their first son, Oscar, just twelve days after Judge Thomas's investiture. Their second son, Skeff, was born two years later.

While not unprecedented, it is certainly not typical for judges to start their families and their Ninth Circuit careers at the same time. Most judges are appointed when they are considerably older than forty-two, and their children are grown or in their late teens when they join the Circuit. The prospect of Martha continuing with her busy law practice and Judge Thomas meeting the demands of his job while commuting from Montana would have intimidated most people, but apparently not the Sheehy-Thomas team. As Martha recalls, "Sid studied babies in advance; he read everything and he had babies all figured out."<sup>71</sup> Though the details of his plan remained somewhat of a mystery, Martha recalls him saying, "We can do this!" and being certain that his plan would work.

In a time when it was fashionable for professionals to vow that they "left their work at the office," Judge Thomas adopted the opposite strategy and purposefully blended his professional duties and his home life. As one of his former clerks put it:

Over the course of a year being in close proximity to him, I never once heard him talk about work-life balance. That was the lesson . . . If you are engaged in important work that you enjoy, it isn't an imposition on your daily life. And if you have that "joi de vivre" that Judge Thomas has, chatting with people around you, lingering over a good meal, and relishing a good story aren't inappropriate or distracting in the workplace. I don't think Judge Thomas intended to teach me this, but he did so, and I'm very grateful to him for it.<sup>72</sup>

Some of his clerks from the early years remember being invited to join Judge Thomas and Martha for dinner at Walker's, a restaurant that was just one flight down from chambers. In an early demonstration of his technological prowess, Judge Thomas was known to take the baby monitor to the

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71. Interview with Martha Sheehy (July 9, 2021).

72. *Chief Judge Sidney R. Thomas: Bench Book - 25 Years*, U.S. CT. OF APPEALS FOR THE NINTH CIR. (entry from a prior law clerk in a collection of letters and messages sent to Judge Thomas for the celebration of his 25th anniversary on the Court).

dinner table so he and Martha could keep close tabs on Oscar while he slept upstairs in his crib.<sup>73</sup>

As the boys got a bit older, it took more than a baby monitor to keep things running smoothly, especially when Judge Thomas had to travel out of town. So Martha developed a routine to avoid tearful goodbyes: Oscar and Skeff rode with her to drop Judge Thomas at the airport, and then she took the boys on a fun outing. As Martha tells it, this worked out fine from the boys' perspective, and being the smart lads that they were, they filled in the blanks: (1) they knew their father was a person in a position of authority; (2) they knew they frequently dropped him at the airport to fly off for work; so (3), they deduced that their Dad was a pilot. Martha realized the boys' mistake when she learned that their friends and teachers all thought Judge Thomas was a pilot, and she is still not entirely sure that Judge Thomas ever corrected them.

Whether he actually memorized the flight schedules between Billings and every Ninth Circuit courthouse, Judge Thomas certainly left his colleagues with the impression that he had done so, and Oscar and Skeff recall him being present in Billings for school plays and sporting events. Judge Thomas flew back from interviewing with President Obama in 2010 for a seat on the United States Supreme Court in time to see Oscar play the part of an animated parrot in middle school; he made sure he was there for Oscar's rendition of *A Christmas Carol* and *The Wedding Singer*; and he scheduled court business so he could be in the bleachers or sitting on a folding chair at countless Montana venues for Skeff's baseball games, basketball games, and tennis matches.

Judge Hawkins and I experienced Judge Thomas's practice of blending work and home life when we went to Billings to hear oral arguments with Judge Thomas. After finishing our work at the courthouse, we all headed to Skeff's high school basketball game, where Judge Hawkins and I joined the fans in the bleachers—about half of whom seemed to be related to Martha in one way or the other—and we all cheered for Skeff's team.

As a teenager, Oscar was diagnosed with Type One diabetes and Judge Thomas dropped everything to be there during the emergency, to read everything there was to read about the condition, and to meet with Oscar's care providers. As Oscar explains it, his dad engrossed himself in the details and had done enough research to know that there was medical information the doctors were not discussing with the family. Judge Thomas encouraged the doctors to give Oscar all the tools he needed, and a doctor later told Oscar

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73. Interview with Brian Pomper, former law clerk to Judge Thomas. Mr. Pomper is now a partner in Akin Gump Strauss Hauer & Feld's Washington, D.C., office.

that he was one of the healthiest diabetics in the state as a result of his dad's prodding.

Oscar and Skeff grew up with the court, and though it surely required creative strategizing on their parents' part to juggle competing work and family commitments, it has been our delight to have Oscar and Skeff as part of the court family.

### G. Use of Technology

The first question Judge Thomas was asked at his Senate confirmation hearing was about his views on media and television access to the courtroom.<sup>74</sup> It was a prescient inquiry because, in one way or the other, he has been working on this since his days representing *The Billings Gazette*.

The Ninth Circuit's extensive use of technology to make court more accessible to the public and to bridge the Circuit's geographic expanse is a well-established tradition. It dates back to Judge Browning, who advocated for the Circuit to employ technology but never learned to use a computer himself. When Judge Browning edited his opinions by "cutting and pasting," he did it the old-fashioned way, with scissors and tape.<sup>75</sup> Judge Thomas adopted the opposite approach and extensively used technology to assist in his own work. He was among the first to jettison paper briefs in favor of an iPad and he used data analytics to identify bottlenecks in the court's processes that were causing delay.

Judge Thomas also worked hard to bring cameras into the courtroom. The Circuit held its first virtual oral arguments in 1998, and one of the first sets of virtual arguments was held with lawyers participating from Montana.<sup>76</sup> In 2003, the Circuit adopted a proposal developed by Judges Thomas and Kozinski to digitally record oral arguments for public distribution using desktop computers retired from other service.<sup>77</sup> The court established a YouTube channel to offer access to previously recorded arguments in 2012, and by 2013 the Circuit was live-streaming its proceedings, enabling the public and the press to see arguments as they happen in the Circuit's 13 courtrooms on the west coast, in Honolulu, and in Anchorage.<sup>78</sup> The publicly available archive on the Circuit's website now includes over

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74. NOMINATION OF SIDNEY R. THOMAS TO BE U.S. CIRCUIT JUDGE, *supra* note 19, at 836.

75. Thomas, *supra* note 54, at 218.

76. Nick Ehli, *Billings Lawyers Argue Case Before Judges in TV Experiment*, THE BILLINGS GAZETTE, Nov. 16, 1999.

77. Interview with Sidney R. Thomas, Judge, Ninth Cir. Ct. of Appeals (Feb. 3, 2022).

78. *Id.*

10,200 oral arguments that members of the public have accessed over 5.4 million times.<sup>79</sup>

The upshot of this innovation is that the public can watch live-streams of the Circuit court and counsel engaging in arguments that range from what the Constitution demands to what the most arcane regulations require. You are all welcome, and I encourage you, to visit any of our courthouses. But a thought I hope you will leave with this evening is that as long as you have a desktop, a laptop, or even a smartphone, you can listen to or watch the Ninth Circuit's arguments free of charge and without leaving your home. And that remarkable fact is largely due to Judge Thomas's persistent efforts to make the court's process more accessible to the public through the use of technology.<sup>80</sup>

#### H. *Service as Chief*

By the time Judge Thomas assumed the duties of Chief Judge in 2014, he had served on 10,670 appeals<sup>81</sup> and published 343 opinions and 47 dissents.<sup>82</sup> That work was as a member of the appellate court. The scope of Judge Thomas's duties and work-related travel changed dramatically when he became Chief because the Ninth Circuit includes not only the court of appeals but also the district courts, trial and appellate bankruptcy courts, and pretrial probation services. The Circuit's trial courts are located throughout the nine western states, the Northern Mariana Islands, and Guam. In all, the Circuit includes about 435 judicial officers and approximately 4,500 court staff.<sup>83</sup>

Given the size of the Circuit, it is easy to see why Judge Thomas's travel schedule was so very demanding during the years he was Chief. My curiosity got the better of me when I prepared these remarks, and I sent a text message to Judge Thomas asking how many frequent flier miles he had

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79. The video archive currently includes about 10,200 video files. As of March 24, 2022, the number of views on YouTube alone was 3,871,722. The total number of views on YouTube and on the Court's website is approximately 5,457,918. *The Ninth Circuit Court of Appeals*, YOUTUBE, <https://www.youtube.com/c/9thCircuit> (last accessed May 5, 2022).

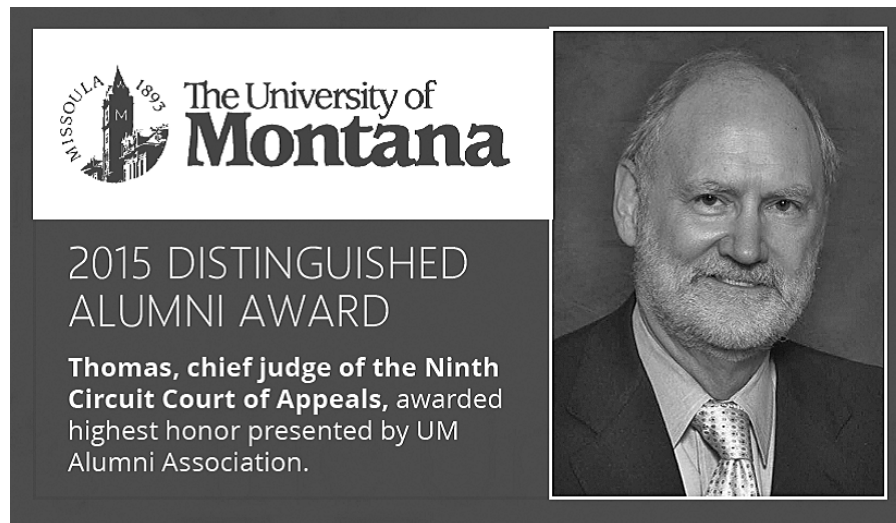
80. In 1990, the Judicial Conference of the United States authorized the Federal Judicial Center to undertake a study of the Conference's "no cameras" policy for federal courtrooms. The Conference ultimately chose not to alter the federal rule, but it adopted a resolution providing that "[e]ach court of appeals may decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject [to statutory and rule-based restrictions.]" *1990 Report of the Proceedings of the Judicial Conference of the United States*, at 104 (1990).

81. Clair Johnson, *He'll be Fabulous; Friends, Colleagues Praise Thomas as 'Remarkable,'* THE BILLINGS GAZETTE, Nov. 23, 2014.

82. *Case Statistics for Judge Sidney R. Thomas*, U.S. CTS. FOR THE NINTH CIR. (Apr. 21, 2022) (internal statistics) (listing the statistics of Judge Thomas at the time he became Chief Judge of the U.S. Court of Appeals for the Ninth Circuit).

83. Johnson, *supra* note 81.

accumulated. Characteristically, he responded right away: “2,289,068 miles.” I was still reeling from that total when I received another text from him a minute or two later. In it, Judge Thomas clarified the 2,289,068-mile total was just his total mileage accumulated on Delta Airlines, and he asked whether I had intended to inquire about his mileage on *other* airlines as well. I decided we might be better off not knowing the other totals.



The University of Montana Alumni Association selected Judge Thomas as a 2015 Distinguished Alumnus shortly after he became Chief Judge.<sup>84</sup> It was a well-deserved honor, to be sure, but also a somewhat prescient choice because Judge Thomas’s tenure as Chief coincided with a global pandemic that threatened to bring other parts of the public sector to a grinding halt. Fortunately, it was already routine practice for the Ninth Circuit to live-stream arguments when COVID-19 hit, and the appellate court barely missed a beat, holding nearly 1,000 oral arguments via Zoom in the last nine months of 2020 alone.<sup>85</sup> Chief Judge Thomas reached out to the bar and made clear that lawyers were welcome to participate in proceedings from their offices or homes. The Circuit’s IT staff walked lawyers through the steps necessary to set up audio and video links on their desktops, laptops, and tablets. Judge Thomas also acted quickly to make sure that the chief judges in the trial courts had what they needed to resume operations as soon as possible.<sup>86</sup>

84. *Past Distinguished Alumni Award Recipients*, UNIV. OF MONT. ALUMNI ASS’N, <https://perma.cc/5RHB-FGY2>.

85. Roemer, *supra* note 8.

86. Chief Judge Thomas convened the Judicial Council on March 24, 2020, and issued a policy directive as Chair of the Council recognizing the need for trial courts to adopt General Orders and local

### I. Keeping the Circuit Together

Any description of Judge Thomas's work on the Ninth Circuit must include mention of his efforts to keep the Circuit together in response to the many efforts that have been made to divide it.<sup>87</sup> Proposals to split the Circuit have usually been billed as ways to reduce delay, and Judge Thomas was on the receiving end of the Circuit's delayed processing time when he worked as a lawyer in the 1990s. So in his first year on the bench, he studied eight proposals that had been advanced to split the Circuit.<sup>88</sup> Though he had joined the court inclined to think the Circuit may need to be split, he concluded that none of the split proposals were viable structural alternatives that would fix the problem of delays.<sup>89</sup> Judge Thomas resolved that the Circuit needed to create a structure that would allow judges to spend most of their time considering and deciding cases rather than performing administrative tasks.<sup>90</sup> "The answer," he argued, "was to fill the vacancies, get to

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rules to immediately restrict access to courthouses. The directive provided flexibility for district and bankruptcy courts to conduct proceedings through electronic means. In the weeks that followed, district and bankruptcy courts adopted a host of mechanisms suited to their respective locations and practices and held settlement conferences, many different types of hearings, bench trials and even some civil jury trials in virtual or hybrid formats. Public Information Office, *News Release: Tech Savvy Ninth Circuit Leading the Way During COVID-19 Pandemic*, U.S. CTS. FOR THE NINTH CIR., May 1, 2020, <https://perma.cc/5R8C-9C77>.

87. A crushing backlog developed when the Circuit operated with ten vacancies for a four-year period. The year after Judge Thomas's appointment, the Circuit's median processing time (measured from notice of appeal to disposition) had grown to 14.4 months. But the Circuit retooled and adopted the recommendations made by Judges Thomas, Leavy and Wallace. By 1999, its processing time had fallen to 10.8 months. Between 2001 and 2003, it fell by another 14%, but a change adopted at the Board of Immigration Appeals resulted in an onslaught of immigration filings that increased the Circuit's annual filings from 10,375 in 2001 to 16,101 cases in 2005 and the Circuit's case processing time topped 19.4 months in 2008. The Chief Judge turned to Judge Thomas again, this time to chair a committee to restructure the Circuit's case processing system in light of the sharp increase in immigration and pro se filings. The committee's recommendations were implemented, and the median processing time was back down to 10.8 months by December 2019. Interview with Sidney R. Thomas, *supra* note 77; HEARING ON REVISITING PROPOSALS TO SPLIT THE NINTH CIRCUIT, S. COMM. ON THE JUDICIARY, SUBCOMM. ON OVERSIGHT AND THE COURTS (Oct. 26, 2005) (testimony of Circuit Judge Sidney R. Thomas, U.S. Court of Appeals for the Ninth Circuit).

88. Patrick Gregory, *Ninth Circuit's Thomas Uses iPad on Bench While Wrestling with Internet Era's Legal Issues*, 83 U.S.L.W. 233 (Aug. 12, 2014).

89. The White Commission concluded that reducing the size of the Circuit by division would not result in an improved median case processing time. See NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 2001, H. COMM. ON THE JUDICIARY, at 58 (July 23, 2002) (testimony of Circuit Judge Sidney R. Thomas, U.S. Court of Appeals for the Ninth Circuit) ("As to the first question, the Commission on Structural Alternatives for the Federal Courts of Appeal ("the White Commission") studied the subject of delay thoroughly in 1998 and concluded that circuit size was not a critical factor in appellate delay.").

90. *Id.* at 56 ("The best method, in my opinion, for delay reduction is aggressive and innovative case management and use of administrative efficiencies that economies of scale permit. The solution is not to divide resources and duplicate bureaucracies. We need to create a structure that allows judges to spend most of their time considering and deciding cases rather than performing administrative tasks.").



work on the [C]ircuit's backlog," and "continue to promote and experiment with time-saving procedures."<sup>91</sup>

In the following years, Judge Thomas testified repeatedly to committees and subcommittees of both houses of Congress, explaining why the various proposals were not feasible.<sup>92</sup> In a nutshell: because budgets for court operations are a function of the size of a circuit's caseload, the creation of a new circuit would not result in more resources to fund court operations. Instead, any split would leave the same number of cases to be adjudicated in the nine western states, but divided into two or three circuits with very expensive and redundant administrative overhead and bureaucracy. The Ninth Circuit's size means that it has the resources that other circuits do not, and those resources permit the Circuit to fund the very innovations that allow the Circuit to handle its caseload,<sup>93</sup> which is now heavy with self-represented litigants<sup>94</sup> and immigration cases.<sup>95</sup> These case management resources include circuit mediators, staff attorneys to screen out cases for which the court lacks jurisdiction and to ably present hundreds of pro se, immigration, and habeas cases for resolution by three-judge oral screening panels, and a court commissioner to resolve a wide variety of motions.<sup>96</sup> Judge Thomas has been tireless in explaining why splitting the Ninth Circuit would result in two or more circuits lacking adequate resources to fund the case processing system that is so critical to the Circuit's operations.

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91. Gregory, *supra* note 88.

92. HEARING ON REVISITING PROPOSALS TO SPLIT THE NINTH CIRCUIT, *supra* note 87 (testimony of Circuit Judge Sidney R. Thomas, U.S. Court of Appeals for the Ninth Circuit); EXAMINING THE PROPOSAL TO RESTRUCTURE THE NINTH CIRCUIT, S. COMM. ON THE JUDICIARY (Sept. 20, 2006) (testimony of Circuit Judge Sidney R. Thomas, U.S. Court of Appeals for the Ninth Circuit); BRINGING JUSTICE CLOSER TO THE PEOPLE: EXAMINING IDEAS FOR RESTRUCTURING THE 9TH CIRCUIT, H. COMM. ON THE JUDICIARY, SUBCOMM. ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET (Mar. 16, 2017) (testimony of Circuit Judge Sidney R. Thomas, U.S. Court of Appeals for the Ninth Circuit); S. COMM. ON THE JUDICIARY, SUBCOMM. ON PRIVACY, TECHNOLOGY AND THE LAW (Aug. 24, 2017) (testimony of Circuit Judge Sidney R. Thomas, U.S. Court of Appeals for the Ninth Circuit).

93. BRINGING JUSTICE CLOSER TO THE PEOPLE: EXAMINING IDEAS FOR RESTRUCTURING THE NINTH CIRCUIT, *supra* note 92 (testimony of Circuit Judge Sidney R. Thomas, U.S. Court of Appeals for the Ninth Circuit).

94. Approximately half of the Circuit's annual filings are now made by litigants who represent themselves, a dramatic shift in the time Judge Thomas has served on the court. 2020 Annual Report, *supra* note 1, at 60.

95. *Id.* (about 30.9% of all new filings in the Ninth Circuit involve immigration and other agency matters).

96. When the court awards fees, the appellate commissioner may determine the appropriate amount of fees pursuant to Circuit Rule 39-1, and pursuant to Circuit Rule 27-1, the appellate commissioner may review motions concerning appointment, substitution and withdrawal of counsel. The appellate commissioner may deny a dispositive motion, but may not grant one. *See* 9TH CIR. R. 27-1 n. (Cir. Advisory Comm. 2011).

*J. Service at the National Level*

Judge Thomas is a national leader in the federal judiciary, as well as a leader in the Ninth Circuit. One way this is apparent is that the Ninth Circuit had held oral arguments in Montana just once before he was appointed, and the Circuit has now had sittings in Montana twelve times.<sup>97</sup> Justices Byron White and Sandra Day O'Connor heard arguments with Judge Thomas in Montana, and Justices Ruth Bader Ginsburg, Elena Kagan, and Neil Gorsuch participated in moot courts and conference programs with Judge Thomas in other parts of the Circuit.

In addition to bringing the Ninth Circuit to Montana, Chief Judge Thomas served on the Judicial Conference of the United States, the national policy-making body for the federal judiciary.<sup>98</sup> Chief Justice John Roberts appointed Judge Thomas to the Judicial Conference's Information Technology Committee in 2009. After completing that six-year term, Judge Thomas became the Ninth Circuit's liaison to the Conference in his role as Chief Judge,<sup>99</sup> and in 2015, Chief Justice Roberts appointed Judge Thomas to the Conference Executive Committee.

I will not attempt to provide a comprehensive list of the projects Judge Thomas,<sup>100</sup> or Chief Judge Thomas,<sup>101</sup> worked on at the national level because the list is simply too long. But the best way to sum it up might be this: if the work had not been done, you would surely know it because the work has been vitally important to ensuring the integrity and accountability of the federal judiciary through the very choppy waters the courts have faced in the past few years—and members of the Conference Executive Committee agree that Judge Thomas dove into it. During his term, the Con-

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97. Johnson, *supra* note 81; Clair Johnson, *Crowd Turns Out For 9th Circuit Panel Hearing in Billings*, THE BILLINGS GAZETTE, Jan. 23, 2015, at A1.

98. The Judicial Conference of the United States was created by Congress in 1922 to frame policy guidelines for court administration. It derives its authority from 28 U.S.C § 331, which provides that the Chief Justice of the United States presides, and the Conference is comprised of the chief judge of each regional federal court, a district court judge from each circuit, and the Chief Judge of the United States Court of International Trade.

99. Public Information Office, *News Release*, U.S. CTS. FOR THE NINTH CIR. (Dec. 3, 2015).

100. Judge Thomas served on the Administrative Office Steering Committee for the Development of an Electronic Voucher Processing System, the Ad Hoc Committee on the Law Clerk Hiring Plan, and as a member of the Administrative Office Oscar (On-line System for Clerkship Application and Review) Working Group.

101. As Chief, Judge Thomas's other work for the Judicial Conference included improving workplace protections by assisting with revisions to the Rules for Judicial Conduct, Judicial Disability proceedings, and the Model Employment Dispute Resolution Plan. He also assisted with improvements to judicial security, including efforts to reduce judges' personal information from appearing on the internet. Of particular importance to the nine western states, he spearheaded an effort to revise the Judicial Conference's committee structure to articulate an express charge to address territorial, tribal, Native and indigenous issues. Judge Thomas also chaired a subcommittee for the Conference Executive Committee to review the Criminal Justice Act (Cardone Report).

ference strengthened the judiciary's cyber security in response to the Solar Winds cyber attack, formulated a plan for continued operations during the 2018–2019 governmental shutdown, and helped plan the response to COVID-19 so that trial and appellate court operations could continue without jeopardizing staff.

Members of the Conference Executive Committee agree that they turned to Judge Thomas time and time again, and the group gathered and thanked him when he completed his six-year term at the end of 2021. Chief Judge Jeffrey Howard of the First Circuit described Judge Thomas's contribution. Judge Howard wrote:

The truth is that there has been perhaps no one in the history of the executive committee who has given more of themselves than you have to ensure thoughtful, consistent, fair and forward-looking decision making for the good of the judiciary . . . You have pushed us when we needed to be pushed, and you have slowed us down when caution was the wiser course . . . These qualities, which you display without fail, are assuredly a part of what makes you one of the great judges of our time. They are certainly what make you the best colleague any of us could ask for.<sup>102</sup>

The judges and staff of the Ninth Circuit agree, and this final slide brings you their words, using some technology—which seemed appropriate—to paint a picture from the interviews and materials consulted for this talk. The largest font in this word cloud shows the words that were most frequently used by Judge Thomas's judicial colleagues, court staff, and current and former law clerks to describe him and their interactions with him despite the demands of his work:

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102. Chief Judge Jeffrey Howard, First Cir. Ct. of Appeals, Meeting of the Executive Comm. of the Judicial Conference of the United States.



struction projects to border wall construction projects); *Doe #1 v. Trump*, 957 F.3d 1050 (9th Cir. 2020) (affirming an order enjoining enforcement of a Presidential Proclamation suspending entry on immigrant visa unless an immigrant demonstrates possession of health insurance); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018) (affirming preliminary injunction enjoining Executive Order preventing sanctuary jurisdictions from receiving federal funds); *Patel v. Reno*, 121 F.3d 1277 (9th Cir. 1997) (holding that U.S. Consulate had no discretion to suspend actions on visa applications).

### B. Criminal Law

*United States v. Hernandez-Estrada*, 749 F.3d 1154 (9th Cir. 2014) (en banc) (standard for evaluating fair cross-section challenges to jury pools); *Lee v. Lampert*, 653 F.3d 929 (9th Cir. 2011) (en banc) (holding that a credible showing of actual innocence tolls AEDPA's statute of limitations); *Bull v. City & Cty. of San Francisco*, 539 F.3d 1193 (9th Cir. 2008) (pre-trial detainee strip search policy violated Fourth Amendment) (overruled in *Bull v. City & Cty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc)); *United States v. Comprehensive Drug Testing*, 513 F.3d 1085 (9th Cir. 2008) (in dissent, urged that the seizure of Major League players' medical records and drug test results violated the Fourth Amendment; on rehearing en banc, en banc court found Fourth Amendment violations in *United States v. Comprehensive Drug Testing*, 621 F.3d 1162 (9th Cir. 2010) (en banc)); *United States v. Milwitt*, 475 F.3d 1150 (9th Cir. 2007) (crime of bankruptcy fraud requires a specific intent to defraud an identifiable victim); *United States v. Boulware*, 470 F.3d 931 (9th Cir. 2006) (concurrency urging different approach to return to capital defense in a criminal tax evasion case, later adopted by the Supreme Court in *Boulware v. United States*, 552 U.S. 421 (2008)); *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003) (en banc) (holding that *Arizona v. Ring* applied retroactively; on remand from the Supreme Court, held in *Summerlin v. Shriro*, 427 F.3d 623 (9th Cir. 2005) (en banc), that counsel had a duty to investigate mental health evidence and court could not allow the defendant to waive presentation of mitigation evidence without assessing competency); *Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (en banc) (state violated *Napue* by presenting false testimony in a capital case); *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc) (state conviction for petty theft did not constitute an aggravated felony for federal sentencing purposes); *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998) (clarifying standards for granting federal evidentiary hearings in death penalty habeas cases. In a subsequent appeal, *Correll v. Ryan*, 465 F.3d 1006 (9th Cir. 2006), held that the evidentiary hearing established ineffective assistance of

counsel at the penalty phase); *Jones v. Wood*, 114 F.3d 1002 (9th Cir. 1997) (reversal was required by magistrate judge's failure to either hold hearing or independently review state court record in habeas case) (comeback case affirmed the grant of writ in *Jones v. Wood*, 207 F.3d 557 (9th Cir. 2000)); *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997) (en banc) (holding that the newly enacted Anti-Terrorism and Effective Death Penalty Act did not have retroactive effect. That holding was later affirmed by the Supreme Court in *Lindh v. Murphy*, 117 S. Ct. 2059, 2060 (1997)).

### C. Immigration

*Alam v. Garland*, 11 F.4th 1133 (9th Cir. 2021) (en banc) (single factor rule requiring Court of Appeals to sustain adverse credibility finding if supported by single ground violated REAL ID Act); *Cheneau v. Garland*, 997 F.3d 916 (9th Cir. 2021) (en banc) (immigrant could derive citizenship if his parent was naturalized and he thereafter began to reside permanently in United States); *Padilla v. Immigration & Customs Enforcement*, 953 F.3d 1134 (9th Cir. 2020) (affirming, in part, grant of preliminary injunction against the United States for failure to hold bond hearings for detained asylum applicants); *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (immigration detention statutes do not authorize Attorney General to incarcerate detainees for indefinite period); *Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858 (2002) (en banc) (BIA could not categorically refuse to provide a procedure for alien to tender evidence); *Hose v. INS*, 180 F.3d 992 (9th Cir. 1999) (en banc) (AEDPA did not deprive courts of subject matter jurisdiction over all immigration matters; however, IIRIRA divested the district courts of jurisdiction in exclusion cases, vesting jurisdiction solely in the courts of appeals); *Barahona-Gomez v. Reno*, 236 F.3d 1115 (9th Cir. 1998) (IIRIRA did not deprive courts of jurisdiction to consider an injunction against BIA for suspending actions on requests for suspension of deportation); *Magana-Pizano v. INS*, 152 F.3d 1213 (9th Cir. 1998) (to the extent IIRIRA removed federal court habeas jurisdiction, it violated the Suspension Clause) (on remand from Supreme Court, in *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999) held as a matter of statutory construction habeas jurisdiction was not removed); *Kalaw v. INS*, 133 F.3d 1147 (9th Cir. 1997) (IIRIRA removed court jurisdiction over discretionary decisions of Attorney General).

### D. Energy

*Cal. Pub. Utils. Comm'n v. FERC*, 879 F.3d 966 (9th Cir. 2018) (FERC improperly granted additive to utility for involuntary participation in transmission association); *Cal. Pub. Utils. Comm'n v. FERC*, 854 F.3d

1136 (9th Cir. 2017) (FERC did not act capriciously in calculating refunds by netting purchases and sales over hourly intervals); *MPS Merchant Servs., Inc. v. FERC*, 836 F.3d 1155 (9th Cir. 2016) (FERC reasonably interpreted tariff and protocol as prohibiting practices of false export, false load scheduling, and anomalous bidding); *California ex rel. Harris v. FERC*, 784 F.3d 1267 (9th Cir. 2015) (FERC could not predicate “just and reasonable” inquiry solely on the accumulation of market power under hub-and-spoke test); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 635 F.3d 1109 (9th Cir. 2011) (Nuclear Regulatory Commission had no duty under the Atomic Energy Act to disclose sensitive information); *Port of Seattle, Wash. v. FERC*, 499 F.3d 1016 (9th Cir. 2007) (FERC was required to consider new evidence of market manipulation in California and its potential ties to Pacific Northwest power shortages); *Public Utils. Comm’n v. FERC*, 456 F.3d 1025 (9th Cir. 2006) (granting in part and denying in part petitions for review based on FERC’s handling of the California crisis); *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004) (FERC’s decision to approve market-based tariffs in wholesale market for electricity did not violate the Federal Power Act); *Ass’n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158 (9th Cir. 1997) (BPA had authority to transmit nonfederal power to direct industrial service customers).

#### E. Tribal Law

*Big Sandy Rancheria Enterprises v. Bonta*, 1 F.4th 710 (9th Cir. 2021) (California permitted to collect cigarette taxes for off-reservation sales from a tribal corporation); *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014) (the Native American Graves Protection and Repatriation Act did not abrogate tribal sovereign immunity); *Pyramid Lake Paiute Tribe of Indians v. Nevada*, 724 F.3d 1181 (9th Cir. 2013) (Tribe had constitutional standing to Nevada State Engineer’s approval of water allocations); *K2 America Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024 (9th Cir. 2011) (federal jurisdiction did not exist over a lawsuit between two Montana corporations alleging state law claims arising from a dispute over lands held by the United States in trust for various Indian allottees); *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004) (DOI regulations excluding native Hawaiians from tribal recognition process for Indian tribes did not violate equal protection); *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) (tribal court lacked jurisdiction over personal injury action against railroad that was operating within its right of way); *Mont. Dep’t of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999) (as a separate sovereign, the State of Montana was not required to comply with tribal employment ordinance when repairing State highway crossing reservation); *Johnson v. Gila River Indian Cmty.*, 174

F.3d 1032 (9th Cir. 1999) (Indian Tribe possessed common-law immunity from federal court suit brought under the Indian Civil Rights Act alleging taking of property; tribal court remedies need not be exhausted if there is not a functioning tribal court); *Montana v. Gilham*, 127 F.3d 897 (9th Cir. 1997) (tribal court had no jurisdiction to enter judgment against the State of Montana); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997) (the principles of comity, not full faith and credit, govern whether a district court should recognize and enforce a tribal court judgment).

#### F. First Amendment

*Bello-Reyes v. Gaynor*, 985 F.3d 696 (9th Cir. 2021) (retaliatory arrest claim should be evaluated under *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); timing of immigration arrest and detention of non-citizen shortly after he exercised his First Amendment rights was highly suggestive of retaliatory intent); *Wood v. Ryan*, 759 F.3d 1076 (9th Cir. 2014) (death row inmate raised serious questions as to whether First Amendment right of access to governmental proceedings attached to accessing information as to the method of execution; vacated by Supreme Court in *Ryan v. Wood*, 573 U.S. 976 (2014)); *Norse v. City of Santa Cruz*, 629 F.3d 966 (9th Cir. 2010) (en banc) (city council meeting qualifies as a limited public forum for First Amendment purposes, and the City Council could not extinguish First Amendment rights by closing the public comment period); *United Bros. of Carpenters & Joiners of America Local 586 v. NLRB*, 540 F.3d 957 (9th Cir. 2008) (shopping mall's ban on union expressive activity violated First Amendment); *United States v. Biagon*, 510 F.3d 844 (9th Cir. 2007) (notice to the public required before closing court proceedings; district court did not abuse discretion in declining closure); *Empress LLC v. City & Cty. of San Francisco*, 419 F.3d 1052 (9th Cir. 2005) (sending letters to zoning administrator protected under First Amendment and the *Noerr-Pennington* doctrine); *Lieberman v. Fieger*, 338 F.3d 1076 (9th Cir. 2003) (attorney's references to psychiatrist as "Looney Tunes," "crazy," "nuts," and "mentally imbalanced" were protected as expressions of opinion in defamation action); *Phoenix Newspapers v. District Court*, 156 F.3d 940 (9th Cir. 1998) (news media had qualified right of access to court transcripts; established criteria for sealing court transcripts).

#### G. Election Law

*Davis v. Commonwealth Election Comm'n*, 844 F.3d 1087 (9th Cir. 2016) (Northern Mariana Islands constitutional provision restricting voting in certain elections to individuals of Northern Marianas violated the Fifteenth Amendment); *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366,



367 (9th Cir. 2016) (injunction pending appeal in Arizona election law challenge); *Feldman v. Ariz. Sec’y of State’s Office*, 842 F.3d 613 (9th Cir. 2016) (in dissent urging that Arizona election statutes violated Voting Rights Act; that position later adopted on rehearing en banc, but reversed by Supreme Court); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003) (punch card voting system violated Fourteenth Amendment) (overruled en banc in *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc)).

#### H. Disability Law

*Lake Washington Sch. Dist. No. 414 v. Office of Superintendent of Pub. Instruction*, 634 F.3d 1065 (9th Cir. 2011) (school district lacked statutory standing to challenge State of Washington’s compliance with IDEA’s procedural protections); *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842 (9th Cir. 2014) (failure to provide data prevented the parents from meaningfully participating in the creation of son’s individualized education program, thereby denying him a free appropriate public education); *Fichman v. Media Ctr.*, 512 F.3d 1157 (9th Cir. 2008) (directors of a non-profit organization or independent volunteer producers may be considered employees within the meaning of the Age Discrimination in Employment Act); *Savage v. Glendale Union High Sch.*, 343 F.3d 1036 (9th Cir. 2003) (school district was not immune from Americans with Disabilities Act suit under the Eleventh Amendment).

#### I. Section 1983 Actions

*Crowe v. Cty. of San Diego*, 593 F.3d 841 (9th Cir. 2008) (officers not entitled to qualified immunity in § 1983 suit alleging that juvenile confessions were coerced in violation of the Fifth Amendment); *Redding v. Safford Unified Sch. Dist. No. 1*, 504 F.3d 828 (9th Cir. 2007) (in dissent, arguing that a school strip search of a teenage girl was unconstitutional; holding adopted in part in *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009)); *Trevino v. Gates*, 99 F.3d 911 (9th Cir. 1996) (city council members were entitled to qualified immunity in suit asserting liability for reimbursing officers for punitive damage award); *Allen v. City of Los Angeles*, 92 F.3d 842 (9th Cir. 1996) (appeal arising from the § 1983 suit filed by Rodney King against Los Angeles).

#### J. Intellectual Property

*Hicks v. PGA Tour, Inc.*, 897 F.3d 1109 (9th Cir. 2018) (requirement that caddies wear bibs at tournaments did not violate their right of publicity); *Fox Broad. Co. v. Dish Network LLC*, 747 F.3d 1060 (9th Cir. 2014)

(advertising skipping software did not violate broadcaster's copyright); *Love v. Associated Newspapers, LTD*, 611 F.3d 601 (9th Cir. 2010) (in a case filed by Beach Boy Mike Love, held that the Lanham Act and California's right of publicity laws did not apply extra-territorially); *Yellow Cab Co. of Sacramento v. Yellow Cab of Elk Grove, Inc.*, 419 F.3d 925 (9th Cir. 2005) (setting the standard for determining generic marks in Lanham Act cases); *Murray v. Cable Nat'l Broad. Co.*, 86 F.3d 858 (9th Cir. 1996) (determination of likelihood of confusion may be made as a matter of law).

#### K. Environmental Law

*Washington v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803 (9th Cir. 2018) (affirmed a grant of preliminary injunction against NMFS arising out of damage to salmon from dam operations); *In re United States*, 884 F.3d 830 (9th Cir. 2018) (federal agencies and officials were not entitled to mandamus relief requiring district court to dismiss action alleging that government policies enabling carbon dioxide emissions from burning of fossil fuels contributed to climate change) (confirmed on second appeal in *In re United States*, 895 F.3d 1101 (9th Cir. 2018)); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) (Clean Air Act displaced federal common law, precluding claim for public nuisance based on climate change); *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166 (9th Cir. 2011) (no NEPA violation with use of genetically modified sugar beets).

#### L. Internet

*In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589 (9th Cir. 2020) (users plausibly alleged invasion of privacy in suit alleging that Facebook improperly used plug-ins to track logged-out users' browsing histories when they visited third-party websites); *Carafano v. Metrosplash*, 339 F.3d 1119 (9th Cir. 2003) (internet dating service entitled to statutory immunity from tort suit under the Communications Decency Act); *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (Communications Act prohibits franchising authority from imposing conditions on cable operator's provision of services).

#### M. Sports

*In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Anti-trust Litig.*, 958 F.3d 1239 (9th Cir. 2020) (affirming grant of an order enjoining the NCAA from enforcing rules restricting grant of education-related benefits to student-athletes); *Dawson v. NCAA*, 932 F.3d 905 (9th Cir. 2019) (holding that student-athletes are not employees entitled to protection under the Fair Labor Standards Act); *Miranda v. Selig*, 860 F.3d 1237 (9th

Cir. 2017) (business-of-baseball exemption to federal antitrust law precluded minor league players' antitrust action).

#### N. Second Amendment

*Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017) (California's regulatory scheme which imposed fees on firearms sales did not violate Second Amendment); *Peruta v. Cty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014) (in dissent, stating that California's and San Diego's regulatory scheme did not violate Second Amendment; rationale later adopted on rehearing en banc in *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc)).

#### O. Arbitration

*Munro v. Univ. of S. Cal.*, 896 F.3d 1088 (9th Cir. 2018) (claims alleging breach of fiduciary duties in the administration of ERISA plan were not subject to arbitration); *Greenwood v. Compucredit*, 615 F.3d 1204 (9th Cir. 2010) (Credit Repair Organization Act provided a non-waivable right to sue; thus, an arbitration clause in consumers' agreement with a credit repair organization was void); *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001) (Federal Arbitration Act did not preempt Montana law as to unconscionability of adhesion contracts); *Textile Unlimited, Inc. v. ABMH & Co.*, 240 F.3d 781 (9th Cir. 2001) (action to enjoin arbitration did not have to be brought in a judicial district designated in an arbitration clause).

#### P. Abortion Rights

*Tucson Woman's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004) (holding that an Arizona statute authorizing warrantless searches of clinics providing abortion violated Fourth Amendment; the statute's requirement of disclosure of medical records violated patient's informational privacy rights; question of fact as to whether the statute as a whole created an undue burden on women's abortion rights).

#### Q. Bankruptcy

*Cobb v. City of Stockton*, 909 F.3d 1256 (9th Cir. 2018) (failure to seek stay in bankruptcy court in challenge to Chapter 9 plan confirmation order renders case equitably moot); *Burton v. Infinity Capital Mgmt.*, 862 F.3d 740 (9th Cir. 2017) (creditor's counsel not entitled to quasi-judicial immunity for violating automatic stay); *Gladstone v. U.S. Bancorp*, 811 F.3d 1133 (9th Cir. 2016) (debtor's interest in term life insurance policy including secondary market value of policies recoverable); *Schultze v. Chandler*, 765 F.3d 945 (9th Cir. 2014) (legal malpractice action brought by creditors

committee was a “core proceeding” over which bankruptcy court had jurisdiction); *Anwar v. Johnson*, 720 F.3d 1183 (9th Cir. 2013) (no discretion under the Rules of Bankruptcy Procedure to retroactively extend deadline for filing nondischargeability complaints); *California v. Findley*, 593 F.3d 1048 (9th Cir. 2010) (costs of attorney disciplinary proceedings imposed by California State Bar Court fall within Bankruptcy Code’s discharge exception for governmental fines and penalties); *Balser v. Dep’t of Justice*, 327 F.3d 903 (9th Cir. 2003) (U.S. Trustees are entitled to quasi-judicial immunity); *Bonham v. Compton*, 229 F.3d 750 (9th Cir. 2000) (setting standards for substantive consolidation of bankruptcy cases); *Gruntz v. Cty. of Los Angeles*, 202 F.3d 1074 (9th Cir. 2000) (en banc) (automatic stay does not enjoin state criminal prosecutions, even if underlying purpose of the criminal proceedings is debt collection); *Hong Kong & Shanghai Banking Corp. v. Simon*, 153 F.3d 991 (9th Cir. 1998) (bankruptcy discharge injunction did not constitute improper extraterritorial application of United States laws); *United States v. Universal Life Church*, 128 F.3d 1294 (9th Cir. 1997) (IRS revocation of church’s tax-exempt status did not violate the automatic stay).

#### R. Miscellaneous

*United States v. Bacon*, 979 F.3d 766 (9th Cir. 2020) (en banc) (court had discretion not to order a new trial when confronted with non-harmless *Daubert* error); *Altera v. Commissioner*, 926 F.3d 1061 (9th Cir. 2019) (settling a question of the treatment of taxes of foreign corporate subsidiaries); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 914 (9th Cir. 2015) (online DVD-rental subscribers did not make sufficient showing of antitrust injury); *Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014) (setting the standard for reviewing due process challenges to state civil damage statutes); *Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007) (sustaining an award of painting ownership to the actress Elizabeth Taylor); *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003) (laborers entitled to compensation for time putting on safety gear, later affirmed by Supreme Court in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005)); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998) (clarified standards for granting class action certification).

