

Senator Dianne Feinstein
Statement for Subcommittee Hearing on
“Oversight of the Structure of the Federal Courts”
July 31, 2018

Good afternoon, and thank you for allowing me to speak on such an important topic – especially for my home state.

Today’s subcommittee hearing “Oversight of the Structure of the Federal Courts” is yet another partisan attempt to criticize the Ninth Circuit Court of Appeals and push for a split. Unfortunately, we have seen this argument raised many times – and each time it goes nowhere.

For good reason.

Whether by way of splitting the Ninth Circuit into two or adding judgeships, critics of the Ninth Circuit continue to advance the same misguided arguments for why a change is needed.

Last August, the subcommittee on Privacy, Technology, and the Law held a field hearing on splitting the Ninth Circuit. Yet, once the hearing was complete the record was clear that splitting the Ninth Circuit is opposed by the judges, the states it would impact, and would fail to address any concerns about caseload.

As I said last August, “[t]he simple fact is that calls by President Trump and Senate Republicans to split the Ninth Circuit are simply a political response to decisions they don’t like.” I stand by that statement, and I continue to oppose in no uncertain terms any and every effort to split the Ninth Circuit.

The statements, letters, and testimony offered last August provide a fulsome and clear basis to oppose any efforts to reorganize the Ninth Circuit. And while I will submit for the record this evidence, I also want to emphasize several key points that should finally put to rest the claims of those who want to split the Ninth Circuit.

I want to begin by addressing some statistics that are critical to understanding the Ninth Circuit.

First, those who want to split the Circuit argue the processing time is too slow – meaning the time it takes from when an appeal is filed to when a circuit court issues its decision in that case. In the past year, the median time from filing a notice of appeal to issuing an opinion was 12.3 months.

Meanwhile, in the D.C. Circuit, the median time from the filing of an appeal to a decision was 12.2 months, and in the First Circuit, it was 13.4 months. In other words, the Ninth Circuit is at the same pace as the D.C. Circuit and is faster than the First Circuit – which covers only Maine, New Hampshire, Massachusetts, and Rhode Island.

Let me say that again.

The Ninth Circuit is as fast as or faster than the D.C. Circuit and the First Circuit.

Importantly, these two Circuits handle among the smallest number of cases of any courts of appeals, while the Ninth Circuit handles the largest number of

cases. These statistics are produced by the nonpartisan Administrative Office of the U.S. Courts, and I'd like to submit their findings for the record.

The statistics also show the progress the Ninth Circuit had made in working through the backlog.

As of last August, the Ninth Circuit had reduced its processing time by 30 percent between 2005 and 2017, even though the Ninth Circuit is one of the few courts that regularly grants extensions for appellate briefings. I am pleased to note that according to Chief Judge Thomas, the Ninth Circuit has continued to reduce this backlog.

In short, as Ninth Circuit Chief Judge Sidney Thomas said last August: “Processing time is not related to circuit size.”

In addition, those on the right consistently argue that the Ninth Circuit is out of touch and that is demonstrated by its rate of being overturned by the Supreme Court. However, this too is not reflected by the facts.

The Ninth Circuit is not and has not been the most reversed circuit court in any of the last 14 Supreme Court terms — going all the way back to 2004. With the October 2017 term now complete, that streak continues.

According to data compiled by the website SCOTUS Blog, in the most recent Supreme Court term, three circuit courts tied for the most reversed. The First, Third, and Sixth Circuits all were reversed in 100% of the cases that the

Supreme Court granted. And it's worth noting that of 16 active judges on the Sixth Circuit, 11 were appointed by Republican presidents.

Next, those arguing for a split usually care about government resources and federal spending. However, when it comes to splitting the Ninth Circuit, they seem to ignore the cost to taxpayers and outright duplication a split would cause.

Specifically, adding new judges to the court will come at an enormous and unnecessary cost. Each new judgeship could cost up to \$34 million over the course of the judge's tenure.

In addition, as Chief Judge Thomas noted, creating a new Twelfth Circuit, headquartered in Phoenix, would cost taxpayers more than \$136 million. And constructing locations to hold hearings in other cities would add costs of up to \$2.5 million per location. Further, splitting the Ninth Circuit would create unnecessary administrative duplication, requiring taxpayers to fund new staff attorneys, case management systems, and even computer operations.

Finally, I want to discuss the widespread opposition to a split within the states that make up the Ninth Circuit. When the Subcommittee on Privacy, Technology, and the Law held a hearing last August on this same topic, the judicial, legal, and business communities made clear they were overwhelmingly opposed to splitting the Ninth Circuit.

Importantly, as the record shows, the vast majority of those most impacted by a split are opposed – from the judges on the court to the businesses in the states,

from state and local bar associations to dozens of organizations that represent teachers, workers, and those with disabilities.

Specifically, Chief Judge Thomas — who knows the Ninth Circuit better than anyone — has sent letters on behalf of 228 judges, all who opposed to a split.

In addition, last August, the Chief Judge himself submitted comprehensive and powerful testimony outlining the case against a split. I'd like to submit for the record both his testimony from the August hearing and a written submission that he has provided for the Committee's benefit today. I'd also like to submit statements and letters in opposition to the split from the businesses, bar associations, and other national, state, and local organizations who oppose splitting the Ninth Circuit.

I want to briefly recite some of the key points made by those who practice, live, and work in the Ninth Circuit.

Consider this letter from the Los Angeles Area Chamber of Commerce. As that organization highlighted, “[t]here is a significant advantage to the Court’s current structure from a business perspective. A ruling from the current Ninth Circuit creates one standard of federal law for the western states. A single federal appellate court for the West Coast minimizes the risk that the laws of intellectual property, maritime trade, labor relations, banking or other business matters will be different in major business hubs like Los Angeles, San Diego, Seattle and Phoenix.”

The State Bar of Montana took a similar position, adopting a resolution that states “a divided circuit would create uncertainty and unpredictability in the law

for business and citizens.” And so too did the Main Street Alliances of Oregon and Washington. These two organizations wrote that the businesses they represent “see no compelling reason to undermine the current court legal system.”

When viewed against the data and the facts, it is abundantly clear that efforts to split the Ninth Circuit or to add new judgeships are driven by only one thing — partisan politics. I oppose any split of the Ninth Circuit. And I will continue to do everything in my power to ensure that the Ninth Circuit remains the effective, efficient court that it has been for decades.