Testimony of

The Honorable Gerald Tjoflat

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PREPARED STATEMENT OF
THE HONORABLE GERALD BARD TJOFLAT
CIRCUIT JUDGE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BEFORE
THE SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS
OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

"IMPROVING THE ADMINISTRATION OF JUSTICE:
A PROPOSAL TO SPLIT THE NINTH CIRCUIT"

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Introduction

Mr. Chairman and members of the Committee, I am Gerald Bard Tjoflat of the United States Court of Appeals for the Eleventh Circuit. I am here today at your invitation to testify about a proposed split of the Ninth Circuit. I do not approach this issue with a political or personal agenda, but instead hope to offer an objective analysis of the disadvantages of a large court, based on my personal experience having served on the old Fifth Circuit when it had 26 active judges and 11 senior judges. Based on this experience-as well as my tenure on the much smaller Eleventh Circuit-it is my unequivocal belief that splitting the Ninth Circuit would be in the best interest of the our nation's great justice system.

The Ninth Circuit is one of thirteen circuits in the federal appellate system, yet hears one out of every five federal appeals. Its courts "sit in nine states and two territories ranging from the Rocky Mountains to the Sea of Japan and from the Mexican border to the Arctic Circle." "[A]s a land mass, the 9th circuit is comparable to all of Western Europe."

Since Congress first began giving serious consideration to splitting the Ninth Circuit over three decades ago, the problems facing the circuit have only grown worse. "In 1973, the ninth circuit was composed of 13 judges and received an annual caseload of approximately 2,300 filings. The Ninth Circuit has now mushroomed to 28 active circuit judges [and 22 senior judges], and the caseload has grown upwards of 8,000 appellate filings each year." The sheer size of the circuit--in terms of both population and judges--strongly counsels in favor of a split.

I. Previous Perspectives on Splitting the Ninth Circuit

Congress has carefully considered whether to split the Ninth Circuit for over thirty years. In 1972, Congress created the Commission on Revision of the Federal Appellate System (the "Hruska Commission"), which recommended that the Fifth and Ninth Circuits each be broken up into two separate circuits. Although the former Fifth Circuit was split into the present-day Fifth Circuit and the Eleventh Circuit, the Ninth Circuit remains unchanged. "The original problems that provided the impetus for these suggestions, however, have persisted and given rise to more recent efforts to reorganize the Ninth Circuit to ensure consistent and high quality decisionmaking."

Nearly a quarter of a century later, in 1997, Congress revisited the Ninth Circuit problem by creating the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by former Supreme Court Justice Byron White (the "White Commission"). Although the Commission did not formally recommend splitting the Ninth Circuit, it did suggest that the circuit be split into three essentially autonomous regional divisions. As the Ninth Circuit's Chief Judge pointed out, these recommendations essentially suggested the substantive equivalent of splitting the circuit. Under the White Commission's proposal, "The Ninth Circuit Court of Appeals would no longer function as one circuit court, amounting to a de facto split of the court of appeals."

What is all the more remarkable is that four Justices of the United States Supreme Court--enough to grant certiorari on the issue--have declared that the time has come to split the Ninth Circuit. Justice Kennedy, a former Ninth Circuit judge, best captured their sentiments in writing:

> [W]hat is striking is the relative absence of persuasive, specific justifications for retaining [the Ninth Circuit's] vast size. A court which seeks to retain its authority to bind nearly one fifth of the people of the United States by decisions of its three-judge panels . . . must meet a heavy burden of persuasion. In my view this burden has not been met.

The simple fact that a good number of Ninth Circuit judges, including its Chief Judge, oppose a split should not be given excessive weight in considering this issue. In the Federalist Papers, Madison recognized that there is a natural tendency for government officials "to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold." The notion of ceding jurisdiction is never one that comes easy to a court--we judges are human beings with a natural tendency to sometimes overlook our own limitations--which makes it all the more necessary for an impartial outside observer such as the United States Congress to recognize that the time has come to split the Ninth Circuit. Moreover, as former Governor Racicot of Montana pointed out, "[T]o argue that judges and attorneys are comfortable with the status quo is a position that . . . falls deaf on the ears of those who have been awaiting a decision from the [c]ourt for many months or years."

II. Population and Caseload

The Ninth Circuit, despite its admirable procedural innovations for dealing with a potentially crushing docket, faces a workload crisis. For example, in 2003, the Ninth Circuit had a staggering 12,872 case filings, up from 11,421 the year

before--a 12.7% increase. While these numbers are troubling enough, they become an especially distressing cause for concern when we realize that, for several years, the Ninth Circuit has had more case filings than terminations. For example, in 2002, 11,421 cases were filed in the Ninth Circuit, but only 10,042 cases were terminated, leaving a backlog of approximately 1,400 unresolved cases. The next year, in 2003, 12,872 cases were filed, but only 11,220 cases were terminated, leaving a backlog of approximately 1,600 cases in addition to the existing 1,400-case backlog from the year before, for a total of over 3,000 unresolved piled-up cases. Given the ever-increasing torrent of cases flooding in, it is unlikely that the Ninth Circuit will ever be able to catch up. The most likely outcome is that the Ninth Circuit will systematically be forced to spend most of its time resolving cases filed and argued several years before, to the detriment of more current cases.

It has been argued that the Ninth Circuit processes cases faster than other circuits. Such claims are not supported by the data:

> [T]he median time for resolution of an appeal in the Ninth Circuit is approximately fourteen months, the longest in the nation. Half of all appeals to the Ninth Circuit take more than two years. The majority of the time is consumed by court reporters and attorneys in record preparation and briefing; only 2.5 months of this time for orally-argued cases and .9 months for submitted cases are spent in judges' chambers. These statistics suggest that the circuit's problems of delay are directly related to the inordinate number of cases that the court's infrastructure must process.

According to the most recent statistics from the Administrative Office of the Courts, the Ninth Circuit's case disposition time has only grown longer. While the nationwide average appeal disposition time, from filing a notice of appeal to final disposition in the circuit court, was 25.9 months, the Ninth Circuit took an average of 30.6 months--that's over 2 1/2 years per case. Moreover, the Ninth Circuit was tied for being the second-slowest circuit in the nation (the slowest being the Sixth Circuit at 30.6 months per appeal).

A comparative look at the data is even more illuminating. "The Fifth and Eleventh Circuits have a total of twenty-nine authorized judgeships. In recent years, the two circuits combined have disposed of 50 percent more cases than the twenty-eight judges of the Ninth Circuit have resolved."

As the number of cases filed continues to increase, and the number of filings continues to dwarf the number of case terminations, case-decision times can only grow; time will serve only to exacerbate these problems. The Ninth Circuit's population is dramatically increasing. According to the United States Census Bureau, the population of the states comprising the Ninth Circuit (even excluding Guam and the Northern Mariana Islands) is currently over 56.1 million people. By 2025, this figure is projected to rise to 75.7 million people. Given its already-tremendous caseload, the Ninth Circuit cannot possibly hope to cope with the deluge of lawsuits such a dramatic demographic change will inevitably produce. The time to address this problem is now, before population pressures cause a true judicial emergency.

While the circuit has developed a number of procedural innovations to address its current docket, it is ill-equipped to handle the federal legal problems of 20 million additional people. It has been persuasively argued, however, that if part of the concern over the Ninth Circuit is based on its caseload, "simply dividing the circuit in two without increasing the judicial resources . . . does nothing at all to address the problem." While the gravamen of this objection is that, given a sufficiently high caseload, we eventually have to create new appellate judgeships, my fundamental point is that we are far better off adding judges to several smaller circuits than to add that same number of judges to a single already-large circuit. For the reasons discussed throughout this testimony, increasing the number of judges on a single court leads to a variety of inefficiencies and undesirable effects.

Moreover, as at least one commentator has pointed out, the workload on a court does increase based on the number of judges on that court. "Work whose volume depends on the size of the circuit arises from court administration and efforts to maintain the consistency of the circuit's law." Each judge, for example, is expected to keep abreast of recent circuit cases. The more judges there are on a court, the more opinions are written and so the greater the number of recent cases each judge must read, thereby taking up precious time. If the Ninth Circuit were split into two or three separate circuits, each judge would have to read a much smaller number of recent cases. It is particularly important for a judge to review her colleagues' work in order to ensure that they are not straying too far from the weight of circuit precedent, to be able to call for an en banc poll when they do, and to gain a familiarity with general developments in circuit law for her own opinions.

Another situation in which the number of judges on a court can have a tremendous impact on the efficiency with which cases can be resolved is in en banc proceedings. The effort required to coordinate a majority, concurring, and dissenting opinions increases exponentially with the number of judges. While the Ninth Circuit has attempted to alleviate this problem through the use of limited en banc rehearings, I discuss later why this solution is not

satisfactory. Consequently, even if we hold the number of federal appellate judges constant, judicial workload will decrease if we split them between two or three circuits, rather than keeping the Ninth Circuit together as an amalgamated whole.

Even putting aside the issue of the judges' workload, a circuit split would make much more sense from an administrative point of view. A single jumbo circuit will require a much larger support apparatus than two reasonably sized circuits. As cases and judges continue to be added to the Ninth Circuit, we will need not only more support employees (staff attorneys, clerks, record handlers, etc.) to do actual work, but additional layers of bureaucrats and supervisors will also be necessary simply to coordinate and supervise the work of others, rather than actually help process any cases. Such additional oversight and employee-management mechanisms would not be necessary if the Ninth Circuit were split into two or more smaller circuits with less employees in each.

III. Collegiality

Perhaps one of the most important factors that determine the efficiency with which a court can operate as well as the quality of its ultimate product is the degree to which the judges on that court enjoy a high degree of collegiality with each other. As former Attorney General Griffin Bell points out, "[W]hen a court becomes too large, it tends to destroy the collegiality among its members . . . ." As the Senate Judiciary Committee has already recognized, "The more judges that sit on a circuit, the less frequent a particular judge is likely to encounter any other judge on a three-judge panel. Breakdown in collegiality can lead to a diminished quality of decisionmaking."

I explained the importance of collegiality in my A.B.A. Journal article entitled More Judges, Less Justice, "In a small town, folks have to get along with one another. In a big city, many people do not even know, much less understand, their neighbors. Similarly, judges in small circuits are able to interact with their colleagues in a much more expedient and efficient manner than judges on jumbo courts." Because appellate judges sit in panels of three, it is critically important that a judge writing an opinion be able to "mind-read" his colleagues. The process of crafting opinions can be greatly expedited if a judge is aware of the perspectives of the other judges on the panel so that he can draft an opinion likely to be amenable to all of them. In a smaller circuit, where the judges know each other--and each other's judicial philosophy and predispositions--the process of drafting opinions likely to attract the votes of the other judges on the panel is greatly simplified.

In a larger circuit, in contrast, the odds are good that you will be sitting on a panel with two strangers (particularly once senior judges, visiting judges, and district judges sitting by designation are taken into account) whom you have never worked with before. "[B]ecause there are so many Ninth Circuit judges, it is conceivable that years could go by between the time when Judge A had last sat on a calendar or screening panel with Judge B. A number of senior and active judges may never have sat on a regular or screening panel with the junior judges appointed in the 1990s." Becoming acclimated with the personalities, views, and writing styles of an unending succession of strangers is much less efficient than working with a smaller group of colleagues who are better known to you. Additionally, as Judge Wilkinson has pointed out, collegiality leads to better group decision-making. "[A]t heart the appellate process is a deliberative process, and . . . one engages in more fruitful interchanges with colleagues whom one deals with day after day than with judges who are simply faces in the crowd. Collegiality personalizes the judicial process. It contributes to the dialogue and to the mutual accommodations that underlie sound judicial decisions." Close interpersonal relationships facilitate the creation of higher-quality judicial opinions. Those relationships also form the basis for interaction and continued functioning when a court faces the most emotional and divisive issues of the day. Furthermore, the close ties that can be forged on a smaller court also allow you to build trust in your colleagues. For example, in a small circuit where the judges know each other well, if one judge declares that he reviewed the record in a particular case and feels that an error is (or is not) harmless under the circumstances, another judge might feel entirely justified in relying upon that assessment, rather than going through the immensely time-consuming task of reviewing thousands of pages of trial transcript and dozens of boxes of pleadings and exhibits in order to come to the same conclusion himself. If two judges do not know each other and are unfamiliar with each others' judgment, work habits, or style, they are not likely to exhibit such reliance and would be prone to needlessly reproducing each others' efforts.

The benefits of a small court are perhaps most evident when dealing with emergency applications for relief, such as when a litigant seeks an emergency stay of a district court order. Although such applications are considered by a three judge panel, typically only one judge is able to have access to the full record at a time. Because the record tends to be voluminous, there is not always time for all three judges to fully review it in-depth. Additionally, because emergency motions can arise at literally any time, not all three judges are always in a position where they can immediately review it. In such cases, the rapport and trust that comes from working together in a small court often allows you to place great stock in the judgment and assessments of your colleagues, thereby allowing the court to handle such emergency matters expeditiously.

Conversely, when you work with another judge repeatedly, you also get to know her particular inclinations, and are able to identify arguments she may systematically overlook, and are aware of her interpretations of particular doctrines with which you might disagree. Thus, panel judges faced with an emergency petition are familiar with the types of errors their colleagues are most likely to make. This allows judges to prevent mistakes that might otherwise go unrecognized by allowing them to focus primarily on these potentially divisive issues.

My concerns with large courts are drawn from personal experience. Having served on both the old (pre-split) Fifth Circuit as well as the Eleventh Circuit, I can definitively attest to the fact that the entire judicial process--opinion writing, en banc discussions, emergency motions, circuit administration, and internal court matters--runs much more smoothly on a smaller court. The Eleventh Circuit has steadfastly opposed efforts to increase the size of the court precisely to avoid the problems experienced by the Ninth Circuit.

IV. Consistency and Clarity of Precedent

Another regrettable effect of the Ninth Circuit's size is that it leads to inconsistencies within, and uncertainty about, its caselaw. Each judge necessarily brings to the bench her own predispositions and judicial philosophy, and exerts (to a greater or lesser degree) her own "gravitational pull" on the law of the circuit. With twenty-eight judges, Ninth Circuit law is being pulled in twenty-eight somewhat different directions. This contributes to litigants' uncertainty over how matters not squarely addressed by precedent will be handled. It also creates what Justice Kennedy has termed an "unacceptably large risk of intra-circuit conflicts or, at the least, unnecessary ambiguities." With so many panels and judges handling potentially similar issues, the potential for inconsistent dispositions dramatically skyrockets. Kennedy explained, "The risk and uncertainty increase exponentially with the number of cases decided and the number of judges deciding those cases. Thus, if Circuit A is three times the size of Circuit B, one would expect the possibility of an intra-circuit conflict in the former to be far more than three times as great as in the latter."

The sheer number of possible panel combinations on the Ninth Circuit is itself a good indication as to the uncertainty and dramatic potential for inconsistent rulings in a large circuit. Even putting aside senior judges and district or visiting judges sitting by designation, with 28 active judges, there are 19,656 possible three-judge panel combinations. This makes it practically impossible for the same three-judge panel to ever reconvene. For the past several years, the Ninth Circuit has been requesting an additional 10 active judges, for a total of 38; this would raise the number of possible panel combinations to 50,616. It is virtually impossible for a court to attempt to maintain any degree of coherence or predictability in its caselaw when it speaks with that many possible voices.

Moreover, while a "case on point" is the gold standard for attorneys, a circuit's law can also be quite confusing and overwhelming when there are simply too many cases on point. Having so many judges produce so many opinions that make similar points in slightly different ways undermines--rather than reaffirms--certainty, "creating incentives to litigate that do not exist in jurisdictions with small courts. . . . Individuals find it more difficult to conform their conduct to increasingly indeterminate circuit law and suffer higher litigation costs to vindicate the few remaining clear rights to which they may cling." While the Ninth Circuit has taken several admirable steps in an attempt to remediate this distressing problem, the best long-term solution is simply to split the circuit.

Interestingly, many opponents of a split have used different concerns about consistency as one of their major reasons for supporting the continued existence of a single jumbo circuit. It has been argued that "[h]aving a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with other nations on the Pacific Rim, is a strength of the circuit that should be maintained." Such arguments overlook the crucial point that Senator Slate Gorton made during the previous hearings on this issue--that the East Coast already has its major port cities in separate circuits, with no detrimental effects:

I look at that map . . . and I see the port of Boston in the first circuit, the port of New York in the second circuit, the port of Philadelphia in the third circuit, and the port of Baltimore in the fourth circuit. Baltimore and Boston are closer than any of the cities described in the ninth circuit are to one another. I don't think we have a disaster in admiralty law and in foreign commerce because there are four circuits on the northern part of the Atlantic coast . . . .

Thus, to the degree consistency in the law is an important value to us, it counsels in favor of splitting the Ninth Circuit.

V. En Banc Review

One of the most obvious deficiencies with the size of the Ninth Circuit is that it essentially precludes en banc review. An en banc hearing is one in which all the judges of a circuit come together to speak definitively about a point of law for that circuit. This occurs primarily when multiple panels issue conflicting opinions, a longstanding precedent needs

to be reconsidered in light of changed circumstances, or a present-day panel simply errs.
Because of the crucial role en banc hearings play in maintaining uniform, coherent circuit law, it is important that each judge of the circuit have a voice in the proceedings. The Ninth Circuit is the only circuit in the nation in which the majority of circuit judges are actually denied the opportunity to participate in most en banc hearings. Due to its size, the Ninth Circuit has been forced to resort to "limited" or "mini" en banc sessions, in which a panel of 11 judges speak for the circuit. Due to these "mini" en bancs, a minority of judges "definitively" determines the law for the Ninth Circuit. "Technically, a mini en banc decision may be reheard by all twenty-eight judges . . . but such a full hearing has not been granted since the mini en banc was authorized in 1978."
The use of limited en banc panels has been roundly criticized. Justice O'Connor wrote, "Such panels, representing less than one-half of the authorized number of judges, cannot serve the purposes of en banc hearings as effectively as do the en banc panels consisting of all active judges that are used in the other circuits." She also observed that, in 1997, while the Ninth Circuit reviewed only 8 cases en banc, the Supreme Court granted oral arguments on 25 Ninth Circuit cases and summarily decided 20 additional ones. "These numbers suggest that the present system in CA9 is not meeting the goals of en banc review." Moreover, the sheer number of judges on the Ninth Circuit means that such a large number of judicial opinions are produced that it is impossible for judges to grant en banc review to correct all important errors once they are found. The fact that the Ninth Circuit is too large to conduct one of the most basic functions of a federal appellate court--the en banc rehearing--is itself problematic enough to warrant a split.

VI. High Reversal Rate

In the words of U.S. Supreme Court Justice Antonin Scalia, "There is, in short, no doubt that the Ninth Circuit has a singularly (and, I had thought, notoriously) poor record on appeal." It is a well-known fact that Ninth Circuit opinions have consistently fared poorly before the United States Supreme Court over the past decade. According to United States District Judge William Browning, the Ninth Circuit "is the most reversed circuit in the country . . . It is the circuit reversed unanimously by the U.S. Supreme Court the most; and it is the circuit, when reversed, which draws the fewest dissents in the U.S. Supreme Court." An examination of the Ninth Circuit's reversal rate before the Supreme Court--especially compared to that of other circuits--demonstrates that there is a systematic problem which deserves congressional attention:

Sup. Ct. Term	9th Cir. cases in the Sup. Ct.	9th Cir. cases reversed by the Supreme Court	Sup. Ct. cases from other circuits	Cases from other circuits reversed	9th Cir. reversal rate	Reversal rate for other circuits
2002-03	23	18	30	21	78.2%	70.0%
2001-02	18	14	52	40	77.7%	76.9%
2000-01	17	13	49	29	76.4%	59.1%
1999-2000	10	9	52	29	90.0%	55.7%
1998-99	18	14	48	32	77.7%	66.6%
1997-98	17	14	63	34	82.4%	54.0%
1996-97	21	20	unavailable	unavailable	95.2%	62.7%
1995-96	12	10	"	"	83.3%	56.9%
1994-95	17	12	"	"	70.6%	65.2%
1993-94	14	12	"	"	85.7%	42.5%
1992-93	22	15	"	"	68.2%	63.1%

As the above data demonstrates, for over a decade, the Ninth Circuit has been reversed a far higher percentage of times than the other circuits in the federal judiciary. On average, 80.4% of Ninth Circuit cases argued before the Supreme Court each year get reversed. In comparison, only 61.15% of argued cases from other circuits get reversed. As Senator Frank Murkowski reminds us, "Let's not forget what all of those reversals were. They represent people--people who had their cases wrongly decided. They are people who had to incur great expense, face unnecessary delay, and risk adverse legal rulings in order to receive justice."
What is particularly disturbing is that these results are not based on a small sample size of Ninth Circuit cases. In the 1996-97 term, for example, 21 cases from the Ninth Circuit were argued before the Supreme Court, and 20 of them resulted in reversals. A few years later, 9 out of the 10 Ninth Circuit cases argued before the Court were reversed. Because the Supreme Court is able to review only an extremely small percentage of the cases the Ninth Circuit hands down each year, this data casts doubt on the validity of the outcomes in many of the Ninth Circuit's other cases

which evade further review.
According to Justice Scalia, this high reversal rate can be attributed at least in part to the circuit's unwieldy size. He argues that a significant function of en banc review is "to correct and deter panel opinions that are pretty clearly wrong," but in the Ninth Circuit "this error-reduction function is not being performed effectively . . . [because] the current size of the Circuit discourages" such hearings. Justice O'Connor offered a similar assessment. Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, after conducting an in-depth statistical analysis of the Ninth Circuit's high reversal rate, agreed that the circuit's large size has contributed to its inordinately high reversal rate. He wrote, "Reversals (especially summary reversals) by the Supreme Court and citations are used as proxies for quality of judicial output. The overall conclusion is that: (1) adding judgeships tends to reduce the quality of a court's output and (2) the Ninth Circuit's uniquely high rate of being summarily reversed by the Supreme Court; (a) is probably not a statistical fluke and (b) may not be a product of simply that circuit's large number of judges."
As the Senate Judiciary Committee has previously recognized, reconfiguring a circuit because of its perceived ideology or due to disagreement with the merits of the decisions it renders is invalid and threatens both judicial independence and important separation of powers principles. Nevertheless, endeavoring to ensure that an inferior court abides by the edicts of its hierarchical superiors and is not dramatically out of step with its coordinate courts in other parts of the country are legitimate aspects of the Senate's oversight function.

VII. Increased Quality of Judging for Smaller States

The Ninth Circuit covers such a huge geographic region that judges can often find themselves confronting an issue from thousands of miles away concerning laws and a region that they know nothing about. Certain federal laws, for instance, are primarily important only in Alaska or other northwestern states. Diversity cases, in which federal circuit courts are called upon to interpret and apply state law, constitute a significant percentage of the circuit court docket; judges unfamiliar with the laws of far-off states are consequently at a severe disadvantage. Judge Eugene Wright reminds us, "Judges whose background and experience lie in places a thousand miles from a given court are unlikely to have a full appreciation of regional aspects of an issue, even if they are aware of them."
Justice Kennedy also raised the interesting point that the sheer size of the Ninth Circuit prevents it from having a close relationship to the citizens it supposedly serves. He wrote, "Our constitutional tradition has been one of broad community participation in the judicial selection process. . . . The sense of shared identity and responsibility dissipates, however, when a circuit is so large that the makeup of a panel is a luck-of-the-draw proposition, with a strong likelihood of drawing judges having no previous attachment to the affect community." When citizens of smaller states face a court that they perceive to be predominated by California, it loses legitimacy in their eyes and they approach it with a sense of detachment.

VIII. The California Split

The most persuasive proposals for splitting the Ninth Circuit include splitting the State of California between two circuits. Because such a large percentage of Ninth Circuit cases come from California, any circuit-split scheme that keeps California entirely within one circuit will invariably be problematic because the circuit containing California will be too large.
It is often argued that California cannot be split between two circuits because this could result in California law being interpreted in different ways in different parts of the state. Such objections are meritless for two reasons. First, California law already can be interpreted differently in different parts of the state--by state courts. Secondly, the law of the United States is frequently interpreted differently in different parts of the nation, yet this does not create an unworkable impediment to the effective functioning of government or the behavior of nationwide corporations. As Justice John Paul Stevens wrote, "[T]he importance of this concern pales in comparison with the disadvantages associated with a circuit that is so large that even the most conscientious judge probably cannot keep abreast of her own court's output."
Moreover, if California were to be split between two circuits, intolerable circuit splits on California law could be resolved by the U.S. Supreme Court. Alternatively, controversial questions of state law could be certified to the California Supreme Court. Even in the absence of such a certification process, once the state supreme court definitively speaks to an issue, both circuits would undoubtedly defer to that judgment. Consequently, there is little reason to fear that divergent interpretations of state-law would be a long term problem, and the potential short-term inconveniences are hardly debilitating.

IX. The Overwhelmingly Positive Experience of the Eleventh Circuit Split

Ultimately, my biggest reason for supporting a split of the Ninth Circuit lies with my own experience as a circuit judge. While the old Fifth Circuit had a long and proud tradition, it simply became too large to function effectively. I fear that the Ninth Circuit reached that point a long time ago. Having served as an active judge through a circuit split, I can personally attest to the fact that the resulting smaller circuits function much more smoothly, efficiently, and with a greater degree of collegiality and coherence in their caselaw. There is no reason to believe that a split of the Ninth Circuit would lead to different results.

Thank you very much for your kind attention.
I would be more than happy to answer any questions the Committee might have.