

**United States Senate
Committee on the Judiciary
Subcommittee on Privacy, Technology, and the Law**

“Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems”

Phoenix, Arizona

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Written Testimony of
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Mr. Chairman and Members of the Committee:

My name is Richard C. Tallman and I am a United States Circuit Judge on the United States Court of Appeals for the Ninth Judicial Circuit with chambers in Seattle, Washington. I was appointed by President Clinton in May 2000. I am honored to appear before you to discuss the reorganization of the Ninth Circuit. I publicly join my colleagues, Circuit Judges Andrew Kleinfeld and Diarmuid O'Scannlain, as well as other federal judges throughout the Ninth Circuit, who favor reorganizing our court to bring about a new era of judicial efficiency.

I previously testified regarding the need to split the Ninth Circuit before the Senate Judiciary Committee's Subcommittee on Administrative Oversight in August 2004,¹ and again in October 2005.² Though more than a decade has passed since the last time a reorganization of the Ninth Circuit was seriously considered, my support for the creation of smaller circuits to better administer justice in the American West has not wavered. Indeed, time has only intensified the reasons why

¹ *Improving the Administration of Justice: A Proposal to Split the Ninth Circuit, Before the S. Subcomm. on Admin. Oversight and the Courts*, 108th Cong. 18-21, 207-28 (Apr. 7, 2004) (oral and written testimony of Richard C. Tallman, Circuit Judge for the United States Court of Appeals for the Ninth Circuit).

² *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem, Before the S. Subcomm. on Admin. Oversight and the Courts*, 109th Cong. 149-67, S. Hrg. 109-190 (Oct. 26, 2005) (oral and written testimony of Richard C. Tallman, Circuit Judge for the United States Court of Appeals for the Ninth Circuit).

such a reorganization is overdue. By any metric the Ninth Circuit is simply too big, too spread out, too slow, and too overworked—the time for change is now. The Ninth Circuit is already a leader among all circuits in promoting new technology. But this is not a problem that can be solved, or even greatly improved, by new computer systems or additional electronic communications equipment.

Article III, section 1, of the Constitution provides: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The question whether it is time to reorganize my court is yours to decide. I offer my views in the hope that it will inform and assist your decision to do so.

I. The Problem Persists: We Are Overworked and Inefficient

“Justice is a contract of expediency, entered upon to prevent men harming or being harmed.”

—Epicurus

While there are many reasons that justify a reorganization of the Ninth Circuit, there are none more compelling than one undisputable truth: we are the most overburdened and slowest federal appellate court in the country. We have been for years. In almost every relevant statistical measurement of judicial and administrative efficiency, the Ninth Circuit is an outlier that has fallen well behind our sister circuits. That was true in 2004; it remains true today.

A. The Ninth Circuit is responsible for more appeals than any other circuit in the country

Perhaps unsurprisingly, given the geographic size and explosive population growth within our area of responsibility, the Ninth Circuit is responsible for far more cases than it was ever intended to handle. Reorganization is necessary to normalize our judicial administration and hasten the delivery of justice to those we serve.

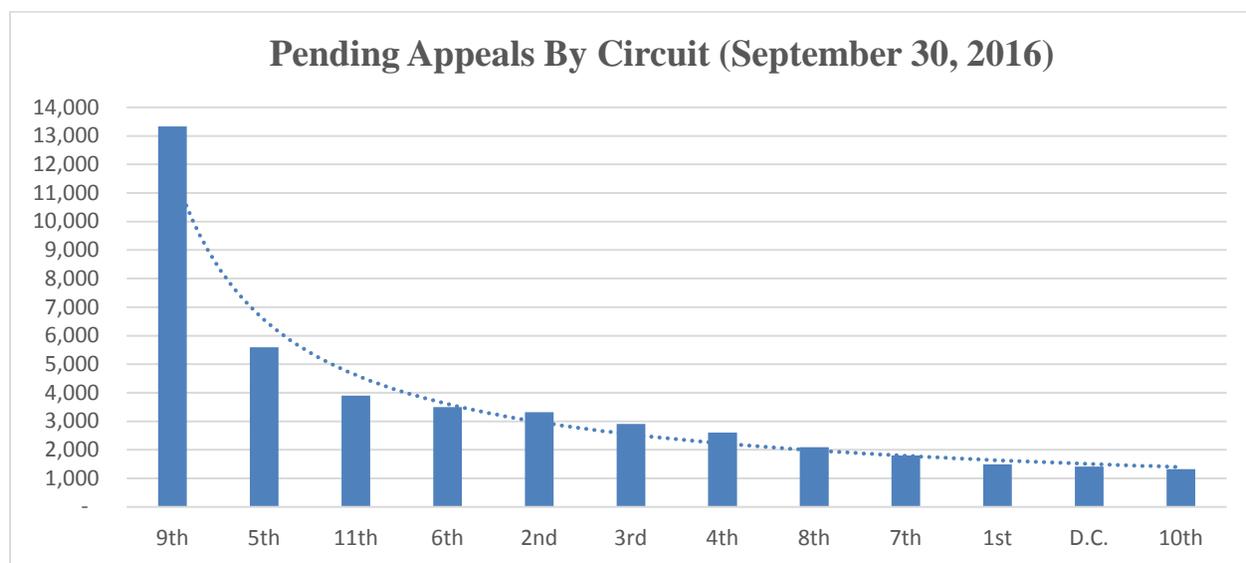
Population growth and development have turned a once modest Ninth Circuit into a behemoth. In 1900, the Ninth Circuit was responsible for a manageable 3.2 million people, or approximately 4 percent of the country's total population.³ Today, the Ninth Circuit serves some 65 million people, approximately 20 percent of the total population of the United States.⁴ This growth in population has unsurprisingly created an overburdened court docket. According to the statistics compiled by the Director of the Administrative Office of the United States Courts, the Ninth Circuit received 11,473 new appeals in the twelve-month period ending September 30,

³ See David C. Frederick, *Rugged Justice: the Ninth Circuit Court of Appeals and the American West, 1891-1941*, University of California Press, 1994 (available at <http://publishing.cdlib.org/ucpressebooks/view?docId=ft22900486&chunk.id=d0e4025&toc.depth=1&toc.id=d0e4025&brand=ucpress>); see also U.S. Census Bureau, *Historical National Population Estimates* (last accessed May 3, 2017) (available at <https://www.census.gov/population/estimates/nation/popclockest.txt>).

⁴ U.S. Census Bureau, *Population Estimates, Population Change, and Components of Change* (last accessed May 3, 2017) (available at <https://www.census.gov/data/tables/2016/demo/pepest/nation-total.html>).

2016.⁵ That accounted for 19 percent of all federal appeals filed nationwide. That is 6,443 more appeals than the average circuit court, 7,321 more appeals than the median circuit court, and 2,809 more appeals than the next closest circuit court.

The disparity in the number of new appeals is even more staggering in light of the massive backlog and age of cases pending in the Ninth Circuit compared to the rest of the country. During that same twelve-month period in 2016, the Ninth Circuit had 13,334 appeals pending, equal to approximately 31 percent of all pending appeals in the United States. For context, that is 9,728 more pending appeals than the average circuit court, 10,576 more pending appeals than the median circuit court, and 7,741 more pending appeals than the next closest circuit court.



⁵ Administrative Office of the United States Court of Appeals, *Statistical Tables for the Federal Judiciary*, Table B-1 (12 month period ending September 30, 2016) (available at http://www.uscourts.gov/sites/default/files/data_tables/jb_b1_0930.2016.pdf).

One of the biggest reasons the Ninth Circuit has fallen so far behind is that our judges are expected to handle far more cases and travel far greater distances than any other circuit judges. Despite having 29 authorized judgeships, which is at least 12 more than any other circuit court, if fully staffed, we would have approximately 460 pending appeals per active judgeship. That is over 100 more appeals than the next closest circuit, and four times the number of appeals per active judge on the Tenth Circuit. Making matters worse, the Ninth Circuit currently has four vacancies, meaning there are actually 533 pending appeals per current active judge. In order to continue reducing our backlog of cases, we must either spend less time per case than other judges in other circuits, or sap alternative judicial resources, such as increasing the number of Visiting Judges borrowed from courts all over the country. In 2017, we are scheduled to rely upon 136 Visiting Judges who sit for one or more days with us to tackle our burgeoning dockets. In total, Visiting Judges will sit on 301 days of three-judge oral argument hearing panels this year.⁶ The Ninth Circuit's massive caseload combined with current vacancies on the court has manifested into a

⁶ This is an increase from years past: 85 Visiting Judges sat for 173 calendar days in 2016, and 86 Visiting Judges sat for 192 calendar days in 2015. These federal judges come from district and appellate courts all over the United States. We are grateful for their help. But we still remain the slowest court in the nation in getting our work done.

persistent judicial crisis.⁷

In terms of caseload, the Ninth Circuit is in a league of its own. There is no other circuit court that is comparable. The volume of appeals has created a backlog of cases that will take years to resolve and more judges to decide them in order to lower our caseloads to levels commensurate with other circuits around the country. Legal briefing in pending appeals, particularly in immigration and civil cases, is frequently years old and contains stale case law, by the time we can get to it. The Ninth Circuit's heavy caseload places a tremendous burden on our circuit judges and the many hard working court staff and law clerks we rely upon to serve the litigants. We are forced by sheer volume to triage our cases, submitting without oral argument far more cases than we can hope to hear live.⁸

B. Economies of Scale? We are the national leader in inefficiency

Admittedly, size alone is not *always* a bad thing. This Committee, by now, is

⁷ See *Judicial Emergencies*, U.S. COURTS, <http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicialemergencies> (last updated May 9, 2017) (last visited May 9, 2017) (showing the current federal judicial vacancies which are classified by the Judicial Conference of the United States as judicial emergencies and defining the term “judicial emergency”).

⁸ In 2016, only 1,556 appeals were resolved on the merits after hearing oral argument. See Administrative Office of the United States Court of Appeals, *supra*, Table B-1. That is, in only 13 percent of the total number of appeals terminated did the parties receive the opportunity to present oral argument directly to the sitting judges.

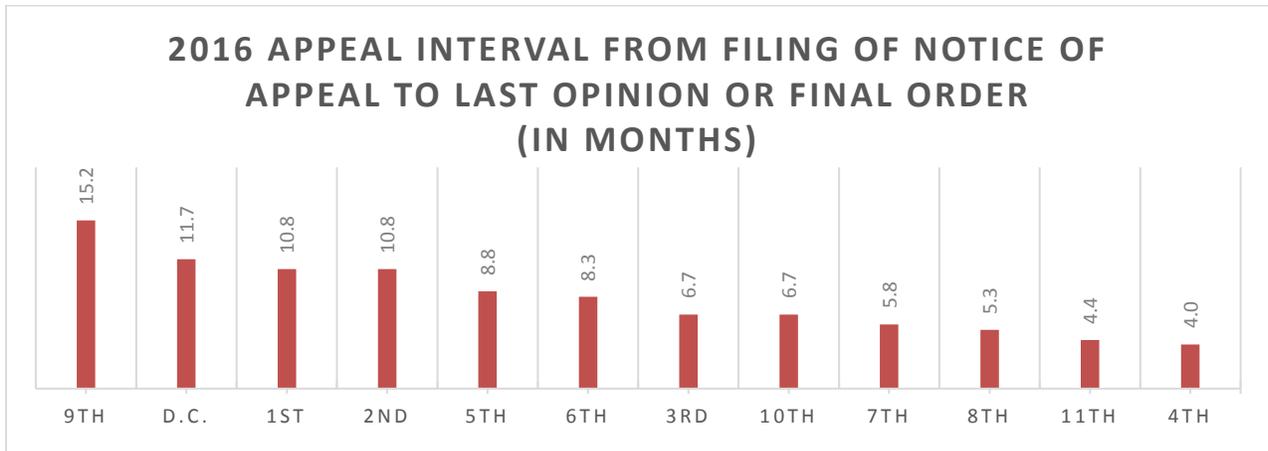
all too familiar with the catchphrase “economies of scale.” This economic theory applies in many areas of business and industry: “bigger can mean better” in terms of eliminating redundancy, reducing unit cost, and increasing efficiency. However, to argue that the Ninth Circuit is a shining example of judicial efficiency, once again, completely ignores the relevant statistical facts; particularly the most nagging fact that we are the slowest circuit court of appeals in actually deciding cases from filing of the notice of appeal to issuance of the decision. This comes despite the fact that we are leaders among the judiciary in implementing video conferencing among judges whose chambers in more than two dozen locations are geographically dispersed over the 1.3 million square miles of our western U.S. and Pacific Islands jurisdiction.

One of the most significant metrics regarding judicial efficiency is the time it takes to resolve an appeal. An untimely appellate process results in serious injustices to all parties involved. Litigants and the public are entitled to a swift decision—win, lose, or draw. The time it takes an appellate court to review a case is the same amount of time a potentially innocent person might spend waiting in jail or on death row. Government agencies, private businesses, and individuals with pending civil cases need prompt decisions to redress injury, resolve challenges to planned projects, obtain their disability benefits, or simply plan their futures. Additionally, the lengthier the appellate process, the more public and private resources are wastefully

expended. Expeditious appeals are equally important in civil matters, because, as a general rule of business, time is money. Companies waiting for an appellate decision in a copyright or trademark dispute, for example, could lose millions of dollars in opportunity costs alone during the time their disputed product is tied up in litigation. Or a necessary public project may be delayed, increasing cost, while environmental challenges must be reviewed.

Then there is the issue of attorneys' fees. Almost any practicing attorney will tell you that the first thing they are asked by their clients is, "What is this going to cost?" The answer is almost always going to depend on how long the controversy in question will take to resolve. Long delays can also hamper a judge's ability to effectively resolve an issue without wasting significant judicial resources. It is not uncommon in our circuit for an appeal to be heard several years after a district court's original decision. In that time, new material facts may develop, or in many cases, even the applicable law, both within our circuit or in new decisions handed down by the Supreme Court, may be different than when the parties originally briefed the issue. Stale briefs are a real problem when a case has been sitting for years awaiting assignment to a three-judge panel. These delays negatively impact our ability to quickly deliver accurate and reliable opinions, as additional legal research must be done by lawyers for the parties, our law clerks, and court staff attorneys simply to understand the current state of the law.

For these reasons, the time it takes from filing of the appeal to resolution of the dispute is one of the most telling indicators of judicial efficiency and effectiveness. It is a metric which trenchantly shows that the Ninth Circuit ranks dead last among all United States Courts of Appeals.



In 2016, the median Ninth Circuit appeal took 15.2 months from filing of Notice of Appeal or Docket Date to the last Opinion or Final Order.⁹ That is over twice as long as the national median of 7.4 months. The time that is required to resolve cases in the Ninth Circuit is particularly poor for civil appeals, in which the median civil case required 25.5 months from Notice of Appeal to the last Opinion or Final Order.¹⁰ The Ninth Circuit is drastically slower than the national median 11.3

⁹ Administrative Office of the United States Court of Appeals, *Statistical Tables for the Federal Judiciary*, Table B4 (12 month period ending September 30, 2016) (available at http://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2016.pdf).

¹⁰ Administrative Office of the United States Court of Appeals, *supra*, Table B-4A.

months for civil appeals, and more than twice as slow as the next slowest circuit, the D.C. Circuit, whose median civil appellate case only requires 11.7 months to resolve. It is not uncommon to be assigned an immigration or routine civil appeal that has been pending for two to three years awaiting review by a three-judge panel.

It should come as no surprise that many commercial cases that used to be litigated to conclusion in federal court are now being diverted elsewhere through alternative dispute mechanisms like private arbitration and mediation. Parties simply can't wait this long for federal courts to resolve their disputes. In 2016, the Ninth Circuit was responsible for over 16.5 percent of the total appeals in the country (110 appeals) that were under submission for at least three months or more before being resolved.¹¹ Not only is the Ninth Circuit the largest circuit, but it is also the slowest.

C. Smaller circuits would improve the law

Reorganizing the Ninth Circuit into two or more smaller circuits would not only make our administration of justice more efficient, but it would also make for better law. The current size of our circuit is one of the most significant factors

¹¹ The term “under submission” means that a court has examined the record, read the briefs, and may have heard argument from counsel, then ordered the case taken “under submission” pending issuance of a final written decision on the merits. Administrative Office of the United States Court of Appeals, *supra*, Table B-20.

impacting the quality of our decisions. I firmly believe that smaller groups of judges working together more frequently will produce better quality decisions that most benefit the citizens of our region and the nation as a whole. The court's policy of mixing up the panels like an unending game of musical chairs is not resulting in better quality decisions. Adding 136 Visiting Judges to 41 active and senior judges to create an endless mix of three-judge panels does little to improve familiarity and collegiality on a court of this size. It really does matter in cases with significant impact on regions or states in the circuit that the decision-makers have informed familiarity with the locale, its inhabitants, and the real world impacts of issues presented in appeals. It also helps if the judges know one another well. That is far more difficult to do on a court of this size that also depends so heavily on bringing in judges from elsewhere to help tackle the caseload.

1. Reorganization would improve collegiality among the circuit judges

Collegiality is extremely important in our appellate system. The genius of the appellate process is founded upon the close collaboration of jurists who combine their independent judgment, informed by their personal experiences, and apply their collective wisdom to decide the issues presented by an appeal. Only by sitting together regularly can members of a court come to know one another and work most

effectively in common pursuit of the right answer under the Rule of Law.¹² That is simply not possible on a court of this size.

When I testified in 2004 before the Senate Subcommittee, I had been on the bench nearly four years, but had yet to sit with all of my active colleagues. It took a full seven years before I could say that I had sat at least once with all of my colleagues in active service. As the court gets even bigger, that time will lengthen. Although I have now presided over at least one matter with each of the current active circuit judges, it is still rare to sit on a three-judge panel comprised purely of active Ninth Circuit judges. More often than not, there is at least one Visiting Judge sitting with us, often a jurist with whom I have never worked before, and may never work with again. Our Senior Judges, who continue to make enormous contributions to tackling the caseload, also frequently supply the third member of the panel. But the irregular membership on our panels comes at a cost; it fails to foster strong personal relationships, and makes for inconsistent opinions.

The adverse consequences stemming from our inability to work with one

¹² See Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* at 29 (1998) (available at <http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf>). It was created by Act of Congress in 1997, Pub. L. No. 105-119, chaired by the late Associate Justice Byron White of the United States Supreme Court, and is colloquially known as “the White Commission.”

another on a regular basis are further compounded by our inability to read each other's decisions. One of the White Commission's notable findings in support of smaller judicial structures was that smaller circuits have more time to read one another's opinions.¹³ Reading the opinions of other judges on the same court serves many purposes, including staying up to date on the ever changing landscape of circuit precedent and the ability to correct errors or offer feedback prior to publication. Strong judicial scholarship is the hallmark of a strong court. Tragically, this is an exercise that the Ninth Circuit's vast size and volume of appeals does not facilitate, even for the most dedicated jurist. In 2016, the Ninth Circuit terminated 7,056 appeals on the merits, 6,709 of which were disposed of by Opinion or Final Order.¹⁴ To read every decision would require a judge to read at least 18 decisions a day, seven days a week, for a year. Even if every opinion only required fifteen minutes to read and digest (which I believe is a generous assumption based on the average length of published opinions), reading all of the current decisions would require four and a half hours of reading, every single day. There is simply no feasible

¹³ *Id.* The court circulates by email to all judges in a "Pre-Publication Report" summaries of cases about to be released when formally filed with the Clerk of Court. But there just isn't enough time to read each opinion daily.

¹⁴ Administrative Office of the United States Court of Appeals, *Statistical Tables for the Federal Judiciary*, Table B-12 (12 month period ending September 30, 2016) (available at http://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2016.pdf).

way to stay up on every case and still fulfill the rigorous duties required in studying the large records and reading the voluminous briefs and relevant case law to decide the more than 500 cases assigned to each of us.

2. Smaller circuits allow for more substantive knowledge of local law

The vast geographical scope of the Ninth Circuit also contributes to unpredictable outcomes for litigants. The Ninth Circuit is responsible for eleven different states and Pacific Islands territories, each with its own unique system of laws and legal precedent. The geographic diversity of the Ninth Circuit requires great breadth of legal knowledge that I fear comes at the expense of a shallow understanding of the applicable local law. This is particularly challenging for the Visiting Judges who come to sit with us only infrequently.

In addition to the difficulty of mastering what law to apply, judges from outside a jurisdiction are understandably less informed, less accountable, and less sensitive to the individual needs of different communities. Federal judges are appointed to lifelong tenure, at least to some extent, because their independent judgment and life experiences further the development of the rule of law. The value of our life experiences may be less relevant when we are unfamiliar with the complex local issues at stake. How often does a judge in the Southwest personally interact with the timber laws of the Northwest? Or how frequently does a judge sitting on the U.S. mainland interact with the indigenous peoples of Hawaii or Native Alaskan

corporations? Smaller circuits would allow for a more intimate relationship with the regions we are appointed to serve, which in turn would foster greater respect for the decisions of the federal judiciary as a whole.

3. We need a more effective and democratic en banc process

Lastly, I believe one of the principal shortcomings of the Ninth Circuit's current configuration remains our inability (and unwillingness because of size) to sit together as an entire court en banc, as every other circuit in the country does. The en banc process is crucial to ensuring uniformity of circuit law, resolving conflicts with other courts, and addressing questions of exceptional importance.¹⁵ The Ninth Circuit's burdensome size has forced us to adopt limited eleven-judge panels, rather than sitting as an entire court of all its judges in active service. This compromise is problematic, undemocratic, and makes the Ninth Circuit an outlier not followed by any other circuit court in the country.

As a procedural matter, the only judge who presides on every en banc panel is the Chief Judge, and the remaining ten seats are filled by lot drawn from a jury wheel. Ten seats to be drawn from a pool of potentially 29 active judges may sometimes mean that none of the judges from the original three-judge panel are

¹⁵ See Fed. R. App. P. 35 (recommending en banc hearings . . . when (1) it is necessary to secure or maintain uniformity in the court's decisions; or (2) the proceeding involves a question of exceptional importance).

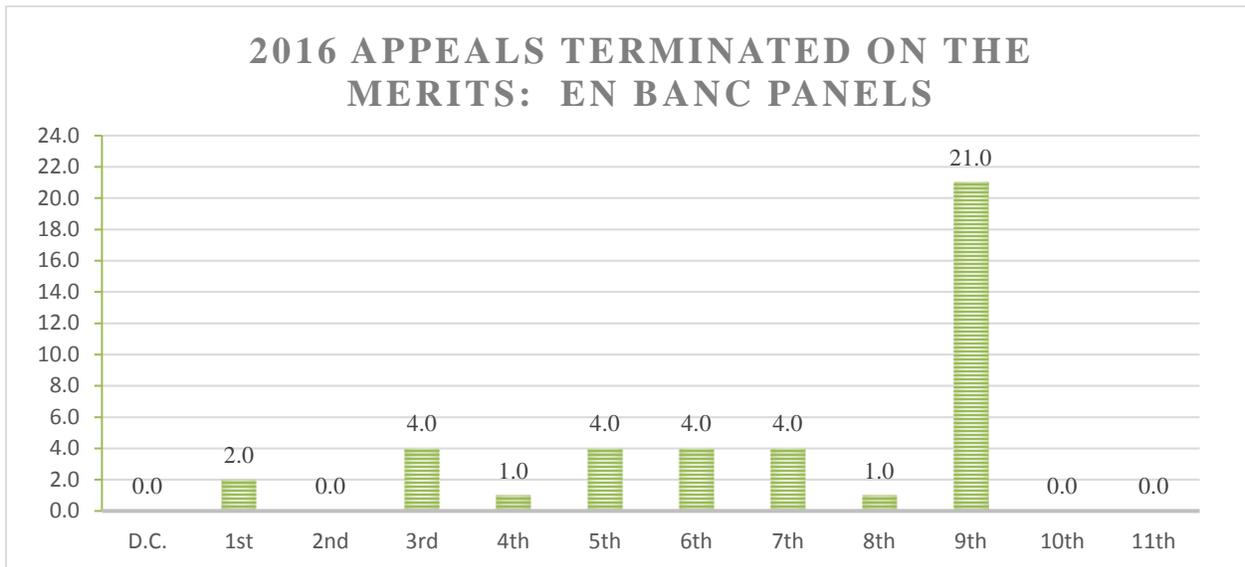
selected to sit on the limited en banc panel. Even then, only a six-judge majority is necessary to deliver the Court's holding. That means, for all practical purposes, that six judges have the ability to speak for all 29 authorized judgeships. For a contentious issue, the outcome of a case can entirely depend on the randomized composition of the judges for a particular en banc panel. This creates a perverse incentive for litigants to essentially "roll the dice" and petition for rehearing en banc.¹⁶

Last year, 51 percent of all United States Court of Appeals en banc decisions were from the Ninth Circuit, meaning the Ninth Circuit sat en banc more than the rest of the federal circuit courts combined. In addition to adding even more time and costs into an already slow and expensive litigation process, the frequency with which we sit en banc detracts from the credibility of the three-judge panels that regularly sit, and in fact, were responsible for making 99.7 percent of the Ninth Circuit's decisions in 2016.¹⁷ Smaller circuits would allow the entire court to sit together, which would allow for more representative opinions from the entire pool of judges

¹⁶ Administrative Office of the United States Court of Appeals, *Statistical Tables for the Federal Judiciary*, Table B-10 (12 month period ending September 30, 2016) (available at http://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2016.pdf).

¹⁷ En banc decisions accounted for only 21 of the 6,709 total decisions that were rendered on the merits of the appeal. *Id.*

in active service.



In sum, the Ninth Circuit’s unparalleled backlog in cases, the glacial pace with which we administer our decisions, and other undemocratic flaws in our judicial process lead to the inescapable conclusion that our court is not as fair, effective, or efficient as it could be. This should not be a political or partisan issue. The justifications for a reorganization to improve judicial administration and ensure the swift administration of justice are clear, they are tangible, and they are not going away. It is now time for change.

II. There is no reasonable argument against reorganization

“The artist who aims at perfection in everything achieves it in nothing.”

—Eugene Delacroix

Despite clear indications that the Ninth Circuit is continuing to fall behind the

rest of the federal appellate system, as it has for decades, the prospect of reorganizing the Ninth Circuit into smaller, more manageable circuits still remains a controversial issue. Recently, my colleagues, Chief Judge Sidney Thomas, and Circuit Judges Alex Kozinski and Carlos Bea, testified in opposition to splitting the Ninth Circuit before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet.¹⁸ With respect, many of their arguments regarding the potential “negative” effects of splitting the Ninth Circuit are overblown, and driven more by personal preferences than actual reality. I would like to take this opportunity to respond to some of the arguments offered against a proposed division. Change is hard for all of us. But it is an inevitable fact of life. Any reorganization would make the resulting smaller circuits *more similar* to the existing federal judicial structures across the country. Normalcy and predictability in the judiciary are strengths, not weaknesses.

A. The division of a federal appellate court has historical precedent

Reorganization is not a radical concept, but a necessary response to inevitable growth and systemic delays. Historical precedent demonstrates how beneficial it

¹⁸ *Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit*, before the H. Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, 115th Cong. (Mar. 16, 2017) (oral and written testimony of Chief Judge Sidney Thomas, Circuit Judge Alex Kozinski, and Circuit Judge Carlos Bea).

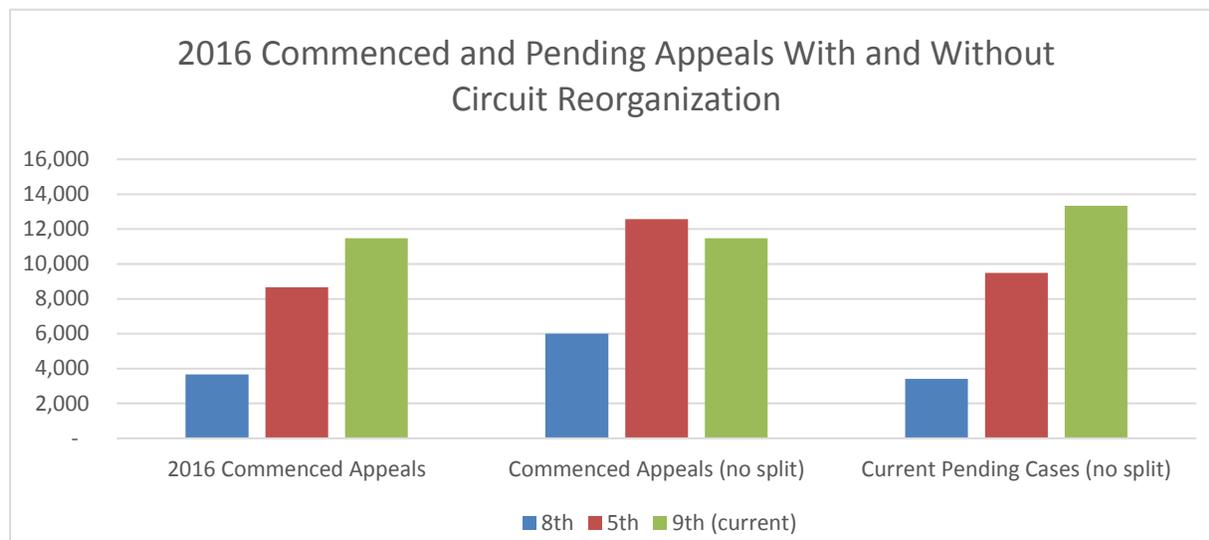
can be to divide a circuit court when it becomes too large to properly function.¹⁹ Congress has periodically invoked its Article III authority to reorganize the federal appellate court structures in order to respond to the demands of a growing nation and facilitate the corresponding migrations of the American population.

From the first Judiciary Act of 1789, to date, Congress has restructured the federal appellate courts at least thirteen times.²⁰ Each time Congress acted to make the United States Courts of Appeals smaller, more geographically cohesive, and more responsive to the citizens they serve. The split of the Eighth and the Tenth Circuits in 1929, as well as the most recent division of the Fifth Circuit into the Fifth and Eleventh Circuits in 1981, was consistent with Congress's historical policy objectives, and has not impaired those jurisdictions in any way or prevented the due administration of justice. Quite the opposite. The Republic still stands. In fact, the

¹⁹ Congress first reorganized the federal judiciary in 1801, when it transitioned from thirteen separate districts (one for each state and territory) and three regional circuit courts, to six numbered circuits. See Benjamin G. Shatz, *The California Circuit?*, The Daily Journal, May 15, 2017, at 8. In 1891, Congress passed the Circuit Courts of Appeals Act, 26 Stat. 826, which established the United States Courts of Appeals as the intermediary appellate courts we know today. *Id.*

²⁰ *Id.* (Once it created federal courts for the new Nation, Congress restructured the the federal judiciary in 1801, 1807, 1837, 1842, 1855, 1862, 1863, 1866, 1891, 1893, 1929, 1981, and 1982); see also Russel R. Wheeler & Cynthia Harrison, *Creating the Federal Judicial System*, Federal Judicial Center (2005) (available at <https://www.fjc.gov/sites/default/files/2012/Creat3ed.pdf>).

Fifth and Eleventh Circuits maintain considerably smaller pending appeals dockets than the Ninth Circuit, despite collectively handling more new appeals every year.



They also resolve appeals in approximately half the time of the Ninth Circuit.²¹ Contrary to the suggestions of my esteemed colleagues, there is nothing unique about the Ninth Circuit that would prohibit a workable division, and history shows from experience that reorganizing the Ninth Circuit would improve its efficiency.

B. Reorganization would not affect the uniformity of the law

One of the other frequent arguments made against reorganizing the Ninth Circuit is the curious notion that creating a new circuit would somehow divide the

²¹ The median Eighth Circuit appeal took 5.3 months to resolve, and the median Eleventh Circuit appeal required 4.4 months to resolve. See Administrative Office of the United States Court of Appeals, *Statistical Tables for the Federal Judiciary*, Table B4 (12 month period ending September 30, 2016) (available at http://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2016.pdf).

law in ways that would inhibit commerce or complicate the administration of national parks, forests, and national monuments. This argument is a fiction. One only needs to look to the current nationwide judicial system to show that the division of the Ninth Circuit would improve the administration of justice, not detract from it.

1. Reorganization would not impede interstate commerce

Those opposed to reorganizing the Ninth Circuit often speak cryptically about the “unknown” ramifications of potentially splitting Silicon Valley away from burgeoning technology hubs in Seattle, Portland, Phoenix, Boise, and elsewhere.²² Yet, those who make this argument fail to provide any further detail about what the actual effects of “splitting” the law between two circuits would mean, nor do they address how such a split would be any different than the current division of judicial circuits on a national level. They also completely ignore the globalization of American businesses, most of which seem to be operating profitably in multiple state, national, and international legal systems.

Entities that operate in technology, entertainment, aviation, transportation, or other commercial industries are more than accustomed to operating across multiple

²² See *Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit*, before the H. Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, 115th Cong. 15–16 (Mar. 16, 2017) (written testimony of Chief Judge Sidney Thomas) (“splitting the Ninth Circuit would disrupt the uniform application of law in many important areas of law”).

jurisdictions. Companies like Google, Microsoft, Boeing, Facebook, and Amazon have offices and facilities all over the *world*, let alone outside the Ninth Circuit. Technology firms in Seattle already operate under different state laws in Washington than their Silicon Valley peers do in California. Oil companies in the Midwest routinely run their operations in multiple states divided between the Fifth, Eighth, and Tenth Circuits, and in foreign countries. New York companies in the Second Circuit are still able to conduct operations with their New Jersey affiliates in the Third Circuit and others in Boston, located in the First Circuit. The list of examples is endless. We have an entire body of jurisprudence called conflict of laws to resolve differences where choice of particular state or federal law matters. A reorganization of the Ninth Circuit would tremendously improve the judicial administration of our law, but would change very little in terms of how companies engage in national and international commerce in day-to-day operations.

2. Reorganization would not affect the administration of public lands

A similar argument is made that a division of the Ninth Circuit could create chaos for the administration of the West's public lands and national parks.²³ But

²³ See *Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit*, before the H. Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, 115th Cong. at 2 (Mar. 16, 2017) (written testimony of Circuit Judge Carlos Bea) (“[W]hat law will rule Lake Tahoe, evenly split between California and Nevada? Will the tackle used by a Nevada fisherman be an illegal lure if his boat drifts into California waters?”).

just like the argument about interstate commerce, such fears are baseless.

The current administration of public lands among the different circuits of the United States Court of Appeals is on full display today. Consider that these federal public lands are overseen by national agencies like the United States Forest Service, the National Parks Service, or the Bureau of Land Management, which operate between circuits on a daily basis. Although Lake Tahoe could technically be “divided” between two different circuits in a split, the United States Coast Guard would continue to patrol it and the interstate Tahoe Regional Planning Authority would regulate it.²⁴ It makes no difference that Yellowstone National Park and surrounding national forests have portions located in both the Ninth and the Tenth Circuits, or that the Ouachita National Forest is split between the Eighth and the Tenth Circuits. Today, fishermen on Lake Michigan drift between the Sixth Circuit in Michigan and the Seventh Circuit in Wisconsin without a second thought or loss of a fish. The administration of Lake Tahoe, in particular, already accommodates a split in state laws under the Tahoe Regional Planning Agency. A split in the Ninth Circuit is just as easily implemented using the same legal structure. No demonstrable harm may be expected from such legal bugaboos.

A reorganization of the Ninth Circuit would tremendously improve the

²⁴ Tahoe Regional Planning Agency: About TPRA, <http://www.trpa.org/about-trpa/> (last visited May 3, 2017).

judicial administration of our courts, yet go practically unnoticed in terms of how it would affect the daily life of the public. Businesses would continue to grow and prosper, people who live in the West would receive better and faster justice, and the states and territories affected by the reorganization would still be home to some of the most beautiful public lands in the country.

C. The costs of reorganization can be mitigated using existing infrastructure

The last element of any argument against the reorganization of the Ninth Circuit is that any division is cost-prohibitive. But let's keep the discussion in perspective. The budget of the entire federal judiciary at \$7.2 billion is still less than half of one percent of the entire federal budget. That's all it takes to operate the entire Third Branch of Government. Admittedly, a reorganization of the Ninth Circuit would require some upfront capital investment. However, the costs associated with dividing the circuit can be significantly lowered by utilizing many of the Ninth Circuit's existing assets. Our great need for reorganization justifies the upfront costs, and will likely save both private and taxpayer dollars in the long run.

One of the biggest financial investments critics point to is the cost of building new court facilities. The current bill proposals all include the construction of new courthouses in Phoenix. The cost of each individual proposal varies depending on what types of facilities would be constructed. Proposals include new spaces for

holding court in Las Vegas, Portland, Missoula, and Anchorage, with the new circuit headquarters to be located in either Phoenix or Seattle. I agree that each proposal would certainly benefit the communities that those new facilities would serve. However, the Ninth Circuit has fully serviceable courthouses in San Francisco, Pasadena, Seattle, and Portland. In addition to these primary facilities, our circuit judges maintain individual chambers throughout the circuit. Should Congress choose to minimize costs, there is no reason that our existing facilities would not suffice to handle the work of a new circuit court. The building costs of a reorganization would be greatly lessened if Congress chooses to locate the new Twelfth Circuit's headquarters in Seattle, Washington.

The William K. Nakamura Courthouse has approximately 120,000 square feet of usable space in the heart of downtown Seattle. In the building's current form, it is fitted to house eight full-time resident judge chambers, and an additional six chambers that could be used, as needed, for visiting judges (who could maintain their chambers in existing locations in Billings, Anchorage, Las Vegas, Phoenix, Pocatello, etc.). The Nakamura Courthouse could therefore accommodate almost all of the proposed authorized judgeships for a new Twelfth Circuit, immediately, at

little-to-no extra cost.²⁵



The William K. Nakamura U.S. Courthouse, Seattle, Washington.

Even a complete renovation of the Nakamura Courthouse would require only a modest investment, relatively speaking. The General Services Administration estimates that a full renovation would require approximately \$19 million to completely retrofit the existing building to serve as a circuit headquarters. Additionally, there are already planned by GSA roughly \$35.4 million in proposed

²⁵ H.R. 1598 (“Gohmert Bill”) proposes 17 total judgeships for the new Twelfth Circuit. The Nakamura Courthouse would require modest renovations in order to facilitate the full court. That is far cheaper than building an entirely new courthouse.

deferred heavy maintenance. These renovations have been deferred over a number of years, but will have to be made soon to continue the life of the building, opened in 1939, whether converted to a circuit headquarters or not. Even at its highest estimate, \$54 million is a manageable expense when viewed as a small part of the \$948 million Congress and GSA approved in 2016 for the construction of courthouses on the judiciary's Courthouse Project Priorities list.²⁶ The relatively modest capital cost of restructuring the Ninth Circuit should not be the reason new proposals do not go forward for the betterment of our ailing, overworked judicial system in the West. It is, in every sense, a necessary investment in our future

III. Choosing the best path for reorganization among a host of options

“Strategy is about making choices, trade-offs; it’s about deliberately choosing to be different.”

—Michael Porter

Considering the present state of the Ninth Circuit and the numerous reasons why it should not continue to exist in its current form, I sincerely hope that we may at long-last reorganize our judicial structure in the western United States. There are currently five pending pieces of proposed legislation which would definitively

²⁶ Administrative Office of the U.S. Court of Appeals, *The Judiciary FY 2017 Congressional Budget Summary*, at 67 (February 2016) (available at http://www.uscourts.gov/sites/default/files/fy_2017_federal_judiciary_congressional_budget_summary_0.pdf).

accomplish this goal.²⁷

I do, however, have my own preferences for the direction reorganization takes. I have always been a proponent of creating a Pacific Northwest circuit comprised of Washington, Oregon, Alaska, Idaho, and Montana. As a longtime resident of the Pacific Northwest, and after serving as a United States Circuit Judge for the past seventeen years, I believe that the cultural and geographical similarities in that region would be most conducive to a cohesive court, and that such a structure would be most responsive to population migrations in the future.

If a Pacific Northwest circuit is not feasible, I believe Senate Bill 295 (“Daines Bill”) would be the best available option among the existing proposals. It strikes the best balance of geographic cohesiveness and court size, and actually addresses the issue of overburdened appellate dockets.

Statistics by Bill Proposal and Proposed Judgeships²⁸								
Bills	Circuits	Appeals	Percentage	Proposed Judges	Appeal/Judge	Senior Judges	District	Population
Gohmert	<i>9th Cir.</i>	6,914	63.96%	29	238	8	60	39,144,818
	<i>12th Cir.</i>	3,896	36.04%	17	229	11	49	25,992,361
Flake	<i>9th Cir.</i>	7,639	70.67%	19	402	11	71	44,821,607
	<i>12th Cir.</i>	3,171	29.33%	10	317	8	38	20,315,572
Daines	<i>9th Cir.</i>	7,129	65.95%	20	356	9	65	40,792,630
	<i>12th Cir.</i>	3,681	34.05%	14	263	10	44	24,344,549
Biggs	<i>9th Cir.</i>	8,516	78.78%	21	406	12	82	51,991,958
	<i>12th Cir.</i>	2,294	21.22%	8	287	7	27	13,145,221
Simpson	<i>9th Cir.</i>	7,129	65.95%	25	285	9	65	40,792,630
	<i>12th Cir.</i>	3,681	34.05%	9	409	10	44	24,344,549

²⁸ Statistics from 2016 CM/ECF appellate data compiled by the Library and Research Services for the Courts of the Ninth Circuit (*available at* <http://web.circ9.dcn/Library/archives/split/Pages/00-Maps-Stats.aspx>) (Last visited May 9, 2017).

The Daines Bill adds a sufficient number of new judgeships to both proposed circuits to accommodate existing caseloads, while also allowing for both circuits to sit en banc as an entire court. The new Ninth Circuit would be comprised of California, Hawaii, the Northern Marianas Islands, and Guam, and would function much like the Second Circuit does. Similar to the Second Circuit's current appellate caseload, in which 88 percent of its appeals originate in New York, the new Ninth Circuit would be better structured, more responsive, and more specialized in order to efficiently resolve the large percentage of appeals commenced in California.²⁹ The proposed Twelfth Circuit would be comparable to the existing Third and Fourth Circuits in terms of its projected caseload and the number of proposed judgeships. I think the Daines Bill would properly address the existing shortcomings of our system, while also paving the way for future growth.

Conclusion

The ultimate measure of a court's influence and service to its residents is its ability to command the respect of the people it serves, including the litigants who

²⁸ Statistics from 2016 CM/ECF appellate data compiled by the Library and Research Services for the Courts of the Ninth Circuit (*available at* <http://web.circ9.dcn/Library/archives/split/Pages/00-Maps-Stats.aspx>) (Last visited May 9, 2017).

²⁹ 63.96 percent of Ninth Circuit appeals originated from the State of California in 2016. *Id.*

must comply with its decisions. The Ninth Circuit in its current form is too big, too dispersed, too slow, and too overworked. Technology improvements will not address the root causes of the problem. The present size of the circuit leads to the public perception that our court is currently incapable of homogenizing the views of its huge population and effectively serving the residents of the vast expanse of land it covers. This perception threatens the very heart of the respect necessary for adherence to the rule of law and it calls for invocation of the Constitution's Article III, section 1, plan for the establishment of "such inferior Courts as the Congress may from time to time ordain and establish" when periodically reassessing the structure of our federal courts to reflect inevitable growth and increasing caseloads.

I thank the Committee for the opportunity to testify and I look forward to your questions.