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Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet

Hearing on:
The Need for New Lower Court Judgeships, 30 Years in the Making

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Written Testimony of:

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Mr. Chairman, Ranking Member, and Members of the Subcommittee: it is an honor to appear before you today. My name is Brian Fitzpatrick and I am the Milton R. Underwood Chair in Free Enterprise and Professor of Law at Vanderbilt Law School in Nashville, TN.¹ Before I became a professor, I worked on Capitol Hill for one of your colleagues on the Senate side, Senator John Cornyn of Texas.

Over the years, I have worked in, researched, and taught about the federal judiciary. After law school, I served as a law clerk to Judge Diarmuid O'Scannlain of the United States Court of Appeals for the Ninth Circuit and Justice Antonin Scalia on the United States Supreme Court. After my clerkships, I practiced law for several years in Washington, D.C. at the law firm of Sidley Austin LLP, during which time I represented litigants who had cases in all three levels of the federal judiciary: the United States District Courts, the United States Courts of Appeals, and the United States Supreme Court. Since I joined the faculty at Vanderbilt in 2007, my research and teaching have focused on the federal judiciary.

In this testimony, I wish to address one of the consequences of increasing the number of appellate judges in the federal judiciary: pushing the size of a Circuit court past the point at which it functions optimally. In my view, we long ago hit this point with the United States Court of Appeals for the Ninth Circuit. If more judges are added to the Ninth Circuit without restructuring it, we will exacerbate rather than mitigate the Ninth Circuit's problems.

Indeed, in my mind, the hard question is not whether to restructure the Ninth Circuit, but how to restructure it. Many proposals have been made over the years, and none of them is perfect. But if I had to choose, I would favor a split that creates two circuits of roughly equal size. But the focus of my testimony today will not be how to restructure the Circuit. Instead, I will focus on why Congress should restructure it.

What to do with the Ninth Circuit is not exactly a new question. You have been talking about restructuring it for almost 50 years now, ever since the Hruska Commission of 1973.² You have been talking about it for good reason. The Ninth Circuit is the largest Circuit in American

¹ I speak only for myself and not for Vanderbilt Law School or Vanderbilt University.

² See Comm'n on Revision of the Fed. Court Appellate Sys., *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change* (1973), reprinted in 62 F.R.D. 223 (1973).

history, with 29 active judges and many more part-time senior judges. It towers over every other Circuit in the country: our smallest Circuit is the First Circuit with six judges and our next largest Circuit is the Fifth Circuit with 17 judges. The Ninth Circuit is almost double the size of the next biggest Circuit.

Proponents of restructuring have long argued that the large size has led the Circuit to decide cases much slower than other Courts of Appeals and to issue internally inconsistent decisions.³ These arguments have as much force today as ever: the Ninth Circuit is still the slowest Court of Appeals in America and it is easy to find inconsistent decisions in the Ninth Circuit; all one needs to do is read the opinions of the district court judges who serve there.⁴ Although I have never seen any data collected on how often conflicting decisions occur in the Ninth Circuit compared to other circuits, I searched for the phrases “intra-circuit split” and “intracircuit split” in Westlaw, and I found that these phrases appear over twice as often in opinions of the Ninth Circuit than in any other Circuit. Although this data is hardly conclusive, it is consistent with the anecdotal complaints. I would be stunned if the Ninth Circuit did not lead the country in internally inconsistent decisions.

But I think the case for restructuring is much stronger than even all this. I say that because I believe the size of the Ninth Circuit makes it more likely to commit errors compared to smaller Circuits. Given that it serves 20% of the United States—some 60 million people—the Ninth Circuit’s error rate should be of great concern. Yet, it is well known that the Ninth Circuit has long had the highest percentage of its decisions reversed by the Supreme Court of any Circuit. I show this in Table 1, which ranks the Circuits on how often they were reversed per 1000 appeals they terminated on the merits in the twelve months preceding the Supreme Court Terms from October 1994 to October 2015.⁵ The

³ See, Diarmuid F. O’Scannlain, *Ten Reasons Why the Ninth Circuit Should be Split*, 6 Engage 58, 60-61 (2005); Hruska Comm’n, *supra*, at 234-35.

⁴ See, e.g., *Taylor v. Cox Commc’ns California, LLC*, No. CV1601915CJCJPRX, 2016 WL 2902459, at *5 (C.D. Cal. May 18, 2016) (“Ninth Circuit panels have split, perhaps inadvertently, on whether CAFA cases are even subject to the ordinary rule that successive removal petitions must be made on different grounds.”)

⁵ I created this chart for my last appearance before this Subcommittee, in 2017. Unfortunately, I did not have enough notice to bring it up to date for this hearing. The chart includes as reversals cases that the Supreme Court reversed or vacated on the

Ninth Circuit has been reversed more than 2.5 times as often as the least reversed Circuits and 44% more often than the next closest Circuit (the Sixth).⁶

Table 1: Number of Supreme Court reversals per 1,000 circuit appeals terminated on the merits, OT 1994 to OT 2015

9 th Circuit	2.501
6 th Circuit	1.732
7 th Circuit	1.641
8 th Circuit	1.418
2 nd Circuit	1.319
10 th Circuit	1.272
1 st Circuit	1.109
3 rd Circuit	1.014
4 th Circuit	1.000
11 th Circuit	0.996
5 th Circuit	0.993

Source: U.S. Courts of Appeals-Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, Table B-10, 1994-2015; SCOTUSBlog; Harvard Law Review.

I should stress these are aggregate statistics. The Ninth Circuit did not have the highest reversal rate every single year (although it did in many, many of them). Moreover, the Ninth Circuit’s reversal rate has fallen some during this period; things looked worse twenty years ago than more recently. Finally, reversal rate is not a perfect proxy for errors made by a court of appeals. The Supreme Court takes cases for all sorts of purposes, only one of which is to correct errors. But there is no reason why those other purposes—such as to resolve splits between the Circuits—would affect the reversal rate in one regional Circuit more than another.

merits even in part. I include only the regional circuits; the Federal Circuit and the D.C. Circuit have non-comparable specialized dockets.

⁶ Although I do not report them separately here, the numbers are similar if one looks at only unanimous reversals—which may be an even better measure of Circuit performance: the Ninth Circuit was unanimously reversed more than three times as often as the least reversed Circuits and over 20% more often than the next closest Circuit.

Why is the Ninth Circuit more reversed than smaller circuits? Although there are many causes,⁷ I think one of them has to be size. Circuit courts decide most of their cases in randomly-selected panels of only three judges. That means that only two judges can decide the law for a Circuit—in the Ninth Circuit’s case, for 20% of the population of the United States or 60 million people. But what if those two judges are outliers with unrepresentative views compared to the others? As I have explained in prior work, a Circuit can get so big that the probability that two judges who hold outlier views like this will be randomly selected for the same three-judge panel is greater than it would be if the Circuit were smaller.⁸ The Ninth Circuit’s size puts it in that “unsweet” spot.⁹

It is true that there is a solution to the problem of errors made by randomly-selected three-judge panels: en banc review. If outlier judges make up a majority of a three-judge panel, then the full court can take the case en banc and set the panel straight. But the Ninth Circuit’s size prevents it from using this solution, too. The Ninth Circuit is too big to hear cases en banc with a full court; it hears cases en banc by randomly selecting ten judges and adding its Chief Judge. That is, the Ninth Circuit rehears cases with only 11 of 29 judges. As such, it only takes six judges to comprise a majority of the Ninth Circuit’s en banc panels. This means that only six judges out of 29 can decide the law for 60 million people.

⁷ For example, the ideological makeup of the Circuit. Unlike any other Circuit, the Ninth Circuit was comprised of more Democratic appointees than Republican appointees during the entirety of the 20 years of data in Table 1. During the same time, the Supreme Court has always had more Republican appointees. We know that judges of different ideological persuasions tend to interpret the law differently. This has surely contributed to the Ninth Circuit’s reversal rate. But the best empirical studies control for this and still find the Ninth Circuit’s size is a factor. See sources cited in note 11, *infra*.

⁸ See, e.g., Brian T. Fitzpatrick, *9th Circuit Split: What’s the math say?*, Daily Journal (Mar. 21, 2017). The probability can be derived from the combination function in discrete mathematics. The function calculates the number of ways to pick a set of objects from a larger set of objects. In this case, the formula is $(\text{COMBIN}(F,3) + (\text{COMBIN}(F,2)*\text{COMBIN}(C-F,1)))/\text{COMBIN}(C,3)$, where F is the number of judges on the court with outlier views and C is the number of total judges on the court.

⁹ For example, everything else being equal, the probability of selecting a three-judge panel with two outliers increases by one percentage point from a court of 14 judges to a court of 28 judges. If a court decides over 10,000 appeals a year as the Ninth Circuit does, that amounts to 100 more three-judge panels with a majority of outlier judges.

This is better than two out of 29, but not much better: the so-called “limited” en banc process is susceptible to the same occasional non-representativeness as the randomly-selected three-judge panels that cause the need for en banc review in the first place. For example, I distinctly remember one en banc panel on the Ninth Circuit during my clerkship year that was comprised of 10 Democratic appointees and only one Republican appointee.¹⁰ Needless to say, that panel was not representative of the full Circuit.

You do not have to take my word for it that the Ninth Circuit’s size has contributed to its high Supreme Court reversal rate. There have been a number of empirical studies that try to assess whether larger Circuits are reversed more often than smaller Circuits.¹¹ The takeaway from these studies is the following: size does not lead to a higher reversal rate until a Court of Appeals becomes so big that it can no longer sit en banc as a full court any more. That is where the Ninth Circuit finds itself. Indeed, the best of these studies estimates that *the Ninth Circuit is reversed an extra ten times every year by the Supreme Court simply because it is unable to sit en banc as a full court.*¹²

In short, the Ninth Circuit’s size leads it to make more errors, and, because it is so big, those errors affect more people. Although it is hard to say with mathematical precision when a Court of Appeals becomes too big, I think a good signal is when a court can no longer sit en banc with all its active members. The Ninth Circuit has been past that point for a very long time. Adding even more judges without restructuring it will only exacerbate the problem.

Thank you for allowing me to testify before you today.

¹⁰ See *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001).

¹¹ See, e.g., Richard Posner, *Is the Ninth Circuit Too Large? A Statistical Study*, 29 J. Legal Stud. 711 (2000); Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 Ariz. L. Rev. 341 (2006).

¹² See Scott, *supra*, at 353.