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Statement on 'Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit'

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Abstract

Congress is once again considering legislation to divide the largest of the federal judicial circuits, the Ninth. On March 16, 2017, a subcommittee of the House Judiciary Committee held a hearing on "Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit." This statement was submitted for the record of the hearing.

The statement addresses three questions. First, what considerations should Congress take into account in determining whether to restructure the Ninth Circuit? Second, if restructuring is desirable, how should the legislation be drafted? Third, how do pending House bills measure up?

The burden is on those who would alter an existing structure to show that the structure is seriously deficient and that their particular proposal would be an improvement on the status quo. On the evidence now available, the proponents of dividing the Ninth Circuit have not met their burden. But the arguments made by opponents of the split are not very compelling either.

In considering whether to divide the present Ninth Circuit into two new circuits, Congress may want to look separately at the likely consequences for the circuit that includes California and for the circuit that does not. If circuit division would benefit the legal communities and the citizenry in the states of the proposed new non-California circuit, and the division can be accomplished without disadvantaging the circuit that includes California, that might be enough to justify the reorganization.

If Congress follows that approach, the legislation should be carefully drafted to avoid the flaws that made prior proposals so injurious, particularly to the circuit that would include California. In particular, each of the new circuits should be composed of at least three states. And the legislation should allocate to the new Ninth Circuit a sufficient number of judgeships to assure that the per-judge caseload in that circuit would be no greater than it is today, and preferably smaller.

March 27, 2017

Statement of

Arthur D. Hellman
Sally Ann Semenko Endowed Chair
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House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on

Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit

March 16, 2017

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Executive Summary

1. The burden is on those who would alter an existing structure to show that the structure is seriously deficient and that their particular proposal would be an improvement on the status quo. On the evidence now available, the proponents of dividing the Ninth Circuit have not met their burden.

2. In the past, Congress has declined to divide a circuit until it received a strong signal from the legal community in the affected region that the existing circuit was too large. That is sound policy, because the judges and lawyers of the circuit are in the best position to know whether the circuit is malfunctioning.

3. Proponents of circuit reorganization invoke numbers and statistics, but some are not probative at all and others fail to show that circuit size is the determining factor. However, one numbers-based argument cannot be easily dismissed: for more than 25 years, the Ninth Circuit Court of Appeals has consistently ranked at or near the bottom among federal appellate courts in the median time interval from filing the notice of appeal to final disposition. But the connection between delay and circuit size has not been shown.

4. Although the arguments made by proponents of a circuit split are not persuasive, the arguments made by opponents are not very compelling either. For example, concerns that the two circuits will go their separate ways on issues of federal law are overstated; empirical studies show that conflicts between circuits generally do not present a serious problem in the legal system.

5. In considering whether to divide the present Ninth Circuit into two new circuits, Congress may want to look separately at the likely consequences for the circuit that includes California and for the circuit that does not. If circuit division would benefit the legal communities and the citizenry in the states of the proposed new non-California circuit, and the division can be accomplished without disadvantaging the circuit that includes California, that might be enough to justify the reorganization.

6. If Congress follows that approach, the legislation should be carefully drafted to avoid the flaws that made prior proposals so injurious, particularly to the circuit that would include California. In particular, each of the new circuits should be composed of at least three states. And the legislation should allocate to the new Ninth Circuit a sufficient number of judgeships to assure that the per-judge caseload in that circuit would be no greater than it is today, and preferably smaller.

Statement of
Arthur D. Hellman

Chairman Issa, Vice Chairman Collins, Ranking Member Nadler, and Members of the Subcommittee:

I appreciate this opportunity to express my views on the topic of this hearing, "Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit."

In my view, Congress should proceed with great caution before restructuring the Ninth Circuit (or indeed any of the federal judicial circuits). The burden is on those who would alter the existing structure to show that the structure is seriously deficient and that their particular proposal would, on balance, improve the administration of justice in the circuit and in the federal judicial system as a whole.

On the evidence now available, I do not think the proponents of dividing the Ninth Circuit have met their burden. But if Congress concludes otherwise, it should restructure the circuit in a way that brings justice "closer to the people" by respecting the relationships and arrangements that the people of the nine states in the circuit have developed voluntarily over the years.

In this statement I discuss some of the principles that should guide Congress and this Subcommittee in assessing current and future proposals for circuit reorganization. The statement is in four parts. Part I addresses the question: what considerations should Congress take into account in determining whether to restructure the Ninth Circuit? Part II discusses the criteria for evaluating particular proposals. Part III briefly examines pending bills in light of these guidelines. Part IV is a brief conclusion.

Before turning to these matters, I will say a few words by way of personal background. I am a professor of law at the University of Pittsburgh School of Law, where I have taught since 1975; in 2005 I was appointed as the inaugural holder of the Sally Ann Semenko Endowed Chair. I have been studying the Ninth Circuit for more than 40 years. In the mid-1970s, I served as Deputy Director of the Commission on Revision of the Federal Court Appellate System (Hruska Commission) and helped to write its report recommending division of the Ninth Circuit. (As I explained in response to a question from the late Chairman of this Subcommittee, Rep. Howard Coble, at a hearing in 1999, I believe that the Hruska Commission recommendation was well-supported at the time, but that

subsequent developments have completely undercut the premises on which the Commission relied.)

In the late 1980s I supervised a group of distinguished legal scholars and political scientists in analyzing the innovations of the Ninth Circuit and its court of appeals.[1] From 1999 through 2001, I served on the Ninth Circuit Court of Appeals Evaluation Committee appointed by Chief Judge Procter Hug, Jr. The 10-person Committee studied every aspect of the operations of the Ninth Circuit Court of Appeals, with particular attention to issues identified by the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission). I have also worked for the Ninth Circuit; in the late 1970s I served as Director of the Central Legal Staff of the Ninth Circuit Court of Appeals. In this statement I speak only for myself; I do not speak for the court or any other institution.

I. Is There a Need for Restructuring?

The purpose of this hearing is to examine ideas for restructuring the Ninth Circuit. The first question is: is there a need to restructure the circuit at all? I therefore begin by outlining some of the general principles that should guide Congress in making that determination.

1. *Congress should not reorganize a federal court out of displeasure with the decisions of its judges.*

In the past, some proponents of a circuit split have openly acknowledged that they were motivated by disagreement with decisions of the Ninth Circuit Court of Appeals. That is contrary to the principle that was established in American political life 80 years ago when President Roosevelt's plan to "pack" the Supreme Court went down to defeat, in large part because it was rejected by members of his own political party. As the White Commission said, "There is one principle that we regard as undebatable: It is wrong to realign circuits (or not to realign them) and to restructure courts (or to leave them alone) because of particular judicial decisions or particular judges. This rule must be faithfully

[1] The fruits of our research were published in *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* (Cornell University Press 1990).

honored, for the independence of the judiciary is of constitutional dimension and requires no less."[2]

2. *The burden is on those who would alter an existing structure to show that problems exist, that the proposed alteration offers a fair prospect of ameliorating the problems, and that the legislation would not create serious new problems.*

No institution is immune from criticism, and change should not be opposed simply because it is change. But change inevitably exacts costs. More important, we can never fully foresee the consequences of replacing one set of institutional arrangements with another. There is always a risk that the cure will be worse than the disease. It is therefore appropriate to put the burden of persuasion on those who seek change.

How heavy should the burden be? Two decades ago, the Judicial Conference of the United States suggested that the burden should be very heavy indeed. It said: "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload."[3]

As a practical matter, this standard is impossible to meet, and I would not adopt it. Instead, I suggest this: Congress should not restructure a circuit unless there is substantial evidence indicating that the circuit – and the federal judicial system as a whole – will be better off with a particular reorganization than with the status quo or other possible courses of action. The burden remains on the proponents of change. The focus must be on the benefits and drawbacks of a particular reorganization plan. Congress does not legislate in the abstract; benefits and drawbacks cannot be assessed in the abstract.

3. *In considering proposals to divide the Ninth Circuit, Congress should be guided by its handling of similar proposals in the past. In particular, it should give substantial weight to the views of the judges and lawyers in the affected region.*

Twice in the 126-year history of the federal courts of appeals, Congress has divided one of the judicial circuits. In each instance, Congress waited until the

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[2] Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 6 (1998) [hereinafter White Commission Report]. The Commission was chaired by the late Justice Byron R. White.

[3] Judicial Conference of the United States, Long Range Plan of the Federal Courts 44 (1995).

legal community in the affected region had reached a consensus that division was warranted.[4]

The first circuit split occurred in 1929, when Congress carved out the Tenth Circuit from the old Eighth. Initially the idea was controversial. But by the time hearings were held on the circuit division proposal, all of the judges of the existing Eighth Circuit and bar associations of eight states had expressed their approval.

Of greater contemporary relevance is the history of the division of the old Fifth Circuit. The Commission on Revision of the Federal Court Appellate System (Hruska Commission) recommended division of the Fifth Circuit in 1973. A bill to implement the recommendation was introduced in Congress within months of the Commission's report. But the legislation was not enacted at that time, or for several years thereafter. One of the main reasons was that the proposed division was strongly opposed by some members of the court, as well as by some lawyers' groups. By 1980, however, professional opinion had turned around. The judges of the court unanimously petitioned Congress to divide the circuit. Bar associations in each of the six states and others in the legal community agreed. Only then did Congress act.

I am not suggesting that Congress should wait until professional opinion is unanimous or even overwhelming in support of a split. But history tells us that Congress has stayed its hand until it received a strong signal from the legal community in the affected region that the existing circuit was too large.

I recognize, of course, that the structure and organization of the federal courts are matters that the Constitution commits to Congress. Indeed, some Ninth Circuit judges have declined to take a position on circuit reorganization proposals for that very reason. Nevertheless, as a matter of comity – the respect due to an equal branch of government – it is appropriate and sensible for Congress to defer action until the proposed reorganization has substantial support from the judges and lawyers in the affected region.

That is good policy as well. If the arguments in favor of a split have not persuaded those who would be most directly affected by any inadequacies in the existing structure, it is hard to see why Congress should conclude otherwise.

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[4] For a brief account of the history summarized here, with additional citations, see Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 Montana L. Rev. 261, 268-70 (1996) [hereinafter Hellman, *Dividing the Ninth Circuit*].

But comity is a two-way street. If Congress is to give such heavy weight to the views of the judges and lawyers in the circuit, it must have confidence in the process by which those views have been reached. This means that the judges and lawyers – particularly the judges – have an obligation to give a fair and thorough hearing to reasonable new legislative proposals, even if they have previously taken the position that no change is warranted.

4. Congress should be very wary of drawing conclusions based on statistics about the performance of the Ninth Circuit Court of Appeals. It should ask whether the numbers truly demonstrate the existence of problems; and if the Ninth Circuit does come off badly, Congress should insist on evidence showing that the problems can be linked to circuit size.

Proponents of dividing the Ninth Circuit make extensive of numbers and statistics. For example, we are told that: the Ninth Circuit covers 20% of the United States population. The court of appeals has an 80% reversal rate. The average wait time for decisions exceeds 15 months. And so forth.

I have written extensively about some of these issues, and I will not repeat that discussion here.[5] But three points are worth making.

First, some of the numbers are not probative at all. Yes, the Ninth Circuit covers a vast territory and includes a large population. But size, of itself, cannot be an argument for restructuring. Alaska is larger than the combined area of the 22 smallest U.S. states, but no one thinks that Alaska should be restructured. One out of every eight U.S. residents lives in California, but few people take seriously the occasional suggestion that California should be divided into two states. The question for Congress is whether the Ninth Circuit's size has impeded its ability to carry out its functions in the American legal system. Mere recitation of large numbers cannot answer that question.

Second, some of the statistics are open to debate. For example, proponents argue that the Ninth Circuit Court of Appeals is reversed by the Supreme Court far more often than other circuits. But there is much disagreement among scholars and other commentators about how to measure the various circuits' reversal rates.[6] And even if it could be established that the Ninth Circuit is indeed "the most reversed," it would still be necessary to show that the reversal

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[5] See, e.g., Arthur D. Hellman, *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. Davis L. Rev. 425 (2000).

[6] See, e.g., John S. Summers and Michael J. Newman, *Towards a Better Measure and Understanding of U.S. Supreme Court Review of Courts of Appeals Decisions*, 80 U.S.L.W. 393 (2011).

rate is a consequence of the court's size. I investigated this point some years ago, and after careful empirical analysis I was not able to substantiate a causal connection between the court's size and the pattern of reversals.[7]

In making their argument, proponents of circuit division often fail to note that size is not the only characteristic that makes the Ninth Circuit unique among the federal courts of appeals. Uninterruptedly for the last 20 years, the Ninth Circuit – and only the Ninth Circuit – has had a majority of active judges who were appointed by Democratic Presidents. During that same period, the Supreme Court has had a majority of Justices who were appointed by Republican Presidents. Numerous studies have shown a strong correlation between the political party of the appointing President and a judge's liberal or conservative voting. Based on these studies, it is much easier to conclude that the Ninth Circuit's high reversal rate is a consequence of the ideological difference between the two courts than it is to attribute the reversal rate to the Ninth Circuit's size.[8]

Third, there is one numbers-based argument that cannot be readily dismissed. Proponents of reorganization assert that the Ninth Circuit's size results in delays in the disposition of cases. They can point out that for more than 25 years, the Ninth Circuit Court of Appeals has consistently ranked at or near the bottom among federal appellate courts in the median time interval from filing the notice of appeal to final disposition.[9] Moreover, this phenomenon has

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[7] See Hellman, *Dividing the Ninth Circuit*, supra note 5, at 431-52.

[8] Ten years ago, Professor Brian T. Fitzpatrick argued that "it can be shown mathematically that, as a court grows larger, it is increasingly likely to issue extreme decisions" that would be candidates for reversal by the Supreme Court. Brian T. Fitzpatrick, Op-Ed, *Disorder in the Court: The 9th Circuit is Overturned More than any Other Appeals Court. Its Size May Be a Factor*, L.A. Times, July 11, 2007 at A15. Professor David H. Kaye, co-author of a leading reference work on statistics, reviewed Professor Fitzpatrick's analysis. He agreed that the mathematics in the op-ed "has some bearing on the optimal size of appellate courts." But he concluded that "the effort to link circuit court size with Supreme Court overrulings seems strained, and the putative link is not a compelling basis for dividing the Ninth Circuit." D.H. Kaye, *On a Mathematical Argument for Splitting the Ninth Circuit*, 48 Jurimetrics J. 329 (2008).

[9] Here is the ranking of the Ninth Circuit for the last ten years (12th is slowest):

2016.....12
2015.....12
2014.....11
2013.....12
2012.....12
2011.....12

persisted even in years when the court has had virtually its full complement of active judges.

To be sure, there is also contrary evidence: if one considers only the time that the cases are in the hands of the judges (that is, from submission to final order), the circuit is among the fastest. But that is little consolation to the litigants whose cases linger in the pipeline.

On balance, this record does suggest a problem, even a problem of some magnitude. But is the problem related to the size of the circuit? That is a much more difficult question. In 2003, I tried to shed light on that point by compiling a table that listed the three slowest circuits for each year from 1980 through 2002. Analysis of the patterns suggested that in most of the courts of appeals, delay was the product of transient circumstances. When circumstances changed, the circuit went off the list. But in the Ninth Circuit, delay appeared to be chronic and persistent. And the ensuing years have not brought improvement.

These findings do lend support to the argument. But correlation does not prove causation. And in the absence of a well-grounded theory that would explain why delay is a consequence of the court's size, it is impossible to conclude that splitting the circuit would provide a cure. One might speculate, for example, that the many manifestations of circuit size – number of cases, number of circuit judges, number of districts, number of trial judges, etc. – somehow combine to produce a complexity that defies even the most skillful and determined management efforts. But speculation – even plausible speculation – is not enough.

Moreover, there is another possible explanation for the pattern of delays: even with 29 authorized judgeships, the court may not have enough judges. In fact, the Judicial Conference of the United States has recommended that Congress create five new permanent judgeships for the Ninth Circuit Court of

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2010.....12
2009.....12
2008.....12
2007.....12

The rankings are limited to cases terminated on the merits. The data are taken from Table B-4 for 12-month periods ending September 30 in the "Judicial Business" series posted on the website of the Federal Judiciary by the Administrative Office of U.S. Courts.

Appeals.[10] The Conference has not recommended new appellate judgeships for any of the other circuits. Arguably it would make sense for Congress to first provide the judges to help the court dispose of its backlog, and to split the circuit later only if the additional judgepower does not enable the court to speed up its pace of disposition. The drawback is that if size does contribute to the pattern of delay, adding judges to the existing circuit could make the situation even worse. From this perspective, splitting the circuit in accordance with the principles suggested in Part II of this statement could actually be the less risky course of action.

5. *In considering whether to divide the present Ninth Circuit into two new circuits, Congress may want to look separately at the likely consequences for the circuit that includes California and for the circuit that does not.*

More than 40 years ago, the Hruska Commission recommended division of both the Fifth and the Ninth Circuits. As already noted, less than a decade after the Commission issued its report, the Fifth Circuit was divided in accordance with the Commission's recommendation. But the Ninth Circuit remains intact, and the controversy over restructuring continues unabated, as is evidenced by this hearing.

One reason the histories diverged is that the old Fifth Circuit consisted of six states that could be divided into two three-state circuits with (at that time) roughly equal caseloads. For the Ninth Circuit, no such division is possible. California now accounts for more than half of the appeals from the district courts of the circuit, and the circuit that includes California will be a very large circuit no matter what other states are contained within it.[11]

There is, however, another way of looking at this seemingly intractable obstacle. If circuit division would benefit the legal communities and the citizenry in the states of the proposed new non-California circuit, and the division can be accomplished without disadvantaging the circuit that includes California, that might be enough to justify the reorganization. To put it another way: If the California circuit (which I'll call the new Ninth Circuit) is no worse off after restructuring, and the non-California circuit (the Twelfth Circuit) is better off, that would seem to effect an overall improvement.

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[10] The most recent recommendation was issued on March 14, 2017. See http://www.uscourts.gov/sites/default/files/2017_judicial_conference_judgeship_recommendations_0.pdf. For further discussion of this point, see Part II.

[11] For further discussion of the California portion of the caseload, see Part II.

Creating a Twelfth Circuit from some of the states that are now part of the Ninth Circuit could indeed appear attractive to the judges and lawyers of those states. No one thinks that it is really desirable to have a system in which cases are decided by panels of three judges selected at random from an array of more than 40 active and senior circuit judges (as well as judges from other courts sitting by designation). That arrangement may be inevitable for the circuit that includes California, but in the new Twelfth Circuit the cohort of judges would be much smaller. In addition, judges might not have to travel as much for oral argument (although that would depend in part on the particular configuration), and the Judicial Conference of the Circuit could be open to all members of the circuit bar, as it is in other circuits.

What prompts this suggestion is my view that although the arguments made by proponents of a circuit split are not persuasive, the arguments made by opponents are not very compelling either. For example, opponents emphasize the value of having a single court interpret and apply federal law in the west. But empirical studies – including interviews with lawyers – have shown that conflicts between circuits generally do not present a serious problem in the legal system.[12] If the existing Ninth Circuit were to be split, some disagreements between the new Ninth and the Twelfth Circuit on issues of federal law would no doubt develop, but these would be no more troublesome than the disagreements that sometimes arise today between the Ninth and other circuits. And with rare exceptions those disagreements have minimal impact on counseling and litigation.[13] Most of the other arguments against circuit division can be addressed through ameliorative provisions in the legislation; some of these are discussed in Part II.

How might the approach suggested here be implemented? I turn now to the considerations that should guide Congress in carving out a new Twelfth Circuit composed of some states that are part of the present Ninth Circuit.

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[12] See Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. Pitt. L. Rev. 693 (1995) (reporting on study conducted for Federal Judicial Center); Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 Sup. Ct. Rev. 247 (1999) (reporting on lawyer interviews).

[13] "When one considers both the tolerability of the unresolved conflicts and their persistence, the evidence points strongly to the conclusion that unresolved intercircuit conflicts do not constitute a problem of serious magnitude in the federal judicial system today." Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. Pitt. L. Rev. 81, 89-90 (2001).

II. If Restructuring Is Desirable, How Should the Legislation Be Drafted?

On the evidence now available, I do not think the proponents have made the case that the Ninth Circuit is too large to function effectively. But Congress may conclude that restructuring would be beneficial, particularly if, as discussed above, Congress looks separately at the likely consequences for each of the two new circuits. On that premise, I suggest six precepts that should guide the Subcommittee in drafting circuit division legislation. For convenience, I will refer to the circuit that includes California as the "new Ninth Circuit" and to the other circuit as the Twelfth Circuit. Included here are a number of detailed suggestions that respond to concerns expressed about prior circuit division proposals.

1. *Each of the new circuits should be composed of at least three states.*

A federal judicial circuit should be composed of at least three states. This is not an idea that is based on academic speculation; on the contrary, it was the conclusion of the very practical-minded White Commission – a commission created by Congress, with four judges (one a judge of the Ninth Circuit Court of Appeals) and a former president of the American Bar Association as its members. The Commission cogently explained the reasons for its position:

> Circuit realignment to produce circuits smaller than three states is undesirable. We conclude this because we believe three is the minimum necessary for units of the intermediate tier of a *federal* system to serve an appropriate federalizing function. Appellate courts serve this function better when they comprise judges from several states. This not only ensures a broader, more national perspective essential to a federal court system, but enlists the continuing interest of several congressional delegations and spreads among a larger number of senators the informal but ingrained influence over the appointment of the court's judges. Concentrating such influence in one or two senators over a court with appellate caseloads as large as those generated, for example, by California, New York, or Texas, would not be, in our view, wise policy.[14]

Those who disagree with this conclusion point out that California is a populous and diverse state. So it is. But that is not responsive to the rationale articulated by the White Commission. As the Commission noted, having three states in a circuit "spreads among a larger number of senators the informal but ingrained influence over the appointment of the court's judges." Each senator

[14] White Commission Report, supra note 2, at 52-53.

brings a unique outlook and a different set of priorities, thus helping to ensure "a broader, more national perspective essential to a federal court system." No matter how diverse California might be, the state still has only two senators.

The political dynamics affecting federal judicial appointments will change from time to time, depending on which party controls the White House and who sits in the Senate. But with three states, each of which has one or more seats on the court of appeals, we can expect greater diversity of jurisprudential perspectives than if only one or two states were represented. Moreover, each senator is, at least potentially, a voice for the circuit when political disagreement threatens a prolonged period of vacant judgeships or other injury to the circuit's ability to function effectively.[15]

Those who question the three-state minimum often cite the District of Columbia Circuit, which encompasses a small geographical area and a single federal judicial district. But the existence of the District of Columbia Circuit in no way refutes the argument. First, the District of Columbia has no senators. The President – elected by a national constituency – exercises complete control over nominations to the court of appeals. No senator enjoys a right to be consulted, let alone a right to veto, in appointments and other matters affecting the circuit. Second, the President can and does appoint judges from anywhere in the country. The District of Columbia Circuit is thus a national court even though its geographical jurisdiction encompasses only a single small district.

Thus, the White Commission was correct: "Circuit realignment to produce circuits smaller than three states is undesirable." The arguments advanced against adhering to the three-state minimum do not withstand scrutiny. If Congress restructures the Ninth Circuit, it should do so in a way that does not produce any circuit smaller than three states.

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[15] This is not simply a matter of theory. During the George W. Bush administration, there were four long-standing Michigan vacancies on the Sixth Circuit Court of Appeals because the Michigan Senators blocked all of the President's nominees from that state. But four nominees from other states were confirmed to the court. In the Fourth Circuit, another disagreement between the White House and Senators kept North Carolina from having any active judges on the court of appeals from 1999 through July 2003.

2. *To bring justice "closer to the people," Congress should restructure the circuit in a way that respects the relationships and arrangements that the people of the nine states in the circuit have developed voluntarily over the years.*

If the new Ninth Circuit should be composed of California and at least two other states, which states should they be? To answer that question, it is helpful to consider the theme of this hearing: "bringing justice closer to the people."

The idea of bringing justice "closer to the people" is an appealing one, but it is not entirely clear what it might mean in the era of the Internet and electronic communication. I think that in the context of circuit restructuring, bringing justice closer to the people should mean respecting the relationships and arrangements that the people of the circuit have developed voluntarily over the years. From this perspective, a central question is: where should Arizona be placed? When the White Commission held its hearings in 1998, several Arizona lawyers and judges discussed this issue. All took the same position: Arizona belongs in the same circuit as California. A few years later, I did some research on legal and commercial practice in Arizona; I found that the state's closest ties are with California and, to a lesser degree, with Nevada.

Based on the White Commission hearings and my own research, I would conclude that California belongs with Arizona and Nevada. But the Subcommittee will want current information; it can obtain that information from the judges and lawyers of the affected states.

Unfortunately, Arizona is the second-largest source of appeals to the Ninth Circuit from the district courts; Nevada is fourth (with Washington State third by a small margin). Thus the most attractive configuration from the perspective of preserving existing relationships is problematic from the perspective of caseload allocation.

In the 114th Congress, a new proposed configuration emerged for the first time in many years: a Pacific Coast circuit composed of California, Oregon, Washington, and Hawaii.[16] Those four states could well be regarded as sharing a community of interest. As for the proposed Twelfth Circuit, here too Congress would want to hear from the lawyers and judges in the affected states.

[16] The circuit would also have included Guam and the Northern Mariana Islands. In the remainder of this statement, I will assume that these Territories – which of course do not have Senators – will be included in the circuit of which Hawaii is a part.

3. *The legislation should allocate to the new Ninth Circuit a sufficient number of judgeships to assure that the per-judge caseload in that circuit would be no greater than it is today, and preferably smaller.*

In the past, circuit division legislation has been opposed with virtual unanimity by the legal community in California and by California political figures on both sides of the aisle. One reason for that opposition has been that the legislation almost invariably short-changed the proposed new Ninth Circuit in the number of appellate judgeships allocated to it. New proposals should avoid that defect, which disserves the people as well as the legal community of the affected states.

Unfortunately, it is not easy to get information about the proportion of the court of appeals caseload contributed by each of the states within the circuit. Both the Ninth Circuit's annual report and the statistical reports of the Administrative Office of United States Courts break out the *district court appeals* by district. But they do not provide that information for the administrative appeals and the original proceedings. For the year ended Sept. 30, 2015 (the most recent available), the latter two categories accounted for about 40% of the total caseload.

The vast majority of the administrative agency cases were immigration appeals. It is likely that the immigration appeals were concentrated in California; to the extent that they were, the figures on district court appeals would understate the proportion of the total caseload that comes from California. Indeed, a very preliminary examination of a sampling of immigration appeals within the present Ninth Circuit indicates that as many as two-thirds are likely to derive from California.

Presumably more precise information about the geographic source of administrative appeals is available from the Ninth Circuit Clerk's Office. With that information, it should be possible to determine how judgeships should be allocated between the new Ninth Circuit and the Twelfth Circuit in a way that is fair to both.

As mentioned in Part I, the Judicial Conference of the United States has recommended five new permanent judgeships for the Ninth Circuit Court of Appeals.[17] It would be desirable for Congress to create these judgeships as part

[17] See supra note 10.

of the circuit division legislation and, depending on the precise restructuring, to allocate most or even all of them to the new Ninth Circuit.

In addition, Congress can make it easy for judges on each of the new courts of appeals to sit in the other circuit without having to go through the regular statutory process of seeking designation by the Chief Justice of the United States. (See 28 U.S.C. § 291.) All that should be necessary is designation by the chief judge of the circuit in which the judge ordinarily sits. A provision to that effect is already included in one of the pending circuit reorganization bills (H.R. 196).

Finally, the legislation should specify that the circuit will not actually be divided until at least some of the new judgeships created by the bill have been filled. Such a provision would assure that the new Ninth Circuit would not be left short-handed during the nomination and confirmation process for the new judges. Language to accomplish this purpose can be found in H.R. 196 (section 15).

4. The legislation should allow the two new circuits to take advantage of the economies of scale that the present large circuit now enjoys in its administrative and managerial functions.

Ninth Circuit judges testifying in opposition to previous circuit split proposals have emphasized considerations of cost and efficiency. In particular, the judges have pointed to the economies of scale that the circuit now enjoys in administrative and managerial functions. For example, Judge (now Chief Judge) Sidney Thomas noted that the resources of a central staff "are available to manage courthouse construction, assist in information technology, provide aid in personnel management, and help in capital case management."[18] In a similar vein, then-Chief Judge Schroeder observed that the new circuit would have to replicate functions such as "processing complaints against judges, ascertaining budgetary requirements for the courts … and meeting [heightened security requirements]."[19]

This concern can be met by including a provision – already part of H.R. 196 – that would authorize any two contiguous circuits to jointly carry out administrative functions and activities when the circuit councils of the two circuits determine that these functions will benefit from coordination or

[18] Ninth Circuit Court of Appeals Reorganization Act of 2001: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Judiciary Comm. at 63 (2002) (statement of Judge Thomas) [hereinafter House Hearing].

[19] Id. at 11 (statement of Chief Judge Schroeder).

consolidation. Thus, if it is efficient to have a single person or office handle matters like courthouse construction or information technology or security for both of the new western circuits, there will be no need to forgo that efficiency.

There is precedent for this kind of intercircuit coordination; the statute governing bankruptcy appeals allows "the judicial councils of 2 or more circuits" to establish "a joint bankruptcy appellate panel" for the participating circuits. See 28 U.S.C. § 158(b)(4). That statute requires authorization by the Judicial Conference of the United States, but it is unnecessary to include such a requirement in the circuit division legislation.

5. *The legislation should make easy to send judges from both circuits into districts experiencing a temporary judicial need, whether in the Twelfth or New Ninth Circuit.*

At a hearing on a circuit division bill in 2002, Ninth Circuit judges expressed concern that splitting the circuit would impair the ability of courts within the circuit "to lend judges to those districts suffering temporary judicial need."[20] To address this concern, the legislation should authorize each of the new circuits to designate judges for service in the other circuit without having to seek authorization from the Chief Justice of the United States, as current law would require. There should be provisions applicable to circuit judges as well as district judges.

This would not quite replicate the current arrangement; two approvals would be required instead of one. But if we assume, as I do, that the two circuits would do their best to make the system work, the argument loses much of its force. Again, provisions along these lines are already included in H.R. 196.

6. *Congress should assume that Twelfth Circuit, following the example of the Eleventh Circuit upon its creation, will adopt as binding precedent the decisions handed down by the Ninth Circuit Court of Appeals before the reorganization.*

Immediately after Congress divided the old Fifth Circuit into two new circuits, the Eleventh Circuit convened en banc "to consider what case law will serve as the established precedent of the Eleventh Circuit at the time it comes into existence." In *Bonner v. City of Pritchard*,[21] the court held unanimously that decisions of the old Fifth Circuit handed down prior to the close of business on the date preceding the split "shall be binding as precedent in the Eleventh Circuit,

[20] House Hearing, supra note 18, at 63 (statement of Judge Thomas).

[21] 661 F.2d 1206 (11th Cir. 1981).

for this court, the district courts, and the bankruptcy courts in the circuit." The court noted that any such decisions could be overruled by the Eleventh Circuit sitting en banc.

This was the sensible course of action, for reasons eloquently explained by Chief Judge John C. Godbold on behalf of the court. The full opinion is worth reading, but here are some excerpts:

> Stability and predictability are essential factors in the proper operation of the rule of law. … During [an extensive span of time starting in 1866] the decisions of the Fifth Circuit have been precedents applied in the states that now constitute the Eleventh Circuit. … Citizens of these states and their legal advisers have relied upon [this jurisprudence] and structured their legal relationships with one another and conducted their affairs in accordance with it. By adopting the former Fifth Circuit precedent we maintain the stability and predictability previously enjoyed.

The court noted that this resolution was consistent with the approach followed after the one previous division of a circuit: decisions by district courts in the new Tenth Circuit "accepted the law of the Eighth as binding."

Until recently, there would have been no need to even mention this point. But a circuit division bill introduced in the Senate early this year (S. 276) includes a provision stating: "Precedent from the former ninth circuit shall not be binding on the twelfth circuit. Precedent from any circuit, including the former and new ninth circuits, shall be persuasive authority only."

There may well be an argument that a provision such as this is unconstitutional under principles of separation of powers. But whether or not such a law is constitutional, it would be extremely unwise. As Chief Judge Godbold explained, citizens and lawyers have relied on circuit precedent in all of the vast areas of human activity governed by federal law. To abrogate that precedent and allow every question to be litigated afresh would be extraordinarily disruptive – and also costly, not just to the courts but also to lawyers and their clients.[22]

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[22] In his lecture on "Adherence to Precedent," Judge Benjamin N. Cardozo famously observed that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case." Benjamin Cardozo, *The Nature of the Judicial Process* 149 (1921). Under S. 276, the additional labor would also be required of lawyers, driving up the cost of legal services.

There is no need to say anything about precedent in the legislation; Congress should assume that the new Twelfth Circuit would follow the example of the Eleventh and convene en banc to adopt a counterpart to the rule of *Bonner v. City of Pritchard*.

III. How Do Pending Bills Measure Up?

At this writing, two bills to reorganize the Ninth Circuit have been introduced in the House: H.R. 196, the Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2017, introduced by Rep. Simpson; and H.R. 250, the Judicial Administration and Improvement Act of 2016, introduced by Rep. Biggs and other members of the Arizona delegation.

H.R. 196 would create a new Ninth Circuit composed of only two states, California and Hawaii. As explained by the White Commission, "three [states] is the minimum necessary for units of the intermediate tier of a *federal* system to serve an appropriate federalizing function." The reorganization proposed by H.R. 196 is inconsistent with that principle. Moreover, the proposed California-Hawaii court of appeals would be so overwhelmingly dominated by California judges that it would be, in effect, a one-state circuit court – the ultimate negation of the "federalizing function" described by the White Commission.

In other respects, however, H.R. 196 deserves plaudits. Indeed, it is evident that the bill was crafted with the aim of addressing the concerns raised by Ninth Circuit judges about previous circuit split legislation. There are good provisions on temporary assignments of judges between the new Ninth and the Twelfth Circuit (sections 11 and 12) and also a good provision on administrative coordination (section 13).

More important, H.R. 196 also has a provision (section 4) authorizing seven new judgeships, five permanent and two temporary, all for the new Ninth Circuit. Four of the new judgeships – two permanent and two temporary – could be filled immediately upon enactment of the bill. The other three judgeships could not be filled until January 21, 2018.[23] Further, the split would not take place until five of the new judgeships authorized by the bill had been filled (section 15).

The other bill, H.R. 250, would create a new Ninth Circuit composed of four states – California, Oregon, Washington, and Hawaii. This is the "Pacific Coast Circuit" discussed above, and it would certainly satisfy the White

[23] It is not clear why appointment of three of the new judges would be delayed until that particular date.

Commission's three-state rule. But in other respects H.R. 250 is wanting. It does not have the provisions on temporary assignments between circuits and administrative coordination that are included in H.R. 196. And, unlike H.R. 196, it would not create any permanent judgeships.[24]

Based on this analysis, I think it would be efficient for the Subcommittee to take H.R. 196 as the starting-point for a new bill. However, section 3 of H.R. 196 would be replaced by section 3 of H.R. 250, so that the new Ninth Circuit would consist of California, Hawaii, Oregon, Washington, Guam, and the Northern Mariana Islands; the remaining states of the current Ninth Circuit would be moved into the Twelfth Circuit.

The most important remaining question relates to the allocation of judges between the two new circuits. Under the composite bill discussed in the preceding paragraph, the two circuits together would have 34 judgeships. Currently, the states and Territories of the new Ninth Circuit account for about 75% of the district court appeals. On that basis, the new Ninth Circuit would be entitled to 26 of the 34 judges. If the two temporary judgeships are also allocated to the new Ninth Circuit, that would probably take care of the additional immigration caseload, at least in the immediate future.[25] The other 8 judgeships would be allocated to the five states of the Twelfth. That happens to be exactly the number of active judges who now have their duty stations in the states of the proposed Twelfth.

IV. Conclusion

If the Ninth Circuit did not exist in its present configuration, no one would argue that Congress should create a single circuit to handle one-fifth of the nation's federal appellate caseload. But that is not the issue for Congress or this Subcommittee today. The Ninth Circuit is a going concern, and the vast majority of its appellate judges believe that it is working well. The primary consumers of

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[24] It does have a provision (section 8) for temporary judgeships in the Twelfth Circuit to replace judges whose duty stations are now in a Twelfth Circuit state but who elect to be permanently assigned to the new Ninth Circuit.

[25] One of the most useful steps Congress could take to ease the caseload burdens of the federal courts of appeals (particularly in the Ninth and Second Circuits) would be to create a robust system of review by an Article I court of immigration decisions by administrative law judges. Such a measure would also be beneficial to the immigration system. Another subcommittee of the House Judiciary Committee, the Subcommittee on Immigration and Border Security, is already pursuing this idea. See http://naij-usa.org/wp-content/uploads/2016/03/Gowdy-Lofgren-Letter-for-GAO-EOIR-Study1.12.15.pdf.

the circuit's appellate decisions – trial judges, lawyers, and the business community – have not complained that the circuit is malfunctioning; on the contrary, at least in the past, they have strongly opposed the various proposals for circuit reorganization. Under these circumstances, it is hard to see why Congress should proceed with any kind of restructuring.

But if Congress looks separately at the interests of the two circuits that would be created by a split, it may conclude that division would improve the administration of justice in the states of the proposed new non-California circuit – and that the reorganization can be accomplished without disadvantaging the other states. If Congress acts upon that conclusion, the legislation should be carefully drafted to avoid the flaws that made prior proposals so injurious, particularly to the circuit that would include California. In particular, each of the new circuits should be composed of at least three states. The legislation should allocate to the new Ninth Circuit a sufficient number of judgeships to assure that the per-judge caseload in that circuit would be no greater than it is today, and preferably smaller. And provisions should be included that will enable the two circuits to take advantage of the economies of scale that the present large circuit now enjoys in its administrative and managerial functions and in the lending of judges to districts in need.