THE NEED FOR NEW LOWER COURT JUDGESHIPS, 30 YEARS IN THE MAKING

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

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C O N T E N T S

WEDNESDAY, FEBRUARY 24, 2021

Page

QUESTIONS AND ANSWERS FOR THE RECORD

THE NEED FOR NEW LOWER COURT JUDGESHIPS, 30 YEARS IN THE MAKING

Wednesday, February 24, 2021

U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY
Washington, DC

The Committee met, pursuant to call, at 10:05 a.m., in Room 2141, Rayburn House Office Building, Hon. Henry C. "Hank" Johnson, Jr. [Chair of the Subcommittee] presiding.

Members present: Representatives Johnson, Nadler, Lieu, Stanton, Lofgren, Cohen, Bass, Jones, Ross, Neguse, Issa, Chabot, Gohmert, Tiffany, Massie, Bishop, Fischbach, Fitzgerald, and Bentz.

Also present: Representative Spartz.

Staff present: David Greengrass, Senior Counsel; Madeline Strasser, Chief Clerk; Cierra Fontenot, Staff Assistant; John Williams, Parliamentarian; Jamie Simpson, Chief Counsel, Courts, and IP; Ken David, Minority Counsel; Kiley Bidelman, Minority Clerk; and John Lee, Minority USPTO Detailee.

Mr. JOHNSON of Georgia. [Presiding.] The Subcommittee will now come to order. Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time.

Welcome to this morning's hearing on the "Need for New Lower Court Judgeships, 30 Years in the Making."

Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that Members might want to offer as part of today's hearing. If you would like to submit materials, please send them to the email address that has been previously distributed to your offices, and we will circulate the materials to Members and staff as quickly as we can.

I would also ask all Members, both those in person and those attending remotely, to mute your microphones when you are not speaking. This will help prevent feedback and other technical issues. You may unmute yourself anytime you seek recognition.

I would also remind Members that guidance from the Office of Attending Physician calls for all Members to wear a mask, even when they are speaking.

I will now recognize myself for an opening statement.

Fundamentally, Americans understand that a well-functioning legal system is vital to a healthy, thriving democracy. I think most of us share a vision of how our federal legal system should work to administer justice. This vision encapsulates a common-sense understanding of the importance of the constitutional right to petition the government for redress, to have due process, and to be entitled to a speedy and public trial. We imagine a system of open and equal justice accessible to everyone where each and every case is closely supervised by a federal judge who ensures that the case is resolved both fairly and efficiently.

This vision falls apart if the judicial system doesn't have enough judgeships to ensure that disputes are not only resolved correctly, but also without unjustifiable expense and delay. That, unfortunately, is the crisis that we face today.

We hear from small businesses and individual litigants who tell us that, because there aren't enough federal judgeships, their disputes drag on, saddling them with crippling uncertainty and spiraling legal costs. We hear about how many years it takes to get a case to trial, settlement, or even an appellate decision. We hear from prosecutors that the delay makes criminal cases harder to prove, and we hear from defense attorneys that their clients languish in the limbo of pretrial detention.

We hear about this crisis in the courts all the time, but it is been going on for so long that we have stopped treating it as a crisis. The last time Congress passed comprehensive judgeship legislation was 1990, just a year after the World Wide Web was created.

A lot has happened in the ensuing 30 years, to put it mildly. The country grew by 75 million people. Our economy more than doubled. The world has become increasingly connected and complex, and the business of the courts has changed accordingly.

Even after three decades of rising caseloads and increasingly difficult cases, the number of federal judges as stayed almost exactly the same. In some districts, the situation is even more dire. For example, the Northern District of Georgia, which encompasses Atlanta, hasn't received a new District Court judgeship since 1978, even though the population of the district has increased exponentially, and the regional economy has been transformed.

Our federal district judges are extraordinary, but there is only so much that they can do to compensate for the fact that they have needed reinforcements for decades. They often rue the techniques they have resorted to try to manage their unmanageable caseloads. At the appellate level, some circuits have developed docket management practices that raise serious concerns about whether a two-tiered justice system has developed, one reserved for marquee cases, White shoe lawyers, and wealthy litigants, and one for everyone else.

All this makes clear that we cannot find a workaround to the fact that expanding the lower courts is decades overdue. The consequences of doing nothing are insidious and can become downright cancerous. When people lose faith in the federal court system's ability to resolve disputes justly, quickly, and inexpensively, our democracy suffers. We need to make sure that the federal courts can still operate according to the principle that justice delayed is justice denied.

I look forward to hearing from our eminently qualified witnesses who will shed greater light on what it is like in a judiciary suffering from a chronic lack of judgeships and who will discuss the importance of finally addressing this crisis.

It is now my distinct pleasure to recognize the Ranking Member of the Subcommittee, the gentleman from California, Mr. Issa, for his opening statement.

Mr. ISSA. Thank you, Mr. Chair.

As you said, justice delayed is justice denied. Many people know that time is money, and, in fact, money is the equivalent of justice delayed and, thus, denied. All of this has been a side effect of our inability to Act in a timely fashion, as you said, for more than 30 years. Although, in 2002, 15 judgeships were created, it only stemmed a small portion of the tide of ever-growing cases.

It, also, is time for significant reform. It is time for a serious conversation about the district judges and the circuit courts, but also about areas such as my own Ninth Circuit. The Ninth Circuit currently has 29 judges. Any reasonable expansion of the court would include additional judges on that court. Yet, the Fifth Circuit, which was last split in 1981, had only 17 judges and was split because it was reaching a point where it could not hold an en banc. The Ninth Circuit has not had a true en banc in decades.

The fact is that the Ninth Circuit has the largest population and includes Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, and the Northern Marianas, along with Oregon and Washington. It decides more than 11,000 appeals each year and its backlog is pending, typically, two years or more. If there is a good example of denied because of delay, the Ninth Circuit is the poster child for it.

It has been 17 years since we last made any increase, which is the longest since 1789. More than 425,000 cases were filed in Federal District Court and the Courts of Appeals last year. These cases included time-sensitive civil rights claims, criminal prosecutions, environmental and consumer protection litigation, discrimination claims, challenging to government power, and holding corporations accountable for misconduct.

With an insufficient number of judges to handle this caseload, ever greater numbers of people have been forced to seek alternate remedies, often to the detriment of what they would otherwise be entitled to and without the precedent-setting decisions that would help in future cases. It is fine to consider outside JAMS and other resolutions, but it is not acceptable when there is no choice but to do so.

While the decision for new judgeships is overdue, it is also important that we do it on a bipartisan basis. When Republicans were in the majority during the 115th Congress, I introduced the Judiciary ROOM Act, where we worked with our Democratic colleagues, many of whom are still here today, including our Chair of the full committee. This bill brought an added 52 permanent District Court judgeships with a total of 66 judges authorized, including eight temporary judgeships, into permanent judgeships. It was perhaps the boldest attempt in 30 years, and it did not fail for lack of a bipartisan nature. It failed for the effective and normal reason, that we ran out of time to get it through the Senate.

That should not happen again. We must work diligently in the early days of this Congress to send to the Senate a comprehensive bill that includes an expansion not only of those judgeships, but additional judgeships.

What is also important, as I have spoken to the Chair of the Subcommittee, is that we also have to send a clear message early on to the Transportation and Infrastructure Committee that these judgeships come with a need for offices and courtrooms, and those courtrooms can take three to eight years to build. For that reason, we need to Act resolute and quickly. We need to send a clear message that this is going to become law.

Lastly, it is my fervent hope that we will use a similar compromise to the one we used in the 115th Congress when the House, the Senate, and the White House were all controlled by the Republican Party, that we have the effective date for at least some of these judgeships to be after the next presidential election, so that no one is being asked, is this a partisan appointment process or an expansion of the court for purposes of one side or the other, but, rather, the ongoing need that we will have even in three years from now.

With that, I thank the Chair for his indulgence and yield back.

Mr. JOHNSON of Georgia. I thank the gentleman from California. I am now pleased to recognize the Chair of the full committee, the gentleman from New York, Mr. Nadler, for his opening statement.

Chair NADLER. I thank the Chair for holding a hearing on this important issue that I know affects judges and litigants profoundly across the country, the growing crisis caused by the failure in recent decades to add new judgeships to the Federal District and Circuit Courts.

Article III, section 1, of the Constitution states that, "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." Pursuant to that grant of authority, Congress soon passed the first bill to create judgeships, the Judiciary Act of 1789. Thereafter, Congress regularly enacted judgeship bills to keep pace with the growing Nation and the growing complexity of the federal docket.

That came to an end about 30 years ago after the passage of the last major judgeship bill, the Federal Judgeship Act of 1990. That was the last time that any new Circuit Court judgeships were created. That was also the last time that anything but a handful of District Court judgeships were created, and there have been no new permanent District Court judgeships added since 2003.

This 18-year pause is the longest break in adding new District Court judgeships since that first Judiciary Act back in 1789. Yet, between 1990 and the end of fiscal year 2008, case filings have only continued to rise, growing by 15 percent in Courts of Appeals and 39 percent in District Courts. In terms of caseloads, this means that the nationwide average caseload per judge is 521. This number is markedly higher in certain districts. As of March 2019, for example, the average for the District of New Jersey was 1,066. We will hear today from judges presiding in districts that are similarly bearing a higher-than-average caseload. Of course, this is to say nothing about whether the average itself is already too high.

The problem is also acute in the Courts of Appeals, which are often effectively the last court to which most litigants will have recourse. The Courts of Appeals have collectively heard around 50,000 appeals in recent years compared to the less than 100 that make it to the Supreme Court docket.

These numbers are dire, but statistics alone understate the depth of the crisis our courts face. What I hope to learn more about from the academics and honorable judges appearing before us as witnesses today is what these numbers mean in real terms. What is the impact of these growing caseloads on plaintiffs and defendants?

Access to justice is a constitutional guarantee, but when this promise meets the reality of an overburdened and understaffed court, too often cases may be delayed or rushed, and justice shortchanged. It is clear, for example, that long waits for civil trials can put pressure on plaintiffs to settle their cases, even if they believe they would win at trial, simply because they cannot bear the cost of drawn-out uncertainty in litigation.

The impact on the criminal justice system can be even more stark. Although there are rules in place to at least prioritize these cases on the federal docket, the pressures of a burgeoning caseload on courts with too few judges can still place severe limitations on access to justice.

We should also consider the impact on judges and how they must structure their practices to accommodate the growing caseload with no new colleagues to help shoulder the burden. At the appellate level, statistics point to Circuit Courts using a range of techniques to cope with the rising caseloads and depart from the traditional model of appellate decision-making. For example, while one-quarter of all opinions were published in 1985, only 1 out of 10 is published now, meaning they are not considered to have precedential effect. This can lead to confusion in the lower courts and among litigants.

In short, the efficient and fair Administration of justice, first and foremost, requires enough judges. From all indications, it seems like we do not have the right number today. I am pleased that we are having today's hearing to start to learn more about this important issue, and I hope, Mr. Chair, that our work will not end here.

Thank you, and I yield back the balance of my time.

Mr. JOHNSON of Georgia. I thank the gentleman from New York, and I will now introduce our witnesses.

The Honorable Kimberly J. Mueller is the Chief Judge for the United States District Court for the Eastern District of California. She was confirmed to the bench in 2010 and assumed the role of Chief Judge in January 2020. Judge Mueller also served as a magistrate judge from 2003 to 2010. Prior to her appointment as a judge, Judge Mueller was in private practice in Sacramento, specializing in intellectual property litigation. Before becoming a judge, Judge Mueller served on the Sacramento City Council. Judge Mueller is a co-founder of the Justice Anthony M. Kennedy Library and Learning Center. Judge Mueller earned her BA from Pomona College and her JD from Stanford Law School.

Welcome, Judge Mueller.

The Honorable Larry A. Burns is a Senior District Judge for the United States District Court for the Southern District of California.

Since January of 2021, Judge Burns was the Chief Judge on that Court. Judge Burns was confirmed as a district judge in 2003, and from 1997 to 2003, he served as a magistrate judge. Prior to his time on the bench, Judge Burns worked in the Office of the U.S. Attorney for the Southern District of California and the San Diego District Attorney's Office. Judge Burns received a BA from Point Loma College and his law degree from the University of San Diego School of Law.

Welcome, Judge Burns.

I will now turn to my colleague, the gentleman from Arizona, Mr. Stanton, to introduce our next witness.

Mr. STANTON. Thank you very much, Mr. Chair, for the opportunity to introduce a duly great Arizonan. The Honorable Diane J. Humetewa was appointed to the United States District Court for the District of Arizona in 2014. She is a trailblazer as the first Native American woman and enrolled tribal member to serve as a federal judge. Before she was unanimously confirmed by the Senate to that post, Judge Humetewa served as Special Advisor to the President and Special Counsel in the Office of General Counsel at Arizona State University and was a professor of practice at the Sandra Day O'Connor College of Law. Judge Humetewa served in the United States Attorney's Office for the District of Arizona for more than a decade and was appointed by President George W. Bush to serve as U.S. Attorney from 2007 to 2009. Previously, she worked in private practice at Squire, Sanders & Dempsey, where she represented tribal governments. She was also counsel to the U.S. Senate Indian Affairs Subcommittee, then chaired by the late Senator John McCain. Judge Humetewa is a member of the Hopi Tribe and served as an Appellate Court judge for the Hopi Tribe Appellate Court. She received her undergraduate degree from Arizona State University and her Juris Doctor from the Arizona State University College of Law.

Mr. JOHNSON of Georgia. Thank you, Mr. Stanton.

Welcome, Judge Humetewa.

Professor Brian T. Fitzpatrick is a Professor at Vanderbilt Law School, where he holds the Milton R. Underwood Chair in Free Enterprise. Previously, he served as the John M. Olin Fellow at New York University School of Law. Prior to teaching, Professor Fitzpatrick clerked for Judge Diarmuid O'Scannlain—let me do justice to that name, Diarmuid O'Scannlain—on the U.S. Court of Appeals for the Ninth Circuit, and later, for Justice Antonin Scalia on the U.S. Supreme Court. He practiced commercial and appellate litigation at the law firm Sidley Austin, LLP, and was the Special Counsel for Supreme Court Nominations to U.S. Senator John Cornyn. Professor Fitzpatrick earned his BS from the University of Notre Dame and his JD from Harvard Law School.

Welcome, Professor Fitzpatrick.

Professor Marin K. Levy is a Professor at Duke University School of Law. She serves as the Director of Duke's Program in Public Law and is a faculty advisor to the Bolch Judicial Institute. She has written extensively on judicial Administration of the Federal Courts of Appeals. Prior to teaching, Professor Levy served as a law clerk to Judge Jose A. Cabranes of the U.S. Court of Appeals for the Second Circuit and was an associate at the law firm Jenner

& Block in Washington, DC. Professor Levy received her BA from Yale, a Masters of Philosophy from King's College at the University of Cambridge, and her JD from Yale Law School.

Welcome, Professor Levy.

Before proceeding with your testimony, I hereby remind the witnesses that all your written and oral statements made to the Subcommittee in connection with this hearing are subject to 18 U.S.C. 1001.

Please note that your written statement will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in 5 minutes. There is a timer in the Webex view that should be visible on your screen. That should help you stay within that time limit.

Judge Mueller, you may begin.

STATEMENT OF THE HON. KIMBERLY J. MUELLER

Judge MUELLER. Chair Johnson, Ranking Member Issa, Members of the subcommittee, good morning.

I am Kim Mueller, Chief Judge, Eastern District of California, covering 34 counties and five of the fastest-growing cities in our State. As you have heard, I have been a trial judge over 10 years, Chief Judge just over one.

We are a collegial, hardworking bench appointed by six Presidents of both parties, but for 20-years-plus we have been in a judicial emergency. We cannot fulfill our obligations without congressional action creating new judgeships.

Specifically, we need at least five new judges, and we have the infrastructure to house them and their staff right now. We urgently ask your help to meet the needs of the public we serve. Without your help, justice delayed is, in fact, justice denied.

We are fighting a losing game, and with apologies to Lucy, that's exactly what Lucy says to Ethel in the unforgettable chocolate factory scene where chocolates race by on the assembly line too quickly to wrap. I promise we are not eating the chocolates, metaphorically speaking.

We have had six authorized permanent judgeships since 1978, like the Northern District of Georgia, when our population was half of what it is today. Our caseload average is almost double the national average. We have also had two vacancies for more than a year. So, our actual caseload right now is almost triple the national average.

Although we are very productive, we are disheartened. We are second worst on the list, 93rd out of 94 for time to close criminal cases. Many criminal defendants wait in jail for their trials. Civil cases languish. A few stories illustrate our plight.

My first year as a district judge, my law clerks and I really were drowning. I didn't think of our workload as punishment, but our labors did, and still do, evoke Sisyphus, that ancient Greek king condemns eternally to roll a boulder uphill, only to have it roll down again when he reaches the top.

This January, hope springing eternal, I asked my permanent law clerk how I could possibly get on top of my cases. He figures I need to issue dozens of lengthy reasoned orders every week, a third in hard cases—this, on top of administrative duties as Chief, weekly

criminal calendars, civil motion and evidentiary hearings and trials. It is impossible for a single judge to do all this. My clerk recommended I spend my time informing those who could make a difference about our needs. Thank you for allowing me to follow his recommendation here today.

Circumstances are particularly dire in our Fresno courthouse, where one judge is forced to do the work of two, due to our vacancies. One of his caseloads is assigned to nobody, "Judge None," N–O-N–E. The real judge holds criminal calendars four days a week. He cannot hold any hearings on civil motions and cannot set new civil trials.

Each judge has a courtroom deputy, and that deputy manages our calendar and answers parties' questions. In our district, our deputies are more like ER triage nurses, I am sad to say. My deputy receives many repeated, increasingly desperate requests for decision, particularly if settlement funds are at stake. All she can say is, "The Judge will get to it when she can." She worries the parties feel ignored or the Court doesn't care, even though we are working tirelessly.

We do enjoy the service of senior judges who draw their retirement pay with no supplement. At this point, we have three, the last since 1979. We value those three.

My immediate predecessor's Chief, Judge O'Neill, who served our court for 21 years, observes, "Most judges work harder and faster when faced with our kinds of caseloads." We can, of course, and we do, but the pace is simply unsustainable. More of us are choosing to leave when we can. The departure of senior judges represents the loss of significant assets that will take years to rebuild, once new judges are appointed.

Our active judges are a good return on public investment. We are the second most productive in our circuit and eighth nationwide.

We implore you to meet our need for new judgeships. We already have the courthouses and the judges' chambers. They are empty. Only the human infrastructure is missing. The net new cost is likely modest here at best, especially given some extra temporary staffing we have been receiving. With new judges, instead of justice delayed, justice will be served.

Thank you very much for your consideration. I am happy to answer questions.

[The statement of Judge Mueller follows:]

Testimony before the U.S. House Judiciary Committee

Subcommittee on Courts, Intellectual Property, and the Internet

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

Kimberly J. Mueller

Chief Judge, Eastern District of California

U.S. District Court

February 24, 2021

10:00 a.m.

Rayburn House Office Building

Chairman Johnson, Ranking Member Issa and Members of the Subcommittee:

Good morning, and thank you for the opportunity to appear and to appear remotely from my chambers in Sacramento, California. I am Kim Mueller, Chief Judge for the Eastern District of California.

Just over ten years ago, I took the oath prescribed by law to begin my service as a U.S. District Judge, swearing to "administer justice without respect to persons, and do equal right to the poor and to the rich."[1] Just over a year ago, I became chief judge of our court, adding to my duties the responsibility to help my colleagues discharge theirs. The bottom line of my testimony today is that we cannot fulfill our obligations without congressional action to create new judgeships. We urgently ask for your help to meet the needs of the public we serve.

I occupy one of the Eastern District's 6 permanent authorized district judgeships; that number 6 has not changed since 1978.[2] Our need for more judgeships dates to that year, and so is more than 40 years in the making. Nationally today, the average caseload per judgeship is 734; our average caseload per judgeship is 1,224. Nationally, the average population per district judgeship is 435,135; our population per judgeship is 1,362,560 and growing. For at least 20 years, we have qualified for judicial emergency status. A decade ago, Justice Anthony M. Kennedy weighed in to note our need for more judgeships, observing our district judges then were "struggling with this caseload," and that "their dedication must be recognized." My colleagues and I are unreservedly committed to fulfilling our oaths of office but the simple truth is that we cannot keep pace with the workload that arises from our district's wide expanse.

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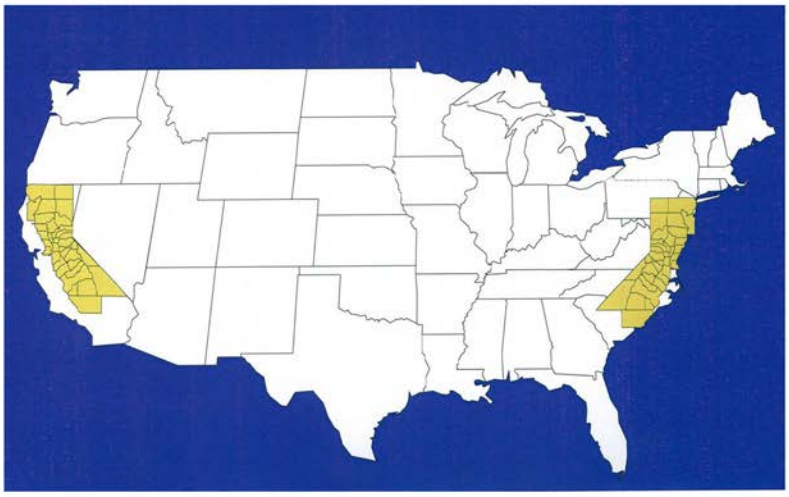
[1] 28 U.S.C. § 453.

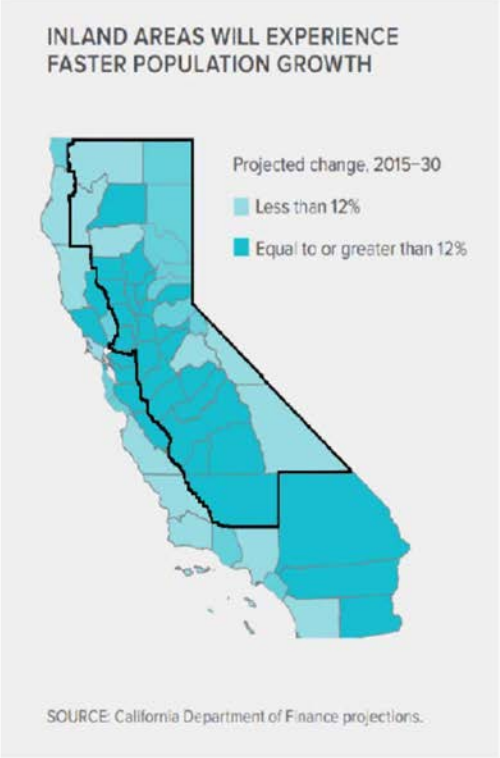
[2] A seventh judgeship was established on a temporary basis in 1990 by 104 Stat. 5089. Unfortunately, that judgeship expired in 2004.

At least five new judgeships are needed to meet our court's needs. Making matters worse, two of our judgeships are not filled currently, and have been vacant for more than a year each. Until those existing judgeships are filled we have one district judge presiding over all the federal cases in our Fresno courthouse, handling two full caseloads. While we are not alone, and we know of several other districts with similarly urgent needs, we are a poster child for illustrating that justice delayed is in fact justice denied when there are insufficient judges to decide cases.

Our need arises from our geography and demography: The Eastern District embraces 34 counties in California's Central and Sacramento Valleys, with main courthouses in Sacramento and Fresno, and additional courthouses in Bakersfield, Redding and Yosemite National Park. We are equivalent in size to about half the entire Eastern Seaboard of the United States. Thirteen Members of Congress represent portions of our district.



The total population of the area we serve is approaching 8.4 million people, and 5 cities in our district are among the fastest growing in the state: Folsom, Roseville, Merced, Rocklin and Clovis. Bakersfield and Sacramento are not far behind. The nature of our terrain and our population growth feed caseload growth. We feature swaths of federal lands, major agricultural operations and water projects, and the state capital is located in Sacramento; we also host many low and moderate income communities, 20 adult prisons and 4 federal prisons, one of which is in the process of closing. As our population rises, the number of criminal and civil cases my colleagues and I are called on to resolve also climbs, with no end in sight. The numbers speak for themselves: In 1978, the last time we were authorized a new judgeship, our population was approaching 4 million. In 1992, the first year for which we have caseload data, the population had reached approximately 5.5 million, and the caseload was 530 per judgeship. In 2000, the population was nearly 6.5 million and the caseload had reached 835 per judgeship. In 2010, the population equaled 7.6 million and the caseload spiked to a staggering 1,434 per judgeship with large numbers of civil and criminal mortgage fraud cases spawned by the Great Recession. As of December 2019, with our population approaching 8.4 million, our caseload per judgeship had evened slightly but was still at the excessive level of 1,262 per judgeship. Today, accounting for our two vacancies, the actual number on the ground is a mind-boggling 1,839 per active district judge.



I will not dwell on the numbers today, except to illustrate key points, because the mathematical case for new judicial resources in our district is well documented. Rather, I would like to focus on what the scarcity of judgeships means, practically speaking, for litigants and the public generally, for our court, our district judges and the essential staff that support us. In doing so, I will review first the nature of our work as federal trial judges. I will then explain three symptoms of our district's frayed judicial infrastructure: a Sisyphus Syndrome, Languishing Litigation, and Unsustainability.

First Principles: The Core Duties of a Federal Trial Court and Its District Judges

Federal trial courts are the foundation of the federal court system. A person who wants to bring a federal case will usually begin with a filing in our clerk's office. When the Government believes a federal crime has been committed, a defendant must answer in our court. Our job is certainly not to make the law, but we are tasked with applying the laws written by the United States Congress, and must follow the interpretations of federal law made by the Supreme Court and the Court of Appeals for our Circuit. When the answer to a question of law is not yet clearly established, we create the records that the courts above us review in determining the law. The sooner we resolve these cases the sooner certainty can be achieved in our system that treasures the rule of law. The overwhelming caseloads that my colleagues and I carry delay justice for parties to a lawsuit and the community at large. For cases not appealed, long times to disposition mean criminal cases are drawn out, evidence grows stale, witness memories fade, attorneys' fees rise, litigants agonize and try not to lose patience. As a California resident, with traffic congestion all around, I see our court as a metered onramp to the federal court highway where the metering light turns red almost immediately once a case is filed and changes to green only intermittently thereafter.

Federal district judges are generalist judges. While our courts are courts of limited jurisdiction, we are expected to handle both criminal and civil cases and master a wide range of subject matters when jurisdiction is present. Ideally we are nimble, and able to move from case to case, learning the law as we need to and developing the factual record so as to dispense justice fairly.

Federal district judges, like all federal judges, must explain our decisions to demonstrate they are reasoned decisions, reached by applying the law according to our oaths to uphold the

Constitution and the law, without respect to persons. Reasoned explanations are the touchstone to maintaining public trust, which is essential to a federal court's proper functioning. At times, we can explain our decisions from the bench in an oral pronouncement. Most often, the nature of our cases requires a well-written explanation to make certain our factual findings and legal reasoning are clear to all.

Federal district judges are the only officers with the authority, under the Constitution, to try a federal felony case or accept a felony defendant's change of plea, within a reasonable period of time. If a defendant is convicted or pleads guilty, we have the exclusive power and duty to impose a sentence sufficient but not greater than necessary to achieve the goals of federal criminal law. It is the district judge to whom a defendant has the solemn right to make his or her case before sentencing.

We are the only judges with the authority to review and authorize, if warranted, wiretap investigations allowing for monitoring of phone and text communications.

And these are just examples of our many duties.

In the Eastern District of California our judges honor these first principles and are deeply committed to meeting the high standards required to vindicate them. We are proud to be a collegial court, and I have had the privilege of working side by side with colleagues appointed by six Presidents, of both parties.

Despite our best efforts over the last many years, our attempts to do our jobs properly are at a breaking point with justice delayed daily in tangible ways not typically understood by the general public.

Sisyphus Syndrome

In my first year as a district judge, it did not take long for the realization to set in that the attempt to satisfy all of the first principles was a daunting task. My law clerks and I dove in and paddled as fast as we could to get on top of our cases, but still felt we were drowning. To make light of our challenge, I printed out for each clerk a clip art image of Sisyphus, the ancient Greek king condemned eternally to roll a massive stone up a hill only to have it roll back when he reached the top. I didn't think of our workload as punishment, but our labors did seem Sisyphean. They still do, ten years on with the numbers worsening.

And the consequence, despite our diligence, is disheartening: the Eastern District is at the bottom of list for time to disposition of criminal cases, currently 93rd out of 94 districts. Our time to disposition of civil cases is stretching out well past the goal of 3 years, with cases requiring trial often waiting 5 years or more. For a losing party with the right to challenge one of our decisions on appeal, I can only imagine the frustration, given the inability to see the road sign marking the destination ahead.

Table D-6.
U.S. District Courts–Median Time Intervals From Commencement to Termination for Criminal Defendants Disposed of, by District, During the 12-Month Period Ending March 31, 2020

National Rank	Circuit and District	Total	
		Number	Median
94	NY,E	631	20.5
93	CA,E	587	19.1
92	PR	1,327	17.3
91	PA,M	514	16.9
90	MO,W	718	15.0
89	NV	477	15.0
88	IL,N	749	14.9
87	TN,M	301	14.9
86	PA,W	460	14.9
85	AR,E	557	14.8

As generalist judges, we scramble to learn the law as our particular cases require, without giving any case short shrift. But many federal cases involve complex facts and legal issues. Our court ranks in the top 10 in the nation for percentage of our caseload that consists of nonprisoner civil rights cases. We hear environmental cases with massive administrative records, hotly disputed water cases, many civils rights and employment discrimination cases, wage and hour class actions and our fair share of business litigation over contract disputes and claimed intellectual property theft. We are called on to resolve many Constitutional clashes in cases challenging federal or state executive or legislative actions. In these cases a party often seeks preliminary injunctive relief, asking us to move its case to the top of the list given some urgency, with a proposed law scheduled to take effect and impact peoples' lives, economic markets, water use or wildlife. When we take up these motions and give them the attention they deserve, other cases filed earlier must wait.

In issuing decisions as key to the public trust, we are highly productive: Combined, our district judges disposed of at least 5,238 cases last year, averaging 873 per judgeship or 1,310 per each of our 4 active district judges. Current numbers show us as second most productive in our Circuit and eighth nationwide, without any hazard pay. We are a good return on the public's investment and yet, with 4,263 civil cases and 410 felony cases filed during the same time frame, we are fighting a losing game – as Lucy says to Ethel in the unforgettable Chocolate Factory scene one law clerk reminded me of recently. (I promise we are not eating the chocolates, metaphorically speaking!)

As the only judges who hear federal felony cases, our active district judges currently average 328 pending criminal defendants. But averages mask the reality on the ground: in Fresno where one district judge is handling two caseloads, and where we have a particularly high

number of criminal cases, our most recently monthly report shows 714 defendants pending before that one judge. That number is despite the judge's having resolved more than 55 defendants' cases in that same month, a high number by any measure. At the same time, that judge is handling a steady stream of wiretap applications.

In January of this year, hope springing eternal, I asked my excellent permanent law clerk to step back and assess where I was with my caseload after a year as Chief Judge. Specifically, I said, how much (more) do I need to do each week to get on top of my cases? He responded with some metrics showing I would need to issue between 20 and 30 orders a week, at least a third of which would resolve hard legal issues or address emerging areas of law with little precedent to guide me. Each matter requires me to carefully consider dozens if not hundreds of pages of briefing by the parties, and often much lengthier evidentiary submissions. And I must prepare explanations for my decision, which often requires hours of work and careful thinking for each order. This on top of the time needed for my budgeting and personnel administrative responsibilities as Chief Judge, preparing for and presiding over matters in court including civil and criminal trials, weekly criminal calendars, civil scheduling conferences, civil law and motion hearings, evidentiary hearings and cases specially set for hearings outside the normal schedule. In other words, there is no way for me to do this as a single judge with my caseload. So he concluded by encouraging me to spend time informing those who need to know about our need for more judgeships to get our essential work done in a timely manner. Thank you for allowing me to follow his recommendation here today. I promise I am returning to work immediately following this hearing, with a remote bench trial scheduled to begin later today.

If our district is authorized the 5 additional judgeships required to meet our legal mandates, I am certain my colleagues and I would be able to carry an average caseload – nothing

less – and with new colleagues we would catch up and be able to deliver timely justice to civil litigants, criminal defendants and their families as well as the communities affected by our judgments.

In the meantime, we are pushing that very big rock up the hill of our caseload, only to have it roll back over us just when we think we are making progress toward the summit.

Languishing Litigation

Fundamentally of course this is not about us, the judges. It is about the function we serve as public servants entrusted to make critically important decisions affecting life and liberty, health and opportunity, property and the economy. Our foremost duty is to the law, to uphold the rule of law and in so doing provide all parties with their day in court and a result they will accept as fair regardless of win or loss. The justice delayed in the Eastern District often obscures the fairness of the result.

In criminal cases, the long times to disposition are exacerbated for those criminal defendants detained pending trial. While the Bail Reform Act provides for pretrial release wherever possible, flight risk and dangerousness concerns can support pretrial detention. In the Eastern District our pretrial detention rate, excluding illegal aliens, currently is 56.7 percent, higher than the national average of 51.8 percent, and reflecting the large number of cases involving firearms, controlled substances including fentanyl and methamphetamine distribution and large marijuana grows on federal land.

In civil cases, while districtwide our time to disposition is lengthy, the circumstances in Fresno are particularly dire. When our situation began to worsen just over a year ago, with our two vacancies, the one District Judge there issued a Standing Order to inform the civil and criminal bars of his case management plans, given that he had assumed responsibility for two

caseloads. The dockets for one caseload is separately identified as assigned to "NONE." Regarding civil cases, the judge noted his preference for oral argument for all civil motions, to allow the court "to more fully grasp the parties' positions and permit[] the parties to address the court's concerns without the need for supplemental briefing." But, he lamented, "such hearings on civil law and motion matters will no longer be feasible." Copies of this district judges' standing orders are included here as **Exhibit A**. Since February 2020, all civil matters before that judge, who is buried in backlog, have been submitted without argument. Additionally, no new civil trial dates have been set before that judge. Without resolution, those on both sides of these cases live with the uncertainty, lives and incomes and reputations often hanging in the balance, closure or vindication out of reach.

In our Sacramento courthouse as well, while not all civil motions are submitted, most are. Despite my pledge to hear all civil motions when I became a district judge, I learned quickly the impossibility of meeting that goal. I hold civil law and motion calendar typically every three weeks, hearing motions that could dispose of a case entirely, those that might be resolved efficiently with a bench order and other choice priority matters. Still, I submit far more matters on paper briefing alone, without hearing, than feels appropriate. This year alone, I have submitted dozens of matters in which a party sought a hearing.

Earlier this year, one of my Sacramento colleagues, a veteran federal district judge and former state court judge, has begun providing parties in certain matters with courtesy notices when he feels he has no choice but to continue a matter to a later date. He has issued the notices in cases including those in which parties are requesting time-sensitive preliminary relief, with language to the following effect: "Considering the overwhelming caseload in the Eastern

District of California and the complexity of the issues involved in the case, the Court requires an additional period of time to consider this motion in advance of hearing."

I asked my courtroom deputy clerk for her sense of how parties are affected by our unacceptable delays. The courtroom deputy is a judge's public face to the litigants, managing a court's calendar, handling litigants' questions, running interference to ensure the judge avoids impermissible ex parte contacts – a sort of air traffic controller or, in the Eastern District of California, emergency room triage nurse. Without hesitation, my deputy said: "Class action settlements, for one." When parties settle a class action, they typically bring to the court a proposal for approval, and the court holds at least one hearing, before final approval. The judge cannot simply rubber stamp a proposal: Federal Rule of Civil Procedure 23 requires the court's approval, and provides for due process protections for class members. Even if the same standards apply to a judge's review of each proposed settlement, the review must be tailored and particularized. Too often the time between the parties' submission of a proposed settlement and the court's approval drags on, not because the judge is vacillating; rather the matter is waiting its turn to move to the top of the stack of matters awaiting decision. Because distribution of settlement funds awaits the judge's signature, and the funds are meaningful to class members, the courtroom deputy receives repeated while still respectful requests for the judge to expedite the matter. All she can say, truthfully, is that the judge will get to it when she can. And she must convey this while worrying that the attorneys and parties she hears from feel ignored or that the court doesn't care, even as she knows that behind the scenes "we are working tirelessly to keep the wheels of justice turning."

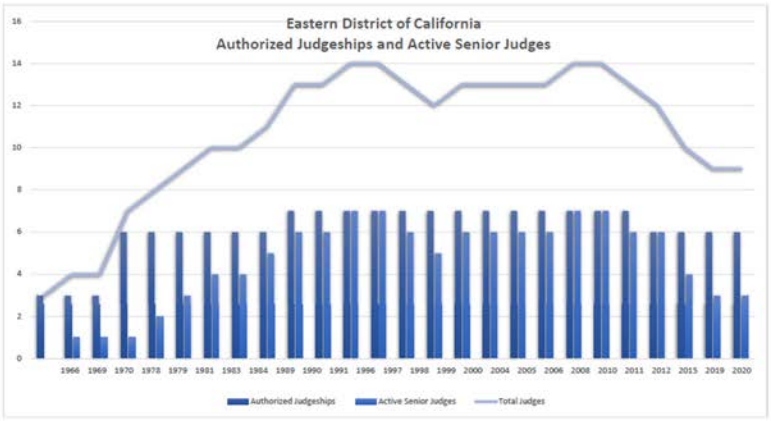
All of the examples provided here are good examples notwithstanding the coronavirus pandemic. Unquestionably, the pandemic has made things even worse, for now and for the

foreseeable future. Since March 2020, judges of our court have continued at least 176 trials, to be rescheduled once we can safely summon jury pools and convene the numbers of persons needed for a trial to go forward. Given that trial dates in new cases are not being set at all, the number of pending trials is even higher. Even as we look forward to a resumption of normal operations as soon as possible consistent with attention to public health, we are bracing for an increase in filings of the kinds of cases we know from experience will follow once the pandemic is suppressed: fraud, employment and bankruptcy cases to name a few.

Simply Put, Unsustainable

The Sisyphus effect and our languishing caseloads expose the deferred maintenance from which the Eastern District of California suffers. Their combined effect makes for a set of circumstances that is simply unsustainable, if justice is to be served.

The best indicator of the unsustainability of our work is the reduction in the number of district judges that decide to continue serving the court after reaching senior status. Historically, we have been able partially to balance our caseloads on the backs of senior judges who choose to remain without any added cost to the court. Contributing their significant wisdom, knowledge and experience, they draw their retirement pay with no supplement and as long as they maintain at least half a caseload they retain some law clerk support. Of course, in the Eastern District the reduction in caseload is all relative: a half a caseload is equivalent to a full caseload in most other courts, applying the nationwide average. Still, many district judges have stayed out of a love for the job and deep commitment to the law. For many years between 1989 and 2011, we had as many as six senior judges continuing to assist us. Since 2011, however, the number has fallen to 3, the lowest level since 1979. Of the two judges who took senior status most recently, only one has remained active, with the other taking inactive senior status and hearing no cases.



The judge who took inactive senior status is my immediate predecessor, Chief Judge Emeritus Lawrence J. O'Neill. Judge O'Neill served as a judicial officer of our court for 21 years—8 as a magistrate judge and 13 as a district judge—and before that was a Fresno County Superior Court Judge and Presiding Judge for 9 years, with prior professional experience as a police officer. Day in and day out, he arrived at his office by 5 a.m., using the early morning hours when all was quiet to chip away at his work. His efforts were prodigious, and invaluable in delivering justice in the heart of the Central Valley. Judge O'Neill is blunt about his reasons for leaving the bench as mirroring those of many others: "Most judges work harder and faster when faced with our kinds of caseloads. But the pace is simply unsustainable." Judge O'Neill's wife reports she feels lucky that he made it to retirement: she was certain he would suffer a heart attack during his time as a district judge. And after Judge O'Neill survived cancer his doctor confronted him, asking what exactly was causing the level of stress that his physical condition disclosed. At that point, the judge had to admit there was only one reasonable explanation: his

job as a judge of our court. Judge O'Neill has much to offer, and is sharing his knowledge and insights now with law students in his Evidence class at UC Irvine. As deserving as he is of his new life, his departure from the bench represents the loss of a significant investment that will take years to rebuild once a new judge is appointed to succeed him, no matter how qualified that new judge.

Only More Judgeships Can Ensure Justice on Time

Simply put, the only solution to the judicial emergency in the Eastern District of California is the creation of more district judgeships: 5 more judgeships specifically, to be filled by qualified judges to manage a fair share of our criminal and civil caseloads. Our need is nothing new: we have been saying we need anywhere from 2 to 7 new judgeships for many years. We said so again last year and the year before that, and we are saying so again this year.

As to those five judgeships, I can certify now that we have the district judge chambers available to house new judges immediately with no new construction costs. Given the longstanding projections showing our need for new judgeships, it was plainly obvious when our courthouses in Sacramento and Fresno were christened in 2000 and 2005 that we would need to house more judges; those courthouses were built on the assumption additional chambers would be needed when they opened. Twenty years later, the decision of retirement eligible judges to go inactive or step down from the bench means even more chambers are vacant. Given the down payment made in the form of those capital improvements, all that is needed now is the funding of the human infrastructure to ensure that all the litigants, plaintiffs and defendants, in our 34 counties and your 13 Congressional districts have their fair share of access to justice. These judgeships will ensure that instead of justice delayed, justice will be served.

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Thank you very much for your consideration. I would be happy to answer any questions you have for me.

* * *

EXHIBIT A

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

Click here to enter text., Plaintiff, v. Click here to enter text., Defendants.	No. Click here to enter text. AMENDED STANDING ORDER IN LIGHT OF ONGOING JUDICIAL EMERGENCY IN THE EASTERN DISTRICT OF CALIFORNIA

The judges of the United States District Court for the Eastern District of California have long labored under one of the heaviest caseloads in the nation even when operating with a full complement of six authorized District Judges.[1] Each of those six District Judges has regularly carried a caseload double the nationwide average caseload for District Judges. Even while laboring under this burden, the judges of this court have annually ranked among the top 10 districts in the country in cases terminated per judgeship for over 20 years. *See* Letter regarding Caseload Crisis from the Judges of the Eastern District of California (June 19, 2018), http://www.caed.uscourts.gov/CAEDnew/index.cfm/news-archive/important-letter-re-caseload-

[1] For over a decade, the Judicial Conference of the United States has recommended that this district be authorized up to six additional judgeships. However, those recommendations have gone unacted upon. This is the case despite the fact that since the last new District Judgeship was created in the Eastern District in 1978, the population of this district has grown from 2.5 million to over 8 million people and that the Northern District of California, with a similar population, operates with 14 authorized District Judges.

crisis/. On December 17, 2019, District Judge Morrison C. England took Senior status. On December 31, 2019, Senior District Judge Garland E. Burrell, Jr. assumed inactive Senior status. On February 2, 2020, District Judge Lawrence J. O'Neill assumed inactive Senior status.[2] As a result of these long anticipated events, the shortfall in judicial resources will seriously hinder the administration of justice throughout this district, but the impact will be particularly acute in Fresno, where the undersigned will now be presiding over all criminal and civil cases previously assigned to Judge O'Neill as well as those already pending before the undersigned. As of the date of this order, this amounts to roughly 1,100 civil actions and 625 criminal defendants. Until two candidates are nominated and confirmed to fill this court's two vacant authorized district judgeships, this situation can only be expected to grow progressively worse.

The gravity of this problem is such that no action or set of actions undertaken by this court can reasonably be expected to alleviate it. Nonetheless, this order will advise litigants and their counsel of the temporary procedures that will be put in place for the duration of this judicial emergency in cases over which the undersigned is presiding. What follows will in some respects be contrary to the undersigned's default Standing Order in Civil Actions,[3] and may also differ from the Local Rules of the Eastern District of California. To the extent such a conflict exists, the undersigned hereby invokes the court's authority under Local Rule 102(d) to issue orders supplementary or contrary to the Local Rules in the interests of justice and case management.

A. DESIGNATION OF CIVIL CASES

As of February 3, 2020, all civil cases previously assigned to Judge O'Neill, and all newly filed cases that will be assigned to his future replacement, will be unassigned. Those cases will bear the designation "NONE" as the assigned district judge and will continue to bear the initials of the assigned magistrate judge. Until new judges arrive, the undersigned will preside as the

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[2] In short, a Senior District Judge is one who has retired from regular active service, usually based on age and length of service, but continues to preside over cases of a nature and in an amount as described in 28 U.S.C. § 371(e). A Senior District Judge taking inactive status is one who has ceased to perform such work.

[3] The undersigned's standing order in civil cases is available on the court's website at http://www.caed.uscourts.gov/caednew/index.cfm/judges/all-judges/5017/.

district judge in the cases so designated. Judge O'Neill's chambers staff have remained in place since his departure from the court. Accordingly, his remaining staff will continue to work on the cases bearing the "NONE" designation and Courtroom Deputy Irma Munoz (559-499-5682; imunoz@caed.uscourts.gov) will continue to be the contact person with respect to any questions regarding those cases. Proposed orders in those cases are to be sent to noneorders@caed.uscourts.gov. Finally, any hearings or trials before the undersigned in cases bearing the "NONE" designation will be held in Judge O'Neill's former courtroom, Courtroom #4 on the 7th Floor at 2500 Tulare Street in Fresno, California.[4]

B. CIVIL LAW AND MOTION

It has been the strong preference of the undersigned over the past twenty-three years to hear oral argument on all civil motions. In the undersigned's experience, doing so allows the court to more fully grasp the parties' positions and permits the parties to address the court's concerns without the need for supplemental briefing. However, given the judicial emergency now faced by this court, such hearings on civil law and motion matters will no longer be feasible. Accordingly, all motions filed before the undersigned in civil cases will be deemed submitted upon the record and briefs pursuant to Local Rule 230(g) without further action by the court. This means that the hearing date chosen by the moving party will not be placed on the court's calendar; it will serve only to govern the opposition and reply filing deadlines pursuant to Local Rule 230(c).

In cases bearing the "DAD" designation, hearings may be noticed for the first and third Tuesdays of each month. In cases designated as "NONE," hearings may be noticed for any Tuesday through Friday. In the unlikely event that the court determines a hearing would be helpful and feasible, the court will re-schedule a hearing date in accordance with its availability. The parties are required to comply with Local Rule 230 and all other applicable rules and notice requirements with respect to motions.

In addition to the motions already assigned to magistrate judges by operation of Local

[4] When filing motions via CM-ECF to be heard by the district judge in "NONE" cases, the filer should select "Courtroom 4" as the location for the hearing and "UnassignedDJ" as the judge.

Rule 302(c), the undersigned now orders that the following categories of motions in cases bearing "DAD" and "NONE" designations shall be noticed for hearing before the assigned magistrate judge:

1. Motions seeking the appointment of a guardian *ad litem*;
2. Motions for class certification and decertification pursuant to Federal Rule of Civil Procedure 23; and
3. Motions to approve minors' compromises.[5]

The undersigned will surely refer other motions to the assigned magistrate judge for the issuance of findings and recommendations by separate orders in particular cases.

C. CIVIL TRIALS

In the two civil caseloads over which the undersigned will be presiding for the duration of this judicial emergency, there are currently trials scheduled through the end of 2021. It is unlikely that those civil cases will be able to proceed to trial on the currently scheduled date because criminal cases will take priority over civil cases once the courthouse reopens to the public and the undersigned resumes trying cases.[6] Given the enormous criminal caseload that is pending before the undersigned and the fact that all civil and criminal trials set before the undersigned have been continued throughout the ongoing pandemic, civil cases are not likely to proceed to trial until mid-2021, if not later.[7] Thus, the setting of new trial dates in civil cases

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[5] Magistrate judges may resolve motions seeking the appointment of a guardian *ad litem* by way of order, while all other motions may be resolved by issuance of findings and recommendations. *See* 28 U.S.C. § 636(b)(1)(A).

[6] Pursuant to General Order No. 618 addressing the public health emergency posed by the coronavirus (COVID-19) outbreak, all courthouses in this district are closed to the public and jurors are not called for service in civil or criminal jury trials until further notice.

[7] Even in those instances where a trial date has been set, such trial dates will be subject to vacatur with little to no advance notice due to the anticipated press of proceedings related to criminal trials before this court, which have statutory priority over civil trials. In any civil action that is able to be tried before the undersigned during the duration of this judicial emergency, the trial will be conducted beginning at 8:30 a.m. Tuesday through Thursday. The court will have calendars for criminal cases bearing a "DAD" assignment on Monday at 10:00 a.m. and for those criminal cases bearing the "NONE" designation on Friday at 8:30 a.m.

would be purely illusory and merely add to the court's administrative burden of vacating and re-setting dates for trials that will not take place in any event. **Accordingly, for the duration of this judicial emergency and absent further order of this court in light of statutory requirements or in response to demonstrated exigent circumstances, no new trial dates will be scheduled in civil cases assigned to "DAD" and "NONE" over which the undersigned is presiding.**[8] As such, scheduling orders issued in civil cases over which the undersigned is presiding will not include a trial date. Rather, the final pretrial conference will be the last date to be scheduled.[9]

Particularly in light of this judicial emergency, parties in all civil cases before the undersigned are reminded of their option to consent to magistrate judge jurisdiction pursuant to 28 U.S.C. § 636(c). The magistrate judges of this court are highly skilled, experienced trial judges. Moreover, because magistrate judges cannot preside over felony criminal trials, trial dates in civil cases can be set before the assigned magistrate judge with a strong likelihood that the trial will commence on the date scheduled.

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[8] Any party that believes exigent or extraordinary circumstances justify an exception to this order in their case may file a motion seeking the setting of a trial date. Such motions shall not exceed five pages in length and must establish truly extraordinary circumstances. Even where such a showing is made, the parties are forewarned that the undersigned may simply be unable to accommodate them in light of the court's criminal caseload.

[9] Final pretrial conference dates may be later vacated and rescheduled depending on the court's ability to rule on dispositive motions that are filed. Moreover, in those "NONE" and "DAD" designated civil cases with trial dates, the parties are hereby ordered not to file any pretrial motions *in limine* prior to the issuance of the Final Pretrial Order and to do so only in compliance with the deadlines set in that order.

CONCLUSION

These are uncharted waters for this court. The emergency procedures announced above are being implemented reluctantly. They are not, in the undersigned's view, conducive to the fair administration of justice. However, the court has been placed in an untenable position in which it simply has no choice. There will likely be unforeseen consequences due to the implementation of these emergency procedures and the court will therefore amend this order as necessary.

IT IS SO ORDERED.

Dated: **February 21, 2021**

Dale A. Drozd
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

Click here to enter text., Plaintiff, v. Click here to enter text., Defendants.	No. 1: __cr___ STANDING ORDER IN LIGHT OF ONGOING JUDICIAL EMERGENCY IN THE EASTERN DISTRICT OF CALIFORNIA

The judges of the United States District Court for the Eastern District of California have long labored under one of the heaviest caseloads in the nation even when operating with a full complement of six authorized District Judges.[1] Each of those six District Judges has regularly carried a caseload double the nationwide average caseload for District Judges. Even while laboring under this burden, the judges of this court have annually ranked among the top 10 districts in the country in cases terminated per judgeship for over 20 years. *See* Letter regarding Caseload Crisis from the Judges of the Eastern District of California (June 19, 2018),

[1] For over a decade, the Judicial Conference of the United States has recommended that this district be authorized up to six additional judgeships. However, those recommendations have gone unacted upon. This is the case despite the fact that since the last new District Judgeship was created in the Eastern District in 1978, the population of this district has grown from 2.5 million to over 8 million people and that the Northern District of California, with a similar population, operates with 14 authorized District Judges.

http://www.caed.uscourts.gov/CAEDnew/index.cfm/news/ important-letter-re-caseload-crisis/ On December 17, 2019, District Judge Morrison C. England took Senior status. On December 31, 2019, Senior District Judge Garland E. Burrell, Jr. assumed inactive Senior status. On February 2, 2020, District Judge Lawrence J. O'Neill will assume inactive Senior status.[2] As a result of these long anticipated events, the shortfall in judicial resources will seriously hinder the administration of justice throughout the district, but the impact will be particularly acute in Fresno, where the undersigned will now be presiding over all criminal and civil cases previously assigned to Judge O'Neill as well as those already pending before the undersigned. As of the date of this order, this amounts to roughly 1,050 civil actions and 625 criminal defendants. Until two candidates are nominated and confirmed to fill this court's two vacant authorized judgeships, this situation can only be expected to grow progressively worse.

The gravity of this problem is such that no action or set of actions undertaken by this court can reasonably be expected to alleviate it. Nonetheless, this order will advise the parties and their counsel of the temporary procedures that will be put in place for the duration of this judicial emergency in cases over which the undersigned is presiding. To the extent any of the following procedures are inconsistent with the Local Rules of the Eastern District of California, the undersigned hereby invokes the court's authority under Local Rule 102(d) to issue orders supplementary or contrary to the Local Rules in the interests of justice and case management.

A. DESIGNATION OF CRIMINAL CASES

As of February 3, 2020, all criminal cases previously assigned to Judge O'Neill, and all newly filed cases that will be assigned to his future replacement, will be unassigned. Those cases will bear the designation "NONE" as the assigned district judge. Until new judges arrive, the undersigned will preside as the district judge in the cases so designated. Judge O'Neill's chambers staff will remain in place for seven months following his departure from the court. Accordingly, his remaining staff will continue to work on the cases bearing the "NONE"

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[2] In short, a Senior District Judge is one who has retired from regular active service, usually based on age and length of service, but continues to preside over cases of a nature and in an amount as described in 28 U.S.C. § 371(e). A Senior District Judge taking inactive status is one who has ceased to perform such work.

designation and Courtroom Deputy Irma Munoz (559-499-5682; imunoz@caed.uscourts.gov) will continue to be the contact person with respect to any questions regarding those cases. Proposed orders in these cases are to be sent to noneorders@caed.uscourts.gov. Finally, any hearings or trials before the undersigned in cases bearing the "NONE" designation will continue to be held in Judge O'Neill's former courtroom, Courtroom #4 on the 7th Floor at 2500 Tulare Street in Fresno, California.

B. WEEKLY CRIMINAL CALENDARS

The court will continue to hold weekly calendars in criminal cases bearing a "DAD" assignment on Mondays at 10:00 a.m. in Courtroom #5. For those criminal cases bearing the "NONE" designation, the weekly criminal calendar will be held on Fridays at 8:30 a.m. in Judge O'Neill's former courtroom, Courtroom #4.

Because the undersigned will be holding two criminal calendars most weeks and will be presiding over trials Tuesdays through Thursdays, last minute filings by counsel can no longer be accommodated. Any filings for the Monday calendar must be submitted no later than close of business the Thursday before the hearing. Any filings for the Friday calendar must be submitted no later than the close of business on the Wednesday before the hearing. Untimely filings may well result in the matter being continued by the court at the time originally scheduled for hearing.

C. CRIMINAL TRIALS

All criminal trials in cases bearing the "DAD" or "NONE" designations will be conducted commencing at 8:30 a.m. Tuesday through Thursday until conclusion, absent other order of the court. Given the number of criminal cases and defendants that will now be pending before the undersigned at any one time, Trial Confirmation Hearings will take on added significance.[3] The court is likely to find itself in the position of juggling several cases with overlapping trial schedules and posing different Speedy Trial Act considerations. If a trial date is confirmed, the

[3] In light of the anticipated congestion of the criminal trial calendar, by separate standing order issued in all civil cases the undersigned has announced that for the duration of this judicial emergency and absent further order of this court in light of statutory requirements or in response to demonstrated exigent circumstances, no new trial dates will be scheduled in civil cases assigned to "DAD" and "NONE" over which the undersigned is presiding.

court must act as if that case is in fact proceeding to trial. The undersigned urges the parties, where there is doubt as to whether a trial date should be confirmed, to seek a brief continuance of the trial confirmation hearing rather than to request a change of plea hearing immediately prior to scheduled trial date.

CONCLUSION

These are uncharted waters for this court. The emergency procedures announced above are being implemented reluctantly. They are not, in the undersigned's view, conducive to the fair administration of justice. However, the court has been placed in an untenable position in which it simply has no choice. There will likely be unforeseen consequences due to the implementation of these emergency procedures and the court will therefore amend this order as necessary.

Mr. JOHNSON of Georgia. Thank you, Judge MUELLER. Your situation is dire, and I want to thank you for the work that you and the other judges, and all the associated personnel, are doing to achieve justice in your district. Thank you very much.

Judge Burns, you may begin.

STATEMENT OF THE HON. LARRY BURNS

Judge BURNS. Good morning, Chair Johnson, Ranking Member Issa, and Members of the committee.

Again, my name is Larry A. Burns. I am recently a senior judge here in San Diego in the U.S. District Court for the Southern District of California. I have served our court since 1997, beginning as a magistrate, and then, since 2003, as a district judge. As Chair mentioned, I am a former chief judge of our court.

The Southern District of California encompasses a wide swath of territory that stretches from the Pacific Ocean on our western border all the way to the Arizona border on the eastern border. It encompasses two large counties, San Diego County and Imperial County, home to some 3.5 million people.

Our district includes five ports of entry that are contiguous with our border along Mexico. The largest and the busiest of those ports is the port at San Ysidro, California. It is the largest port in the world, as a matter of fact. Each day, more than 50,000 cars and 25,000 pedestrians cross into the United States through that port of entry from Tijuana, Mexico. Just to give you some perspective, in the standard vehicle lane coming in from San Ysidro, it can take more than six hours of waiting to get across.

Our district's jurisdictional reach also comprises many military installations, including the Naval Air Station at Coronado and the Marine Base at Camp Pendleton, California, up in the northern part of our district.

Congress has authorized 13 active district judgeships for the Southern District of California. We have been at that number since 2003. That is the last time district judge positions were authorized for our court.

Our court is a full-service U.S. District Court. By that, I mean that our caseload consists of just about every type of criminal and civil case that is common in districts across the country. In addition, we are one of the five Southwest border courts, a designation that I mentioned which greatly impacts our caseload.

I won't bore you with tedious statistical data, but I want to provide the Subcommittee with an overview of the trends in our caseload which reflect an increasing demand on the part of our court for more judges. National statistics since 2003, the last year we had a judgeship bill, through September of 2019 show that the number of total cases filed in the Nation has risen by 13.6 percent. California alone, the District Courts here and the Circuit Court, handle 10 percent of the nation's caseload. During the 16-year period since we last had judges, the caseload in our district has increased by 17 percent, and we have seen weighted filings are the basic caseload assessment that determines the average amount of time it takes to complete a case—weighted filings have increased by 30 percent. In 2019, our district judges' weighted caseload was 634 cases per judge, an increase way over the national average of

535 cases per judge. Between 2017–2019, our court's criminal filings rose 30 percent.

The effects of the increase in our caseload have been profound, and they inexorably lead, as the Chair and Ranking Member mentioned, to delay of cases, particularly the civil cases. The average time to adjudicate a civil case in District Court across the Nation is about two years. In our court, it is, unfortunately, about 37 months, which is way too long.

As Members of this Subcommittee well know and have alluded to, long delays in adjudicating case can lead litigants to conclude that the expense and the passage of time make it impractical to continue the litigation and leaves them the only option of foregoing their day in court. These outcomes lead to an erosion of trust in the judiciary and in the judicial process itself.

Our criminal caseload is absolutely staggering here. Most of the cases fall into two categories: Criminal immigration and border drug cases. They predominate the workload of our district judges.

We are assisted by nine senior judges, but it is important to remember that those senior judges have the prerogative of choosing which cases that they will handle. Some in our district don't choose to handle the immigration cases or the border cases. Also, the term of the senior judges is up to them. They can stop at any point.

So, quite simply, we need more district judges if we are to continue to meet the demands of the increasing caseload. There is an urgent in our district, as there is, as Judge Mueller mentioned, in her district, for more judges to handle the cases and to process them efficiently.

Thank you. I am available to answer questions at the appropriate time.

[The statement of Judge Burns follows:]

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Southern District of California
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STATEMENT OF U.S. DISTRICT JUDGE LARRY ALAN BURNS BEFORE THE HOUSE SUBCOMITTEE ON THE COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET
FEBRUARY 24, 2021

Good morning Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee,

My name is Larry Alan Burns and I serve as a Senior District Judge on the U.S. District Court for the Southern District of California. I have served on our Court since 1997, beginning as a Magistrate Judge in 1997, and then as a District Judge since 2003. I served as Chief Judge from 2019-2021.

The Southern District of California encompasses a wide swath of territory stretching from the Pacific Ocean to the Arizona border. The district encompasses two large counties – San Diego County on its western border, and Imperial County to the east. It is home to some 3.5 million people.

Our district includes five ports of entry contiguous to our border with Mexico, including the largest and busiest port at San Ysidro, California. Each day, over 50,000 vehicles and 25,000 pedestrians cross into the United States from Tijuana, Mexico through the San Ysidro Port. In the standard vehicle lane, it can often take more than 6 hours of waiting to get across. Our district's jurisdictional reach is also comprised of many military installations, including the Naval Air Station at Coronado, California and the Marine Base at Camp Pendleton in the northern section of the district.

Congress has authorized 13 active District Court judgeships for the Southern District of California. The last time new District Judge positions were authorized for our district was 2003. Our court is a full service U.S. District Court. By that I mean that our caseload consists of every type of criminal and civil case that is common in district courts across the country. In addition, we are one of five Southwest Border Courts – a designation that greatly impacts our caseload. While I won't bore you with tedious statistical data, I would like to provide the Subcommittee with an overview of trends in our caseload statistics, which reflect an increasing demand on our Court and our judges since 2003.

National federal court management statistics since 2003, the year of the last judgeship bill, through September 30, 2019, show the number of total cases filed in the nation has risen by 13.6 %. California, alone, handles 10 percent of the nation's caseload. During this 16-year period, the caseload in the Southern District has increased by 17 %, and we have seen weighted filings – the basic caseload assessment system that determines the average amount of time each case type takes to complete – increase by 30%. In 2019, our district's weighted caseload was 634 cases per judge – well above the national average of 535 cases per judge. From 2017 to 2019, our court's criminal filings alone rose 30% – the 4th highest criminal caseload in the nation and more than three times the national average. Based on this most recent data from before the COVID-19 pandemic, we expect weighted filings in the Southern District of California to continue to increase – which, of course, increases our need for additional judges to handle the cases.

The effects of the increase in our caseload have been profound and have inexorably led to delay in the handling of cases – particularly civil cases. In most federal districts, it takes about 2 years on average to adjudicate a civil case from filing to final judgment. But in the Southern District of California, the median time is 37 months, which is too long. As the members of this Subcommittee well know, long delays in adjudicating cases can lead litigants to conclude that the expense and the passage of time makes it impractical to continue, leaving them only the option of foregoing their "day in court." Such outcomes lead to an erosion of trust in the judiciary and in the judicial process itself.

A staggering increase in our Court's criminal caseload since 2003 is the main cause of the problem. Statistics relating to just two areas of our criminal docket – immigration enforcement and cross-border drug smuggling – best illustrate why we desperately need

additional judges. In 2019, 89% of our overall criminal caseload consisted of immigration and border drug cases. Criminal immigration cases invariably involve due process challenges to the defendant's prior immigration and criminal record and are often very time consuming – even when the case does not go to trial. Similarly, cross-border drug smuggling cases typically require multiple pretrial hearings to resolve discovery and search and seizure issues. These cases predominate the workload of our District Judges, only eight of whom are current Active Judges. Thankfully, our Active Judges are assisted by nine Senior Judges, who during the one-year period ending September 20, 2020 handled 26% of the border drug cases and 32% of the criminal immigration cases. Without the assistance of our Senior Judges, it is unlikely our Court could effectively process the glut of criminal cases.

Quite simply, we need more District Judges if we are to continue to meet the demands of increasing caseloads and fulfill the guaranty of access to justice. While our Court is grateful for the assistance provided by Senior District Judges, occasional Visiting Judges, and Magistrate Judges, the problem will not be solved by relying on these judges to help shoulder the burden. Senior District Judges enjoy the prerogative to choose which cases they will handle, and their continued service on the Court is indeterminable. Similarly, while Visiting Judges generously provide "stop-gap" relief, their temporary assistance will not solve this ongoing problem. Finally, appointing additional Magistrate Judges will not help, as their jurisdiction is limited and does not generally include authority to try civil or criminal cases. To the contrary, the urgent issues I have highlighted will only be solved if Congress authorizes additional District Judge positions.

Mr. Chairman, in the time allotted, I have tried to highlight only some of the issues that impact the functioning of the United States District Court for the Southern District of California. I would be happy to address any questions that may follow.

Thank you.

Larry A. Burns

Hon. Larry Alan Burns
U.S. District Judge
Southern District of California

Mr. JOHNSON of Georgia. Thank you, Judge BURNS.

Next, we will hear from Judge HUMETEWA. Judge Humetewa, you may begin.

STATEMENT OF THE HON. DIANE HUMETEWA

Judge HUMETEWA. Chair Johnson, Ranking Member Issa, and Members of the subcommittee, I am honored to testify on the dire need for more district judges in Arizona.

As of September 2020, Arizona is fifth in the Nation for criminal felony filings and 16th for civil case filings. Since 2003, the JCUS has consistently recommended three to six new judgeships for Arizona. Yet, it has been 19 years since a new judgeship was authorized.

Our need stems Arizona's geography, the tribal presence, and a growing population. Thirty-eight percent of Arizona land is under federal superintendence. Another 27 percent is tribal land. Arizona also has a 370-mile-long border with Mexico, and it is among the top three fastest-growing states, home to over 7.4 million people. Recent data also shows sustained and significant growth in Arizona's tribal nations, reaching approximately 425,000 persons in 2019.

Our caseload continues to grow in complexity and volume. Federal court management statistics from 2018 through 2019 show Arizona had a weighted caseload of 800 filings per district judge, which is fifth highest in the country. Arizona's weighted filings were 86 percent higher than the general standard of 430 cases per judge and 50 percent higher than the national average of 535.

The paucity of district judges uniquely impacts Arizona's 22 tribal nations. In states like Arizona, the Federal District Court is the felony criminal court for tribal nations. We adjudicate crimes arising in Indian country under the Major Crimes Act. Congress has seen fit to enact additional federal crimes that apply to Indian country, including felony child abuse and neglect, sexual abuse and domestic violence offenses.

With more crimes come more criminal proceedings. Northern Arizona, in particular, demonstrates this need. The region covers five counties and ten Indian nations. From 2016 to 2019, northern Arizona's criminal filings increased 13 percent and its civil case filings increased 21 percent. In 2019, the region's weighted caseload was 774.6, surpassing the national average. If it were a judicial district, it would qualify for at least one new district judge under the U.S. Judicial Conference standard.

While there is a federal magistrate judge in Flagstaff, home to northern Arizona's only federal court, magistrate judges have limited authority. They handle the preliminary stages of felony criminal cases, and then, must transfer the case to a Phoenix district judge. Many civil cases move south to Phoenix for all pretrial and trial proceedings because magistrate judges cannot dispose of civil cases without the parties' consent.

Arizona's courtrooms in Phoenix and Tucson pose logistical challenges to those living in Arizona's tribal nations. Criminal proceedings such as grand juries, trials, and sentencings usually take place hundreds of miles away from the accused's family, the victims, and the impacted community. The demographic reflected in

a grand jury or trial jury pool seldom resembles the accused's peers or the population in the affected community.

When we can, we try to conduct proceedings in the Flagstaff magistrate judge's courtroom. This is more convenient for the accused's family, the victims, tribal and federal law enforcement, and the northern Arizona jury pool. To journey 148 miles north necessarily impacts our other judicial responsibilities.

The distance from northern Arizona also inhibits proceedings when we work from Phoenix. A federal judge in Phoenix cannot summon a supervisee from the Navajo Nation or White Mountain Apache Nation and expect him or her to appear the next day. Federal location monitoring is simply not practical up north, and Arizona ranked the third highest district for supervised release violations from 2013 to 2017. In Arizona, the status quo simply cannot meet the constitutional mandate to administer meaningful justice to all.

I am happy to answer any questions that you have of me. Thank you.

[The statement of Judge Humetewa follows:]

Hon. Diane J. Humetewa
United States District Court Judge, District of Arizona

Before the
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
United States House of Representatives

"The Need for New Lower Court Judgeships, 30 Years in the Making"

February 24, 2021

Introduction

Chairman Johnson, Ranking Member Issa, Chairman Nadler, Ranking Member Jordan, and Members of the Subcommittee on Courts, Intellectual Property, and the Internet, I am honored to testify before you on the dire need for more district court judges in Arizona, and how these positions affect Indian Country in Arizona.

I am Diane J. Humetewa. I was unanimously confirmed as an Arizona District Court judge in 2014. Before taking the bench, I served as an Assistant United States Attorney, prosecuting violent crimes, including crimes in Indian Country. I served as the confirmed United States Attorney for the District of Arizona from 2007-2009. I was appointed and served as a Hopi Tribal Appellate Court Judge from 2003-2007 and acted as the tribe's Acting Chief Prosecutor in 2011. The majority of my legal practice has been in the Arizona federal court and tribal courts. And a majority of that work involved federal civil and criminal Indian law issues.

In March of 2019, the Judicial Conference of the United States ("JCUS") delivered several recommendations to Congress. Therein, JCUS recommended adding four new district judges to the District of Arizona and making Arizona's one temporary judgeship permanent. I support these recommendations and ask that you do as well, particularly considering the critical need for a federal district judge's presence to serve the five counties and ten Indian Nations in northern Arizona.

The District's need for additional judgeships is not new. The last time a new judgeship in Arizona was authorized was 19 years ago. Although that position was designated as temporary, the judiciary has successfully sought an extension every year since. In addition, following review of Arizona's response to the judiciary's comprehensive biennial judgeship surveys, the JCUS has consistently recommended Congress authorize between three and six new judgeships for Arizona since 2003. These recommendations are based on the District's burgeoning caseload, consistently ranked as one of the busiest in the country.

For the 12-month period ending September 30, 2020, Arizona ranked fifth in the nation for criminal felony filings, and 16th for civil case filings. The 2021 biennial survey of judgeship needs, which was completed by the court in early 2020, resulted in reaffirming our request for four new permanent judgeships and conversion of our

temporary judgeship to permanent. We anticipate that the JCUS will again support this request and recommend to Congress some number of new judgeships for Arizona in 2021.

This dire need for judgeships stems from Arizona's unique geography,[1] the tribal presence in Arizona, and the state's continued population growth. According to a February 2020 Congressional Research Service report, the Bureau of Land Management, the Forest Service, the Fish and Wildlife Service, the National Park Service, and the Department of Defense control 38% of Arizona's total land mass.[2] That is over 28 million acres under federal superintendence. That does not account for the additional 19,775,958 million acres (or 27% of Arizona's land mass) of Tribal lands that fall under Arizona federal court jurisdiction.[3] In addition, Arizona shares approximately 370 miles of its border with Mexico.

According to 2019 population estimates from the United States Census Bureau, Arizona is among **the top three** fastest growing states in the country in terms of numeric and percent growth. Maricopa County, Arizona's largest county by population, was the fastest growing county in the United States by numeric growth, adding over **668,000** residents between 2010-2019. Arizona's population grew by **23.8%** between 2000 and 2010, increasing from 5,160,000 in 2000 to 6,392,288 by 2010. Arizona's population grew by another **15.8%** between 2010 and 2020, reaching approximately 7,400,000 by 2020. And its economy has been spurred by new areas of growth in the Aerospace, Technology, Health Care, and Bioscience industries.[4]

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[1] *See* Exhibit A: Federal Lands and Indian Reservations in Arizona.

[2] CAROL VINCENT, ET AL., CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 7 (2020), https://fas.org/sgp/crs/misc/R42346.pdf.

[3] U.S. FOREST SERVICE, FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS D-3 (1997), https://www.fs.fed.us/spf/tribalrelations/documents/publications/NtlResourceGuide/tribexd.pdf (citing Bureau of Indian Affairs, Acreages of Indian Lands by State (1990)).

[4] *Industries in Arizona | Key Sector Opportunities for Industries in AZ,* ARIZ. COM. AUTH., https://www.azcommerce.com/industries.

The Fifth Highest Caseload in the Country

Given this growth, our civil caseload continues to evolve in its legal complexity and volume. The judiciary's Federal Court Management Statistics for the 12-month period ending September 30, 2019, showed Arizona had a weighted caseload of 800 filings per district judge, which is the 5th highest in the country. Arizona's weighted filings were 86% higher than the general standard of 430 cases per judgeship and 50% higher than the national average of 535.[5] Arizona is a border state, and it is possible that criminal filings may level off a bit this year because of the new administration's policies on illegal border crossing. And yet even still, Arizona is a growth state with a decades-long trend of increasing case filings over multiple administrations and immigration policy changes. Arizona has a steady caseload related to illegal re-entries, alien, drug and firearm smuggling, and an increased civil habeas corpus caseload. Moreover, the weights assigned to illegal entry and reentry cases are somewhat nominal, so the demands of Arizona's complex civil and criminal dockets are expected to remain substantial.[6] The authorization of new Article III judgeships would bring the workload of Arizona's district judges into alignment with other federal judges throughout the country.

You have surely heard lawyers talk about "the disappearing trial." In my experience, the large volume of cases require judges to encourage parties to resolve their disputes and motions without oral argument and short of trial. Local rules and procedures have been implemented to help judges manage large caseloads. As a result, parties' abilities to appear in federal court are greatly diminished. This is not the judicial system that the United States Constitution envisions, nor is it what one considers when pursuing a judgeship.

The Indian Country Caseload

How does the lack of adequate district court judges impact Indian Country? First, population growth is not unique to our urban or rural communities. It is also true for

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[5] These statistics dropped in 2020 due to the COVID-19 pandemic, but filings will surely resume or even exceed their pre COVID-19 rates in the future. For example, the District suspended all federal grand jury proceedings due to the pandemic which are expected to resume in March. *See* General Orders 20-12 (March 16, 2020); 21-02 (January 11, 2021).

[6] For example, the January 20, 2021, Memorandum of the Department of Homeland Security has been interpreted by the U.S.I.N.S. as mandating 8 U.S.C. §1326(a) and (b)(1) detainees be released and placed on U.S. Court supervision rather than be presented for deportation proceedings. *See Texas v. United States*, 2021 WL 247877 (S.D. Texas Jan. 26, 2021).

Indian Country. There are twenty-two tribal nations in Arizona. Two of the nation's largest tribes, the Navajo Nation and the Tohono O'odahm Nation, are in Arizona. Recent data from the U.S. Census Bureau and the Arizona Office on Tribal Relations reflects sustained and significant growth in Arizona's tribal nations over the past twenty years, as seen in the sample below:[7]

	2000 population	2010 population	2017 population (est.)	Percent growth
Navajo Nation (in AZ)	101,835	104,565	110,000	8%
White Mt. Apache	12,429	13,409	15,487	24.6%
Hopi	6,496	7,185	9,268	42.6%
Salt River Pima-Maricopa	6,405	6,289	7,727	20.6%

Moreover, the number of Arizonans identifying as Native American/American Indian grew at a similar rate to Arizona at large, growing **20.8%** from 292,552 in 2000 to 353,386 in 2010. The American Indian population in Arizona grew another **20.3%** between 2010 and 2019, reaching an estimated 424,955. For most Indian tribes, the median population age is much lower than Arizona's population at large. Arizona's tribal population is also highly mobile in that many tribal members work or attend school off of Indian lands, but they maintain homes and families in Indian Country. Population growth on tribal lands is significant because it, too, equates to more federal cases being filed in our civil and criminal dockets.

As you know, in states like Arizona, Montana, South Dakota, and others in the judicial circuits, **the district court is the felony criminal court for tribal nations**. The

[7] U.S. Census Bureau Dept. of Intergovernmental Affairs: Tribal Affairs. https://www.census.gov/tribal/.

Arizona district court adjudicates enumerated crimes arising in Indian Country[8] under the Major Crimes Act.[9] Congress has also enacted specific federal felony offenses that apply to Indian Country, including felony child abuse and neglect,[10] sexual abuse offenses,[11] and domestic violence offenses.[12] [13] Historically, the U.S. Attorney's Office in Arizona has had the highest number of such prosecutions in the Nation. That distinction continues through today. Since approximately 2002, the U.S. Attorney's Office has dedicated prosecutor resources to prioritize these crimes in Indian Country.

The need for district judge resources in Northern Arizona is especially great. The Northern Arizona region of the district court comprises the Apache, Coconino, Mohave, Navajo, and Yavapai counties. Those counties are also home to ten Indian Nations. Flagstaff, located in Coconino county, houses Northern Arizona's only federal court dedicated to criminal cases. Flagstaff is also the largest and most populous city in Northern Arizona. The U. S. Census Bureau estimates that the population of Flagstaff increased by 13.7% between April 1, 2010 and July 1, 2019, which is on par with the state population growth of 13.9% for that same period, and it far exceeds the national average of 6.3%.

A full-time federal magistrate judge has been present in Flagstaff for many years to handle misdemeanor cases and the preliminary stages of felony cases (including a preliminary hearing and detention hearing) that arise in the Grand Canyon National Park, Glenn Canyon National Recreation Area, Lake Powell, Lake Mohave, and other federal jurisdictions in Northern Arizona, including Indian Country. If a felony case proceeds beyond the preliminary stages (i.e., the case is not pled down to a misdemeanor), then the case must be transferred to Phoenix for adjudication by a district court judge. In addition, magistrate judges lack authority to dispose of civil cases without consent of the

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[8] 18 U.S.C. § 1151.

[9] 18 U.S.C. § 1153.

[10] 18 U.S.C. § 1153(a); Adam Walsh Child Protection and Safety Act of 2006, Pub.L. No. 109–248, § 215, 120 Stat. 587, 617 (2006).

[11] Chapter 109A Offenses include Aggravated Sexual Abuse, Sexual Abuse, Abusive Sexual Contact.

[12] Chapter 110A Offenses include Interstate Domestic Violence, Interstate Stalking and Interstate Violation of Protection Order. Recent amendments to VAWA contemplated whether federal district courts have a role to play in reviewing tribal court convictions of non-Indian defendants prosecuted pursuant to SDVCJ. On April 4, 2019, The Violence Against Women Reauthorization Act of 2019 ("VAWA 2019") was introduced in the Senate. VAWA 2019 required appellate courts to hear appeals and render decisions on tribal appellate decisions no later than 90 days after a defendant requests an appeal. The bill included a provision allowing convicted defendants to skip tribal appellate courts and appeal directly to the federal court system.

[13] *Id.* at § 804(g)(1)-(h)(1).

parties, which is rare. Consequently, all civil disputes arising out of Northern Arizona are also assigned to Phoenix district judges for all pre-trial and trial activities.

The criminal filings in Northern Arizona increased 13% between 2016 and 2019, and the civil case filings increased 21% during that same period. The two largest contributors to the federal case load in Northern Arizona are the multiple reservations across the region and Grand Canyon National Park. The weighted caseload for Northern Arizona has been well above the national average of 535 for years. For example, in 2019, the weighted caseload for that area was 774.6.

The growth in population and criminal filings in Northern Arizona over the years has resulted in the establishment of a comprehensive federal law enforcement infrastructure in Flagstaff. The FBI, DEA, USMS, USAO, FPD, U. S. Probation, and U. S. Pretrial Services all have offices with full time staff in Flagstaff to serve the needs of Northern Arizona's communities. In 2019, Section 82 of Title 28 was amended to add Flagstaff as an official place of holding court in Arizona, which statutorily authorizes federal district court trials to be held in that location.[14] If Northern Arizona were to be designated as its own small judicial district, it would qualify for at least one new judgeship under the U. S. Judicial Conference standard.

The criminal activity in Northern Arizona is unfortunately quite common, and it has been increasing over the years. Federal crime data has long suggested that Indian reservations have higher rates of violent crime than the national average, especially when it comes to violence and sexual offenses against women. I left the U.S. Attorney's Office in 2009. Since then, and during my time on the district court bench, I have witnessed a new trend of crimes in Indian Country, specifically, crimes arising under the general federal criminal statutes, such as the distribution of controlled substances like methamphetamine, possession of child pornography, firearms offenses, and alien smuggling offenses. Plainly, crimes impacting metropolitan and urban centers are no longer unusual in tribal communities. Congress recognized this problem and recently enacted the Tribal Law and Order Act,[15] Not Invisible Act, Savanna's Act, and the POWER Act, all of which aim to address the epidemic of violence affecting Native Americans.

How do all of these dynamics relate to a district judge's ability to administer justice in and for Arizona's tribal nations? Each of my colleagues takes their oath to "administer

[14] The Bill to accomplish that amendment had the bipartisan support of Arizona's entire Congressional delegation.
[15] P.L. 111-211; 25 U.S.C.A. § 2801 et. seq.

justice without respect to persons, and do equal right to the poor and to the rich" seriously. This oath assumes everyone has equal access to the federal court. But because Arizona's courtrooms are situated in major metropolitan areas, many citizens in remote areas, whom our courts must serve, face logistical challenges. For example, when a federal felony crime occurs on the Navajo or White Mt. Apache Nation, it may not be immediately discovered or investigated. If it is, the lack of federal law enforcement resources can result in delayed investigations, which leads to delayed evidence collection and witness identification. The result is a delayed or declined prosecution decision. Further, when an investigation is complete, the grand jury proceedings take place in Phoenix or Tucson, several hours away from the tribal community.

If charges are ultimately brought, the pre-trial, trial and sentencing proceedings usually take place hundreds of miles away from the accused's family, the victims, and the impacted community. Moreover, the demographic reflected in a grand jury or trial jury pool seldom resembles the accused's peers or the population in the affected communities. My colleagues and I attempt to address these issues by moving our trial proceedings to Flagstaff, where we use our Magistrate Judge courtroom.[16] While this makes it more convenient for the accused's family, the victims, tribal and federal law enforcement, and the northern Arizona jury pool,[17] it does impact our daily judicial responsibilities. For one week or more, we relocate our judicial chambers, travel 148 miles north, and attempt to address our remaining docket remotely. Some of my colleagues find this work arrangement impractical for a variety of reasons.

While adding new federal judges may not cure the systemic resource issues, it would make the overall caseload more manageable, which, in turn, would result in more judges handling northern Arizona cases *in* northern Arizona. As a result, the federal judicial system would be more accessible to its citizens and the federal and tribal agencies that need it.

The practical effect of this large civil and criminal caseload on any one judge cannot be ignored. Civil cases have wholly different issues at stake when compared with our criminal docket, where the accused is often indigent and undereducated. Criminal case adjudication requires additional attention, time, and patience. I appreciate the work that

[16] Since 1999, there have been numerous calls by the northern Arizona communities to establish a district court in Flagstaff, Arizona. *See* Exhibit B.

[17] The Northern Arizona jury pool is drawn from citizens of Mohave, Yavapai, Coconino, Navajo and Apache Counties. Ten Indian Nations are present within those Counties.

our Administrative Office of U.S. Courts must do to ensure that each judicial district and circuit receive "adequate" resources. But, the geographic distances, population and industry growth, and federal jurisdiction to hear tribal cases impact the ground-work necessary to administer justice and cannot be discounted. For example, the District of Arizona has over 25% of all American Indians/Alaska Natives in the federal court system under its supervision. Arizona ranked as the third highest district for supervision violations during 2013 through 2017, with 6,526 violations.[18] The District of Arizona is ranked first in the entire system for Presentence Investigation Reports for Part A violence offenses and sex offenses, as well as first in the number of post-conviction risk assessment high-risk cases, mental health, and substance use disorders. It is also ranked second system-wide for co-occurring disorders and is in the top three districts nationally for the immigration caseload. And, Arizona was one of the districts with the largest number of individuals on supervision, but also with one of the largest number of violations - unfortunately, we were in the top 50% in both categories.[19]

What does this mean in practical terms? Federal location monitoring may be feasible in Phoenix but not in Fort Defiance, a four-hour drive away. Re-entry and rehabilitation centers may be abundant in Tucson, but they are not accessible for citizens of the Hopi or Hualapai tribe, a five-hour drive away. A federal judge in Chicago may summon a supervised release violator to appear before him the next day to address a relapse, a request that a federal judge in Phoenix cannot make of a supervisee from the White Mt. Apache or Navajo Nation. In addition, our Indian Country caseload often requires that our Courts receive tribal court records from twenty-one tribal court systems to adequately understand the background of the individuals appearing before us before sentencing. These tribal court systems are often not equipped to electronically share that information, which pose additional challenges for our courts.

We envy our colleagues in other districts who use "drug court" programs, or diversion programs for first time felony offenders. There are enormous benefits to these preventative programs. For example, if a tribal member, born, educated and permanently residing in his or her Indian community, was directed toward a drug court instead of federally prosecuted for selling small quantities of controlled substances in the community, the member could avoid a federal term of incarceration and all of its

[18] July 2020 Report of the U.S. Sentencing Commission on "Federal Probation and Supervised Release Violations."
[19] *Id.*

attendant impacts. But, again, commitment to these programs takes time, patience, and work hours. And time is a luxury this District does not have.

These dynamics stretch our judicial resources to their limits. Likewise, our current caseload makes meaningful court supervision of those on supervised release impracticable. As a result, I fear more tribal members are at a greater risk to recidivate.

Other Judicial Responsibilities

Finally, over the years, the Congress and the Executive branches of government have tasked federal district court judges who have Indian Country jurisdiction with additional responsibilities. Our judicial responsibilities are also impacted by these other "non-judicial" requirements, such as compliance with the Civil Justice Reform Act, the Power Act, and various annual reporting statutes. The Civil Justice Reform Act[20] requires that district court judges report civil motions that are fully briefed and are pending for six-months or more, and civil cases pending for three or more years. My colleagues and I all take our Congressional reporting requirements seriously. So, it is commonly known that judges are highly focused on submitting a "clean report," which requires that priority be given to these civil cases, which are often the most complex cases on our docket. In 2017, the Power Act[21] was enacted to address domestic violence in Indian Country. This is a unique requirement for district courts with jurisdiction over Indian Country, such as Arizona. The Power Act mandates the chief judge for each judicial district across the United States to: (1) sponsor public events in partnership with a state, local, tribal, or territorial domestic violence service provider/coalition; (2) conduct a public event promoting pro bono legal services for Indian or Alaska Native victims and survivors; and (3) provide an annual report to the Administration Office. Judges must also annually report on orders authorizing the interception of wire, oral or electronic communications[22], applications for delayed-notice of search warrants[23], and report pursuant to the Crime Victims' Rights Act[24], to name a few.

The Arizona district judges recognize Congress' need for this information, especially in regard to the prevention of violent crimes, including domestic violence, and

[20] 28 U.S.C. § 476.
[21] "Pro bono Work to Empower and Represent Act of 2018," S. 717; passed by the 115th Congress (2017-2018).
[22] 18 U.S.C. § 2519(3).
[23] 18 U.S.C. § 3103a.
[24] 18 U.S.C. § 3771.

to promote access to the federal courts. We see, first-hand, what crime does to the victim, the accused, and the community. And, we know that an involved judiciary can make a large impact. But, simply put, there are just not enough judges in Arizona to currently meet ***all*** of the demands and responsibilities of Article III and the many mandates of the U.S. Congress or program goals of the Executive.

In closing, I ask you to consider that our nation's "system of justice" relies on federal court judges to administer justice. The judiciary in the District of Arizona desperately needs new permanent judgeships. The district's caseload shows little sign of subsiding, and it continues to strain our existing resources. The status quo simply cannot meet the Constitutional mandate to administer meaningful justice for all of its citizens.

Exhibit A:

Federal Lands and Indian Reservations in Arizona

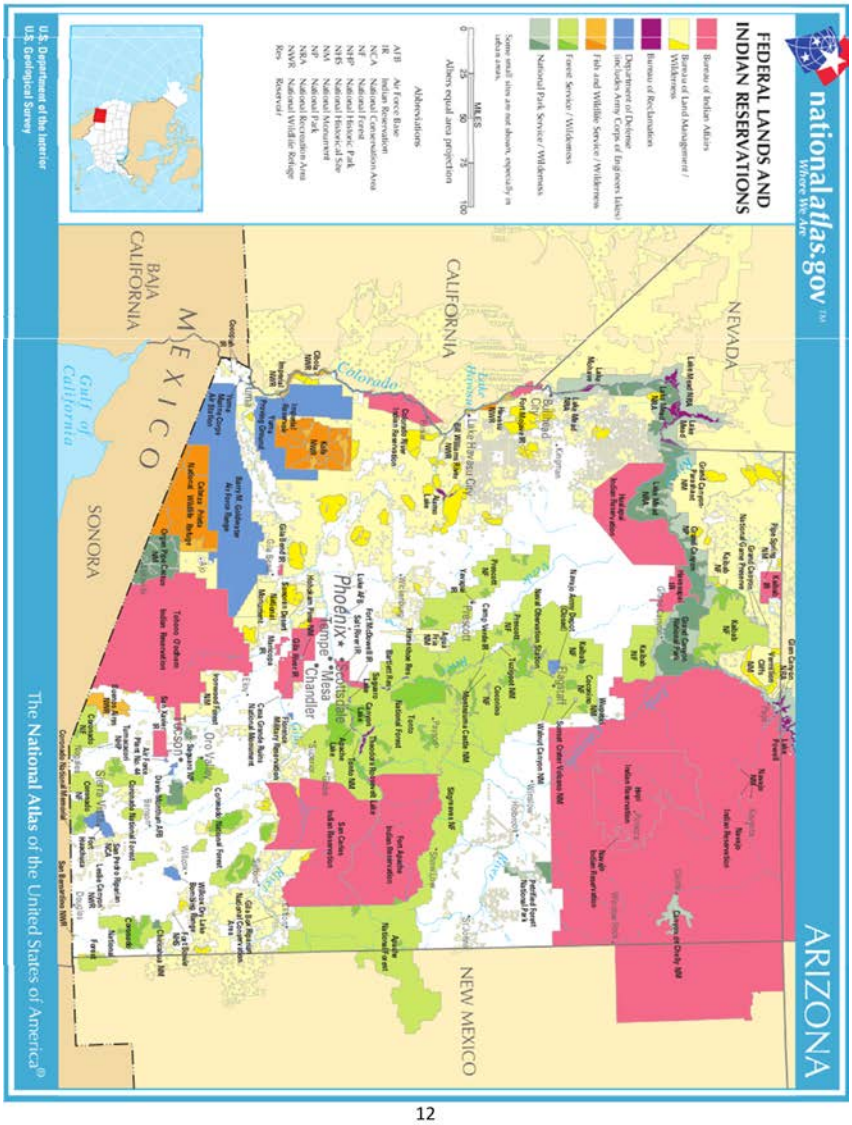
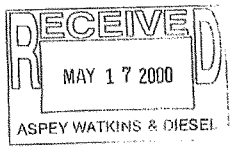


Exhibit B

COCONINO COUNTY ARIZONA
OFFICE OF THE COUNTY MANAGER

May 15, 2000

Dora H. Harrison
County Manager



Mr. Louis M. Diesel
Aspey, Watkins & Diesel
123 N. San Francisco Street
Flagstaff, Arizona 86001

Dear Mr. Diesel:

Enclosed is Resolution 2000-28 adopted by the Coconino County Board of Supervisors on May 1, 2000, in support of establishment of a United States District Court in Flagstaff, Arizona. Copies of this Resolution were sent to Senators Jon Kyl and John McCain.

Sincerely,

Sandy Coffman
Executive Secretary
County Manager's Office

219 E. CHERRY AVE. • FLAGSTAFF, AZ 86001-4695
(520) 779-6690 FAX (520) 779-6687

COCONINO COUNTY BOARD OF SUPERVISORS

RESOLUTION 2000- 28

IN SUPPORT OF ESTABLISHMENT OF A UNITED STATES DISTRICT COURT IN FLAGSTAFF, ARIZONA

WHEREAS, all federal cases must be filed in Phoenix and tried either in Phoenix or Prescott, both distant from the communities of Northern Arizona; and

WHEREAS, there is a hardship on the victims, families and all parties involved to journey to Phoenix or Prescott for trial; and

WHEREAS, privately owned office space is available in downtown Flagstaff for expansion of the federal court;

NOW THEREFORE BE IT RESOLVED, that the Coconino County Board of Supervisors supports the establishment of a United States District Court in Flagstaff, Arizona.

BE IT FURTHER RESOLVED, that Coconino County urges Arizona's congressional representatives to take any and all reasonable and necessary action which may be necessary to implement the same, including but not limited to the amendment of 28 U.S.C. 82 to include Flagstaff as part of the Judicial District of Arizona.

Signed and sealed this 1st day of May, 2000.

Elizabeth C. Archuleta
Chairperson, Board of Supervisors

Attest:

Andrea Paul - Deputy
Clerk of the Board

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WATKINS
& DIESEL
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Whitney Cunningham**
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Brett M. Hager

John Verkamp
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*Also admitted in California
**Also admitted in Navajo and Hopi Courts
***Also admitted in Texas
Certified as a Specialist in:
† Injury and Wrongful Death
†† Real Estate

September 22, 1999

Hon. Stephen M. McNamee
Chief Judge
United States District Court
District of Arizona
230 North First Avenue
Phoenix, AZ 85025

Re: Amendment of 28 U.S.C. § 82 to include Flagstaff

Dear Judge McNamee:

Thank you very much for speaking to me recently regarding the amendment of 28 U.S.C. § 82. As you may recall, I am Chairman of the Coconino County Bar Association committee which was formed in 1985 to facilitate the establishment of a United States District Court in Flagstaff. Over the years, our committee has had numerous discussions with various public officials and groups regarding the need for a United States District court in Flagstaff. As you know, Flagstaff is the regional hub for Northern Arizona and is located near to the Navajo and Hopi Indian Reservations. The Navajo Indian Reservation is one of the largest reservations in the United States extending throughout much of Northeastern Arizona, a portion of Western New Mexico and Southern Colorado. The distances are vast and travel is sometimes very difficult. Currently, major crimes occurring on the reservations are prosecuted in the United States District Court in Phoenix. On occasion they are handled in Prescott. Civil matters involving native american issues are frequently heard in United States District Court in Phoenix. Because the distances are so great, it is difficult for victims, families of defendants, witnesses and civil litigants to participate in a meaningful way in the various proceedings. A particularly good example was the criminal prosecution of former Navajo Tribal Chairman, Peter McDonald. I am reliably advised that during his trial in Prescott, many native americans had to camp out at a lake near Prescott for many months in order to attend the various proceedings. This created great hardship. It has been our committee's belief that the location of a federal court in Flagstaff would alleviate many of these concerns.

As we discussed, I have spoken with Joe Lodge, an Assistant U. S. Attorney with the U. S. Attorney's office in Phoenix, regarding the issue. He apparently is involved in many of the cases arising on the reservations in Northern Arizona. He advises that of all the criminal cases prosecuted nationwide in Indian country, 26% arise in Northern Arizona. There are apparently 16 F.B.I. agents assigned to investigate such cases in

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† Injury and Wrongful Death
†† Real Estate

Northern Arizona and yet there is no full-time prosecutor located in Flagstaff. Presently, there is a United States Magistrate's Court in Flagstaff. The U. S. Attorney has an office but no full-time prosecutor. The Federal Probation Department and Pre-Trial Services are also located in Flagstaff. All of these offices are housed in a building at 123 North San Francisco Street, Flagstaff, Arizona. The courtroom has already been constructed, is currently being utilized by the Magistrate and for bankruptcy proceedings and would be available for use by a District Court judge. There is even an office for such a judge and his staff. Judge Bilby utilized the facilities prior to his untimely death. One of the impediments, however, is 28 U.S.C. § 82. The statute provides that Arizona shall constitute one judicial district and that court shall be held at Globe, Phoenix, Prescott and Tucson. We have asked Senator Kyle to submit legislation to add Flagstaff to the list of cities wherein court can be held. Please note that the other cities would not be deleted. This would eliminate the problem which presently exists whereby cases cannot be tried in Flagstaff except by mutual consent of the parties.

I recently had dinner with Kelsey A. Begaye, President of the Navajo Nation, to discuss this issue. He personally supports the establishment of a United States District Court in Flagstaff and advised me that he would be willing to submit a resolution to the Tribal Council for adoption demonstrating its support as well. I also attended the Annual Conference and Meeting of the Navajo Nation Bar Association on June 10 and 11, 1999 in Flagstaff and a resolution was adopted supporting the establishment of a full-time United States District Court in Flagstaff and the amendment of 28 U.S.C. § 82 to include Flagstaff as part of the judicial district in Arizona. Our committee has submitted proposed resolutions to the Flagstaff City Council and the Coconino County Board of Supervisors supporting the establishment of a United States District Court in Flagstaff and have been advised that it is likely that the resolutions will be adopted. The Coconino County Bar Association has previously approved such a resolution. I have discussed the issue with Jose Rivera, U.S. Attorney for the District of Arizona, and he has indicated to me that if a federal District Court was established in Flagstaff that he would staff the U.S. Attorneys Office located there on a full-time basis.

As you can see, there appears to be a great deal of support for the proposal. I have spoken with Stephen Higgins, an attorney with Senator Kyle's office, and he advises that there is a subcommittee meeting coming up on December 1, 1999 of the Judicial Conference. If you could send a letter supporting the amendment of 28 U.S.C. § 82 to include Flagstaff as part of the judicial district in Arizona, I am advised that it is likely that the legislation can be passed. I understand that you and Senator Kyle speak from time to time concerning matters affecting the judicial district in Arizona. Our committee

would appreciate it if you would discuss this issue with him. I also understand that the issue has precipitated discussion among the various district court judges in Arizona and that there is general awareness of the problem. In our committee's view, the time has come to amend the statute. Your help in accomplishing this goal would be very greatly appreciated. Thanks again for your interest in this very important issue which impacts so many in Northern Arizona. If you need additional information, let me know.

Best wishes,

ASPEY, WATKINS & DIESEL, P.L.L.C.

Frederick M. Aspey

FMA:pjw
cc: Senator Jon Kyle

THE HOPI TRIBE

Ivan L. Sidney
CHAIRMAN

Clifford T. Balenquah
VICE-CHAIRMAN

April 17, 1985

In reply refer to:

RECEIVED
APR 19 1985
COCONINO COUNTY
ATTORNEYS OFFICE

Mr. John Verkamp
Coconino County Attorney
Coconino County Court House
Flagstaff, AZ 86001

Dear Mr. Verkamp:

I am in receipt of your letter regarding the feasibility of establishing a United State Federal District Court in Flagstaff.

I would not hesitate to support this concept for a majority of the Hopi Tribes litigative actions are through the federal court. As stated in your letter a federal court in Flagstaff would be of great benefit to the Hopi Tribe.

To further pursue this idea, I am appointing Mr. Michael O'Connell, Resident Counsel to be the Hopi Tribe's contact. Please contact him at 734-2441, Ext. 164 for any further discussion.

Sincerely,

Ivan L. Sidney, Sr., Chairman
Chief Executive Officer

cc: Law & Order Committee
Resident Counsel

P.O. BOX 123 — KYKOTSMOVI, ARIZONA — 86039 — (602) 734-2441

Mr. JOHNSON of Georgia. Thank you, Judge HUMETEWA.
Next, Professor Fitzpatrick, you may begin.

STATEMENT OF BRIAN T. FITZPATRICK

Mr. FITZPATRICK. Thank you, Mr. Chair. It is an honor to be back before this subcommittee.

I am a professor of law at Vanderbilt Law School in Nashville, 10nessee. I have practiced in the federal judiciary. I was a law clerk in the federal judiciary. Now, I research and teach about the federal judiciary as a professor.

I want to focus my testimony on new judgeships for the Courts of Appeals, and, in particular, I want to focus on one Court of Appeals, the Ninth Circuit. I want to tell the Committee that, if you decide to create more judgeships for the Ninth Circuit, I think that you will also be required to restructure the Ninth Circuit. I think you should be aware of that as you go forward.

The Ninth Circuit is the largest Federal Court of Appeals in American history. It has 29 active judges, many more part-time senior judges. It covers 20 percent of the country, 60 million people. Because the Ninth Circuit decides cases in panels of only three judges, this means that two judges can end up deciding the law for 60 million people.

The Circuit should have been restructured long ago, and the need to do so will be even greater if you add more judges. The truth is that the only reason the Circuit has not been restructured, in my view, is because it has been mired in partisan politics for so long. The reason why it has been mired in partisan politics is because 10 Ninth Circuit judgeships were created when Jimmy Carter was President, and this has led to a predictable partisan imbalance on the court ever since then. This predictable partisan imbalance has led one party to want to break up the Ninth Circuit and the other party to do everything it can to keep the Ninth Circuit intact.

This is very unfortunate because, if there had been no partisan imbalance that was so predictable, I think the Ninth Circuit would have been restructured long ago. The reason is there are very good government reasons to restructure the Circuit. There have long been complaints that the Ninth Circuit's size makes it the slowest Court of Appeals in America. There have long been complaints the Ninth Circuit's size makes it difficult for the judges to keep track of what the others are doing, leading them to issue decisions that inadvertently conflict with one another.

I want to focus on another problem that I is caused by the Ninth Circuit's unprecedented size. That is, it leads to more erroneous legal decisions being made, and we should care about that because 60 million people are affected when the Ninth Circuit makes mistakes. It is hard to deny the Ninth Circuit makes more mistakes than other Circuit Courts. For decades, it has been the most reversed Circuit by the United States Supreme Court. I put the data on that in my written testimony.

Part of the reason it makes more mistakes is because bigger circuits end up more frequently picking by random three-judge panels, led by odd or outlier judges with non-representative views of

the bigger court. You can show this phenomenon with simple math, and I do it in my written testimony.

Part of the reason why the Ninth Circuit makes so many more mistakes and ends up getting reversed more often by the Supreme Court is because the Ninth Circuit is so big it cannot correct mistakes by its three-judge panels by going en banc. The way that circuits correct mistakes is through en banc rehearing, but the Ninth Circuit is the only circuit in American history that has become so big it cannot go en banc with the full court. Instead, it goes en banc with only 11 out of 29 judges. That means six judges, a majority of 11, can control what the Ninth Circuit does, but those six judges can be unrepresentative of the full 29.

This is not just theory. There have now been some excellent empirical studies done by scholars that show the Ninth Circuit's size is what leads it to get reversed more often. The best study is done by Dr. Kevin Scott. He is a political scientist who used to work at the Administrative Office of the Federal Courts. He is now a chief of statistics in the Department of Justice. He has used regression analysis and he has shown the Ninth Circuit's inability to go en banc with a full court has led to get reversed 10 extra times every year by the United States Supreme Court—10 times just because of its limited en banc.

I am out of time. I am happy to take questions. Thank you very much for having me.

[The statement of Mr. Fitzpatrick follows:]

Congress of the United States
House of Representatives
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

Wednesday, February 24, 2021, 10:00 A.M.
2141 Rayburn House Office Building
Washington, D.C.

Written Testimony of:

Brian T. Fitzpatrick
Milton R. Underwood Chair in Free Enterprise and Professor of Law
Vanderbilt Law School
Nashville, TN

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

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[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

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[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

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

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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.

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[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 (COMBIN(F,3) + (COMBIN(F,2)*COMBIN(C-F,1)))/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.

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[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.

Mr. JOHNSON of Georgia. Thank you, Professor Fitzpatrick.
Professor Levy, you may begin.

STATEMENT OF MARIN K. LEVY

Ms. LEVY. Chair Johnson, Ranking Member Issa, and distinguished Members of the subcommittee, thank you so much for the opportunity to testify today regarding the need for additional judgeships on the Federal Courts of Appeals. Quite simply, it is an honor to be here.

I am sure that I do not need to stress to this Subcommittee the importance of the Federal Courts of Appeals in the functioning of our judicial system and in our government as a whole. According to the Administrative Office of the U.S. Courts, the 13 Courts of Appeals collectively decided more than 50,000 appeals in 2019. I contrast the Supreme Court decided just 61 cases in October term 2019, only 50 of which were from federal courts.

Accordingly, the Courts of Appeals have effectively become the courts of last resort for tens of thousands of litigants across the country. It is, therefore, critical that they have sufficient resources, including, first and foremost, a sufficient number of judges. It is my belief, based upon years of research, that they currently do not.

By way of history, when the Courts of Appeals were created in 1891 by the famed Evarts Act, they began with just 19 judges. Then, over the next hundred years, Congress consistently and frequently authorized new judgeships for those courts. Indeed, as I tell in my written testimony, Congress expanded the courts nearly 30 times over the decades that followed, eventually growing the regional Circuit Courts and the Federal Circuit to 179 judges by 1990.

The reason for this regularized expansion is plain. Congress grew the courts to try to keep pace with the dramatically rising caseload. In 1950, when the great Learned Hand was on the bench, there were just under 5,500 filings in the Federal Courts of Appeals, or about 73 per active judgeship. By the late 1970s, the case filings had nearly quadrupled, and they doubled again by 1990 to just over 40,000.

Throughout this time, Congress added judgeships again and again, including several omnibus judgeship bills. In 1978, as we have already referenced here today, during the Carter Administration, Congress created 35 Circuit Court judgeships. In 1994, during the Reagan Administration, Congress created 24 more, and in 1990, during the Bush Administration, Congress created yet 11 more.

Through these congressional interventions, the number of filings per judgeship, though it continued to climb, was kept somewhat in check. By 1990, it was 237 per year, importantly, below a benchmark that the Judicial Conference had set of 255.

Unfortunately, though, Congress has not added a single judgeship since that time, the caseload has risen still. In 2019, there were just under 51,000 cases filed in the Federal Courts of Appeals. That is an increase of approximately 20 percent above where we were in 1990. This puts us at 284 filings per judgeship, and in certain circuits, of course, that figure is considerably higher. Indeed,

it is currently over 350 per judgeship in the Ninth Circuit, 410 per judgeship in the Fifth, and 450 per judgeship in the 11th.

As I am happy to talk about more during questions, we know what happens when we ask courts to do more without concurrently giving them more resources to do it. Courts must adapt, which means relying more heavily on case management strategies and, in particular, sending a smaller percentage of cases to oral argument, having a larger percentage of cases go first to staff attorney offices for consideration, and then, ultimately, having a larger percentage of cases resolved by short, and in some circuits even cursory, unpublished decisions.

To provide just one illustration, just after the last court expansion in 1991, 45 percent, or close to one-half, of all cases decided on the merits received oral argument. Today, that figure is less than half. Only one in five cases decided on the merits are heard before a panel of three judges.

As we know, truncated review has its effects and its costs. It can leave parties feeling like they did not have their day in court. Moreover, judges and scholars alike have raised accuracy concerns in addition to these process-based ones.

The courts should not be put into this position. In sum, Congress should return to its earlier practice and authorize new judgeships for the Courts of Appeals consistent with their caseload need—for the courts, for all of those who come before them for the just resolution of appeals.

Thank you, and I look forward to your questions.

[The statement of Ms. Levy follows:]

"The Need for New Lower Court Judgeships, 30 Years in the Making"

Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet Of the House Committee on the Judiciary

Wednesday, February 24, 2021, 10:00 a.m.

Testimony of Marin K. Levy
Professor of Law, Duke University School of Law

Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee:

Thank you for the opportunity to testify today regarding the need for additional judgeships on the federal courts of appeals. My name is Marin Katherine Levy, and I am a Professor of Law at the Duke University School of Law. My research and teaching over the past twelve years have focused on judicial administration and the federal courts of appeals. I have published over a dozen scholarly works on these topics, several of which were coauthored with federal appellate judges.

I am sure that I do not need to stress to this Subcommittee the importance of the federal courts of appeals in the functioning of our judicial system, and our government more generally. According to recent statistics provided by the Administrative Office of the U.S. Courts, the thirteen courts of appeals collectively decided more than 50,000 appeals in 2019.[1] By contrast, the Supreme Court decided far fewer than 100 appeals in each of its past two terms.[2] The key point is that the federal courts of appeals are effectively the courts of last resort for tens of thousands of litigants across the country. It is therefore critical that they have sufficient

[1] Specifically, the courts of appeals together terminated 50,050 appeals. This figure was arrived at by combining two data tables from the Administrative Office of the U.S. Courts. The first notes that the U.S Courts of Appeals (excluding the U.S. Court of Appeals for the Federal Circuit) together terminated 48,811 appeals in 2019. *See U.S. Courts of Appeals – Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2018 and 2019*, ADMIN. OFF. OF THE U.S. CTS., tbl.B, https://www.uscourts.gov/statistics/table/b/statistical-tables-federal-judiciary/2019/12/31. The second notes that the U.S Court of Appeals for the Federal Circuit terminated 1,239 appeals by judges in 2019. *See U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2019*, ADMIN. OFF. OF THE U.S. CTS., tbl.B-8, https://www.uscourts.gov/statistics/table/b-8/statistical-tables-federal-judiciary/2019/12/31.

[2] In fact, the Supreme Court released 61 merits opinions in October Term 2019. *See* SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2019 (2020), https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf. It released 72 merits opinions in October Term 2018. *See* SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2018 (2019), https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf.

resources, including, first and foremost, a sufficient number of judges. Based upon my research, I believe that Congress should authorize new judgeships for the courts of appeals to keep pace with higher caseloads—as it has done, traditionally with bipartisan support, nearly thirty times before.[3]

What follows, first, is a brief description of the expansion of the courts of appeals over time. My testimony then turns to the main cause for the expansion: a rising caseload that at points has been so significant as to warrant the phrase "crisis in volume" at the courts of appeals.[4] I further stress that the caseload is markedly above where it was in 1990—the last time Congress authorized new judgeships.[5] Finally, I discuss the stakes of an understaffed judiciary, including an increase in the percentage of cases that will go without the traditional judicial process: oral argument, decision by a panel of judges (rather than review first by staff attorneys), and a published opinion explaining the court's reasoning.

The History of Expansion at the Federal Courts of Appeals

The history of the federal courts of appeals is, at its core, a history of expansion.

Just over one hundred years after the First Judiciary Act,[6] Congress created the modern courts of appeals.[7] In 1891 the Circuit Court of Appeals Act (known as the Evarts Act) gave life to nine intermediate appellate courts that would take appeals from the federal district courts and be reviewed by the Supreme Court.[8] But Congress did not stop there. Only two years after the Evarts Act, Congress added another court—what would eventually be called the United States Court of Appeals for the District of Columbia Circuit.[9] The Tenth and Eleventh Circuit Courts of Appeals were later created in 1929[10] and 1980,[11] respectively. And the United States Court of

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[3] *See Chronological History of Authorized Judgeships - Courts of Appeals*, ADMIN. OFF. U.S. CTS., https://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-courts-appeals.

[4] *See, e.g.*, Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 634–35 (1974); DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974); *see also* Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1112 & n.9 (2011) (noting that the "crisis in volume" literature dates back to the 1960s, and citing the sources noted above as well as first citing Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior, and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 7–13 (1983); then citing Lewis F. Powell, Jr., *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A. J. 1370, 1371 (1982); and then citing Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 949 (1964)).

[5] *See* Marin K. Levy, *The Promise of Senior Judges*, *The Promise of Senior Judges*, 115 NW. U. L. REV. 1227, 1234 n.33 (2021) (noting that the 1990 Judgeship Bill was the last major expansion of the courts of appeals, in which Congress created eleven new circuit judgeships and citing The Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 202(a), 104 Stat. 5089, 5098–99).

[6] *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73.

[7] *See* Judiciary Act of 1891, ch. 517, 26 Stat. 826.

[8] *See id.*

[9] *See* Act of Feb. 9, 1893, ch. 74, 27 Stat. 434, 434–35.

[10] Specifically, in 1929 Congress created the United States Court of Appeals for the Tenth Circuit. *See* Act of Feb. 28, 1929, ch. 363, 45 Stat. 1346, 1346–47.

[11] In 1980, Congress created the United States Court of Appeals for the Eleventh Circuit out of the old Fifth Circuit. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 2, 94 Stat. 1994, 1994.

Appeals for the Federal Circuit followed in 1982,[12] out of what had earlier been the Court of Customs and Patent Appeals.[13]

Critically, it is not only the number of courts that has grown over time, but also the number of judges who sit on each court. Before the passage of the Evarts Act, Congress had created dedicated "circuit judges," one for each circuit, to sit, alongside district judges and Supreme Court Justices, on the then-nine circuit courts (the precursors to the modern courts of appeals).[14] One additional circuit judge was later bestowed upon the Second Circuit alone in 1887.[15] To this stable of ten judges, Congress authorized the addition of nine more—again, one for each of the then-nine circuits—through the Evarts Act itself in 1891.[16]

Over the next hundred years, Congress authorized new judgeships both frequently and consistently, with nearly thirty such authorizations, spread out across every decade save one.[17] During this time, the total number of appellate judges expanded from the original 19 to 179.[18] What follows is a table, based upon data from the Administrative Office of the U.S. Courts, which details the expansion of the thirteen courts of appeals from 1891 to the present.[19]

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[12] *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 101, 165, 96 Stat. 25, 25, 50.

[13] *See* Act of Mar. 2, 1929, ch. 488, 45 Stat. 1475.

[14] *See* An Act to Amend the Judicial System of the United States, ch. 22, § 2, 16 Stat. 44, 44–45 (1869).

[15] *See* Act of Mar. 3, 1887, ch. 347, 24 Stat. 492.

[16] *See* Judiciary Act of 1891, ch. 517, §§ 1–2, 26 Stat. 826, 826–27 (1891).

[17] *See Chronological History of Authorized Judgeships - Courts of Appeals*, *supra* note 3. The only decade in which judges were not added to the bench between 1891 and 1990 is the 1910s. *Id.*

[18] *See id.*

[19] *See* ADMIN. OFF. OF THE U.S. CTS., *Authorized Judgeships*, https://www.uscourts.gov/sites/default/files/allauth.pdf. Note that, unlike Table 2, these figures do not include the Court of Claims or the Court of Customs and Patent Appeals.

Table 1: Authorized Circuit Judgeships, 1891 – Present

Calendar Year	Authorized Circuit Judgeships
1891	19
1893	22
1894	23
1895	25
1899	28
1902	29
1903	30
1905	32
1922	33
1925	35
1928	36
1929	41
1930	45
1935	46
1936	47
1937	49
1938	54
1940	57
1942	58
1944	59
1949	65
1954	68
1961	78
1966	88
1968	97
1978	132
1982	144
1984	168
1990	179

The expansion of the courts of appeals ended with the Civil Justice Reform Act of 1990, which created eleven new circuit judgeships.[20] Despite the fact that Congress regularly authorized new judgeships for the courts of appeals for the first hundred years of those courts' existence, it has now held them at the same size for thirty years.[21]

The History of Expansion of the Federal Appellate Caseload

These expansions of the federal bench have generally been in response to expanding caseloads. As I have chronicled in several articles, the courts of appeals have faced a rapidly rising caseload for much of their collective life.[22] In 1892, just one year after the courts were formed, there was an average of 44 filings per judgeship per annum.[23] That number had jumped to 73 by 1950 (even while the number of judgeships had grown from 19 to 75) and jumped again to 137 by 1978 (when the number of judgeships stood at 144).[24] It is no wonder that throughout this time, judges and scholars alike referred to the "crisis" in volume at the courts of appeals.[25] Only a little over a decade later, in 1990, filings per judgeship had risen to 237.[26]

Although the expansion of the federal bench halted in 1990,[27] the caseload expansion did not. In 1997, it reached 300 filings per judgeship.[28] It then reached a high-water mark in 2005 with 400 filings per judgeship,[29] before beginning to recede somewhat in the years that followed. The annual caseload has stabilized over the past few years, and today it stands at about 284 filings per judgeship—still nearly fifty more cases per judge than in 1990.[30] It is worth noting

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[20] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 202(a), 104 Stat. 5089, 5098–99.

[21] It is worth noting that while the overall size has held constant at 179 judgeships, one of those judgeships was transferred from the D.C. Circuit to the Ninth Circuit, effective January 21, 2009. *See* Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 509(a), 121 Stat. 2534, 2543.

[22] *See, e.g.*, Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2393–2402 (2014) (reviewing WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS (2012)); Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 407-409 (2013) [hereinafter "Levy, *Judicial Attention as a Scarce Resource*"]; Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 320–25 (2011) [hereinafter "Levy, *The Mechanics of Federal Appeals*"].

[23] *See* COMM'N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, FINAL REPORT 14 (1998).

[24] *See id.*

[25] *See supra* note 4.

[26] *See supra* note 23, at 14.

[27] *See supra* 5 and accompanying text.

[28] *See* COMM'N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, FINAL REPORT, *supra* note 23, at 14.

[29] This figure was arrived at by combining two data tables from the Administrative Office of the U.S. Courts. The first table notes that there were 70,003 filings during the twelve-month period ending December 31, 2005 in the U.S. Court of Appeals (excluding the U.S. Courts of Appeals for the Federal Circuit). *See U.S. Courts of Appeals – Appeals Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2005 and 2006*, ADMIN. OFF. OF THE U.S. CTS., tbl.B, https://www.uscourts.gov/statistics/table/b/statistical-tables-federal-judiciary/2006/12/31. The second notes that there were 1,552 appeals filed in this same timeframe in the U.S. Court of Appeals for the Federal Circuit. *See U.S. Courts of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2006*, ADMIN. OFF. OF THE U.S. CTS., tbl.B-8, https://www.uscourts.gov/sites/default/files/statistics_import_dir/B08Dec05.pdf. The two figures combined—71,555—divided by the number of federal appellate judgeships—179—equals approximately 400 filings per judgeship.

[30] This figure was arrived at by combining two data tables from the Administrative Office of the U.S. Courts. The first notes that there were 49,421 filings during the twelve-month period ending December 31, 2019 in the U.S Courts of Appeals (excluding the U.S. Court of Appeals for the Federal Circuit). *See U.S. Courts of Appeals – Cases Commenced,*

that in some circuits this figure is much higher. In the Ninth Circuit, for example, there are just over 350 filings per judgeship.[31]

What follows is a table, based upon data from the Commission on Structural Alternatives for the Federal Courts of Appeals as well as the Administrative Office of the U.S. Courts, which details the rise in filings per judgeship at the courts of appeals over time.[32]

Table 2: Authorized Circuit Judgeships and Filings Per Judgeship, 1892 – Present

Calendar Year	Circuit Judgeships	Filings	Filings Per Judgeship
1892	19	841	44
1930	55	3,532	64
1950	75	5,443	73
1964	88	6,736	77
1978	144	19,657	137
1984	168	32,616	194
1990	179	42,364	237
1997	179	53,688	300
2019	179	50,887	284

The key point is that the filings per judgeship have grown considerably over time, including since the federal courts of appeals were last expanded. Specifically, the caseload metric today is nearly four times what it was in 1950, and more than twice was it was in 1978. And it remains markedly above where it was in 1990—an increase of approximately 20% or 8,523 new cases for the courts of appeals to contend with each year.

Terminated, and Pending During the 12-Month Periods Ending December 31, 2019 and 2020, ADMIN. OFF. OF THE U.S. CTS., tbl.B, https://www.uscourts.gov/statistics/table/b/statistical-tables-federal-judiciary/2019/12/31. The second notes that there were 1,466 appeals filed in this same timeframe in the U.S. Court of Appeals for the Federal Circuit. *See U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2020*, ADMIN. OFF. OF THE U.S. CTS., tbl.B-8, https://www.uscourts.gov/statistics/table/b-8/statistical-tables-federal-judiciary/2019/12/31. The two figures combined—50,887—divided by the number of federal appellate judgeships—179—equals approximately 284 filings per judgeship.

[31] This figure was arrived at by taking the number of filings in the U.S. Court of Appeals for the Ninth Circuit in 2019—10,191—and dividing it by the number of authorized judgeships for that court—29. *See U.S. Courts of Appeals – Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2019 and 2020*, ADMIN. OFF. OF THE U.S. CTS., tbl.B, https://www.uscourts.gov/statistics/table/b/statistical-tables-federal-judiciary/2019/12/31.

[32] *See* COMM'N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, FINAL REPORT, *supra* note 23, at 14 (providing the figures for the years 1892 through 1997, and noting that the years 1930–1978 combine the Court of Customs and Patent Appeals and Court of Claims, and that appellate filings and judgeships for 1984–1997 include the U.S. Court of Appeals for the Federal Circuit); *supra* note 30 and accompanying text (providing figures for the present based upon data from the Administrative Office of the U.S. Courts).

In short, if we pull these two strands of history together, we can see that as caseloads climbed through the course of the twentieth century, Congress consistently responded by authorizing new judgeships to take up the workload—until 1990. Before thirty years ago, these responses were routine and traditionally bipartisan (indeed, the Omnibus Judgeship Act of 1978, which created thirty-five new judgeships for the courts of appeals,[33] had bipartisan cosponsorship[34]). This past pattern of practice was critical to the functioning of the courts given that, as the next Section details, the courts and the judicial process they provide suffer when under stress.

The Effects of Appellate Courts Under Pressure

As the demands on the courts of appeals have grown while their judicial resources have not, the circuits have been forced to relieve the pressure by changing how they evaluate and resolve cases.[35] These adaptive practices have come at the expense of the traditional model of appellate decisionmaking.[36]

First, following a 1964 decision by the Judicial Conference that only opinions of "general precedential value" must be published,[37] the circuits created their own plans for disposing of cases through unpublished opinions.[38] Soon, these short unpublished opinions became the most common form of case disposition.[39] Second, starting in 1968 with the Fifth Circuit, courts began to move away from the default that oral argument would be offered in most, if not all, cases.[40] A 1979 amendment to Federal Rule of Appellate Procedure 34 formalized this change, authorizing the resolution of an appeal without oral argument when the panel determined that the case was frivolous, had already been "authoritatively decided," or when the decisionmaking process "would not be significantly aided by oral argument."[41] Third, starting in 1973, courts began receiving funding for staff law clerks to assist with certain classes of cases.[42] By 1982,

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[33] Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629.

[34] *See Cosponsors: H.R.7843 – 95th Congress (1977-1978)*, CONGRESS.GOV, https://www.congress.gov/bill/95th-congress/house-bill/7843/cosponsors?searchResultViewType=expanded (last visited Feb. 21, 2021).

[35] *See* JOE S. CECIL & DONNA STIENSTRA, FED. JUDICIAL CTR., DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS 8 (1987).

[36] *See* Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1268 (1996).

[37] *See* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 127 (1994) (citing ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964)).

[38] *See* William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807, 808 (citing ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12–13 (1974)).

[39] *See* Reynolds & Richman, *supra* note 38, at 808. Specifically, the percentage of opinions published by the circuits was 48.4% in 1973 and 37.2% in 1977. *Id.* (citing ADMIN. OFFICE OF THE U.S. COURTS, 1977 ANNUAL REPORT OF THE DIRECTOR 3 (1977)).

[40] *See* JOE CECIL & DONNA STIENSTRA, FED. JUDICIAL CTR., DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS 2 (1985).

[41] FED. R. APP. P. 34(a)(2); 28 U.S.C. app. Rule 34(a) (Supp. III 1980).

[42] *See* Levy, *Judicial Attention as a Scarce Resource*, *supra* note 22, at 415-16 (citing *Staff Attorney Offices Help Manage Rising Caseloads*, USCOURTS.GOV, host4.uscourts.gov/newsroom/stffattys.htm).

Congress authorized the creation of staff attorney offices within the courts to defray the workload further.[43]

Today, the courts rely heavily upon these methods, which form the backbone of federal appellate docket management. To begin, the vast majority of cases terminated on the merits are disposed of via unpublished opinion or order. According to the most recent Annual Report of the Director of the Administrative Office of the U.S. Courts, of the 32,086 cases terminated on the merits during the twelve-month period ending September 30, 2019, a total of 28,216 or 87% were decided by unpublished opinion or order.[44] In some circuits, including the Third, Fourth, Ninth, and Eleventh, that figure exceeded 90%.[45]

Likewise, the courts of appeals now forgo oral argument in most appeals. Of the same 32,086 cases that were terminated on the merits in the twelve-month period ending September 30, 2019, only 6,056 or approximately 19% received oral argument.[46] If we expand the scope to include all cases that were terminated, including on procedural grounds (for a total of 47,889 cases), then fewer than 13% were heard at oral argument.[47] By way of comparison, if one looks back to the 1991 Annual Report of the Director—just after the last expansion of the federal appellate bench—of the 23,071 cases terminated on the merits, 10,321 or 45% were heard at oral argument.[48] Even if all terminated cases from the time period are considered, including those terminated on procedural grounds, the figure is 10,321 out of 41,905, or about 25%.[49]

Finally, the federal courts of appeals now rely on staff attorneys, particularly to review cases that will not go to oral argument.[50] Based upon my own qualitative study of five of the courts of appeals from 2011, I learned that staff attorneys often draft a proposed order and accompanying memorandum about a particular case, to be reviewed by the deciding panel.[51] Although the courts do not provide figures on the percentage of cases terminated on the merits that are prepared by staff attorneys, my study suggests that the percentage is sizeable.[52]

Several scholars have documented the concerns that attend truncated review—including that many litigants will not believe that they had a meaningful opportunity to be heard and will therefore question the fairness and legitimacy of the procedural process.[53] Furthermore, there are risks not just to process values but also to accuracy. Scholars and judges alike have

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[43] *See id.*

[44] *See* ADMIN. OFFICE OF THE U.S. COURTS, *Judicial Business of the United States Courts: 2019 Annual Report of the Director*, tbl.B-12, https://www.uscourts.gov/sites/default/files/data_tables/jb_na_app_0930.2019.pdf.

[45] *See id.*

[46] *See id.* at tbl.B-1.

[47] *See id.*

[48] *See* ADMIN. OFFICE OF THE U.S. COURTS, *Judicial Business of the United States Courts: 1991 Annual Report of the Director*, tbl.B-1. Note that this table reported figures for the twelve-month period ending December 31, 1991.

[49] *See id.*

[50] *See* Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 6–7 (2007).

[51] *See* Levy, *The Mechanics of Federal Appeals*, *supra* note 22, at 345–46.

[52] *See id.* at 346–54.

[53] *See generally* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533 (2020); WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS (2012); BAKER, *supra* note 37.

suggested that as caseloads rise, the same degree of attention cannot be paid to every appeal, which may ultimately affect case outcomes.[54]

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In sum, the courts of appeals serve as the backstop within the federal judiciary, acting as the courts of last resort for the majority of litigants. It is imperative that these courts be provided the necessary resources to carry out their critical function. For the first hundred years of the courts' existence, Congress consistently did just that by adding seats to the federal appellate bench to keep pace with a rising caseload. This practice stopped in 1990, though the caseload has continued to grow and courts have had to rely on case management strategies that come at the expense of traditional appellate review. Congress should return to its earlier practice and authorize new judgeships for the courts of appeals, consistent with their caseload needs—for the courts and all who come to them for the just resolution of appeals.

Thank you.

[54] *See, e.g.*, Huang, *supra* note 4, at 1127–37 (finding evidence for the claim that docket pressure can alter the nature of appellate scrutiny and, specifically, that a court that experienced a surge in caseload began to reverse district court rulings less often); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 345 (1996) (noting that "one consequence of the heavy caseload pressures on the courts of appeals has been an increase in the deference paid by those courts to the rulings made by district judges").

Mr. JOHNSON of Georgia. Thank you, Professor Levy.

Mr. ISSA. Mr. Chair?

Mr. JOHNSON of Georgia. Yes, the gentleman is recognized.

Mr. ISSA. Thank you, Mr. Chair.

At this time, I would like to ask unanimous consent that the Horonable Spartz, who is a Member of the Full Committee, be allowed to sit in and hear the testimony today and participate only if time is yielded by another Member of the Subcommittee.

Mr. JOHNSON of Georgia. Without objection, it is so ordered.

Mr. ISSA. Thank you, Mr. Chair.

Mr. JOHNSON of Georgia. We will now begin under the 5-minute Rule with questions, and I will begin by recognizing myself for 5 minutes.

Professor Levy, I understand that, because of the crushing workload, a large number of Courts of Appeals judges are increasingly relying on staff attorneys to both screen cases and write opinions which often become the basis for final case disposition. Can you talk about that practice, what it looks like, and how it differs from the process for cases where a law clerk assigned to a particular judge might work the case?

Ms. LEVY. Sure. I would be happy to.

So, I think the starting point is, as you said, to think about staff attorneys in comparison to law clerks. Law clerks, as we know, are hired directly by judges and they are supervised directly by judges. So, the judges will give their law clerks instructions about a particular case. The law clerks will, then, work with the judges to draft an opinion. Again, they are being directly supervised by the judges.

In contrast, we can look to staff attorney offices. It is hard to get great statistics on this, but according to a book authored by Judge Posner three years ago, there are over 400 staff attorneys across the country today. You can think about these as almost mini-law firms with a particular circuit. These staff attorneys do not work directly for any judge. Instead, they are supervised by a head staff attorney.

So, what this means is cases come in. There is variation from circuit to circuit, but cases will come in. The staff, then, in many circuits will screen those cases; they will make the determination at the outset if the case will go to oral argument or not. Then, in many cases, they will end up writing a memo and draft a disposition, which a panel of judges will then consider.

So, hopefully, that gives you some sense of some of the key differences there.

Mr. JOHNSON of Georgia. So, what we have is a situation where a staff attorney not accountable to any particular Court of Appeals judge is reviewing cases and actually making a recommendation as to the final disposition of the case. This is in the courts of last resort in our Federal Government.

Ms. LEVY. So, that is right. What we have is a situation in which the staff are, again, first screening the cases, but then, ultimately, drafting the dispositions. The judges, of course, as we said, do review them and the judges can decide if a case really should be set for argument instead. It is an enormous amount of power that is given, then, to staff attorneys; that is absolutely right.

Mr. JOHNSON of Georgia. The staff attorney positions I suppose have increased. In other words, we have more staff attorneys now because of the increased caseload that the Courts of Appeals are faced with, that they must manage, and the staff attorney route is a mechanism whereby the Court of Appeals judges can manage the work that is hoisted upon them?

Ms. LEVY. Yes, that is absolutely right. So, these staff attorney offices, I should say, were first authorized by Congress in 1982, and they were initially designed for really the review of pro se prisoner cases. That has expanded significantly. Both the offices themselves have expanded in size, but also the role of staff attorneys has expanded considerably since that time, as the caseloads have risen.

Mr. JOHNSON of Georgia. Thank you.

Judge Mueller, can you talk about how, in your view, we should be thinking about the cost-benefit analysis of adding new judgeships? Obviously, there are costs involved in the addition of new judgeships, but, in your view, are those costs outweighed, or at least balanced, by the benefits of right-sizing the judiciary?

Judge MUELLER. Thank you for that question, Chair Johnson.

Absolutely, we see district judges as investments—I don't believe that we are alone—but trial courts are the foundation of the federal judicial system. We are the courts that the public most likely sees as jurors, as parties, as Members of the public who at times still crowd into our galleries—even when we don't have the coronavirus pandemic, we still crowd into our public galleries to watch proceedings. We are the foundation, and we are essential infrastructure.

We have the physical infrastructure in our district, as I said. So, we need the human infrastructure to complete the infrastructure picture, and we believe it is essential to look not only at costs, but also the benefits that we bring to the table.

Thank you.

Mr. JOHNSON of Georgia. Thank you, Judge MUELLER.

At this time, I will now recognize the gentleman from California, the distinguished Ranking Member of the Subcommittee, Mr. Issa, for 5 minutes.

Mr. ISSA. Thank you, Mr. Chair. I want to thank all of our witnesses. This is one of those hearings where we hear each of you and I believe there is broad agreement here on the dais on both sides.

Judge Burns, if I can go to you first, I want to first thank you for staying on the bench. I realize that you could be making more money somewhere else, but you are staying and handling a caseload.

Specifically, in the case of the San Diego District, one of the high-tech capitals of the country there in San Diego, if a patent case comes up, could you just briefly tell us what the process would be and how the ability to take a patent case to trial in the Southern District, how it is impacted by the shortage of judges?

Judge BURNS. Thank you, Congressman Issa. We have a patent program here where patent cases, in particular, are channeled to certain judges who have expertise or have great interest in them. It doesn't mean that those cases are expedited. They are not. They fall in line with the other civil cases and as you know, patent liti-

gation is incredibly complex, more complex I will say than most civil cases. So, it takes a lot of time. The issues are difficult ones. A Markman hearing, which is a determination of just what the patent covers, can be a long and contentious hearing. It is a special hearing that is different from other pre-trial hearings, so it is a feature of patent cases that is unique that doesn't apply in other civil litigations. The general effect of this crushing caseload, particularly the criminal cases, is that patent cases and all civil litigation are given a back seat and it takes more time than it should to resolve such cases.

Mr. ISSA. Thank you. Briefly, I mentioned this in my opening statement, the Southern District is like some other districts where if we gave you the three or so more judges, at a minimum—I think it's six, actually, that the Judicial Conference thinks you should have, you would have no courtrooms for them.

Could you briefly give us your timeline costs and how you would deal with getting those courtrooms if you were given the judges today?

Judge BURNS. We have three court facilities in the Southern District. As with Arizona, we have one outlying court in El Centro in Imperial County has got a magistrate judge. Then we have two courthouses here, one built in 1976, the Schwartz Courthouse, and then the newer one, the Carter-Keep Building which was opened in 2012. When that building was designed, it was designed for more courtrooms that ultimately were authorized in the bill authorizing building the courtroom. We had six to begin with.

Recently, the House has authorized two additional courtrooms. Construction of those courtrooms is underway now. We have room for expansion within our existing facility. There are several floors here with high ceilings and people in cubicles, IRS and otherwise, now occupying that space, but they can be readily converted to courtrooms for district judges, magistrate judges.

Mr. ISSA. Thank you. Professor Fitzpatrick, as you know, you noted in your statement, there was a partisan history to the Ninth Circuit.

Is it fair to say that today the Ninth Circuit is relatively balanced and perhaps this is the most non-partisan time to reorganize the Ninth Circuit?

Mr. FITZPATRICK. I think that is right, Congressman. I think that we are close to parity in the Ninth Circuit now and therefore, this may be an opportunity for the Congress to make changes without obvious partisan implications helping one side over the other. So, I think this is an optimistic time to do the work that should have been done a long time ago to restructure the circuit.

Mr. ISSA. So, if we are not to change the Ninth Circuit and expand it as the Judicial Conference wants to about 33 judges, would you opine on the fairness of instead of remaining with so many other districts, if we collapsed other districts to similarly have 33 judges or perhaps eliminated circuits all together, what the effect would be?

Mr. FITZPATRICK. I think we would multiply the problems in the Ninth Circuit across America. I think we would have slower appeals across America. We would have more inconsistent rulings within a circuit across America. There would be more mistakes

made in other circuits if we made them all gigantic circuits similar to the Ninth Circuit. So, I just think that would multiply problems, rather than multiply solutions.

Mr. ISSA. Thank you. I yield back.

Mr. JOHNSON of Georgia. The gentleman's time has expired. The gentleman yields back.

At this time, we will recognize the gentleman from Florida, Mr. Deutch. Oh, at this time, I am sorry, we will recognize the Full Committee Chair, Jerry Nadler, for five minutes.

Chair NADLER. Well, thank you, Mr. Chair. Before I begin with my questions, I want to thank all the witnesses for their testimony today.

Judge Mueller, I understand that although delay in civil cases is often more common and apparent than in criminal cases, delays in criminal cases nonetheless are occurring, especially where judicial shortages are most dire.

Can you put into real world terms what these delays mean both for criminal defendants and for the prosecution in trying these cases?

Judge MUELLER. What the court sees in terms of the delays in criminal cases is on a number of fronts. As I said, we are 93rd of 94th currently. We were 94th last year, so we're at the bottom. So, for criminal defendants, even though the criminal reform Act appears to favor release when possible, detention is common, and our district has a high detention rate, higher than the national average. We are over 55 percent of criminal defendants pending trial who are detained in local jails up and down the Central Valley. They wait longer periods of time, as the stats show. Often two years before they can go to trial. In terms of the prosecutors, they are very anxious to see that number go down.

Chair NADLER. Judge Mueller, are you talking about civil cases?

Judge MUELLER. Did you also wish me to address civil cases?

Chair NADLER. No, thank you.

Judge MUELLER. Thank you.

Chair NADLER. Judge Humetewa, you reference in your testimony the disappearing trial and the role that judicial under staffing plays in causing this trend.

Can you elaborate on this point and why more trials would be good for the judiciary and for litigants?

Judge HUMETEWA. Yes, I would be happy to. I think it is no secret that over the years, to handle our huge caseloads, district courts and judges have tried to find ways to make it more manageable and really try to force the litigants themselves to resolve their issues short of trial and to really whittle down the paper that is filed with summary judgments or dispositive motions.

In many, many instances, where you have litigants for the first time and their clients wish to appear and have oral argument, it is just not feasible when you have a very heavy docket. So we have adopted rules, for example, here in Arizona, that permit a district judge to say that oral argument is not necessary because the matter has been fully briefed.

I fear that in many ways litigants see that the courtroom doors are closing rather than opening and that in many instances litigants and clients and the parties involved never set foot in a court-

room. As a result of that, you have a decrease in practice, actual litigation practice of people that are actually going to law school and graduating with the hopes of becoming a litigant. So, it really does damage to what courtrooms are meant to be, public forms for airing these grievances and to be able to have the ability to orally argue your case to make persuasive points that may not otherwise resonate in a paper form. So, I think there are multiple issues that arise from that.

Chair NADLER. Thank you. Professor Levy, I understand that there has been an increase over the last 30 years of unpublished decisions by courts of appeals as a way to manage the caseloads.

Can you explain that trend and what implications it has? Is this something that we should be thinking about as we look to assessing the need for additional judgeships in the courts of appeals?

Ms. LEVY. Sure. I would be happy to. So, no surprise, as the courts began to experience the rising caseload, they had to find some way to save time. It has been said that judges spend as much as 50 percent of their time writing opinions and so it is not surprising that they would then turn to writing shorter unpublished decisions as a way to cope.

I would say now, so again, we see decisions on the merits, right? Almost 90 percent of cases are decided by unpublished decisions. I think the real loss that we should be focused on is the content of some of those cases, so Professor Merritt McAlister has done a great, recent study on this. She looked to the Fourth Circuit a few years ago. In one week, the Fourth Circuit issued a hundred decisions. Only two of those were published, so only two made law. Of the rest, there was a sizable percentage that did not contain independent reason-giving. So, it simply said, for example, the court found no error. Or, for the reasons that the district court stated, the case was affirmed. That, I think, is a cause for concern. We don't have independent reason-giving by the courts. I think the litigants then don't feel like their cases have truly been heard and that is a cause for concern for process values and legitimacy as a whole.

Chair NADLER. Thank you, Mr. Chair. I yield back.

Mr. JOHNSON of Georgia. The gentleman yields back. At this time, we will recognize the gentleman from Ohio, Mr. Chabot for five minutes.

Mr. CHABOT. Thank you, Mr. Chair. Professor Fitzpatrick, let me begin with you. I will start by noting that Democrats took over the House of Representatives over two years ago, back in 2018. They took over this committee. We have a Democratic Chair of this Subcommittee and the overall Judiciary Committee. They set the agenda, they set up—they determined what topics we are going to talk about. Whereas, Democrats have espoused the point of view that we needed to add federal judges, they didn't hold a single hearing in this Committee during the last two years when they determined what the agenda is. Neither did they bring a single piece of legislation to the floor of the House to get new federal judges. I wonder why.

Well, we had a Republican president, Donald Trump, who was at the White House and he would have been able to nominate those judges. Now, we have a Democratic president, who one of the first

orders of business of this Committee which, of course, the Democrats still control, is to hold a hearing with the goal of adding new federal judges.

Now, Professor Fitzpatrick, let me ask you this. For the purpose of fairness here, what would you think about the idea of staggering any new judgeships over several different Administrations?

Now, we don't know who is going to win the upcoming election, so you don't know for sure how that would all play out, but to have at least a balance that you don't, for example, as you mentioned there earlier, where you had a whole slew of either liberal or progressive judges that one puts on the bench, if you did it over a period of time, what about that idea?

I believe Mr. Issa and Senator Todd Young over in the Senate have put forth a proposal along those lines. Could you comment on that?

Mr. FITZPATRICK. Yes, I can. I think that is the right way to do this. I don't think the right way to do this is to add a bunch of judgeships that is going to have a predictable, partisan effect.

The right way to do this is to push off the effective date of the new judgeships until there is a new presidential Administration, so both parties have a chance to have some of their people put on the bench. We don't want to recreate the mistake we made with the Ninth Circuit during Jimmy Carter's Administration.

The Ninth Circuit has been a political football for decades because all those judgeships were created for President Carter and now the Ninth Circuit has been a predictable, partisan, imbalanced court for decades. So, push it off, neither side of those will benefit politically. That is the fairest way to do it and that doesn't mire our courts in this partisan warfare.

Mr. CHABOT. Thank you. Let me follow up, Professor. You mentioned in your testimony that the Ninth Circuit has long had the highest percentage of its decisions reversed by the Supreme Court of any other circuit, substantially higher, not just by a small margin, but substantially higher. What impact does having such a high-reversal rate or a reversal at all, what impact does that have on the litigants, the public, the taxpayers, the people that foot the bill for government and the court system obviously is part of that government and a reversal, obviously, that the process goes on even longer. Could you comment on that?

Mr. FITZPATRICK. Yes, I mean certainly for the litigants in a given case, having to go up to the Supreme Court to get the Ninth Circuit corrected takes time and money, but there are effects beyond that. The law in the Ninth Circuit is less coherent because it is subject to Supreme Court reversal more frequently. You're never sure, when you get a Ninth Circuit ruling, how long it is going to be around, what's the shelf life of a Ninth Circuit ruling, because the Supreme Court reverses it more often.

Even more importantly than all those things, I think the Supreme Court reversal rate is a signal that the Ninth Circuit is making more mistakes. What I worry about is all the mistakes the United States Supreme Court cannot catch. The Supreme Court hears very few cases every year. It can't correct all the mistakes of the Ninth Circuit or the other circuits. So, I worry about 60 mil-

lion Americans having to live under erroneous, legal rulings more often than their fellow citizens in other parts of the country.

Mr. CHABOT. Thank you very much. My time has expired, Mr. Chair. I yield back.

Mr. JOHNSON of Georgia. I thank the gentleman from Ohio.

Professor, you have just made the case for expansion of the U.S. Supreme Court, so that it can hear more cases. I don't know if you intended to do that or not, but at this time I will recognize the gentleman from California, Mr. Lieu for five minutes.

Mr. LIEU. Thank you, Chair Johnson, for holding this important hearing. Thank you, Chair Nadler, for your leadership on the Judiciary Committee.

My wife has served for a federal district court judge, and I was a law clerk for a Ninth Circuit judge out of law school, so first, I want to say to the judges that we have here today for your public service and for what you are doing and for testifying.

I also do want to start by countering the notion that the Ninth Circuit's 80 percent reversal rate is somehow year after year. That is just not true. *The Washington Post*, the *AP*, and *PolitiFact* have looked at that statistic and it is true that in one year, one term, 2015–2016, the Ninth Circuit had a 79 percent reversal rate.

It is also true that in that same term, that was not the highest of any circuit. In fact, since 2005, the Ninth Circuit has never been the highest circuit in terms of cases reversed by a Supreme Court. So, what these newspapers are saying is basically that Mr. Fitzpatrick is misleading us with his statistics.

Now, that doesn't mean I don't think the Ninth Circuit should be smaller. I am open to arguments that the Ninth Circuit for efficiency reasons maybe we do want to either split it up or move some of the states to another circuit.

So, I want to commend Ranking Member Issa for agreeing that we need to increase the number of judges at the appellate and district court level. It is also clear to me that perhaps the U.S. Senate might require some changes to the way we have our circuits.

So, with that in mind, I am going to ask Judge Mueller, what do you think about proposals to either split up the Ninth Circuit or take some states in that circuit and shift, let's say, to the 10th Circuit?

Judge MUELLER. Congressman Lieu, I have to admit I did not prepare for questions on that issue. As a trial court judge in the trenches who follows the law of the controlling circuit and of course, the Supreme Court, when it has applied the law, and so I am not really prepared to give you a cogent answer to that question today.

Mr. LIEU. If you could just submit some testimony after that fact to us that would be great.

So, Judge Burns, let me ask you that same question. Do you have any thoughts on proposals to split the Ninth Circuit into two different circuits or taking some of the states and shifting it to, let's say, the 10th Circuit?

Judge BURNS. Thank you, Congressman Lieu. I have personal opinions about that. Over my term as a district judge, I frequently sat as a visiting judge with the Ninth Circuit. One of the down sides to the size of the circuit and the caseload is that the Ninth

Circuit is required frequently to bring in district judges. We have judges who have no historical connection, no every day connection to the Ninth Circuit that are coming in and deciding cases. They are coming from all over the country. Many times, they are district judges from the opposite side of the United States. I think that is probably a downside.

The other observation I would make is this. I serve on a very collegial court. We meet once a week. We have judges' meetings. The judges, although we are not always of the same philosophy or the same political persuasion, we enjoy each other's company. We respect one another.

The randomness with which Ninth Circuit judges can be on the same panel with one another, because of the size of the court is very much compromised. I saw a statistic recently that said that it is once every three years that one judge of the Ninth Circuit will sit with another judge of the Ninth Circuit. That is how random it has become. I think you lose something as a circuit court when you don't have the opportunity for that kind of cohesiveness. So, those are general observations. Again, that is a personal opinion borne out of my anecdotal experience in sitting with that court.

Mr. LIEU. Thank you. Then, Mr. Fitzpatrick, I don't mean to imply that you are trying to mislead us. I am just saying that one of the sentences you said is a misleading statistic. I am also going to give you the opportunity to respond to what I said, so if you would like to go ahead.

Mr. FITZPATRICK. Congressman, that is very kind of you. I appreciate that. I just think we are talking about two different statistics. I think the statistic that you are talking about is given the cases the Supreme Court accepts for cert, how many of them end up getting reversed. The statistic I was talking about was given how many appeals the Ninth Circuit decides every year, how many of those cases end up getting reversed by the Supreme Court.

So, you are absolutely right. In any given year, the Ninth Circuit is not the most reversed of the cases accepted for cert. I think if you look at the number of reversals compared to the number of appeals decided by the Ninth Circuit every year, those that are granted cert and not granted cert together, the total number of appeals, you will find that the reversal rate is the highest.

It is an open question which of those statistics is more meaningful to us and so, I don't begrudge you your focus on the statistic that you did.

Mr. LIEU. Thank you very much. I yield back.

Mr. JOHNSON of Georgia. We will now resort to the gentleman from Texas, Mr. Gohmert, for five minutes.

Mr. GOHMERT. Thank you, Mr. Chair. I appreciate you resorting to me.

Judge Mueller, are there dramatically more cases being filed this year than you have had in prior years?

Judge MUELLER. Congressman, that is directed to me, is that correct?

Mr. GOHMERT. Yes.

Judge MUELLER. I would say that our caseload is essentially maintaining, but we have not seen a steep rise yet in light of the pandemic, if that is a part of your question. We are bracing for an

increase in filings. As with any crisis, we see cases follow. So, as with the mortgage crisis, we had a steep uptick in cases. Our actual cases per judge spiked to almost 1,500 cases per judge.

Right now, our actual caseload per judge is around 1,200 cases. We expect that that number will go up with bankruptcy filings, employment case filings. So, we are staying tuned, unfortunately.

Mr. GOHMERT. Okay. Thank you. I just wondered if there was a dramatic rise so that maybe that could justify why we didn't have a hearing for two years and you were in desperate need of new judges, and now all of a sudden within six weeks, we have this hearing. Anyway, I guess—

Mr. ISSA. Would the gentleman yield?

Mr. GOHMERT. Yes.

Mr. ISSA. I was gone for two years, Louie. I am back.

Mr. GOHMERT. Yes, but you aren't the one that sets up the hearings the last two years nor now. So, it is good to have you back. I am concerned about that, why if there was such an emergency, we didn't have them before.

Professor Fitzpatrick, the last numbers I had seen from 2017 indicate that the Ninth Circuit has more than twice as many cases as the next largest circuit, being the Fifth Circuit. That is reflected also in the number of cases that are filed.

When you looked at cases filed in California and the cases filed in the rest of the Ninth Circuit, what do you think it would look like if the Ninth Circuit were divided and a new circuit created, one for California, because the last I had seen, more of the cases the Ninth Circuit had were from California compared to all the other states in the Ninth Circuit? What do you think that would look like to have California be the Ninth Circuit and then a new circuit take the other cases from the other states?

Mr. FITZPATRICK. That is one of the leading proposals on how to split the Ninth Circuit is to make California into its own circuit. We have never done that before. We have never had a circuit confined to a single state. The truth is, California is so big that it would have a lot of judges even in a California-only circuit, so I don't know if we actually end up decreasing the size of the Ninth Circuit that much if we keep California intact.

I actually prefer another solution which is also not ideal and that is to break California across two different circuits, so Northern California would join the states in the Northwest. Southern California would join the states in the Southwest, and you would have a circuit that divides California in the middle. That has also never been done before, but I think it would allow us to get each circuit down to a more reasonable size and I don't think that it is impossible to deal with the fact that federal law may vary from San Francisco to L.A. for a while. Right now federal law varies from San Francisco to Salt Lake City for a while, different circuits. State law varies from parts of California to another for a while.

Mr. GOHMERT. I appreciate that. It does seem that more of California's population is in the southern part of California, but going back to what my friend, Congressman Lieu, referred to the year that there were so many reversals of the Ninth Circuit I was thinking maybe the appropriate remedy would be to confine the Ninth Circuit to controversies that arose in its own courthouse and then

create another circuit for everything else in the Ninth Circuit. My time has expired and I will yield back.

Mr. JOHNSON of Georgia. I thank the gentleman from Texas.

We will now move to the gentleman from Arizona, Mr. Stanton, for five minutes.

Mr. STANTON. Thank you very much, Mr. Chair, for holding this hearing and to the witnesses for being here to speak to an important issue as we work to expand access to justice throughout our nation.

When I became a member of the Judiciary Committee two years ago, one of the very first things I did was to meet with the chief judge of the District Court for the District of Arizona, Judge Murray Snow. I asked him, how can I help? Right away, he told me about the caseload issues in Arizona and how Congress could do more to expand access to the judicial system to communities around the state. I have been working on this since and I know that if it weren't for the pandemic that this is a hearing that we would have had last year. This is a pressing issue in Arizona where the State makes up a single judicial district.

Since the year 2000, Arizona's population has grown by 50 percent. More people have moved to Arizona in the past 20 years than live in the States of Rhode Island, North Dakota, and Vermont combined. That means the criminal and civil caseload has gone up, too. In that time, we have only seen the addition of a single federal judge in our state, just one.

Judge Humetewa, as she mentioned, that means that Arizona's federal district judges see a weighted caseload of 800 filings each. The general standard is 430 cases per judge. So, in Arizona, we are nearly double that.

I am encouraged by what the District of Arizona would do with more judges. The focus on increasing access to the courts for rural tribal communities is the right one. For those who haven't been to Arizona and may not be familiar with the Navajo Nation, it is the largest tribal land in the country. Its capital, Window Rock, is a five-hour drive from the federal courthouse in Phoenix. Hopi lands are a four-hour drive. That is a long way to travel for court. Yet, that is what tribal citizens must do unless Judge Humetewa and other federal judges coordinate for the temporary use of a courtroom space with a magistrate judge in Flagstaff, Arizona.

When this coordination does happen, and my understanding that it is about once per month, Judge Humetewa must drive up from Phoenix, leaving her civil caseload pending, to address the criminal caseload in Northern Arizona. She does this because she is committed to providing direct access to those in Northern Arizona, but it is not a long term, workable solution.

We need a permanent federal judge, district judge in Flagstaff to handle the caseload that originates from Indian country in Northern Arizona. That is what Arizona will get if we approve more judgeships. In turn, grand jury proceedings would be made up of peers that is more accurately representative of the community and other district judges would no longer have to travel and leave other also pressing cases pending. Arizona desperately needs more federal district judges. The District Court has been working with too little for too long at the expense of Arizonans who should have fair,

unobstructed access to our country's judicial system. Additional judges, that is a good place to start.

I have a question for Judge Humetewa. Are there any lessons that you can share from your experience as a judge of the Hopi Appellate Court that would inform why it is important to appropriately staff courts that include Indian country land?

Judge HUMETEWA. Thank you for the question, Congressman Stanton.

When I was an appellate court judge for the Hopi Nation, it drew my attention to, really, the limited jurisdiction that tribal courts have, especially in the criminal context.

As you know, in my written testimony I outlined that the federal courts, we Act as, essentially, a county court handling violent crimes off Indian nations, homicides, sexual assaults, domestic violence, and the like.

So, when a serious crime is committed and it is not picked up by the U.S. Attorney's Office, then the tribal courts have to adjudicate those offenses, and there often are not enough resources in the tribal court itself to appropriately handle those kinds of cases.

In addition, in the civil context where there is much broader authority for tribal courts, nonMembers usually are nervous about filing their cases in tribal courts.

They would rather file them in federal district courts, and many of my colleagues know and we do exercise in the appropriate instances tribal court exhaustion.

So, we may see a case be filed in federal court in the first instance which should land in the tribal court, and so we Act as sort of a go-between.

I also raised in my written testimony that recently last Congress, in the Violence Against Women Act amendments, there was a contemplation that for cases that were brought of non-Indians committing domestic violence in Indian country, there was an idea that the federal court should Act as a reviewing court, essentially an appellate court in some instances.

So, there are numerous experiences that I draw upon from that. Thank you for the question.

Mr. STANTON. Thank you very much, your Honor, and, Mr. Chair, thank you for holding this hearing. I yield back.

Mr. JOHNSON of Georgia. I thank the gentleman.

We will now hear from the gentleman from Wisconsin, Mr. Tiffany, for five minutes.

Mr. TIFFANY. Thank you, Mr. Chair, and I wish the Chair of our Full Committee was here today right now because, once again, we saw the failure of remote testimony today.

I could not hear some of Judge Mueller's remarks when she was answering his questions, and we saw this in the full Committee hearing a couple weeks ago where it was very difficult to hear people giving their remarks, Committee Members, when they were wearing masks.

Oftentimes, people don't have voices that project the same as someone like myself, and it was very difficult to hear their comments, and as a member of a committee, I really want to hear what people have to say like Judge Mueller, people testifying here as

well as the other Members of the committee, regardless of which side of the Committee that they sit on.

So, this failure is impeding the ability to communicate and communicate clearly. Anyhow, just to make that comment for the for the good of the order.

Judge Burns, I believe you said something about, and I'll characterize it this way, border/immigration issues are a big part of what the cases that you deal with. Is that accurate?

Judge BURNS. Yes, that's accurate.

Mr. TIFFANY. Are some of those cases violent crime cases?

Judge BURNS. Some are, but the majority of them are status cases with people who are not authorized to enter the United States coming in.

As I mentioned in my written statement, those cases are weighted with less weight than a typical criminal case. I am not sure that that weighting is accurate because frequently the status cases involve due process challenges to the manner in which somebody was previously removed or, in the case of a criminal conviction, they challenge whether the criminal conviction was a proper basis for their removal.

So, these cases typically involve motion hearings. They involve a lot of research on the part of the court to look at, perhaps, the State court cases, State court definitions of crime. So, they are very time consuming.

Mr. TIFFANY. Mr. Chair, I would make the case that with better border enforcement we could probably reduce some of the caseload for the Ninth Court.

I would turn to Mr. Fitzpatrick now. It seems like the point of some of the people testifying here today is that there needs to be more judges, and what I'm hearing from you say is you're saying that the Ninth should be split.

Are these mutually exclusive questions, or could there be a greater number of cases that could be resolved if the Ninth was split and we wouldn't have this same backlog that some are talking about?

Mr. FITZPATRICK. That's a great question, Congressman. I think it would definitely help with the speed of resolution of appeals, and so if you split the Ninth Circuit, the appeals would be decided more quickly in each of the two smaller circuits, and so that would relieve some of the caseload pressure that's currently on the Ninth Circuit judges because they could get through their cases more quickly.

I don't know if it would help as much at the trial level caseload question.

Mr. TIFFANY. Mr. Chair, is this Subcommittee going to be considering or talking about splitting the Ninth? Is that something that's going to be discussed?

Mr. JOHNSON of Georgia. Well, I am not ruling out any measures that anyone might want to propose to the subcommittee.

Mr. TIFFANY. Mr. Chair, did you consider inviting Mr. Scott, who was alluded to earlier, that has done detailed statistical analysis on this? Was he considered as an invitee?

Mr. JOHNSON of Georgia. Yeah, we'll consider all witnesses, particularly those who are unbiased, to appear before the committee.

Mr. TIFFANY. I really appreciate that. I think that's something that's really missing here today is—what I'm hearing is that this Kevin Scott has done—I think I got his name correct—has done a detailed analysis, and we always want to use the best data possible, and to have data like that might be really helpful.

If anyone, Mr. Fitzpatrick or anyone else, has information that they can share with the Committee that bolsters this point that Mr. Scott makes, that would really be helpful.

I want to thank you so much for giving me the time, Mr. Chair. I yield back.

Mr. JOHNSON of Georgia. Thank you, Representative Tiffany.

Next we will go to the gentleman from 10nessee, Mr. Cohen, for five minutes.

Mr. COHEN. Thank you, Mr. Johnson, and I want to thank you for calling this hearing and for the witnesses that appear before us today.

We had a hearing last Congress on the issue of the Supreme Court decisions they've given on the shadow docket, and at that time there were different witnesses, of course. It was a different issue before us.

I did ask the witnesses if they felt that there was a need for more reform and maybe more addition to the Supreme Court, and they didn't really think there was so much need at the Supreme Court, but they felt there was a great need at the appellate court level, that the appellate courts needed more judges at the appellate court level, and the Circuit Court of Appeals.

Judge Mueller, do you agree that there needs to be additions to the Appellate Circuit—I think since 1990 there haven't been any new appellate circuit benches created, and I think the caseloads increased by 19 percent in appeals. Do you think there needs to be more appellate judges?

Judge MUELLER. Again, Congressman, thank you for the question.

I'd clarify I haven't studied up to answer questions based on the appellate courts, in particular. I know, generally, that our administrative office has identified the need for more appellate judges in many parts of the country.

So, I'm certain there is a need. My focus is on the trial courts' need where even if the law is better clarified by reform, I would observe I'm not certain that would stop the number of cases coming into the trial courts.

Our population in the Central Valley and Sacramento Valleys is hurtling towards 8.4 million. People and demography drive caseload filings, and so that is our issue here in Central California.

We have wide swaths of public land. We're top 10 in civil rights cases, non-prisoner civil-rights cases. We have any number of cases, soup to nuts, and I believe that trend is going to continue.

So, I'm here to tell you we implore you to remember the trial courts, the foundation of the federal court system. We believe public trust depends on our being fully fixed as well as any other court that needs a fix.

Thank you, sir.

Mr. COHEN. You're welcome, Judge.

Let me ask you this, and I guess this can go to any of the people on the panel. Does diversity make a difference in the courts as far as the results? I note, they call people Trump judges and Obama judges, and all that.

Diversity does have an effect on the bench, does it not, and people's perspectives and backgrounds and life experiences?

Judge MUELLER. Again, Congressman, I'm not prepared to address that in any great detail. Generally, if we got the five new judgeships, we believe we qualify for, particularly if this is the time to fix the infrastructure, certainly, we would have five colleagues join us and so there would be the chance to expand our numbers.

I do think it makes sense to have society as a whole represented on the bench in terms of maintaining the public trust.

Mr. COHEN. Mr. Fitzpatrick, do you agree with that?

Mr. FITZPATRICK. I do. I have to tell you that there's very good both theory and empirical evidence that having a diversity of perspectives really improves decision-making.

There's an entire field of literature called the many minds literature or the wisdom of crowds, and one of the big benefits to having diversity is you get different perspectives and people's mistakes can be corrected by one another. So, I think it's a definite gain.

Mr. COHEN. Judge Levy, do you agree that diversity can affect outcomes and be important for the court to reflect America?

Ms. LEVY. Yes, I think I was just elevated to a judge and, I should say, I'm just a lowly professor, though, I do have life tenure.

Yes, absolutely. I mean, as Professor Fitzpatrick said, there's great literature on this. There's no question that it increases the sociological legitimacy. That is the perception of legitimacy on the part of the public to see themselves reflected back.

I would also point out that this was a real priority before the 1978 Omnibus Judgeship bill, right. The real sense was we needed to diversify the federal bench, and we saw that accomplished during that time.

Mr. COHEN. Professor, I've got 20 seconds left. I want to thank you.

Congressman Issa suggested we create new judgeships but we put them off till the next president. The last President appointed over 60 appellate court judges, and only one of them was African American.

The country and diversity and African Americans can't wait to the next presidency when they have been done such a disservice by the previous president, who could only find one African American worthy of serving out of 60 or 65 appointments.

If there's a need for more judges, there's a need for more judges now. Justice delayed is justice denied, and not having diversity, which has increased so much with the last president, is justice denied—justice delayed, justice denied—for our country not being a rainbow, reflecting all of us in the country.

Ms. Levy, I apologize. I just generally, I think Levy I think of judge. I think Levy, I think of doctor. I think Levy, I think of rye bread. Now I'll think of it as professor.

Thank you. I yield back.

Ms. LEVY. May I respond?

Mr. JOHNSON of Georgia. Well, the gentleman's time has expired.

Mr. COHEN. Respond about rye bread. That's okay.

Mr. JOHNSON of Georgia. I'll allow the witness to respond.

Ms. LEVY. Thank you. I think I won't say anything about rye bread. I will just point out, though, that all the other times in which we have added judgeships to the courts of appeals, we have not staggered them.

Again, from a caseload perspective, I would say, if there's a leak in your roof, you don't want to hear that you're going to have someone fix it a year from now or four years from now. You want it fixed as soon as possible. Thank you.

Mr. JOHNSON of Georgia. Thank you.

Mr. COHEN. Thank you.

Mr. JOHNSON of Georgia. At this time, we will recognize the gentleman from Kentucky, Mr. Massie, for five minutes.

Mr. MASSIE. Thank you, Mr. Chair.

The leak in the roof seems to have happened several years ago, and Ranking Member Issa, tried to fix the leak. So, I think we should take time to do it right if we have taken this much time already.

Judge Burns, I'd like to address my first question to you. The late Chief Judge John Roll of the U.S. District Court for the District of Arizona said back in 2011 that federal courts in Arizona were drowning in a tsunami of criminal cases filed as a result of a surge in federal law enforcement agents working to secure the border with Mexico.

He said back in 2011 that more judges were needed due to the high immigration caseload. I wanted to see if you have thoughts regarding how our lack of border control, lack of a strong immigration policy, has perhaps led to the need for an increase in the number of federal judges in the lower court.

Judge BURNS. Thank you, Congressman. I can't speak to need for additional legislation. I can speak to the impact on our court, which, as I mentioned, is one of the five border district courts.

Our caseload is predominantly concerned with immigration type cases. These include not only status cases, but it also includes crimes along the border. It includes alien smuggling. It includes drug smuggling.

So, I agree with Judge Roll's comments from both 2011 and then later. The situation has not changed. In the years, now 23 years, that I've been on the court, it hasn't changed.

As you heard in my biography, I worked as a federal prosecutor. It hasn't changed since 1985. So, those cases are the staple of what we do, what criminal cases we handle here.

Mr. MASSIE. What percent of your cases are dealing with crime or crime related—immigration-related crime or crime related to drugs coming across the border?

Judge BURNS. Well, as I mentioned in my statement, fully 89 percent of our criminal docket includes those two categories of crime. Drug smuggling, and we're not talking about minor amounts of drugs. We're seeing increasingly 40, 50, 60 pounds of actual methamphetamine being brought across in vehicles.

Between border drug smuggling and immigration offenses of the type that I've mentioned, not just status offenses but alien smug-

gling and other types of immigration offenses, 89 percent of our caseload, criminal caseload, concerns those categories of cases.

Mr. MASSIE. Thank you very much.

Professor Fitzpatrick, you mentioned about the dangers of stacking one circuit by allowing too many partisan nominations in any given year and that many of the appeals from the Ninth Circuit have been overturned by the Supreme Court.

Now, a lot of those are overturned 5 to 4. Those could be differences of opinion or viewed slightly differently. Are there any cases of where the Supreme Court unanimously decided against the Ninth Circuit in a sort of what were you thinking kind of way?

Mr. FITZPATRICK. Yes, there are, and I allude to some of this data in a footnote in my written testimony. You can slice the numbers as Supreme Court reversals by any vote. Compared to the number of appeals decided, the Ninth Circuit is number one.

You can slice the data unanimous reversals by the Supreme Court compared to the underlying appeals decided by a circuit. Ninth Circuit is still number one.

Then even better, you can slice the data looking at reversals that were so obvious that not only was it unanimous, but the Supreme Court didn't even bother to hear oral argument. They just summarily reversed on the cert petition and the briefing, and the Ninth Circuit's number one on those as well.

So, no matter how you slice the numbers, the reversal rate, and the Ninth Circuit is number one.

Mr. MASSIE. So, there have been many 9 to 0 unanimous decisions overturning Ninth Circuit—

Mr. FITZPATRICK. Yes. Yes, unanimous, and even unanimous on the briefs without even hearing argument called a summary reversal, because it was so obvious the Ninth Circuit was wrong.

Mr. MASSIE. In those cases, that seems like a clear mistake, miscarriage of justice, instead of a difference of opinion.

Mr. FITZPATRICK. I completely agree with you.

Mr. MASSIE. Well, I'd like to yield back to the Chair and thank him.

Mr. ISSA. Would the gentleman yield?

Mr. MASSIE. I will yield to the Ranking Member.

Mr. ISSA. In those cases, Professor, weren't a good many of them three-judge panels in which there was no en banc and, as a result, it was a microscopic portion of the circuit?

Mr. FITZPATRICK. That's correct.

Mr. JOHNSON of Georgia. Thank you. We will now go to the gentleman from New York, Mr. Jones, for five minutes.

Mr. JONES. Thank you, Mr. Chair, and thank you all for appearing before us today.

On behalf of the American people, I'd like to particularly express my gratitude to Chief Judge Mueller, Judge Humetewa, and Senior Judge Burns for discharging your duties under such challenging conditions.

As a former law clerk in the Southern District of New York not too long ago, from the years 2014 to 2015, I am intimately familiar with the burdens placed on article III judges and their law clerks with respect to what are mounting controversies that arise under federal law.

It is for this reason that I'm a bit disheartened to hear a number of my Republican colleagues suggest a tactic and approach, rather, that would effectively amount to delaying justice for the purpose of satisfying some of them that their preferred President gets to appoint a number of the judges that we must add immediately to the lower courts.

Also, based on my experience, and due to the intensive demands on our justice system as you have illuminated, we need, obviously, to expand these courts to expand access to justice.

I want to emphasize that expanding the courts will also help us ensure that they reflect the diversity of the American people and the underrepresented perspectives of attorneys who have devoted their careers to public service.

President Biden has committed to building a judiciary that truly represents America, and by expanding the courts, we can help him achieve that goal faster.

Finally, I'd like to thank my colleagues for their longstanding bipartisan recognition of the urgency of court expansion. I'm hopeful that my colleagues across the aisle will continue their commitment to giving our justice system the resources it needs to fulfill its vital mission.

Now, Judge Humetewa, in your testimony this morning you suggested that because of your district's resource deficits, the juries who hear cases affecting tribal Members are often unrepresentative of tribal nations.

I'm committed to ensuring that our juries represent our communities. That's why I introduced the Juror Nondiscrimination Act, a component of the Equality Act, which the House will pass tomorrow.

Could you explain how expanding courts like yours is important to guaranteeing everyone has a trial by a jury of their peers?

Judge HUMETEWA. Yes. I want to reflect on testimony in northern Arizona, where we have 10 tribal nations, we also draw our jury pool from northern Arizona, the five counties, which include the tribal nations.

So, oftentimes, if we have to have a trial in Phoenix for lack of an ability to use our magistrate judge's courtroom, we're essentially asking all of those individuals from northern Arizona to drive four, five, six hours to Phoenix, Arizona, to serve on a federal trial, and many times the individuals who suffer logistical challenges, hardship, transportation, all those issues that get in the way of their ability to leave home for a week at a time to serve on a jury, it weeds out a lot of the individuals from many of those communities.

So, what ends up happening is you may have a Native American defendant, the victim is Native American, the tribal investigators investigated the case, and you have no Native Americans represented on the jury.

It simply doesn't reflect the communities, and that is also true in many instances in our Tucson division, of course.

So, we see it, in real time, and we hope that with the addition of new district court judges that more and more of my colleagues will be able to bring justice closer to those communities so that there can be full participation of the communities affected in these jury pools.

Mr. JONES. Thank you so much.

With my 40 remaining seconds, I'd like to ask Judge Mueller to talk about how her overwhelming caseloads affects the most marginalized parties that appear before you like indigent defendants, including people who have to represent themselves pro se. If there are any particular cases that come to mind and if you could elaborate on those?

Judge MUELLER. Thank you, Congressman.

We do have a steady diet of cases filed by persons representing themselves. We have robust panels of attorneys that we can appoint. To appoint we need to determine whether or not a case has sufficient merit, and that takes time.

We have able assistance from our magistrate judges. We have a very healthy number of magistrate judges assisting. Magistrate judges do not have dispositive authority. So, a magistrate judge may see something in one of those cases, but then it gets in line before one of us.

Times to disposition in civil cases—and again, we're top 10 in the Nation in non-prisoner civil rights cases—those times are stretching out to five years or more, and in pro se cases they can take the longest.

Mr. JONES. Thank you. I yield back.

Mr. JOHNSON of Georgia. Thank you. We will now hear from the gentleman from North Carolina, Mr. Bishop, for five minutes.

Mr. BISHOP. Thank you, Mr. Chair.

I was scratching my head for much of this hearing over why it is now only that we have the hearing on the possibility of expanding judges. Many have commented on that. Of course, Mr. Chabot asked Professor Fitzpatrick about the possibility, I guess, of a partisan desire to control those appointments.

I thought that Chair Johnson in a moment sort of spoke the quiet part out loud, and I wanted to ask about that. He asked about the possibility of needing to expand the United States Supreme Court.

Last week, we heard in a hearing much about what they call the shadow docket summary, the Supreme Court orders list, or just the summary adjudications there.

I think that to the extent that expanding lower courts may be a ploy to render the Supreme Court less able effectively to manage them, that begins to be a fairly apparent purpose.

Professor Fitzpatrick, let me ask you, you spoke and testified a good bit, and wrote about the reversal rate in the Ninth Circuit.

If that reflects, to any degree, recalcitrance at a lower level or unwillingness to recognize that we're in a hierarchical judicial system in which lower courts owe their allegiance to the law as declared by the United States Supreme Court, if you take that situation in the Ninth Circuit or assume that and you increase the number of judges without the structural reforms you've spoken about, wouldn't the result likely be increasingly to overwhelm the United States Supreme Court's ability to supervise the lower courts and to enforce adherence to the law it declares?

Mr. FITZPATRICK. I think so, Congressman. I think that if you add more judges to the Ninth Circuit without restructuring the Ninth Circuit, you're going to get more erroneous two-judge majori-

ties on three-judge panels and you're going to get more limited en banc reviews that do not reflect the larger circuit, because only 11 of the bigger number is going to be sitting en banc.

So, there's going to be more errors the Supreme Court will need to correct, and the question is does the Supreme Court have the resources to catch all of the errors.

They don't catch all the errors now, and they're not going to be able to catch them all in the future. If I could just briefly respond to the notion that expanding the Supreme Court might help the Supreme Court decide more cases, I don't think it would, and I don't think it would because the Supreme Court sits as a full court.

So, if you increase the number to 11 or 13, it's not going to help them take more cases because now all 11 or 13 is going to have to weigh-in on each and every case. Only if you were to ask the Supreme Court to serve in three-judge panels could it help. No one is proposing that.

Mr. BISHOP. That would undermine other interests as well, I would suggest.

Mr. FITZPATRICK. Yes.

Mr. BISHOP. Professor Levy, if I could go to you for just a moment. One thing about your material is that it covered the length of time that this situation has been the case, at least on the Court of Appeals level. Congressman Massie spoke to this a little bit as well.

It struck me. I think you said that the case of the Court of Appeals filings per judge are now down from the peak—there was a peak in 2005, at 400 per judge, I believe it said, and now it's down in 2019 to 284 per judge, and that it's stabilized over the past few years.

One of the judges on the panel, I think Judge Mueller, spoke to the fact that population drives increase in cases. I wonder if you have any insight as to why that the caseload has not continued to rise, notwithstanding that Congress last added Court of Appeals judges in 1990?

Ms. LEVY. Of course, and I just want to say it's nice to see someone from North Carolina.

Mr. BISHOP. Likewise.

Ms. LEVY. Regarding the 2005–2006 jump, so those were due to two really *sui generis* events. So, first, we saw substantial upswings in criminal appeals and original proceeding petitions. This was following the Supreme Court's decisions in *Blakely* v. *Washington* and then Booker.

So, those were big sentencing cases that had to move through the system.

At the same time, we saw a substantial growth in administrative agency decisions. This was following a DOJ decision in 2002 to streamline the procedures at the BIA.

So, a large backlog of immigration appeals then had to move through the system. They have moved through, and that's why the caseload has now stabilized.

The key point, I would say again, is that we are up 20 percent from where we were in 1990. So, that slight coming down from the high water mark I don't anticipate extending. We should see the caseload continue to rise.

Mr. BISHOP. Thank you, ma'am. The leak in the roof has been there a while.

Mr. Chair, my time has expired.

Mr. JOHNSON of Georgia. I thank the gentleman from North Carolina.

We next have another representative from North Carolina, the gentlelady, Ms. Ross, for five minutes. You are recognized.

Ms. ROSS. Thank you so much, Chair Johnson.

Just to let you know that the gentleman from North Carolina and I were in the same law school class, and so—

Mr. BISHOP. The same small—

Ms. ROSS. The University of North Carolina is very proud to have two Members of Congress right now from the same class.

Ironically, that class was the class of 1990, the last time that we expanded the judges in the lower federal courts, and so maybe we're here at precisely the right time to do some good bipartisan work.

I wanted you to know, and I'm sure that everybody knows, that North Carolina has had tremendous population growth without any increase in judges. As a matter of fact, we may even get another congressional district this next round of redistricting.

My district sits in the Eastern District of North Carolina, and since 1990, we have had more than an increase in population of more than 160 percent. So, in the district that I represent, which is where the State government capital is and a lot of lawyers, we add 60 people a day.

Back in 1992, there were 1,817 new cases filed in the Eastern District. That number jumped to more than 3,100 in 2020, which is a 71 percent increase, and the number of new filings has gone up to 777 per judge.

I think it's also no secret that because of partisan divides, we have had difficulty on, let's just say, settling on new people to appoint, and we had a vacancy in the Eastern District for more than 10 years.

I do think that the judges are doing an honorable job. I've appeared before several of them. Really, it's not fair to the litigants, and you've heard about that at the criminal level, at the civil level, and it's on us. It's Congress' fault that we have not had the proper Administration of justice.

In addition to expediting cases, we also need to focus on having judges who reflect the litigants before them. In the Eastern District, we have a very large minority population, and we have not had a minority judge, a self-identified minority judge.

It means so much both to the litigants but also to the Administration of justice that we have people from diverse backgrounds. The majority of law students in 2020 were women, and more than 30 percent were minorities. Yet, among our district court judges, only 32 percent are women, and less than 30 percent are minorities.

We have a similar problem on the appellate court. My colleague, G.K. Butterfield, who served as a Superior Court judge and briefly on our Supreme Court, has been working on this, and I am a true partner with him.

For these reasons, which I'm sure that many, many of the Members of the Committee share, we need to expand our federal judges, and we need to do it in a bipartisan way.

I do have one question for our distinguished Duke Law Professor. Thank you for being here representing North Carolina. We had talked about the fact that there are more and more unpublished opinions at the appellate level and particularly in the 4th Circuit, and this is not a new phenomenon in the 4th Circuit. I was very frustrated by it as a practicing attorney.

I'm interested in knowing whether there's any trend in the types of cases. As Congressman Cohen talked about, we talked a little bit about the Supreme Court shadow docket and what kinds of cases might be in the shadow docket.

Is there a similar correlation in the appellate courts?

Ms. LEVY. Absolutely, thank you, and I should say, since we're required to tell the truth, I am a Tar Heels fan, despite the fact that I work for Duke.

So, it's a terrific question, right, are there certain kinds of cases that we see both resulting in unpublished decisions, but also thinking about the front end that don't receive oral argument, and I would say the answer is yes.

As a whole, if we were to make a generalization about the dockets of the federal courts of appeals, we see pro se cases, largely, ending up on this—what has been called a kind of track two treatment, immigration appeals, Social Security appeals. Those, in general—prisoner appeals—tend to be, again, put on that kind of track two. I think that's a fair characterization.

Ms. ROSS. Thank you very much, and, Mr. Chair, I yield back my time, my two seconds.

Mr. JOHNSON of Georgia. I thank the gentlelady.

At this time, we will hear from the gentleman from Wisconsin, Mr. Fitzgerald, for five minutes.

Mr. FITZGERALD. Thank you, Mr. Chair.

More of a comment, and if somebody would want to maybe jump in, they could. In Wisconsin we have the Western District, which oftentimes philosophically doesn't necessarily match up with the 7th Circuit in Chicago, and it's been frustrating over probably the last decade, I would say, in that some of these rulings that come out of the Western District oftentimes, either because of vacancy or, not really sure—it's kind of a mystery. It takes years and years for rulings.

We just waited three years for a ruling on a bill that had made it through the Wisconsin legislature and was challenged in the Western District.

So my point is, because of retirement or because of illness, in some cases, there's so many different reasons that the 7th Circuit will hold something or not act, I guess, is a better way of putting it, it's just a contributing factor that is so frustrating for those that are trying to develop legislation, full authority of the legislature to pass it. Governor signs it into law, and then it's held up in court.

So, I'm not sure if anybody would like to comment on that. It was something that is a real-life example of something that we continue to live through in the State of Wisconsin and it's the dynamic between the Western District and the 7th Circuit in Chicago.

Mr. Chair, I yield back to the Ranking Member.

Mr. ISSA. Would the gentleman yield?

Mr. FITZGERALD. I would, yes.

Mr. ISSA. For the two judges from California, both of you in the Eastern and the Southern District currently have vacancies. Is that correct? One in the Eastern and then two in San Diego, or is it more? Two in Eastern?

Judge Burns, how many vacancies do you have now that you're on senior status?

Judge BURNS. We have five, Congressman Issa.

Mr. ISSA. Okay, so we have seven. I just want to point out that those are the result of blue slips, correct? Basically, there were nominees, but they weren't able to move forward. Is that correct?

Judge BURNS. That's correct, from the Southern District.

Mr. ISSA. Okay.

Judge MUELLER. I can't say that we know, but our nominees did not get out of Senate Judiciary Committee last year.

Mr. ISSA. I interviewed all of them. So, I have a tendency to know some of them. The reason I point that out is that during the intervening time, particularly in the Southern and Eastern District, could you opine briefly on how you used visiting judges and other techniques to try to stem what would have otherwise been an insurmountable caseload?

Judge MUELLER. I can go first.

Again, we do have the two vacancies. They are over a year old now, and with my written testimony I provided the standing orders that the one judge who sits in the Fresno courthouse, where those two new judges will sit when appointed, issued standing orders explaining the emergency circumstances, the inability to preside over civil cases, and he's holding four criminal cases, per calendar, a week.

We have used visiting judges to the extent we can. I have just seen the approval for a visiting judge to assist us. Visiting judges can help but they typically do not own caseloads from start to finish.

Federal trial judges own caseloads from start to finish, and without resident visiting judges, visiting judges are not in a position to provide us with the help we need.

We have at times had almost a hundred visiting judges. When they come—one more point—they don't come with the full complement of staff. Each district judge draws on staff from the clerk's office: Courtroom deputy, court reporter, in addition to our law clerks.

So, we have about three extra staff. No visiting judge comes with that staff, and so a lean and mean staff is then stretched to try to support that complement. They help, but they are no fix.

Mr. ISSA. Thank you.

Mr. Chair, hopefully this will be a point that we study to make sure that we actually fill those to stop this practice of visiting judges that tend to be, as she said, very inefficient.

With the remaining time, Professor, could you give us a brief summary of your view on the possibility of doing something in the Ninth Circuit similar to Justice White's proposal?

Mr. FITZPATRICK. Is that for me, Congressman Issa, or Professor Levy?

Mr. ISSA. Oh, I'm sorry. For you.

Mr. FITZPATRICK. Oh, okay. Thank you.

So, Professor, or Justice White's proposal on the White Commission was to basically create another level of appellate review, en banc review, if you will, in between the full court and the three-judge panel.

So, he wanted to divide the Ninth Circuit into divisions. Rather than separate circuits, they'd be separate divisions. Each division, I think he wanted three divisions—each division would have its own en banc, and then if there was disagreement among the divisions, it would go to a full court en banc, but it would only be 13 of the judges on this full court en banc. So, it's going to be a small minority of the entire circuit.

So, it's that last step that I still don't care for. It's still a limited en banc. So, there might be some improvement with the White Commission proposal, but I don't think it gets us as much improvement as if we just split the Ninth Circuit up into separate circuits where each one could have their own full court en banc.

Mr. ISSA. Thank you, Mr. Chair. Thank you.

Mr. JOHNSON of Georgia. Thank you. Waiting patiently has been the gentleman from Colorado, Mr. Neguse, and he is now awarded with five minutes.

Mr. NEGUSE. Well, I thank the Chair, and I certainly have enjoyed the hearing and very thoughtful testimony from all the witnesses and appreciate their testimony, and, of course, thank you, Chair Johnson, and to Chair Nadler for holding this very important hearing.

I, like many of my colleagues who participated in today's hearing, represent a State that is in tremendous need of new lower court judgeships.

It's become a common theme that I've heard over the course of my time in Congress from stakeholders in Colorado, and to address those needs I'm introducing a bill today to authorize additional district court judgeships for the State of Colorado and, also, to add Fort Collins to the list of places that the district court is authorized to hold court.

I represent Fort Collins in the United States Congress, and, like a lot of states represented by my colleagues, Colorado's population has skyrocketed, especially in northern Colorado, over the last several decades.

While our population and the caseload has certainly grown, the number of judges we have added to the federal bench has not.

So again, I want to thank the Chair for holding this hearing to bring light to the tremendous need to expand our lower courts across the country and the consequences for not doing so.

I certainly want to thank all our witnesses, in particular, those Members of the federal bench for their service to our country, to the judicial system, and for offering their testimony today with respect to this very important issue.

With that, I'll yield back the balance of my time. Thank you, Mr. Chair.

Mr. JOHNSON of Georgia. I thank the gentlemen.

We have come to the end of the road. The gentleman from Oregon, Mr. Bentz, will take us home with five minutes.

Mr. BENTZ. Thank you, Mr. Chair, and to everyone's relief, I yield back.

Mr. JOHNSON of Georgia. That was a quick trip.

This concludes today's hearing. Thank you to the panelists for attending.

Without objection, all Members will have five legislative days to submit additional written questions for the witnesses or additional materials for the record.

With that, the hearing is adjourned.

[Whereupon, at 12:15 p.m., the Committee was adjourned.]

APPENDIX

CONSTITUTIONAL ACCOUNTABILITY CENTER

Statement of the Constitutional Accountability Center

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

Subcommittee on Courts, Intellectual Property, and the Internet
United States House of Representatives
February 24, 2021

The Constitutional Accountability Center (CAC) is a non-partisan think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. We work in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and a fair, impartial, and fully functioning federal judiciary. We are certain that expanding the lower courts could powerfully improve the chances that people will receive timely justice in our nation's federal judicial system and therefore ask that you exercise Congress's constitutional power to create, and appropriate funding for, additional judgeships in the federal district and circuit courts.

The Constitution guarantees all persons the ability to vindicate their rights in court. When the Constitution was drafted, the promise of access to federal courts was at the heart of a new system of government accountable to the people. In Article III, the Framers created the federal judiciary as a co-equal branch of government vested with the power of expounding what the law means in the context of cases and controversies.[1] Article III's grant of judicial power was viewed as critical to enforce the Constitution's limits and maintain the supremacy of federal law.[2] In designing the federal judiciary, the Framers sought to ensure that the power of the federal courts was co-extensive with Congress's legislative power under Article I. However, in recent years, Congress has weakened the power of the federal judiciary by not providing for staffing sufficient to ensure this co-equal branch of government can meet the challenge of rising caseloads. As a result, judges are overworked, and litigants can experience long delays when seeking justice. These delays undermine justice, equality, and confidence in our judicial system.

The courts play a critical role in people's lives and in our society. From the air they breathe to the water they drink, from protecting their rights to holding bad actors accountable, the judiciary affects the lives of people in this country every day. In particular, the lower courts play a crucial role. The Supreme Court decides very few cases a year. The roughly 7,000-8,000 petitions for Supreme Court review each year

[1] *Osborn v. Bank of the United States*, 2 U.S. (9 Wheat.) 738, 818-19 (1824) (arguing that Article III enforced the "great political principle" that "[a]ll governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws").
[2] *See* Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 Sup. Ct. Econ. Rev. 115, 117 (2004) (arguing that "the original meaning of the 'judicial power' in Article III, included the power of judicial nullification").

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amount to less than 2% of the cases filed in our federal lower courts, and of these petitions, the high court grants certiorari in roughly 80, meaning approximately 1%.[3] Thus, annually, the Supreme Court hears .02% of the cases filed in our federal courts. So, for the vast majority of federal court litigants, a decision in district court or a decision in one of 13 courts of appeals is the end of the line.

Because of the important role the courts play, ensuring the judiciary has adequate capacity to dispense equal justice is a critical congressional role in the constitutional design created by the Framers. Congress has the enumerated constitutional power and obligation through the Necessary and Proper Clause to ensure the federal judiciary is equipped to carry out its Article III mandate to dispense fair and impartial justice.[4] Doing so ensures that all those who walk through the courthouse doors to vindicate their rights in court can do so in a timely fashion. Congress has exercised this constitutional power and fulfilled its ongoing constitutional duty several times since the creation of our modern judicial system in 1891.[5]

However, Congress has not significantly increased the number of federal judgeships since 1990,[6] making the last 30 years one of the slowest periods of judicial expansion in modern history,[7] even as our nation grew by a third in population.[8] The stasis in lower court size is not indicative of lessened demands placed upon our judicial system. In fact, reality is quite the opposite. Since 1990, the number of cases filed in the federal courts of appeal and district courts has increased by approximately 40 percent.[9] As of March 31, 2020, there were nearly 30,000 civil cases pending for more than *three years*—99 percent of those cases were before a federal district court judge.[10] This is nearly double the figure from 2011.[11] From 1960 to 1990, Congress passed six comprehensive judgeship bills—each one increasing the size of the judiciary by at least 12 percent, with no more than eight years between laws. Our current 30-year period of neglect requires a much greater response.[12]

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[3] *Federal Judicial Caseload Statistics 2019*, UScourts.gov (last visited Feb. 19, 2021), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019; *Supreme Court Procedure*, SCOTUSblog (last visited Feb. 19, 2021), https://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/.
[4] U.S. const, art. I, § 8, cl. 18.
[5] Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.
[6] Elizabeth B. Wydra, *There's More to Repairing Federal Courts Than Supreme Court Expansion*, The Hill (Feb. 10, 2021), https://thehill.com/opinion/judiciary/538176-theres-more-to-repairing-federal-courts-than-supreme-court-expansion.
[7] *Table: Authorized Judgeships*, UScourts.gov, https://www.uscourts.gov/sites/default/files/allauth.pdf.
[8] *Resident Population of the United States from 1980 to 2020*, Statista (last visited Feb. 19, 2021), https://www.statista.com/statistics/183457/united-states--resident-population/.
[9] *The Federal Bench – Annual Report 2019*, UScourts.gov (last visited Feb. 19, 2021), https://www.uscourts.gov/statistics-reports/federal-bench-annual-report-2019.
[10] *March 2020 Civil Justice Reform Act*, UScourts.gov (last updated Mar. 31, 2020), https://www.uscourts.gov/statistics-reports/march-2020-civil-justice-reform-act.
[11] *Civil Justice Reform Act: Report of Motions Pending More Than Six Months, Bench Trials Submitted More Than Six Months, Bankruptcy Appeals Pending More Than Six Months, Social Security Appeal Cases Pending More Than Six Months, and Civil Cases Pending More Than Three Years on March 31, 2011* at 3 (Mar. 2011), https://www.uscourts.gov/sites/default/files/statistics_import_dir/CJRAMarch2011.pdf.
[12] Letter from Alliance for Justice et al., to Senator Lindsay Graham, Chairman, and Senator Dianne Feinstein, Ranking Member, Senate Judiciary Committee (Dec. 7, 2020), https://aboutblaw.com/Ut1.

To help determine what that response should be, we start by looking to the Judicial Conference of the United States, which was established by statute to be the official, non-partisan, policy-making body of the federal courts. The Judicial Conference assesses judicial workload through calculating "weighted filings" for district courts and "adjusted filings" for appellate courts, calculations that consider not only the number of cases, but their complexity.[13] And based on such calculations, the Judicial Conference makes recommendations for future judgeships. In its March 2019 report to Congress, the Judicial Conference (headed by Chief Justice John Roberts) recommended the creation of 5 new permanent appellate judgeships, 65 new permanent district court judgeships, and the conversion of 8 district court judgeships from temporary to permanent status[14]—only a 9 percent increase in the total number of permanent Article III judgeships. According to prior research and congressional testimony by the Judicial Conference, this recommendation likely understates the actual need.[15] Despite the modest nature of the recommendation, Congress has failed to act.

Congress cannot ignore this problem any longer. Our courts cannot deliver justice efficiently without a sufficient number of judges to adequately serve the American people. The federal judiciary, on behalf of its judges and litigants, is asking for help and Congress is the only body with the power to provide it. Congress should answer that call.

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[13] *Judicial Emergency Definition*, UScourts.gov (last accessed Feb. 19, 2021), https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition.

[14] Barry J. McMillion, Cong. Research Serv., RL45899, *Recent Recommendations by the Judicial Conference for New U.S. Circuit and District Court Judgeships: Overview and Analysis* 12 (Sept. 3, 2019), https://www.everycrsreport.com/files/20190903_R45899_ec24a05f6d227b4e272b2ff5de0359ac5d3e80b7.pdf.

[15] *Joint Statement of Judge Lawrence F. Stengel, Chair, Comm. on Judicial Resources of the Judicial Conference of the United States et al., Before the Subcommittee on Courts, Intellectual Property, and the Internet of the H. Comm. On the Judiciary,* 115th Cong. (June 21, 2018), https://www.uscourts.gov/sites/default/files/testimony_for_congressional_hearing_-_examining_the_need_for_new_federal_judges_0.pdf.

February 24, 2021

Chairman Hank Johnson
Ranking Member Darrell Issa
Subcommittee on Courts, Intellectual Property, and the Internet
House Committee on the Judiciary
United States House of Representatives

Dear Chairman Johnson and Ranking Member Issa:

Thank you for your leadership in convening today's hearing on "The Need for New Lower Court Judgeships, 30 Years in the Making." We write to urge you to create enough additional judgeships in our federal district and circuit courts to allow our judiciary to adequately serve the American people.

Our overwhelmed judicial branch is indeed a crisis decades in the making. While Congress regularly increased the number of judges on the federal bench to keep pace with our booming population and growing number of cases over the course of the 20th century, for the past 30 years, the creation of new judgeships has largely stalled. Because our judiciary has too few judges, struggling to manage too many cases, the administration of justice is being undermined in this country.

The Judicial Conference, headed by Chief Justice John Roberts, makes biennial recommendations to create new judgeships, but these recommendations unfortunately have been unheeded for decades. As a result, the overwhelmed dockets of our federal courts have limited access to justice and effectively block many Americans from seeking relief for civil wrongs.

Now, the Judicial Conference's recommendations are only a first step, insufficient to meet today's crisis in our courts. The U.S. population has grown by nearly a third since the last time Congress comprehensively addressed the number of judgeships in 1990, but the Conference only recommends an 8 percent increase in judgeships.

Caseload statistics also support a more robust approach. While the Conference recommends increasing district court judgeships by less than 10 percent, filings in our district courts have increased by roughly 40 percent since 1990. Similarly, the Conference only would increase circuit court judgeships by 3 percent, while circuit court filings have grown by 15 percent. Judge Brian Miller's testimony to your Committee conceded that "Even with these additional judgeships, weighted filings would be 475 per judgeship or higher [10 percent higher than the Conference's benchmark] in 14 district courts."

Even if Congress adopted the Judicial Conference's recommendations in full and added 8 percent to our judiciary, it would be the smallest increase in a comprehensive judgeship bill in modern history. From 1960 to 1990, Congress passed six comprehensive judgeship bills -- each one increasing the size of the judiciary by at least 12 percent, with no more than eight years between laws. Our current, 30-year period of inattention requires a much greater response.

Congress' failure to create new judgeships has devastated the ability of our courts to fulfill the promise of equal justice under the law and exacerbated existing inequalities in our system. It encourages defendants to seek plea bargains to avoid jail time while awaiting delayed trials and discourages people without the resources for protracted litigation from filing cases in the first place. Furthermore, our overwhelmed lower courts have led judges to create procedural hurdles and substantive law that keeps civil rights plaintiffs -- especially those bringing employment disputes—out of federal court. Adding judgeships to the lower courts would not only relieve unmanageable caseloads and overworked judges, but would also lay the groundwork for reforms needed to correct for inequalities that plague our system.

Adding judgeships also presents an additional opportunity to improve judicial diversity, a crisis that has reached historic proportions under the Trump administration. By expanding the federal courts, Congress would provide another opportunity to correct course and add judges who represent both the diversity of the nation and the professional diversity of attorneys. An expanded federal bench must include more women, people of color, LGBTQ+ people, and people with disabilities to fill the created seats. Lower court expansion would also increase capacity to nominate lawyers who have represented individuals -- such as indigent defendants, workers, consumers, immigrants, and civil rights plaintiffs -- whose perspective is sorely lacking on our federal benches.

Congress' failure to add new judgeships for decades is the exception, not the norm, and the historic crisis we face warrants immediate action by this Committee. We are currently living in the longest period of time with no major increase in judgeships since the creation of our modern judicial system in 1891.

Our courts cannot provide the efficient administration of justice in this country without a sufficient number of judges to adequately serve the American people. We cannot accept a status quo that undermines justice, equality, and confidence in our judicial system. Only Congress has the power to address our current crisis, and it must do so with a solution that is large enough to meet our judiciary's full need.

Sincerely,

Alliance for Justice
American Association for Justice
American Atheists
American Constitution Society
American Federation of Teachers (AFT)
American Federation of State, County and Municipal Employees (AFSCME)
Asian American Legal Defense and Education Fund (AALDEF)
Autistic Self Advocacy Network
Center for American Progress
Center for Popular Democracy Action

Climate Hawks Vote
Committee for a Fair Judiciary
Constitutional Accountability Center
Demand Justice
Demand Progress
Demos
Equal Justice Society
Freedom From Religion Foundation
Giffords
IndivisAbility
Indivisible
Just Democracy
Lambda Legal
Lawyers for Good Government (L4GG)
League of Conservation Voters
Main Street Alliance
NARAL Pro-Choice America
National Asian Pacific American Women's Forum (NAPAWF)
National Council of Jewish Women
National Education Association (NEA)
National Employment Law Project
National Employment Lawyers Association
National Equality Action Team (NEAT)
National Health Law Program
National Women's Law Center
People For the American Way
People's Parity Project
Planned Parenthood Federation of America
Revolving Door Project
Service Employees International Union (SEIU)
Stand Up America
Take Back The Court
The Employee Rights Advocacy Institute For Law & Policy (The Institute)
The Immigration Hub
The Leadership Conference on Civil and Human Rights
United We Dream

Written Submission to the U.S. House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet

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

Ilya Shapiro
Director
Robert A. Levy Center for Constitutional Studies
Cato Institute

February 24, 2020

Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee, thank you for holding this important hearing and for this opportunity to submit my thoughts on the structure of our judiciary.

Despite our nation's natural growth in population and litigation, we haven't had new district judgeships created in nearly 20 years and new circuit judgeships in more than 30 years. I am happy to defer to the Judicial Conference on the question of how many new judgeships are needed and where, and defer to all of you regarding the political compromises and staggering of vacancies that will be necessary for any created judgeships not to be seen as "court packing" that benefits only the incumbent president's political party. Instead I write simply to suggest that you combine this fruitful discussion with serious consideration of splitting up the Ninth Circuit—but not for political reasons. I've published a law review article to this effect, which I attach to this submission, and here is a summary.[1]

Even as that great western court has long been a bogeyman for conservatives, breaking it up would have no ideological impact, because presidents of both parties appoint judges to all federal courts. Indeed, after President Trump's appointments, there are now five circuits with a higher ratio of Democratic- to Republican-appointed judges (a rough proxy) than the Ninth.

The Ninth Circuit's perceived ideological tilt is a function of history, not geography. In 1978, Congress added 10 judgeships to a 13-member court, allowing President Carter to fill all those seats. Most of those judges in turn timed their taking of senior status to coincide with Democratic presidencies, so until very recently, most of those seats "stayed in the family." It would take a long run of Republican presidencies to break a judicial-turnover skew that's historically been more pronounced in this court than anywhere else.

But there are other reasons for restructuring the Ninth Circuit. One is the sheer size of the court—covering 40 percent of the nation's land mass and 20 percent of its population—and the high number of appeals it must decide, double the next-highest circuit and triple the average.

The Ninth Circuit bears an astonishing backlog, accounting for nearly a third of all pending federal appeals.[2] "Legal briefing in pending appeals . . . is frequently years old and

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[1] Ilya Shapiro & Nathan Harvey, *Break Up the Ninth Circuit*, 26 Geo. Mason L. Rev. 1299 (2019), https://www.cato.org/sites/cato.org/files/2020-04/shapiro-break-up-the-ninth-circuit.pdf.

[2] U.S. Courts, U.S. Courts of Appeals Judicial Business: Median Times for Civil and Criminal Cases Terminated on the Merits (Sept. 2017), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary0930.2020.pdf.

contains stale case law, by the time we can get to it," wrote Ninth Circuit Judge Richard Tallman (a Clinton appointee) in Senate testimony in 2017.[3]

A second problem is legal unpredictability. With 29 active judges, there are over 3,600 combinations of three-judge panels and judges can go years before hearing cases with some colleagues. That's before including senior judges and judges visiting from elsewhere, which the Ninth Circuit uses far more than any other court. These visitors do yeoman's work, but they can hardly be expected to be familiar with local precedent—which is difficult enough for "home" judges given the more than 550 precedential opinions published each year.

As Judge Diarmuid O'Scannlain (a Reagan appointee) wrote in testimony at that same Senate hearing, "Such a system affords hardly enough time for Ninth Circuit judges even to stay informed about developments in our law, let alone to ensure consistency."[4] That echoed former Supreme Court Justice John Paul Stevens, who wrote in 1998 that the Ninth Circuit was "so large that even the most conscientious judge cannot keep abreast of her own court's output."[5]

Even more striking is the court's peculiar "en banc" process. Because of its size, the Ninth Circuit uses a randomly selected 11-judge panel rather than having all judges sit together. There's a provision for a full-court "super" en banc, but it's so impractical that it's never been used. This means that a six-judge majority can set rules that bind 23 others.

Proponents of the status quo have emphasized the "economies of scale" from a large circuit. But if larger were inherently better, we wouldn't have regional circuits, instead using one gargantuan court of appeals. Smaller circuits allow for more substantive knowledge of local law and more collegiality among the judges.

Nor would splitting off California, Hawaii, and the Pacific islands (and possibly Oregon) create unmanageable imbalance in a reduced Ninth Circuit. Many current circuits have one state that dwarfs the others: New York generates nearly 90 percent of cases in the Second Circuit, Texas 60 percent in the Fifth, Illinois nearly 64 percent in the Seventh, and Florida 62 percent of cases in the Eleventh (which itself was split from Fifth in 1981).

Because the Supreme Court hears so few cases, the legal buck generally stops in the circuit courts. Yet when circuit rulings are slow, inconsistent, and made by judges less familiar with local law, the quality of justice suffers.

At a House appropriations hearing in March 2007, Justices Anthony Kennedy and Clarence Thomas testified that there was a consensus among the justices that the Ninth Circuit was too large and unwieldy, and that it should be split.[6] Nearly 15 years later, it's long past time to do just that.

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[3] Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary, 115th Cong. 13 (Aug. 24, 2017) (statement of Hon. Richard C. Tallman, Circuit J., U.S. Court of Appeals for the Ninth Circuit, at 7), https://www.judiciary.senate.gov/imo/media/doc/Tallman%20Testimony.pdf.

[4] Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary, 115th Cong. 13 (Aug. 24, 2017) (statement of Hon. Diarmuid F. O'Scannlain, Circuit J., U.S. Court of Appeals for the Ninth Circuit, at 14), https://www.judiciary.senate.gov/imo/media/doc/O'Scannlain%20Testimony.pdf.

[5] Letter from John Paul Stevens, Associate Justice, United States Supreme Court, to Hon. Byron R. White, Chair, White Commission 1 (Aug. 24, 1998).

[6] Fiscal Year 2008 Supreme Court Budget, Hearing Before the Subcomm. on Financial Services and General Government, H. Comm. on Appropriations, Mar. 17, 2007, https://www.c-span.org/video/?197182-1/america-courts, starting at 49:40 (Kennedy) and 52:50 (Thomas).

BREAK UP THE NINTH CIRCUIT

Ilya Shapiro[*] *& Nathan Harvey*[**]

INTRODUCTION

In early 2017, President Donald Trump indicated that he would "absolutely" consider proposals to "break up" the U.S. Court of Appeals for the Ninth Circuit.[1] The President has insisted that "every case" that goes through the circuit court results in "an automatic loss" for his administration.[2] These comments followed a defeat in federal district court concerning an executive order purporting to end federal funding to "sanctuary cities," a decision the Ninth Circuit shortly thereafter affirmed.[3] The Ninth Circuit was also responsible for blocking the Trump administration's proposed travel ban, prohibition on transgender servicemen in the military, and efforts to end the Deferred Action for Childhood Arrivals immigration program.[4] To be sure, the Ninth Circuit has long been a thorn in conservatives' sides,[5] for example ruling against the phrase "under God" in the Pledge of Allegiance and the "Don't

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[**] Former legal associate, Cato Institute. Nathan Harvey now practices as a civil rights attorney with the U.S. Government. This article was written prior to his federal employment. The views expressed herein are solely his own personal views and do not necessarily reflect the views or position of the U.S. Government.

[1] Sarah Westwood, *Exclusive Interview: Trump 'Absolutely' Looking at Breaking Up 9th Circuit*, WASH. EXAMINER (Apr. 26, 2017, 5:00 PM), https://www.washingtonexaminer.com/exclusive-interview-trump-absolutely-looking-at-breaking-up-9th-circuit.

[2] Jeremy Diamond & Ariane de Vogue, *Trump Rails Against 9th Circuit Court of Appeals in Wake of Asylum Ruling*, CNN (Nov. 20, 2018, 5:02 PM), https://www.cnn.com/2018/11/20/politics/donald-trump-9th-circuit-court-of-appeals/index.html.

[3] *See* City & County of San Francisco v. Trump, 897 F.3d 1225, 1231 (9th Cir. 2018). The term "sanctuary city" is not defined by federal law, but it is often used to refer to localities that have adopted policies designed to limit cooperation with federal immigration requests and enforcement actions. *See generally* MICHAEL JOHN GARCIA, CONG. RES. SERV., RS22773, "SANCTUARY CITIES": LEGAL ISSUES (2009), https://fas.org/sgp/crs/homesec/RS22773.pdf.

[4] *See* Hawaii v. Trump, 859 F.3d 741, 755 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392, 2423 (2018) (travel ban); Karnoski v. Trump, No. 18-35347, 2018 U.S. App. LEXIS 19912 (9th Cir. July 18, 2018) (transgender military ban); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476, 520 (9th Cir. 2018) (Deferred Action for Childhood Arrivals).

[5] In November 2018, President Trump said during a conference call that "[w]e get a lot of bad court decisions from the Ninth Circuit, which has become a big thorn in our side. It's a terrible thing when judges take over your protective services, when they tell you how to protect your border. It's a disgrace." Jonathan Allen, *After Rare Rebuke, Trump Rips into Chief Justice John Roberts*, NBC NEWS (Nov. 22, 2018, 8:24 AM), https://www.nbcnews.com/politics/politics-news/trump-ripping-roberts-says-judges-make-our-country-unsafe-n939286.

Ask, Don't Tell" policy regarding gays in the military.[6] In response, lawmakers have put forward various proposals over the years to finally divide the "liberal" Ninth, but have faced intense criticism from those who view any circuit-splitting scheme to be politically motivated.[7] A division of the Ninth Circuit would indeed be in the nation's best interest, but for reasons that are much more prosaic than political—and in a way that wouldn't necessarily fix whatever ideological problems the court's opponents now identify (which can be solved only by nominating and confirming judges with different jurisprudential approaches).[8]

Many nonpolitical reasons exist for splitting up the most outsized federal appellate court. Chief among them are the circuit's unwieldly size, procedural inefficiencies, jurisprudential unpredictability, and unusual en banc process. The Ninth Circuit is by far the largest circuit in terms of the number of judgeships, geographic size, and population served. As a result, and as we discuss in detail below, it suffers from a myriad of procedural inefficiencies, including a massive backlog that accounts for nearly one-third of all pending federal appeals.[9] According to data from 2017, the median time from notice of appeal to a last opinion or final order in civil appeals was an astounding 22.8 months (and that is just the median time, so more than half of appeals take over two years).[10] As we discuss below, these numbers are significantly higher than in any other circuit. The Ninth Circuit's current structure also makes its jurisprudential direction unpredictable for lawyers, judges, and litigants. With more than 3,600 combinations of three-judge panels and hundreds of opinions published each year, lawyers and district court judges are particularly hard-pressed to understand what the court will do in any given case. Most alarmingly, the circuit's expansive jurisdiction, as well as the large number of opinions it publishes each year, makes it exceptionally difficult for the court's own judges to stay informed about developments in circuit law, adding yet another dimension of jurisprudential uncertainty. Finally, the Ninth Circuit is the only circuit court that employs "limited" en banc

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[6] *See* Newdow v. U.S. Cong., 292 F.3d 597, 612 (9th Cir. 2002), *amended on denial of reh'g en banc*, 328 F.3d 466, 468 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. V. Newdow, 542 U.S. 1, 4–5 (2004) (finding lack of standing); Log Cabin Republicans v. United States, 658 F.3d 1162, 1168 (9th Cir. 2011).

[7] Paul Gordon, *GOP Efforts to Break Up the Ninth Circuit Would Harm Justice*, PEOPLE FOR THE AM. WAY (Aug. 23, 2017), http://www.pfaw.org/blog-posts/gop-efforts-to-break-up-the-ninth-circuit-would-harm-justice/.

[8] *See* Mark Brnovich & Ilya Shapiro, *Split Up the Ninth Circuit—but Not Because It's Liberal*, WALL ST. J. (Jan. 11, 2018, 7:05 PM), https://www.wsj.com/articles/split-up-the-ninth-circuitbut-not-because-its-liberal-1515715542.

[9] U.S. COURTS, *U.S. Court of Appeals Summary – 12-Month Period Ending Sept. 30, 2018*, STATISTICS AND REPORTS, CASELOAD STATISTICS AND DATA TABLES, FEDERAL COURT MANAGEMENT STATISTICS (2018) [hereinafter *Court of Appeals Management Statistics*], http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary0930.2018.pdf.

[10] U.S. COURTS, *U.S. Courts of Appeals Judicial Business: Median Times for Civil and Criminal Cases Terminated on the Merits* (2017) [hereinafter *Courts of Appeals Median Times*] http://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2017.pdf.

(with only a subset of judges participating), which often results in hearings with disproportionate ideological or geographic concentrations of judges. This step defeats the purpose of en banc, which aims to give litigants the full court's attention and arguably contributes to the circuit consistently having among the highest reversal rates before the Supreme Court.

Although proponents of splitting the Ninth Circuit often point to the court's reputation as a liberal and erratic federal circuit, any ideological tilt is more a function of history than geography. After all, both Republican and Democratic presidents appoint judges in all states, regardless of how "blue" or "red" a state voted in the last election. As it happens, however, it was in 1978, after decades of rapidly growing population and caseload in the western states, that Congress added ten Ninth Circuit judgeships.[11] These seats were thus filled by Democratic President Jimmy Carter, with people who were generally quite liberal. While some of those judges, upon death or retirement, have been replaced by more moderate appointees, most judges still aim to retire when a president of the same party as the one who appointed them is in power. Accordingly, most of those "Carter judges" are now "Clinton judges" and "Obama judges."[12] No circuit-split proposal could superficially propel the Ninth Circuit's jurisprudence in a conservative direction because the same judges would fill the seats. Judicial vacancies, or new judgeships, would still be filled through the normal process of appointment and confirmation, whereby control of the White House (and sufficient votes in the Senate) are what matters.

Opponents of splitting the Ninth Circuit often contend that new technology will alleviate the court's problems. Although technology may speed up the resolution of cases, it cannot, by itself, fix the circuit's inherent structural issues. Large circuits impose substantial information costs on judges, requiring them to set aside time to learn the law of their own circuit and determine what other judges are writing. Indeed, the Ninth Circuit's enormous size and expansive jurisdiction make it nearly impossible for even the most conscientious judges to stay abreast of the court's output. Information costs also effect lawyers and litigants who must invest time in determining obscure circuit law and navigating the court's administrative labyrinth. Such heavy costs substantially reduce any "economies of scale" that may result from the Ninth Circuit's size and use of technology.

Moreover, splitting up a circuit court when it becomes too large and overworked is in no way a novel concept. Federal circuits have habitually expanded in number and split in response to the addition of new states and territories, or when population growth and ever-expanding dockets have pressured Congress to create new circuits. Indeed, Congress has twice split

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[11] Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 3, 92 Stat. 1629, 1632 (1979) (codified at 28 U.S.C.§ 44(a) (2012)).

[12] Adam Liptak, *Trump Takes Aim at Appeals Court, Calling It a 'Disgrace'*, N.Y. TIMES (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html (describing President Trump's use of the term "Obama Judges").

circuits to create smaller courts of appeals that would be more effective.[13] The most recent such division occurred in 1980, when Congress split the Fifth Circuit in response to many of the same issues currently facing the Ninth Circuit.[14] The common myths surrounding a division of the Ninth Circuit are therefore overblown and discursive.

This Article aims to provide a balanced and apolitical contribution to the ongoing debate over whether the Ninth Circuit should be split. It proceeds on the premise that policy decisions concerning the organization of the judiciary should be based on objective principles of sound judicial administration. Such decisions should not be made in response to specific judicial rulings or about the perceived ideological leanings of individual judges currently serving on a court. We focus instead on the policy and administrative concerns surrounding the Ninth Circuit as currently structured. This Article maintains that the circuit should be divided into more manageable and reasonably sized circuits that are consistent with the rest of the nation's judicial system. The first Part provides a brief historical overview of the expansion of the federal circuit courts. Next, we outline the four main arguments in support of a circuit split: the circuit's unwieldly size, procedural inefficiencies, jurisprudential unpredictability, and unusual en banc process. The following Part dispels the common myths associated with proposals to split up the circuit. In closing, this Article reviews reasonable proposals that have been offered for splitting up the Ninth Circuit and offers a way forward.

I. THE HISTORY AND EXPANSION OF THE FEDERAL CIRCUIT COURTS[15]

The judicial system has changed drastically since the nation's founding. Article III of the Constitution prescribes that the "judicial power of the United States, shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish."[16] Section 1 leaves to the legislative branch the authority to create such lower federal trial and appellate courts as needed. The Constitution also allows Congress to fix most of the rules regarding the size, scope, and makeup of the courts.[17] The judicial rules were first implemented through the Judiciary Act of 1789, which created a federal judicial district and several one-judge district courts,

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[13] COMM'N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, FINAL REPORT 17 (Dec. 18, 1998) [hereinafter WHITE COMM'N REPORT].

[14] Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980).

[15] Except where otherwise noted, this history is taken from the WHITE COMMISSION REPORT, *supra* note 13, and the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2439 (1997). Further citations to specific legislation are provided as needed.

[16] U.S. CONST. art. III, § 1.

[17] *See* 28 U.S.C. §§ 41–49.

one in each of the then-eleven states.[18] The Act also created eastern, middle, and southern judicial circuits. The existing states were organized into these three circuits, with two Supreme Court justices and a district court judge holding court in each district within these circuits.[19] Initially, Congress required Supreme Court Justices to travel to each circuit—to "ride" circuit—and convene circuit courts with the respective district court judges. In this way, justices would assist in presiding over the chief trial courts of the time, the circuit courts. By 1802, Congress had rearranged the three circuits into six, with a separate Justice serving each circuit. As the nation grew, Congress added more circuits and steadily enlarged the Supreme Court to provide new justices for those courts.

From the passage of the Judiciary Act of 1789 until 1866, Congress altered the circuit courts thirteen times. In 1855, the number of circuits hit a high point when Congress added a separate California circuit in response to western growth. Nearly a decade later, an 1866 statute redrew most of the then-existing circuit boundaries, creating boundaries that are for the most part still in existence today.[20] Since 1866, congressional practice has been to add new states and territories to existing circuits instead of creating new ones. The statute also reduced the number of justices from ten to eight. In 1869, Congress created nine new circuit judgeships—one for each circuit existing at the time. Even though the judicial system's geographic limits were more or less established by 1866, it took Congress more than twenty-five years to create separate intermediate appellate courts for each circuit. Meanwhile, the Judiciary Act of 1875 allowed general federal-question jurisdiction, so long as the case involved a controversy of over $500.[21] The addition of federal question jurisdiction substantially increased the workload of the federal district courts. This large increase in caseload, without additional judgeships to manage the added work, resulted in a need for intermediate appellate courts. Congress considered numerous proposals to expand federal appellate capacity, ultimately settling on the Circuit Court of Appeals Act of 1891.[22] This legislation created new intermediate appellate courts—the circuit courts of appeals—in each of the nine circuits. It also transferred the vast majority of the Supreme Court's appellate caseload to these new circuit courts. Simultaneously, the Act made the federal district courts the primary trial courts of the judicial system. Further, it eliminated the practice of circuit boundaries demarcating a Supreme Court justices' trial court duty. Instead, the new circuit boundaries established the territorial reach of the circuit courts' appellate jurisdiction. The old circuit courts were eventually abolished in 1911.[23]

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[18] Judiciary Act of September 24, 1789, 1 Stat. 73, 92 (1789) (codified as amended at 28 U.S.C. § 1652 (1982)).

[19] *See* Erwin C. Surrency, *A History of Federal Courts*, 28 MO. L. REV. 214, 215 (1963).

[20] Act of July 23, 1866, ch. 210, 14 Stat. 209.

[21] Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

[22] Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

[23] Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1167, § 289.

When the circuit courts were originally created in 1891, Congress authorized a total of nineteen judgeships.[24] In the decades that followed, the number of judgeships expanded significantly. In 1930, there were fifty-five judgeships. By 1950, that number had risen to seventy-five. This trend continued over the following decades, reaching a high of 179 circuit judgeships in 1990, where the number remains to this day.[25] The work assigned to the circuit courts, however, has increased disproportionately to the increase in the number judgeships. Circuit judges have been faced with a persistent increase in cases, particularly since the beginning of the upswing in appeals in the 1960s. While judges in 1930 had a caseload of only about forty-six cases per judge, by 1990 that number increased to about 228 cases per judge.[26] As of 2017, federal appellate judges handled, on average, 282 cases each year. In other words, over the last century, the caseload per judge has increased by a factor of nearly six. The circuit courts now handle a greater workload than any of their predecessor courts. Constant pressure from increasing appellate filings have required circuits to adapt their administrative procedures to meet the heightened demand. Some have coped through the use of technology, but by most accounts the resolution of appellate cases has become a prolonged endeavor for judges, lawyers, and litigants.

The circuit courts of today are far different both structurally and functionally than when they were created nearly 130 years ago. The growth and development of the Ninth Circuit has been particularly noteworthy. In 1891, when the Evarts Act created the Ninth Circuit, between two and three million people inhabited the area that now composes the circuit.[27] At the time, the circuit covered six sparsely populated western states: California, Idaho, Montana, Nevada, Oregon, and Washington. As new states and territories were added throughout the 20th century, many of those in the western United States were placed in the Ninth Circuit. These include Alaska and Hawaii in 1900, Arizona in 1912, Guam in 1951, and the Commonwealth of the Northern Mariana Islands in 1977.[28] When the Ninth Circuit was originally formed, it only had appellate jurisdiction over about 3 percent of the country's total population. Today, some 65 million people (or about 20 percent of the nation) reside within the Ninth Circuit, nearly double the number of people in the

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[24] WHITE COMM'N REPORT, *supra* note 13, at 13.

[25] *Id.*; *see also* U.S. COURTS, *Authorized Judgeships*, http://www.uscourts.gov/sites/default/files/allauth.pdf.

[26] *Caseloads: U.S. Courts of Appeals, 1892-2017*, FED. JUDICIAL CTR., https://www.fjc.gov/history/courts/caseloads-us-courts-appeals-1892-2017.

[27] *See* Act of Mar. 3, 1891, ch. 517, 26 Stat. 826; U.S. CENSUS BUREAU, THIRTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1910, vol. 1, ch. 1, at 30, http://www2.census.gov/prod2/decennial/documents/36894832v1ch02.pdf.

[28] *See U.S. Court of Appeals for the Ninth Circuit: Legislative History*, FED. JUDICIAL CTR., https://www.fjc.gov/history/courts/u.s.-court-appeals-ninth-circuit-legislative-history.

next-largest circuit.[29] Not counting the Ninth Circuit, the average federal geographical circuit has a population of about 22 million people. Demographic trends suggest the population of the Ninth Circuit will continue to grow in years to come. As a result of the circuit's weighty caseload and structural limitations, there has been a growing consensus among policymakers that the Ninth Circuit should be split into more manageable and reasonably sized circuits in a fashion consistent with the federal judiciary's historical development.

II. WHY SPLITTING UP THE NINTH CIRCUIT MAKES SENSE

A. *Unwieldy Size*

The most obvious reason the Ninth Circuit should be split is due to its sheer size. As it exists today, the Ninth Circuit is by far the largest circuit in terms of geographic size, population served, number of judgeships, and caseload. It covers a region that spans most of the western United States, an area containing fifteen federal judicial districts.[30] The Ninth Circuit has jurisdiction over cases originating in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.[31] Originally serving a mere 3 percent of the nation's population, demographic trends have increased the population under its jurisdiction to include roughly one-fifth of the nation.[32] The Ninth Circuit also has a disproportionate number of judges. The circuit is currently authorized twenty-nine judgeships, of which there is one vacancy as of this writing, one more opening up at the end of the year, and one judge who will take senior status upon a confirmation of his successor.[33] This far exceeds the next closest circuit, the Fifth, with only seventeen judgeships. In fact, the Ninth Circuit has double the average number of active judgeships in all circuit courts. Beyond the twenty-nine active seats, the circuit utilizes a number of senior judges, bringing the potential total to forty-nine judges altogether and further increasing the margin over the next-largest circuit.[34] The Ninth Circuit also decides an

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[29] *Quick Facts: Population Estimates, July 1, 2018*, U.S. CENSUS BUREAU [hereinafter *Census Data*], https://www.census.gov/quickfacts/geo/chart/US/PST045218 (indicating the population for each state within the Ninth Circuit). Simple arithmetic indicates that the total figure is over 65 million people, and this is 20 percent of more than 300 million people in the United States.

[30] *What Is the Ninth Circuit?*, U.S. COURTS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/judicial_council/what_is_the_ninth_circuit.php.

[31] *Id.*

[32] *Census Data*, *supra* note 29.

[33] President Trump has appointed seven judges to the Ninth Circuit as of August 2019 *See Judicial Vacancies and Nominations*, U.S. COURTS FOR THE NINTH CIRCUIT (Aug. 1, 2019), https://www.ca9.uscourts.gov/content/view_db.php?pk_id=0000000899.

[34] *Senior Judges of the United States Court of Appeals for the Ninth Circuit*, U.S. COURTS FOR THE NINTH CIRCUIT (2018), https://www.ca9.uscourts.gov/content/view_active_senior_judges.php.

extraordinary number of appeals. As of September 2018, there were over 11,000 appeals pending.[35] The most recent data from 2018 show that over 21 percent of all federal appeals were filed in the Ninth Circuit.[36] The circuit generally handles more than 11,000 cases a year, triple the average for the other regional circuits.[37] Although the Ninth Circuit is merely one of twelve regional circuits in theory, it is unfathomable to consider a judicial body spanning nine states, 40 percent of the nation's land mass, and nearly 65 million people as a typical court of appeals.

Many federal appellate judges (including about a third of the appellate judges in the Ninth Circuit) agree that the Ninth Circuit is simply too large to function effectively. In 1998, Supreme Court Justice Anthony Kennedy submitted a letter to the White Commission—headed by retired Justice Byron White and charged by Congress with evaluating circuit structure—supporting a division of the Ninth Circuit.[38] Justice Kennedy, who served on the Ninth Circuit before his elevation, wrote that the Ninth Circuit was simply too big. He concluded that "the large Circuit has yielded no discernible advantages over smaller ones."[39] Ninth Circuit Judge Andrew Kleinfeld reaffirmed that position during remarks before the House Judiciary Committee in 2017, stating that the circuit's "size has severe negative consequences."[40] Both Justice Kennedy's and Judge Kleinfeld's sentiments echo the outcome of the study conducted by the White Commission two decades ago, which determined that circuit courts with too many judges lack the ability to render clear, timely, and uniform decisions. Back in 1998, the Commission found that the Ninth Circuit could not function effectively with so many judges and that "the maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between eleven and seventeen."[41] That recommended maximum is far less than the twenty-nine judgeships currently authorized for the Ninth Circuit. The Commission concluded that "an appellate court of that size, attempting to function as a single

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35 *Court of Appeals Management Statistics*, *supra* note 9.

36 *Id.*

37 *Id.*

38 Letter from Anthony M. Kennedy, Associate Justice, United States Supreme Court, to Hon. Byron R. White, Chair, White Commission 1 (Aug. 17, 1998) [hereinafter Justice Kennedy Letter], http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/kennedy.pdf.

39 *Id.* at 2.

40 *Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 115th Cong. 1 (2017) [hereinafter *Kleinfeld Testimony*] (statement of Hon. Andrew J. Kleinfeld, Circuit J., U.S. Court of Appeals for the Ninth Circuit).

41 WHITE COMM'N REPORT, *supra* note 13, at 29. The Commission also conducted a survey of 205 circuit judges who expressed an opinion about how many judges a court of appeals can have and still function well. Of those judges, 74 percent reported that the maximum number is between ten and eighteen, while only 22 percent believed that number is higher or that there is no natural limit on the size of an effective court. *Id.* at 29 n.72.

decisional entity, encounters special difficulties that will worsen with continued growth."[42]

Empirical studies provide further evidence that the Ninth Circuit as currently composed is too large to function effectively. In 2000—long before any of the current controversies—then–Chief Judge Richard Posner of the Seventh Circuit conducted a study that found the quality of judicial output declines as the number of judges on an appellate court grows.[43] Controlling for judicial ideology, the study demonstrated that the Ninth Circuit had the highest rate of reversal of any federal appeals court in the nation during the period 1985–97.[44] This finding becomes particularly relevant when considering that, during the same period, the combined reversal rate of the Fifth and Eleventh Circuits was significantly lower than the reversal rate of the pre-split Fifth.[45] Thus, as Judge Posner concluded, "adding judgeships tends to reduce the quality of a court's output" and increase the probability of summary reversal.[46] The size of a court matters, and the Ninth Circuit as currently structured is too large to function properly.

In addition to judicial output, the numerical composition of an appellate court affects judicial collegiality. Unlike trial courts, appellate courts require groups of judges to decide cases together. As Senior Judge Harry Edwards of the D.C. Circuit has suggested, collegiality is the manner in which "appellate judges overcome their individual predilections in decision making."[47] According to Judge Edwards, "judges have a common interest, as members of the judiciary, in getting the law right, and . . . as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect."[48] Collegiality enhances understanding of each judge's legal reasoning while decreasing misunderstandings or imputations of bad faith.[49] This allows judges to accommodate differences of opinion in order to produce a

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[42] *Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 112 (1999) (statement of Hon. Byron R. White, Chair, White Commission).

[43] Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711, 711 (2000).

[44] *Id.* at 714–15.

[45] *Id.* at 714–17; *see also Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet*, 115th Cong. 8–9 (2017) (statement of Dr. John C. Eastman, Professor of Law, Chapman University Fowler School of Law) [hereinafter *Eastman Testimony*].

[46] Posner, *supra* note 43, at 719.

[47] Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1639 (2003).

[48] *Id.* at 1645 (footnote omitted).

[49] *Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 115th Cong. 13 (2017) [hereinafter *O'Scannlain 2017 Testimony*] (statement of Hon. Diarmuid F. O'Scannlain, Circuit J., U.S. Court of Appeals for the Ninth Circuit).

coherent body of law. Even Justices of the Supreme Court have regularly noted the utmost importance of collegiality in judicial decision-making.[50]

Oversized circuits can undercut collegiality by limiting the interactions of the entire circuit as a collective whole.[51] The Ninth Circuit strives to sit each active judge with every other active and senior judge the same number of times over a two-year period, a policy that even when observed still results in infrequent interactions between judges.[52] In summer 2017, in testimony prepared for a Senate Judiciary Committee hearing, Judge Diarmuid O'Scannlain, a senior judge on the Ninth Circuit, recalled that when he was an active judge it was common for him "to go *years* without ever sitting with some of [his] colleagues."[53] He observed that "an active Ninth Circuit judge may sit with fewer than twenty colleagues on three-judge panels over the course of a year," which is less than half the total number of active and senior judges sitting on the court.[54] Similarly, Judge Richard Tallman, a Clinton appointee on the Ninth Circuit who favors a split, testified that after four years on the bench he had yet to sit on a panel with all of his active colleagues and that it "took a full seven years" to do so.[55] He further claimed that "the irregular membership on [the] panels comes at a cost; it fails to foster strong personal relationships, and makes for inconsistent opinions."[56]

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[50] Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS U. L.J. 1067, 1072 (1996) ("[J]udicial etiquette [is] a means of maintaining the collegiality requisite to a great court."); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 141, 148 (1990) (discussing the effect of collegiality on the number of dissents and concurrences by members of a federal appellate court).

[51] Diarmuid F. O'Scannlain, *A Ninth Circuit Split Study Commission: Now What?*, 57 MONT. L. REV. 313, 315 (1996) ("As a court of appeals becomes increasingly larger, it loses the collegiality among judges that is a fundamental ingredient in [the] effective administration of justice . . . .").

[52] *See* Laural Hooper, Dean Miletich & Angelia Levy, *Case Management Procedures in the Federal Courts of Appeals*, FED. JUDICIAL CTR. 174 (2011), https://www.fjc.gov/sites/default/files/2012/CaseMan2.pdf.

[53] *The Case for Restructuring the Ninth Circuit: An Inevitable Response to an Unavoidable Problem: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 115th Cong. 13 (2018) [hereinafter *O'Scannlain 2018 Testimony*] (statement of Hon. Diarmuid F. O'Scannlain, Circuit J., U.S. Court of Appeals for the Ninth Circuit). As described *infra*, the twenty-nine active judgeships make for over 3,600 possible three-judge panel combinations. (If the circuit's twenty senior judges are included in the analysis, that number increases to over 17,000 possible three-judge panels.) Basic combinatorics suggests that a judge could indeed go years without sitting with a colleague.

[54] *Id.*; *see also Questions for the Record from Senator Charles Grassley: Judge O'Scannlain Responses: Hearing on "Oversight of the Structure of the Federal Courts" Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts of the S. Comm. on the Judiciary*, 115th Cong. 4 (2018) (statement of Hon. Diarmuid F. O'Scannlain, Circuit J., U.S. Court of Appeals for the Ninth Circuit) ("I further agree with Justice Kennedy that the Ninth Circuit's extreme size disrupts our ability to foster the sort of close, collegial relationships that ought to exist on an appellate court.").

[55] *Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 115th Cong. 13 (2017) [hereinafter *Tallman Testimony*] (statement of Hon. Richard C. Tallman, Circuit J., U.S. Court of Appeals for the Ninth Circuit).

[56] *Id.*

Adding 136 visiting judges into a mix of forty-nine active and senior judges creates an endless mishmash of three-judge panels that further undercuts the court's collegiality. As the White Commission stated back in 1998, "a court of appeals, being a court whose members must work collegially over time to develop a consistent and coherent body of law, functions more effectively with fewer judges than are currently authorized for the Ninth Circuit."[57] It should come as no surprise, given the Ninth Circuit's size, that the court has seen increased incidences of intracircuit conflicts. Several Supreme Court Justices have previously noted the heightened risk of intracircuit conflicts on a court that publishes as many opinions as the Ninth Circuit.[58] After all, a circuit court as large as the Ninth's precludes close, regular, and frequent contact in joint decision-making.

Moreover, the Ninth Circuit's far-reaching jurisdiction poses serious questions about the nature of federalism. The circuit's enormous size affords it immense power in determining the direction of the nation's jurisprudence. Since very few cases receive further review, nearly every Ninth Circuit case is decided by a three-judge panel—and that panel decides the law for 65 million people.[59] In 1998, Justice Kennedy wrote that any circuit claiming the "authority to bind nearly one fifth of the people of the United States by decisions of its three-judge panels . . . must meet a heavy burden of persuasion."[60] Under the current regime, judges sitting in the Ninth Circuit simply have too much power over too many people. And when these judges err, the consequences of their error can be great. As Judge Kleinfield has pointed out, "[o]ur size causes errors, and gives us too much power. When we make a mistake, the impact is colossal, and we do make mistakes."[61]

In other words, the Ninth Circuit's immense size prevents effective function, undermines collegiality and familiarity among its judges, and poses serious federalism concerns.

B. *Procedural Inefficiencies*

The Ninth Circuit's sizable caseload has led to considerable procedural inefficiencies. As it stands, the circuit's active judges, even when augmented by senior judges and designated visitors from elsewhere, are badly overworked and unable to manage the constant influx of cases effectively. The circuit currently has an astonishing backlog, accounting for nearly a third of

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57 WHITE COMM'N REPORT, *supra* note 13, at 29.

58 *Id.* at 38. Five members of the Supreme Court wrote the Commission's chair before the report was released. Four justices expressed general "concern about the ability of judges on the Ninth Circuit Court of Appeals to keep abreast of the court's jurisprudence and about the risk of intracircuit conflicts in a court with an output as large as that court's." *Id.*

59 *See Census Data*, *supra* note 29.

60 Justice Kennedy Letter, *supra* note 38, at 2.

61 *Kleinfeld Testimony*, *supra* note 40, at 1.

all pending federal appeals.[62] The most recent statistics (through September 2018) show that the circuits have over 38,000 appeals pending.[63] Of those, the Ninth Circuit has more than 11,000 appeals outstanding.[64] As of September 2018, over one-fifth of all federal appeals filed came from the Ninth Circuit.[65] The circuit had 3,000 more new filings in the past year than the next busiest circuit.[66] Given the substantial number of appeals the Ninth Circuit processes, it should be no surprise that it takes the circuit longer than any other to resolve an appeal. Statistics from 2017 show that the median Ninth Circuit appeal took 14.9 months to resolve.[67] This amounts to 50 percent higher than the average circuit and five months more than the national median.[68] For civil appeals, the median case required 22.8 months from the notice of appeal to the last opinion or final order, a drastic difference from the national median of 12.1 months.[69]

A primary reason for the Ninth Circuit's procedural inefficiencies is that its judges are badly overworked. The most recent data (through September 2018) show that the court terminated 7,386 cases on the merits in the preceding twelve months, amounting to 550 cases per judge.[70] To keep up with all this output, the circuit's judges would be required to read twenty decisions every single day (assuming it was plausible for judges to work seven days out of every week, and 365 days a year). Even if fully staffed with its authorized maximum of twenty-nine judges, the court would still have approximately 460 pending appeals per active judgeship. That amounts to over 100 more appeals per judge than the next closest circuit, and about "four times the number of appeals per active judge on the Tenth Circuit."[71] As it stands, the Ninth Circuit is not fully staffed, meaning that each active judge is required to handle closer to 533 appeals.[72] In addition to the large number of appeals filed in the Ninth Circuit, the court regularly receives around 800 petitions for en banc review each year.[73] As a result, each judge has more than fifteen new en banc petitions to consider every week.

The procedural inefficiencies the Ninth Circuit faces has practical implications for judges, lawyers, and litigants. Because cases take so long to process, by the time legal documents reach the judges' desks, they can be

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62 *See Court of Appeals Management Statistics*, *supra* note 9.

63 *See id.*

64 *Id.*

65 *See id.*

66 *Id.*

67 *Courts of Appeals Median Times*, *supra* note 10.

68 *Id.*

69 *Id.*

70 *See Court of Appeals Management Statistics*, *supra* note 9.

71 *Tallman Testimony*, *supra* note 55, at 6.

72 *Id.*

73 *See, e.g.*, U.S. COURTS FOR THE NINTH CIRCUIT, 2017 ANNUAL REPORT 43 [hereinafter 2017 NINTH CIRCUIT ANNUAL REPORT], https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2017.pdf.

outdated. As Judge Tallman told the Senate Judiciary Committee, a legal brief in a pending appeal "is frequently years old and contains stale case law, by the time we can get to it."[74] In addition, the court's significant "backlog increases the pressure on [judges] to dispose of cases quickly for the sake of the litigants"; a practice that can serve only to "inflate the chance of error and inconsistency."[75] Some have proposed adding additional judgeships to assist with the heavy caseload, but procedural inefficiencies can't be remedied simply by adding more judges.[76] The circuit is already authorized twenty-nine judgeships, more than twice as many as the average circuit. Even with double the average number of judgeships, the Ninth Circuit continues to be flooded with cases and incapable of efficiently handling its constant caseload, resulting in the incredible amount of time it takes to dispose of each case. Additional judgeships would obviously help alleviate the workload, but they would only exacerbate the inefficiencies and inequities of the circuit's inordinate size.

C. *Jurisprudential Unpredictability*

The Ninth Circuit's size and structure make it markedly unpredictable. District judges, litigants, and parties seeking to conform their conduct to circuit law have encountered serious obstacles to assessing what the law is. For one, the court's enormous jurisdictional scope contributes to erratic outcomes. The Ninth Circuit is responsible for a vast geographic area consisting of eleven different states and territories, each with its own system of laws and legal precedent. As Judge Tallman expressed in testimony before the Senate Judiciary Committee, the Ninth Circuit's geographic diversity "requires great breadth of legal knowledge that I fear comes at the expense of a shallow understanding of the applicable local law."[77] The problem of providing consistent, predictable outcomes for litigants is further compounded by the court's heavy reliance on visiting judges, who tend to be less informed about relevant local law and less sensitive to the individual needs of different communities.

The vast number of possible panel combinations on the current Ninth Circuit provides good indication of the uncertainty that results from such a large circuit. The Ninth Circuit is currently authorized twenty-nine active

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74 *Tallman Testimony*, *supra* note 55, at 7.

75 *O'Scannlain 2017 Testimony*, *supra* note 49, at 21.

76 In 2017, the Judicial Conference of the United States recommended to Congress the creation of fifty-seven new Article III judgeships in the courts of appeals and district courts, including the addition of five new appellate judgeships for the Ninth Circuit. U.S. COURTS, ADDITIONAL JUDGESHIPS OR CONVERSION OF EXISTING JUDGESHIPS RECOMMENDED BY THE JUDICIAL CONFERENCE 2017, http://www.uscourts.gov/sites/default/files/2017_judicial_conference_judgeship_recommendations_0.pdf.

77 *Tallman Testimony*, *supra* note 55, at 15.

judges, making for over 3,600 possible three-judge panel combinations.[78] If the circuit's senior judges are included in the analysis, that number increases to over 17,000 possible three-judge panels.[79] In terms of en banc panels—see below for a discussion of the Ninth Circuit's unique "limited en banc" procedure—there are well over 13 million possible eleven-judge combinations.[80] With so many possible combinations of judges, it is virtually impossible to maintain any degree of coherence or predictability in case law.

The White Commission conducted a survey asking district court judges and lawyers in the Ninth Circuit for their views and experiences. While district judges reported finding the law "insufficiently clear to give them confidence in their decisions on questions of law about as often as their counterparts in other circuits," they were more likely to report difficulties resulting from inconsistencies between published and unpublished opinions.[81] Lawyers, meanwhile, reported "somewhat more difficulty discerning circuit law and predicting outcomes of appeals than lawyers elsewhere."[82] More often than other lawyers, those who practice before the Ninth Circuit "reported as a 'large' or 'grave' problem the difficulty of discerning circuit law due to conflicting precedents," and that they "'frequently' have trouble predicting the outcome of an appeal."[83] Further evidence bearing on the validity of these criticisms can be found in a another survey of lawyers who litigated cases in the various federal courts of appeals. In that survey, 30 percent of experienced litigators found it difficult to predict how the Ninth Circuit would decide an appeal, more than for any other circuit.[84]

To complicate matters further, the Ninth Circuit generates more than 550 published opinions each year and many more unpublished opinions. The most recent data show that each circuit judge authored an average of 170 decisions (13 signed, 157 unsigned).[85] According to Judge Kleinfeld, "[n]o district judge and no lawyer can, by reading even a few hundred of our decisions, predict what our court will do in the next case. Even if the decisions could be read, there are over 3,000 combinations of judges who may wind up

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78 *Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 115th Cong. 3 (2017) [hereinafter *Roysden Testimony*] (statement of Brunn (Beau) W. Roysden III, Deputy Division Chief of the Civil Litigation Division of the Arizona Attorney General's Office); *see also Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2009: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 111th Cong. 9 (2009) (statement of Hon. Gerald Bard Tjoflat, Circuit J., United States Court of Appeals for the Eleventh Circuit).

79 *See Eastman Testimony*, *supra* note 45, at 7.

80 *Roysden Testimony*, *supra* note 78, at 3 n.6. This number comes from choosing ten out of the twenty-eight judges besides the Chief, a method resulting in 13,123,110 combinations.

81 WHITE COMM'N REPORT, *supra* note 13, at 39.

82 *Id.* at 39–40.

83 *Id.* at 40.

84 Posner, *supra* note 43, at 717 n.12.

85 *See Court of Appeals Management Statistics*, supra note 9.

on panels, so the exercise would not be worth the time."[86] He further stated that "[j]udges on the same court should read each other's decisions. We are so big that we cannot and do not. That has the practical effect that we do not know what judges on other panels are deciding."[87]

The Ninth Circuit's size and workload make it virtually impossible for any one judge to maintain familiarity with the relevant substantive law and local precedent of nine states and two territories. With the court generating so many opinions, judges face many challenges in staying adequately informed about the court's own output. Back in 1995, Third Circuit Judge Edward Becker compared the size and workload of his circuit to that of the Ninth, noting that the Third Circuit published 353 opinions, equating to approximately 8,500 pages of material.[88] In explaining that due to such a large amount of reading, coupled with an appellate judge's other duties of "writing, thinking, conferring, and administering," Judge Becker observed that "it takes me seven days a week to do my job."[89] The Ninth Circuit, meanwhile, published 927 opinions during the same period.[90] Judge Becker maintained that "there is no conceivable way that any judge of that court can read, or even meaningfully scan and digest, anywhere near that number of opinions so as to be abreast of circuit law."[91] In 1998, then-Justice John Paul Stevens made a similar observation, noting that the Ninth Circuit was "so large that even the most conscientious judge probably cannot keep abreast of her own court's output."[92] Ninth Circuit Judge Pamela Ann Rymer told a Senate Judiciary subcommittee in 1999 that "the court's output is too large to read, let alone for each judge personally to keep abreast of, think about, digest or influence" with a resulting toll, over time, "on coherence and consistency, predictability and accountability."[93] Since Judge Rymer offered this testimony almost twenty years ago, the Ninth Circuit's caseload has, of course, only increased.

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86 *Kleinfeld Testimony*, *supra* note 40, at 7.

87 *Id.* at 4.

88 William H. Rehnquist et al., *Symposium: The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 285 (1996) [hereinafter *Symposium*].

89 *Id.*

90 *See* LEONIDAS RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1995 REPORT OF THE DIRECTOR 50 tbl.S-3 (1995) (demonstrating that during the twelve-month period ending Sept. 30, 1995, the Third Circuit published 346 written and signed opinions and seven written, reasoned, and unsigned opinions; meanwhile, during the twelve-month period ending Sept. 30, 1995, the Ninth Circuit published 909 written and signed opinions and eighteen written, reasoned, and unsigned opinions).

91 *Symposium*, supra note 88, at 285.

92 Letter from John Paul Stevens, Associate Justice, United States Supreme Court, to Hon. Byron R. White, Chair, White Commission 1 (Aug. 24, 1998).

93 *Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and the Ninth Circuit Reorganization Act: Hearing on S. 253 Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 106th Cong. 60 (July 16, 1999) (statement of Hon. Pamela Ann Rymer, former Circuit J., U.S. Court of Appeals for the Ninth Circuit).

As noted by lawyers, multiple appellate judges from different circuits, and Supreme Court justices, the size of the Ninth Circuit creates significant and detrimental unpredictability for its litigants and arbiters. Any tribunal whose law cannot be clearly stated or deciphered requires reform.

D. *Unusual En Banc Process*

The incredible size and workload of the Ninth Circuit has necessitated the use of an unusual en banc process. As it stands, the Ninth Circuit is the only circuit in the nation that never sits with all judges together at once. Federal law permits circuits with more than fifteen active judges to use a limited form of en banc.[94] Under this unique procedure, en banc review is handled by a subset of the active judges, as opposed to all the active judges. The Fourth (fifteen authorized judgeships), Fifth (seventeen), and Sixth (sixteen) Circuits are the only courts aside from the Ninth that have at least fifteen authorized judgeships. But the Ninth is the only one that relies upon a randomly selected subset en banc panel. The limited en banc court traditionally consists of eleven judges (the chief judge and ten others) that are selected by lot for each case. The circuit's limited en banc process has faced severe criticism for its apparent inability to act as an effective substitute for full en banc review.[95] For example, Supreme Court Justice Sandra Day O'Connor, in a 1998 letter to the White Commission, said that the Ninth Circuit's limited en banc hearings "cannot serve the purposes of en banc hearings as effectively as do the en banc panels consisting of all active judges that are used in the other circuits."[96] In truth, using a panel only slightly larger than a third of the court's full complement of judges contravenes the very concept of an "en banc" court.[97]

Under the limited en banc procedure, a mere six of the twenty-nine Ninth Circuit judges may speak for the entire court. This wasn't as big of a concern twenty years ago, when the White Commission noted that, "very few en banc decisions are closely divided, so it is unlikely a full court en banc would produce different results."[98] A study conducted just after the White Commission's report, however, looked at the number of closely divided en banc decisions during the period from 1998 to 2005 and found that nearly one-third of the cases decided en banc by the Ninth Circuit were by "close"

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[94] *See* Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (1978).

[95] *See* Pamela Ann Rymer, *The "Limited" En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317, 320 (2006).

[96] Letter from Sandra Day O'Connor, Associate Justice, United State Supreme Court to Hon. Byron R. White, Chair, White Commission 2 (June 23, 1998), http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/oconnor.pdf.

[97] Judge Rymer, who served on the White Commission, has stated that a "'limited' en banc is an oxymoron, because 'en banc' means 'full bench.'" Rymer, *supra* note 95, at 317.

[98] WHITE COMM'N REPORT, *supra* note 13, at 35.

votes (6–5 or 7–4).[99] The late Judge Stephen Reinhardt, often described as the lion of the liberal Carter appointees, conceded that, "occasionally, the en banc vote does not reflect the true sentiment of the majority of the court."[100] There have even been occasions when *none* of the three-judge panel members who decided a case were on the en banc panel.

Furthermore, due to the high threshold for rehearing en banc (a majority of active judges voting in favor), many cases are never reheard despite having many votes in favor.[101] The court's rules do provide that a judge dissatisfied with the decision of the limited en banc may call for a vote on whether the full court should convene to reconsider the case.[102] Since the court adopted its limited en banc procedure in 1980, however, such a vote for a "true" or "super" en banc has seldom been requested and never been successful. Judge O'Scannlain recently lamented that the court will "forego meritorious en banc calls because there simply isn't enough time to pursue every case that ought to be reheard en banc. What follows is that only a small fraction of our published opinions receive meaningful en banc consideration—let alone actual en banc review."[103] The result is that in a typical year only about thirty cases receive an en banc vote, and fewer than twenty of those cases are actually reheard en banc.[104]

As Judge Rymer has pointed out, even if a majority of active circuit judges vote to rehear a case "limited en banc," since not all active circuit judges will be drawn to hear the case en banc, there is no assurance that *any* of the judges who voted for en banc review will be selected to hear the case.[105] Judge Rymer further acknowledged that when no panel member is drawn to hear the case on "limited en banc," the en banc panel "lacks the benefit of input from colleagues who are well-versed in the record and law applicable to the case and whose prior work would bring a different perspective to en banc deliberations."[106] Conversely, the luck of the draw may result in an en banc panel's being dominated by the original panel's members and their allies, even though the probability that an en banc panel will include the same

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[99] *See, e.g.*, John M. Roll, *Split the Ninth Circuit: It's Time* (2005), https://www.myazbar.org/AZAttorney/PDF_Articles/0905procon3.pdf. While we were unable to find any studies covering the period since 2005, given that there have been no procedural alterations to the en banc process and that the ratio of Democratic to Republican appointees hasn't shifted significantly, we surmise that the proportion of "close" en banc decisions is no different today.

[100] Nunes v. Ashcroft, 375 F.3d 810, 818 (9th Cir. 2004) (Reinhardt, J., dissenting).

[101] Roll, *supra* note 99, at 38.

[102] U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, FEDERAL RULES OF APPELLATE PROCEDURE: NINTH CIRCUIT RULES: CIRCUIT ADVISORY COMMITTEE NOTES, at 149–50, Cir. R. 35-3 (2018).

[103] *Questions for the Record from Senator Ben Sasse: Judge O'Scannlain Responses: Hearing on "Oversight of the Structure of the Federal Courts" Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts of the S. Comm. on the Judiciary*, 115th Cong. 5 (2018) (statement of Hon. Diarmuid F. O'Scannlain, Circuit J., U.S. Court of Appeals for the Ninth Circuit).

[104] *Id.*; *see also* 2017 NINTH CIRCUIT ANNUAL REPORT, *supra* note 73, at 43.

[105] Rymer, *supra* note 95, at 322–23.

[106] *Id.* at 323.

three judges as the original panel is only about 5 percent.[107] In one highly publicized case, a unanimous three-judge panel was unanimously reversed 11–0 by a limited en banc court that had no members of the original panel.[108] In another case, in which a three-judge panel reached a conclusion contrary to that arrived at by five other circuits, nine active Ninth Circuit judges unsuccessfully voted for rehearing en banc.[109] In yet another case, on two occasions en banc review was denied, and both times the Supreme Court granted review.[110]

The Ninth Circuit's selection process for en banc review "is susceptible to the same occasional non-representativeness as the randomly selected three-judge panels that cause the need for going en banc in the first place."[111] For example, in one case the en banc panel comprised ten Democratic appointees and one Republican appointee.[112] While "the Ninth Circuit has long had more Democrats on it, it has never had ten times" the number of judges appointed by Republican Presidents.[113] But, as a result of the limited en banc process, there is a very real possibility that the court will have a highly disproportionate number of Democratic appointees on some en banc panels.

The limited en banc process is also problematic because it arguably causes the Ninth Circuit to be frequently reversed by the Supreme Court. One contributing factor is that the court convenes en banc proceedings infrequently, which helps explain its high reversal rate in the Supreme Court.[114] The relative infrequency of en banc rehearings in the Ninth Circuit deprives judges and lawyers of sufficient guidance as to circuit law. Justice Antonin Scalia summarized the thrust of this argument when he said that there is a "disproportionate segment of [the Supreme] Court's discretionary docket that is consistently devoted to reviewing Ninth Circuit judgments, and to reversing them by lop-sided margins, [which] suggests that [the limited en banc] error reduction function is not being performed effectively."[115] The adoption

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107 Posner, *supra* note 43, at 712.

108 Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 882, 888 (9th Cir. 2003), *rev'd en banc*, 344 F.3d 914, 915–16, 920 (9th Cir. 2003) (addressing the California gubernatorial recall procedure).

109 Bockting v. Bayer, 418 F.3d 1055, 1055–56, 1061 (9th Cir. 2005).

110 Belmontes v. Woodford, 359 F.3d 1079, 1079–80 (9th Cir. 2004) (denying en banc review), *vacated sub nom.* Brown v. Belmontes, 544 U.S. 945 (2005), *en banc reh'g denied*, 427 F.3d 663 (9th Cir. 2005), *cert. granted sub nom.* Ornaski v. Belmontes, 126 S. Ct. 1909 (2006).

111 *Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 115th Cong. 8 (2017) [hereinafter *Fitzpatrick Testimony*] (statement of Brian Fitzpatrick, Professor of Law at Vanderbilt Law School).

112 *Id.*; *see also* Cramer v. Consol. Freightways, Inc., 255 F.3d 683, 687 (9th Cir. 2001).

113 *Fitzpatrick Testimony*, *supra* note 111, at 8.

114 From 2006 to 2015, for example, the Supreme Court heard 160 cases from the Ninth Circuit, reversing 106 decisions and vacating 24. *See* Timothy B. Dyk, *Thoughts on the Relationship Between the Supreme Court and the Federal Circuit*, 16 CHI.-KENT J. INTELL. PROP. 67, 72 (2016).

115 Letter from Antonin Scalia, Associate Justice, United States Supreme Court, to Hon. Byron R. White, Chair, White Commission 1 (Aug. 21, 1998), http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/scalia1.pdf.

of the limited en banc has thus arguably increased the court's reversal rate. Error correction is one of the primary functions of en banc, but the circuit's unusual limited en banc has, as Justice Scalia suggested, failed to accomplish this task effectively. The Ninth Circuit's en banc procedure systematically fails to provide its litigants with the same access to justice that litigants from other circuits receive.

In sum, the Ninth Circuit's vast and uncontrollable size, procedural ineffectiveness, unpredictability, and unusual en banc review, prevent justice for all who live under its jurisdiction. To ensure fair resolution of each litigant's dispute, equal justice under the law, and effective judicial decision making, Congress must use its Article III power to carve one or more new circuits out of the Ninth.

III. DISPELLING THE MYTHS

A. *Not a Partisan Agenda*

Perhaps the most pervasive myth surrounding modern plans to split the Ninth Circuit is that they are merely political ploys by conservatives to undermine the court's liberal composition.[116] To be sure, the Ninth Circuit has long enjoyed a reputation as a bastion of liberal jurisprudence. Since the San Francisco–based circuit consists notably of Democratic supermajority states like California, Hawaii, and Oregon, it's no surprise that many conservatives have attributed the court's ideology to its geography. But the court's ideological tilt is more a product of history—and it's actually "better" now (from a conservative perspective) than it was before. Professor Arthur Hellman, a federal courts scholar at University of Pittsburgh Law School, has noted that the court's "reputation is certainly deserved based on the history of the last 40 years or so," but that it's "less of an outlier now than it was."[117] University of Richmond Law School Professor Carl Tobias called the notion that the Ninth Circuit is liberal "dated."[118] This shift becomes clearer when looking to the history of the circuit's appointments—which also shows that a split won't have any effect, one way or the other, on the court's (or post-split courts') partisan or jurisprudential composition.

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116 *See* Press Release, Sen. Dianne Feinstein, Senator Feinstein Fights Back Effort to Split Ninth Circuit Court of Appeals (Apr. 19, 2007), https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=0BA37422-F9AF-C888-C132-66DB0833DD80 ("I [Senator Feinstein] am concerned that recent attempts to split the Ninth Circuit are part of an assault on the independence of the judiciary by those who disagree with some of the court's rulings.").

117 Gene Johnson, *How "Liberal" Reputation of 9th Circuit Court of Appeals Is Overblown, Scholars Say*, MERCURY NEWS (Feb. 7, 2017, 7:35 AM), https://www.mercurynews.com/2017/02/07/how-liberal-reputation-of-9th-circuit-court-of-appeals-is-overblown-scholars-say.

118 *Id.*

The circuit's leftward tilt occurred mostly during Jimmy Carter's presidency. In the late 1970s, Congress substantially increased the number of judgeships in the Ninth Circuit, nearly doubling the size of the court.[119] President Carter, who never got a chance to make any Supreme Court appointments, was then able to fill these open seats, with little opposition in a Democrat-controlled Senate. But the court has shifted in recent years as those appointees, who were considered extremely liberal, took "senior" status or passed away. While most of the Carter appointees were eventually replaced by nominees of Presidents Clinton and Obama—many judges want to keep their seats in the same party—the court, believe it or not, has become more moderate. A 2007 study found that the Ninth Circuit was among the most liberal appellate courts, a distinction shared with the Second Circuit; had a number of influential conservative judges with national reputations; and grew sharply less liberal as a result of both Presidents Ronald Reagan and George H.W. Bush's judicial appointments.[120] The circuit's ideological composition shifted further under President George W. Bush, who appointed seven judges. Although President Obama also appointed seven judges during his two terms, those judges have generally been considered moderates, with more radical nominees like Goodwin Liu (now on the California Supreme Court), failing to be confirmed. As of this writing, the Ninth Circuit consists of sixteen judges appointed by Presidents Clinton or Obama, twelve appointed by Presidents George W. Bush or Trump, and one vacancy. The resulting ratio of Democratic to Republican appointees is lower than in the First, Fourth, Tenth, D.C., and Federal Circuits.

Perhaps one reason the Ninth Circuit has been so hated by conservatives is its rendering of high-profile decisions that conservatives tend to find objectionable. But it's no surprise, given the circuit's vast size and disproportionate caseload, that this court would be more likely to decide a larger share of controversial cases. Indeed, the Ninth Circuit issues a substantial number of conservative decisions in addition to the liberal ones—at a greater rate than any other circuit (though they often then get reversed en banc).[121] This may again be attributable to the court's size, which increases the prospect of generating outlier panel decisions that do not accurately reflect the court's median jurisprudence.

Despite the court's relative moderation in recent years—compare its treatment of the "travel ban" litigation, for example, with the Fourth Circuit's "judicial resistance"[122]—conservatives have continued to express a desire to

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119 28 U.S.C. § 44 (Supp. III 1979).

120 Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. ORG. 303, 312 (2007), http://www.jstor.org/stable/40058180.

121 Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341, 351 (2006).

122 The Fourth Circuit struck down President Trump's ninety-day travel ban on foreign nationals from six majority Muslim countries, stating that the text had to be read in the context of Trump campaign speeches that "drip[ped] with religious intolerance, animus, and discrimination." Int'l Refugee Assistance

finally "break up" the Ninth Circuit. Yet efforts to divide the court have been repeatedly met with resistance from those who believe this move is just a politically motivated scheme to dilute the court's ideological composition.

Ironically, both sides miss the point that splitting a court doesn't affect any sort of ideological bias. Moving Arizona into a new circuit won't suddenly turn its two Obama appointees into originalists. Having California in its own circuit with only one or two states won't make its four Bush appointees into devotees of the living Constitution. The same judges would fill the seats of any new circuit that Congress creates—and judicial vacancies would still be filled through the political process of appointment and confirmation by presidents and senators of both parties.

The only way for one party to shift the long-term balance of a given court is to maintain sustained control of the White House—or to create new judgeships as happened under President Carter. Neither of these possibilities has anything to do with how big a circuit is in terms of size, population, or caseload. Circuit-splitting proposals thus cannot, and should not, be conflated with advocacy for partisan advantage. Instead, they are natural and appropriate reactions to the changing circumstances of the nation's judiciary.

B. *Technology Can't Fix Everything*

Another commonly advanced argument against splitting the Ninth Circuit is that technology alone can solve the court's problems. Chief Judge Sidney Thomas has claimed that the court "leads the judiciary in technology and innovative case management."[123] He explained that its e-filing and inventory management systems have allowed the court to overcome or prioritize many of its caseload issues.[124] On the other hand, his colleague Judge Richard Tallman has argued that the use of technology has not been able to meaningfully address the court's backlog: "The Ninth Circuit is already a leader among all circuits in promoting new technology," but its problems are not ones "that can be solved, or even greatly improved, by new computer systems or additional electronic communications equipment."[125]

Project v. Trump, 857 F.3d 554, 572 (4th Cir. 2017). Many news commentators viewed the biting decision as evidence that the Fourth Circuit had joined the "judicial resistance" against the President. *See* David B. Rivkin Jr. & Lee A. Casey, *The Fourth Circuit Joins the 'Resistance*,' WALL ST. J. (May 29, 2017, 11:30 AM), https://www.wsj.com/articles/the-fourth-circuit-joins-the-resistance-1496071859; *see also* F.H. Buckley, *The Federal Courts Just Joined 'the Resistance'*, N.Y. POST (May 31, 2017, 8:51 PM), https://nypost.com/2017/05/31/the-federal-courts-just-joined-the-resistance/.

123 *Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 115th Cong. 1 (2017) [hereinafter *Thomas Testimony*] (statement of Hon. Sidney R. Thomas, Chief Circuit J., United States Courts of Appeals for the Ninth Circuit).

124 *Id.* at 1–2.

125 *Tallman Testimony*, *supra* note 55, at 3.

The idea that technology can solve the Ninth Circuit's problems is premised on the concept of "economies of scale." Judge Alex Kozinski, a Reagan appointee who served as the Ninth Circuit's chief judge from 2007 to 2014, contended that there are "economies of scale" by having a large circuit.[126] Judge Thomas has similarly contended that the Ninth Circuit is "well administered, demonstrating the benefits of economies of scale, critical mass of resources, and consolidation of services."[127] While technology may improve judicial efficiency, it cannot solve inherent structural issues caused by circuit size. Large circuits impose both substantial information and administrative costs on courts, including the time it takes judges to learn the law of their own circuit and find out what other judges are writing. These costs affect lawyers and litigants who must also invest time in determining obscure circuit law and navigating the circuit's administrative labyrinth. Such heavy costs substantially reduce any "economies of scale" that may result from the Ninth Circuit's large size.

To argue that the Ninth Circuit is a glowing example of judicial efficiency ignores both common sense and the relevant facts. As described in detail above, the circuit remains the slowest federal appeals court in the nation. This is despite the fact that the Ninth Circuit purports to be a leader in the judiciary in harnessing new technologies.

C. *More Intercircuit Conflict Is a Feature, Not a Bug*

While dividing the Ninth Circuit into two or three smaller circuits might increase the potential for intercircuit conflicts (also commonly referred to as "circuit splits"), this shouldn't cause any more concern now than it did any time in our history a new circuit was created. A basic tenet of our system of federalism is that it permits each state to "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[128] Similarly, regional circuits allow courts to apply their own approaches to difficult questions of law. As Judge O'Scannlain puts it, "Courts might analyze a legal question differently, and the resulting diversity of views may in fact inform and *improve* the national understanding of that question."[129] Although we want courts to eventually reach the same conclusions concerning important questions of law—so long as they're the correct ones!— national uniformity is not the only goal of the circuit system. If it were, we could simply

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126 *See* Gary L. Stuart, *Viewpoints: Why Splitting the 9th Circuit Is a Bad Idea*, AZ CENTRAL (Mar. 19, 2017, 10:03 AM), https://www.azcentral.com/story/opinion/op-ed/2017/03/19/split-ninth-circuit-court-stuart/99150992/.

127 *Thomas Testimony*, *supra* note 123, at 1.

128 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

129 *Oversight of the Structure of the Federal Courts: Hearing Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts of the S. Comm. on the Judiciary*, 115th Cong. 10–11 (2018) [hereinafter *O'Scannlain Responses to Sasse*] (responses of Diarmuid F. O'Scannlain, Circuit Judge, U.S. Courts of Appeals for the Ninth Circuit).

reorganize the circuits into one national court of appeals, or at least consolidate them into three or so supercircuits. But nobody has suggested this, as it defeats the purpose of having an orderly appellate process that feeds into the Supreme Court.

Besides, even if there were an increase in intercircuit conflicts, the Supreme Court is still able to resolve them. After all, one of the primary functions of the Court's discretionary certiorari process is to resolve conflicts among the circuits.[130] Circuit splits are by far the most important consideration in deciding whether the Court grants review in a case.[131] Although the number of petitions accepted by the Court has dwindled in recent years, this is not due to a lack of capacity. Chief Justice John Roberts has indicated that the Court could easily hear "100 cases without any stress or strain, but the cases just aren't there."[132] His remarks suggest that the Court could grant review in more cases if it were presented with consequential intercircuit conflicts. Thus, any increase in the number of intercircuit conflicts would pose no real burden on the High Court. If anything, it would provide more incentive for the Court to take more cases involving important questions of law.

Moreover, intercircuit conflict is significantly less worrisome than the possibility of *intra*circuit conflict. This occurs when two panels in the same circuit reach contradictory conclusions concerning the same question of law. And the larger a circuit grows the more likely that it will develop intracircuit conflicts. Judge O'Scannlain again provides the apt conclusion that "even if restructuring the Ninth Circuit might marginally increase the chance for new *inter*circuit conflict, such restructuring would likely reduce the far more troubling risk of *intra*circuit conflicts in a court of our size."[133] Accordingly, any peripheral increase in intercircuit conflict as a result of splitting the Ninth Circuit is no real cause for concern but merely a consequence of having a larger country that requires more courts.

D. *Splitting Circuits Isn't Radical*

The notion of splitting a circuit court into several smaller circuits is hardly a new one. Until recently, it was considered a regular function of Congress, which habitually expanded and split the federal courts of appeals in response to the addition of new states and territories. Indeed, since the passage of the Judiciary Act of 1789, Congress has restructured the federal

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130 *See, e.g.*, SUP. CT. R. 10 (listing the need to resolve conflicting circuit decisions among the considerations when deciding whether to grant a petition for certiorari).

131 *See, e.g.*, H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246 (1991) ("Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits.").

132 *See* Evan Bernick, *Federalism and the Separation of Powers: The Circuit Splits Are Out There—and the Court Should Resolve Them*, ENGAGE, July 2015, at 36.

133 *O'Scannlain Responses to Sasse*, *supra* note 129, at 11.

appellate courts a total of thirteen times.[134] And since the Evarts Act created the circuit courts of appeals in 1891, there have been four occasions in which entirely new circuits were added or carved out of existing circuits.[135] Congress twice broke up circuits to create smaller courts in the interest of efficiency and better administration of justice.[136] These actions reflected a view that the only way to deal with a court of appeals deemed to have grown too large was to reconfigure the circuit of which it was a part. One of those divisions occurred just a few decades ago in response to many of the same logistical challenges now facing the Ninth Circuit.

The split of the Fifth Circuit and the creation of the Eleventh Circuit should serve as good precedent for a division of the Ninth Circuit. In 1971, the Judicial Conference recommended and Congress established the Commission on Revision of the Federal Court Appellate System—commonly known as the Hruska Commission—to examine possible changes in the structure of the nation's federal appellate courts.[137] The commission primarily sought to decrease caseloads and increase judicial efficiency. In 1973, it recommended that Congress split both the Fifth Circuit and the Ninth Circuit.[138] Congress declined to enact the proposals but, as part of a compromise in 1978 to secure passage of an omnibus judgeship bill adding judgeships in the Fifth and Ninth Circuits, authorized the limited en banc procedures discussed above and allowed those large circuits to organize themselves into administrative divisions.[139]

The debate over whether the Fifth Circuit should be split rested in part on the issue of circuit size: the inefficient operation of a twenty-four-judge en banc session proved to be the catalyst.[140] After the newly enlarged Fifth Circuit held its first en banc hearing—having declined to use the limited en banc function—the judges found it too difficult to stay current with circuit law. They themselves petitioned Congress to create a new Eleventh Circuit consisting of Alabama, Florida, and Georgia, leaving the Fifth Circuit with Texas, Louisiana, and Mississippi.[141] The proposal, aptly named the Fifth

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134 Congress restructured the federal judiciary in 1801, 1807, 1837, 1842, 1855, 1862, 1863, 1866, 1891, 1893, 1929, 1981, and 1982. *See generally* Russell R. Wheeler & Cynthia Harrison, *Creating the Federal Judicial System*, FED. JUDICIAL CTR. 10–26 (3d ed. 2005), https://www.fjc.gov/sites/default/files/2012/Creat3ed.pdf; *Tallman Testimony*, *supra* note 55, at 20.

135 *See* Act of Mar. 3, 1891, ch. 517, 26 Stat. 826; *O'Scannlain 2018 Testimony*, *supra* note 53, at 29.

136 WHITE COMM'N REPORT, *supra* note 13, at 17.

137 *See* Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807 (1972). *See generally* COMMISSION ON REVISION OF THE FED. COURT APPELLATE SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE 2 (1973) [hereinafter HRUSKA COMM'N REPORT].

138 *See* HRUSKA COMM'N REPORT, *supra* note 137, at 4.

139 Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633.

140 Deborah J. Barrow & Thomas G. Walker, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 230–37 (1988).

141 *See* Robert A. Ainsworth, Jr., *Fifth Circuit Court of Appeals Reorganization Act of 1980*, 1981 BYU L. REV. 523, 524 n.6 (1981) (quoting Resolution of the Fifth Circuit (May 5, 1980) (on file with the Fifth Circuit Clerk of Court)).

Circuit Court of Appeals Reorganization Act of 1980, attracted wide support, with Congress ultimately adopting it and President Carter signing the bill to create the Eleventh Circuit on October 15, 1980.[142]

Since that time, the drumbeat for splitting the Ninth Circuit has only increased. Despite the Ninth Circuit's rapid population boom and corresponding docket surge, it continues to falter under the status quo. Throughout the past forty years, more judgeships have been added to deal with the circuit's massive caseload, which continues to grow at an alarming rate. Since the 1980 split of the Fifth Circuit, the Ninth Circuit has grown to nearly the size of the total population of the Fifth and Eleventh Circuits—the next two largest circuits by population—combined.[143] The same justifications that endorsed their division support a similar split of the Ninth Circuit today.

IV. PROPOSALS TO SPLIT UP THE NINTH CIRCUIT

As discussed above, a division of the Ninth Circuit is long overdue. Members of Congress have been talking about restructuring it for over forty years, ever since the Hruska Commission of 1973.[144] There have been countless studies and congressional hearings conducted, including the 1998 White Commission Report. In the years following the White Commission, Congress introduced a plethora of circuit splitting bills. Such proposals have included:

* various configurations that divide California, with resulting new northern and southern circuits in the west (what we call the "California split");[145]

* a California-only Ninth Circuit, with the remaining states and territories into a new Twelfth Circuit (or vice versa) (the "California circuit");[146]

* leaving California and Nevada in the Ninth Circuit and putting the remaining states and territories into a new Twelfth Circuit;[147]

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142 Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980).

143 *See O'Scannlain 2018 Testimony*, *supra* note 53, exhibit 9.

144 *See generally* HRUSKA COMM'N REPORT, *supra* note 137, at 4.

145 The California split plan was introduced at the end of the 102nd session of Congress by Representative Michael Kopetski of Oregon as House Bill 3654, but it was not revived at the next session. *See* H.R. 3654, 103d Cong. (1993); HRUSKA COMM'N REPORT, *supra* note 137, at 13.

146 *See* H.R. 1598, 115th Cong. (2017).

147 *See* S. 562, 108th Cong. (2003).

* same as the above, but also keeping Arizona in the Ninth Circuit (the "desert split");[148]

* leaving California, Hawaii, Guam and the Northern Mariana Islands in the Ninth Circuit and putting the remaining states and territories into a new Twelfth Circuit (the "island split");[149]

* keeping California, Hawaii, Oregon, Washington, Guam, and the Northern Mariana Islands in the Ninth Circuit and putting Alaska, Arizona, Idaho, Montana, and Nevada into a new Twelfth Circuit (so that the Twelfth "hopscotches" over the Ninth);[150]

* leaving California and Nevada in the Ninth Circuit, moving Arizona to the Tenth Circuit (to maintain geographic contiguity, and also because the Tenth Circuit is the third-smallest by population), and putting the remaining states and territories into a new Twelfth Circuit;[151] and

* a three-way division with a Ninth Circuit consisting of California, Hawaii, Guam, and the Northern Mariana Islands; a Twelfth Circuit consisting of Arizona, Nevada, Idaho, and Montana; and a Thirteenth Circuit consisting of Oregon, Washington, and Alaska.[152]

Despite an abundance of reasonable proposals, Congress has yet to adopt or endorse any particular one. Within the last few years there has been a growing movement in Congress to finally split the Ninth Circuit. Yet, the question remains: how should the Ninth Circuit be split? Decades of studies, commissions, and expert testimony reveal several factors that should be considered in any circuit-splitting plan. Such factors include the distribution of judgeships and caseloads, the geographic size of any newly created circuits, whether the states in all post-split circuits are contiguous, and other logistical concerns. This section reviews the most commonly proposed circuit-splitting plans that have been offered and uses these factors as guideposts for assessing their feasibility.[153]

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148 *See* H.R. 212, 109th Cong. (2005); H.R. 2723, 108th Cong. (2003); H.R. 1203, 107th Cong. (2001).

149 *See* S. 1296, 109th Cong (2005); H.R. 3125, 109th Cong. (2005); H.R. 4093, 109th Cong. (2005); S. 1845, 109th Cong. (2005).

150 *See* H.R. 250, 115th Cong. (2017).

151 *See* H.R. 1033, 108th Cong. (2003).

152 *See* S. 1301, 109th Cong. (2005); *see also* H.R. 211, 109th Cong. (2005); S. 2278, 108th Cong. (2004); H.R. 4247, 108th Cong. (2004).

153 For an excellent summary of most if not all the active proposals, see *O'Scannlain 2018 Testimony*, *supra* note 53, exhibits 20–23.

A. *The California Split*

The Hruska Commission initially concluded that the only logical way to split the Ninth Circuit was to divide the state of California itself, placing Northern California in one circuit and Southern California in another.[154] More recent commentators have agreed that dividing California between two new circuits is the only viable solution because of California's disproportionately large caseload relative to the other states in the circuit.[155] California presently accounts for just over 65 percent of the Ninth Circuit's caseload.[156] Without dividing California in half, the bulk of the Ninth Circuit's cases would thus remain in the new Ninth Circuit. In other words, any circuit-splitting plan that does not also split California would ensure that far more than 70 percent of the caseload in the new Ninth Circuit would come from one state (more than 80 percent without Arizona and Washington). That's not necessarily a problem—we see large imbalances in the Second (New York), Fifth (Texas), Seventh (Illinois), and Eleventh (Florida) Circuits—but it does mean we shouldn't reject the "California split" offhand.

Still, this "logical" idea is probably too clever by half, creating as many problems as it solves. While dividing California in half would more evenly spread the caseload, the new circuits would eventually diverge—even if only on the margins—on questions of federal and even state law within one state. Such a development would pose a significant problem for California litigators and lawmakers, because Northern California and Southern California federal circuit courts would employ different legal standards and tests—plus federal questions involving state-based initiatives could be tested in two circuits. A state law or practice could be legal in San Francisco but not Los Angeles! As it stands, the jurisdictional and jurisprudential headaches that would be created by dividing California has ensured that all the Ninth Circuit–split proposals pending in the House and Senate call for keeping California within one federal circuit.

B. *The California Circuit*

Also known as the "Horsecollar" proposal, the California-only split plan would place all states and territories except California in a new Twelfth Circuit. Such a proposal, the Ninth Circuit Court Modernization and Twelfth Circuit Court Creation Act of 2017, was recently introduced in the U.S. House of Representatives.[157] This is the only way to more-or-less evenly split the Ninth Circuit in terms of population, caseload, and judgeships without

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154 HRUSKA COMM'N REPORT, *supra* note 137, at 13.

155 *See, e.g.*, Eric J. Gribbin, Note, *California Split: A Plan to Divide the Ninth Circuit*, 47 DUKE L.J. 351, 354 (1997).

156 *Thomas Testimony*, *supra* note 123, at 66.

157 H.R. 1598, 115th Cong. (2017).

splitting California. The problem, however, is that circuits are meant to include more than one state—to get balanced perspectives and uniform application of federal law across states in a particular region. Still, there is precedent for a one-state circuit—and it involves California, from 1855 (a few years after statehood) until 1866 (when Nevada and Oregon were added to this Ninth Circuit).[158] And we have of course had the D.C. Circuit on its own since 1948—though most of its cases involve federal agencies rather than civil or criminal cases that happen to originate in the territory of the District of Columbia.

Moreover, any concern that a California Circuit would evolve a jurisprudence that's completely divorced from the rest of the country is overblown—at least in terms of ideological extremism—because, again, Republican and Democratic presidents alike would be appointing judges to this court. Of the sixteen Ninth Circuit judgeships based in California, eight are occupied by Democratic appointees and seven by Republican, with one vacancy. In short, a Ninth Circuit split that involves a California-only circuit would be much more practical than a split of California itself. The more significant problem would be an isolation of Hawaii and the Pacific territories from the state that's closest to them (geographically, demographically, and culturally).

C. *"String Bean" Proposals*

The so-called "string bean" bills essentially reconfigure the Ninth Circuit into two new collections of states: one relatively large circuit (in terms of land mass) and the other relatively small. For example, two recent bills that we've called the "island split" would place Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington in a new Twelfth Circuit, with California, Hawaii, Guam and the Northern Mariana Islands remaining in the Ninth Circuit.[159] As the proposal's nickname suggests, a "string bean" proposal would result in a disproportionate division of land mass, with only about 12 percent retained in the new Ninth, and the remaining 88 percent or so allocated to the Twelfth.[160] Caseload allocation would be disproportionate the other way, with only about a third of the cases transferred to the new Twelfth Circuit. Under either of the two proposed bills the new Ninth Circuit would still have the largest number of circuit judges in the nation.[161] Having more than the minimally required fifteen judges, the new Ninth Circuit could,

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158 Act of Mar. 2, 1855, 10 Stat. 631.

159 *See* H.R. 196, 115th Cong. (2017); S. 295, 115th Cong. (2017).

160 *Thomas Testimony, supra* note 123, at 69.

161 S. 295 would provide the new Ninth with twenty circuit judges, while H.R. 196 would provide twenty-five circuit judges. Both plans would impact caseloads. "S. 295 would overburden the 'new' Ninth with 377 cases per judgeship. H.R. 196 would significantly overburden the new Twelfth with 418 cases per judgeship." *Thomas Testimony, supra* note 123, at 68.

in theory, continue its practice of relying on its limited en banc procedure—although, like the other three circuits in that boat, it would be unlikely to do so. Still, this plan allows all states in the newly created circuits to remain contiguous and represents an improvement over the currently oversized, overworked Ninth Circuit.

D. *"Hopscotch" Proposals*

The term "hopscotch" describes proposals that would create new circuit boundaries that are not necessarily geographically contiguous—essentially allowing newly created circuits to "hopscotch" over bordering (or next-closest) states. A bill introduced in 2017, for example, would keep California, Hawaii, Oregon, Washington, Guam, and the Northern Mariana Islands in the Ninth Circuit and put Alaska, Arizona, Idaho, Montana, and Nevada into a new Twelfth Circuit.[162] The new Twelfth Circuit would thus "hopscotch" over Washington and Oregon. Although under this plan the new Ninth would retain almost 80 percent of the new caseload, the Twelfth would assume over 75 percent of the land mass.[163] This plan would also lack geographic coherence, because Alaska would be separate from its closest (and fellow Pacific) states. Additionally, some national parks and geographic landmarks would fall under multiple jurisdictions. For example, Lake Tahoe and the Rogue River-Siskiyou, Klamath, Wallowa-Whitman, and Colville National Forests would all fall under the jurisdiction of two circuits.[164]

Other "hopscotch" proposals have suggested that Nevada also remain in the Ninth Circuit. But that configuration would leave Arizona without a border with any other state in the circuit—a more drastic change than isolating Alaska, which, of course, has always been noncontiguous and isolated anyway.

E. *Flake Proposal*

In early 2017, Arizona Senator Jeff Flake proposed creating a new Twelfth Circuit comprising Alaska, Arizona, Idaho, Montana, Nevada, and Washington, and a new Ninth Circuit containing California, Hawaii, Oregon, and the Pacific island territories.[165] In other words, this would be the "island split" plus Oregon. Under this proposal, the two newly created circuits would have population distributions largely "in line with the average size of the smallest six circuits, and the new Ninth Circuit would be far closer to the

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162 H.R. 250, 115th Cong. (2017).

163 *Thomas Testimony*, *supra* note 123, at 70–71.

164 *Id.* at 71.

165 S. 276, 115th Cong. (2017).

sizes of the next-largest four circuits."[166] The new Ninth Circuit would have approximately 30 percent fewer appeals and population, as well as "a more manageable geographical area."[167] In terms of judges, the proposal would keep nineteen judgeships in the Ninth Circuit, in proportion with its caseload. The caseload of the new Twelfth Circuit would place it squarely within the normal operating range of the other existing circuits. While the new Ninth Circuit would continue to be the largest circuit in terms of judges, population, and case filings, it would be significantly closer to the normal distribution.

The main downside to this proposal is that it puts Washington and Oregon into different circuits. Still, that kind of split seems less jarring—culturally, politically, and geographically—than many of the allocations in the various "string bean" or "hopscotch" proposals.

F. *Summary*

While this Article does not endorse any particular circuit-splitting proposal, we do think that the nation's judicial system would greatly benefit from a fundamental restructuring of the Ninth Circuit. Any of the currently pending restructure bills offer necessary changes and improvements to the status quo. As to the specifics, we are content to leave it to the vagaries of the political process to settle on one of the proposed circuit-splitting plans, or to come up with an entirely new compromise. We welcome any legislation that creates logical groupings of states consistent with the rest of the nation's circuits, balances the workload of judges, prioritizes smaller decision-making units, and eliminates the need for a limited en banc process. Such changes would surely foster greater judicial efficiency, consistency, accountability, and collegiality. All the proposals described above effectuate these necessary changes and offer circuit reconfigurations that are far superior to the current structure.

CONCLUSION

The debate over whether to divide the Ninth Circuit has been ongoing for nearly three quarters of a century. During that time, the problems facing the nation's largest circuit court have been exhaustively detailed. Still, the Ninth Circuit's boundaries remain intact. Mounting concerns about the administration of justice in the West have once again propelled policymakers to put forward numerous proposals to finally split up the outsized circuit into smaller, more manageable jurisdictions. Unfortunately, these proposals face resistance from those who view any circuit-splitting plan as a political ploy designed to undermine the independence of the judiciary and dilute the

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166 *O'Scannlain 2017 Testimony*, *supra* note 49, at 25.

167 *Id.* at 26.

court's ideological salience. But proposals to split the Ninth Circuit cannot be so easily dismissed as mere partisan gamesmanship—and we must reiterate that none of the splits we've described or that have been proposed necessarily advantage any party or judicial methodology. Instead, they represent genuine attempts to return to a federal judiciary with regional circuits of reasonably comparable size, population, and caseload. While it would surely be mistaken to realign the circuits (or not realign them) because of particular judicial decisions or individual judges, it's only salutary to consider circuit-splitting proposals when the objective evidence weighs in favor of restructuring the circuits.

After years of study and commentary, it's clear the Ninth Circuit has simply become too large and cumbersome to effectively and efficiently administer justice. The circuit's unwieldy size, procedural inefficiencies, jurisprudential unpredictability, and unusual en banc process all contribute to the Ninth Circuit's unmanageable state. Notwithstanding the best efforts of its judges and administrative staff, the Ninth Circuit, as structured, does not and cannot function properly—and justice is suffering as a result. Indeed, if new boundaries were appropriately drawn, each of the states and territories served by the Ninth Circuit—and the administration of justice nationwide—would be better served.

This Article has sought to bring a greater focus to the policy concerns surrounding the Ninth Circuit as currently configured. Reasons for a split has been discussed in earnest for four decades, all while the circuit's problems have only grown worse. It's time that the oversized court be divided into more manageable and reasonably sized circuits that are consistent with the rest of the nation's judicial system.

The need to break up the Ninth Circuit is urgent—and it transcends politics.

QUESTIONS AND ANSWERS FOR THE RECORD

Questions for the Record
Rep. Henry C. "Hank" Johnson, Jr., Chairman
House Judiciary Committee
Subcommittee on the Courts, Intellectual Property, and the Internet "The Need for New Lower Court Judgeships, 30 Years in the Making"
February 24, 2021

The Honorable Kimberly J. Mueller, Chief Judge, U.S. District Court, Eastern District of California:

1. Are there additional details you would like to share regarding the impact of the judicial crisis on criminal defendants? If yes, please provide those details in your response.

Questions for the Record of Congressman Ted W. Lieu
House Judiciary Committee
Subcommittee on the Courts, Intellectual Property, and the Internet
"The Need for New Lower Court Judgeships, 30 Years in the Making"
February 24, 2021

Chief Judge Mueller: What do you think about current proposals to either split the Ninth Circuit Court of Appeals, or to take several states currently within the Ninth Circuit and shift them to the Tenth Circuit?

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Request to Correct Record
and
Responses to Questions for the Record

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

Hearing on
"The Need for New Lower Court Judgeships, 30 Years in the Making"
February 24, 2021

Provided by Chief U.S. District Judge Kimberly J. Mueller
Eastern District of California

Request to Correct the Record:

During my testimony, I communicated my assumption that the Circuit Courts of Appeals had submitted a number of requests for new appellate judgeships to the Judicial Council of the United States in the most recent biennial survey of judgeship needs. *See* Kimberly J. Mueller Test. at 1:34, U.S. House of Representatives Committee on the Judiciary and the Subcommittee on Courts, Intellectual Property and the Internet hearing, *The Need for New Lower Court Judgeships, 30 Years in the Making* (Feb. 24, 2021).[1] Since providing my testimony, I have learned that only the Ninth Circuit Court of Appeals submitted a new judgeship request, for two new appellate judgeships, in the most recent survey. *See* 2021 Judicial Conference Recommendations.[2]

I request that my testimony be corrected to reflect the accurate information now available on the current need for new appellate judgeships.

[1] https://www.youtube.com/embed/cwFJ5g5YidI?autoplay=1. This testimony appears in the written transcript of my hearing testimony at 10:242-44.
[2] https://www.uscourts.gov/sites/default/files/2021_judicial_conference_recommendations_0.pdf

Question from Rep. Henry C. "Hank" Johnson, Jr., Chairman:

Are there additional details you would like to share regarding the impact of the judicial crisis on criminal defendants? If yes, please provide those details in your response.

Response:

The Eastern District of California has ranked at or near the bottom of the 94 federal district courts, in terms of time to disposition of criminal cases, for many years.[3] The following chart graphically demonstrates what this ranking means for defendants in our district contrasted to defendants facing federal charges in neighboring districts:

Judicial Caseload Profiles – Selected Statistics						
	E.D. Cal.	**N.D. Cal.**	**D. Nev.**	**D. Or.**	**C.D. Cal.**	**S.D. Cal.**
Population[4]	**8,175,310**	8,376,322	3,080,156	4,217,737	19,441,046	3,519,545
Authorized District Judgeships[5]	**6**	14	7	6	28	13
Ratio:Population/Authorized District Judgeships	**1:1,362,552**	1:598,309	1:440,022	1:702,956	1:694,323	1:270,734
12-Month Period Ending June 30, 2020						
Median Time From Filing to Disposition - Criminal Felony Cases; Rank Nationwide[6]	**20.3 months 94/94**	11.2 months 59/94	16.1 months 89/94	12.8 months 75/94	14.7 months 83/94	4.6 months 6/94
Median Time to Dismissal for Criminal cases[7]	**38.6 months**	20.2 months	20.7 months	8.7 months	6.9 months	2.1 months

While awaiting disposition, custodial pretrial detainees, presumed innocent, languish in contracted space in local jails throughout the Central Valley.

[3] Time to disposition in criminal cases is recorded quarterly, in December, September, June and March of each year. Since at least June 2013, the Eastern District of California has ranked among the worst ten districts in the nation, and typically is one of the five worst. (June 2020 – 94; June 2019 – 90; June 2018 – 92; June 2017 – 94; June 2016 – 93; June 2015 – 92; June 2014 – 90; June 2013 – 85).

[4] 2019 Census, https://www.census.gov/programs-surveys/acs/news/updates/2019.html (accessed April 15, 2021).

[5] Federal Judicial Center U.S. District Court Legislative History, https://www.fjc.gov/history/courts/u.s.-district-courts-districts-california (accessed April 15, 2021).

[6] These data include defendants in all cases filed as felonies or Class A misdemeanors and include only those defendants in cases filed as petty offenses that were assigned to district judges rather than magistrate judges. The median is computed only for 10 or more defendants. Beginning in March 2012, the median time interval has been computed from the initial charging date for a defendant (e.g., the date an indictment or information was filed) to the date on which the defendant was found not guilty or was sentenced.

[7] U.S. Courts Caseload Statistics Data Tables, https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?m%5Bvalue%5D=&page=65&pn=All&t=All&tn=All&y%5Bvalue%5D=&order=name&sort=asc (accessed April 15, 2021).

Pretrial Detainees Languish In Local Jails

The Eastern District of California's pretrial detention rate is 56.7 percent, higher than the national average of 51.8 percent. While each person charged receives an individualized detention hearing, this higher rate overall is tied to the nature of the cases prosecutors bring in our district, with many firearms and drug cases, which can invoke mandatory minimum sentencing exposure and charge crimes of violence.

To fulfill its obligation of housing our pretrial detainees, with no federal correctional center in the Eastern District, the U.S. Marshals Service contracts with local jails throughout the Central Valley, in Fresno County, Bakersfield, Sacramento, Nevada County and Colusa County. Defense counsel regularly remind judges at criminal calendars of the undesirable conditions in local jails. If their clients are going to be convicted they hope for earlier resolution and transfer to the federal Bureau of Prisons where, they believe, conditions are overall better and substance abuse and vocational programming is available. One of the jails in which federal pretrial detainees are held, in Sacramento, is currently the subject of a consent decree ordered by one of our judges to settle claims for injunctive relief in a class action lawsuit concerning conditions of confinement. *See Mays v. Cty. of Sacramento*, No. 2:18-cv-02081, 2018 WL 11295523 (E.D. Cal. Dec. 28, 2018).

The Eastern District also currently has no federal Residential Reentry Center (RRC), or halfway house, anywhere in our 34 counties. We have not had an RRC in the Sacramento area since April 2001. The RRC in Fresno closed in March 2018, and the RRC in Bakersfield closed in October 2018. We understand a new RRC will open in Fresno in May 2021, subject to passing final inspections. RRCs can relieve some of the need to house pretrial detainees in local jails, given that they may provide sufficient structure and an acceptable residential location to allow release of certain defendants who cannot otherwise provide a sound release plan due to personal and family circumstances. The absence of RRCs in the Eastern District of California also means that after having spent longer periods in local jails at the front end of their cases, defendants leaving the Bureau of Prisons upon completion of their sentences either are released to RRCs outside our district or see their time in an RRC reduced, minimizing the availability to them of reentry services, notwithstanding the First Step Act's requirement that eligible inmates be considered for RRC placement or home confinement and that opportunities for inmate placement into RRCs be expanded. *See* 18 U.S.C. § 3624 (amended 2018).

Defendants Not Held Accountable for Serious Crimes

Innumerable persons are not held accountable for serious federal crimes that go unprosecuted; these persons face only state court prosecutions or none at all. Even though the number of prosecutors in the Eastern District of California has increased approximately five-fold since 1984, during the same time the number of authorized district judgeships has decreased by one. Without a sufficient number of district judges, prosecutors in the U.S. Attorney's Office are not able to take on new cases as would be

warranted, while aging cases are pending. During the delays, Assistant U.S. Attorneys still need to work their existing cases and simply do not have the capacity for more. They regularly receive requests from federal agents and joint federal-state law enforcement task forces to take on new serious cases, including fentanyl, firearms trafficking and human trafficking cases, for example, but must decline them. Local district attorneys may charge some in state court, but a significant number of big drug and human trafficking cases are too challenging and complex for state prosecutors to work up.

The Eastern District of California's high rate of violent crime, compared to other federal court districts in California, underscores the cost of an insufficient number of district judgeships, which limits the capacity for robust law enforcement.[8] Some studies have confirmed that increased capacity in a legal system correlates with greater ability to hold persons who commit crimes accountable, leading to a reduction in crime rates. *See* Laura Schiavon, *The Impact of judicial performance on violent crimes* (Jan. 2016) (La Plata National University), at 3 (study of homicides in Brazil, reporting "[o]ur results indicate that an increase in legal capacity significantly reduces homicides.").[9]

Victims Wait for Justice

As criminal cases languish, so too do victims' hopes for the resolution a court judgment can provide, with any order of restitution due. The Eastern District of California's U.S. Attorney's Office reports that 510 charged felony cases currently are pending before the court involving one or more victims who have opted to receive case updates through the victim notification system (VNS). In those cases, a total of 20,194 victims are receiving general notifications. In reviewing victim case opening statistics, the most prevalent case types that involve victims include fraud (various types including individual, private institutional, and public institutional victims), child exploitation, identity theft, drug trafficking (likely family members of those suffering fentanyl and other opioid overdose deaths), human trafficking/civil rights offenses/hate crimes, other violent crimes and postal offenses. To the extent restorative justice initiatives are a worthwhile component of systems designed to deliver justice in full, they too are frustrated by delays in resolving cases.[10]

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[8] Public Policy Institute of California, *Just the Facts: Crime Trends in California* (Feb. 2021) (reviewing preliminary 2020 trends while focusing on pre-pandemic 2019 data; noting "The State's highest rate of violent crime was in the San Joaquin Valley, which had 556 violent incidents per 100,000 residents. . ."). *See* https://www.ppic.org/publication/crime-trends-in-california/.

[9] https://www.cedlas.econo.unlp.edu.ar/wp/wp-content/uploads/Schiavon.pdf (accessed April 14, 2021).

[10] U.S. Sentencing Commission, *Federal Alternative-to-Incarceration Programs* (Sept. 2017) at 22, 26 (noting restorative justice options available once a defendant enters a guilty plea or is on supervised release following service of sentence). *See* https://www.ussc.gov/research/research-reports/federal-alternative-incarceration-court-programs.

Question from Congressman Ted W. Lieu:

What do you think about current proposals to either split the Ninth Circuit Court of Appeals, or to take several states currently within the Ninth Circuit and shift them to the Tenth Circuit?

Response:

In August 2017, as a U.S. District Judge, I joined Ninth Circuit Chief Judge Sidney R. Thomas, then-Eastern District of California Chief Judge Lawrence J. O'Neill, and many other district, bankruptcy, and magistrate judges throughout the area served by the Ninth Circuit Court of Appeals in expressing opposition to the then-pending legislative proposals dividing the Ninth Circuit, including S. 276, S. 295, H.R. 196, H.R. 250 and H.R. 1598. At that time I agreed that division of the Ninth Circuit would be costly, inefficient, and would harm the administration of justice in the West. I continue to believe the same generally today, although I have not had the time to study current proposals in depth. The reasons for my views, broadly speaking, are summarized below.

The Ninth Circuit is the only Circuit to profile and inventory each case before it once that case is briefed. Cases involving similar questions are grouped together for oral argument to promote consistent treatment and uniformity in Ninth Circuit case law. Any proposal to divide California into more than one federal appellate district would undermine the uniformity of federal appellate law in the state without solving any perceived structural problem that might be associated with the Ninth Circuit's size. The Ninth Circuit's size, rather, has allowed it to achieve economies of scale in a number of noteworthy ways.

No other Circuit comes anywhere near the Ninth Circuit in terms of productivity achieved through a robust, professional, court-based mediation program. Over the last six years, the Circuit's Mediation Office has resolved an average of more than 1,000 appellate matters each year, approximating the total overall case resolution of some smaller circuits, such as the D.C. and First Circuits. The Mediation Office's size allows strategic support of appellate oral argument panels handling large numbers of cases raising the same issues; it also allows mediations in support of the district courts to occur across the Circuit, with bundling of related cases across districts where appropriate. A mediator's office needs the kind of critical mass the Ninth Circuit has to routinely achieve this kind of success.

Furthermore, the size of the Ninth Circuit enables it to provide the space, information technology, and administrative services to support the Ninth Circuit Bankruptcy Appellate Panel, or BAP. In fiscal year 2020, the BAP handled 47 percent of the appeals from bankruptcy courts and resolved 362 appeals, producing decisions that contributed significantly to the development of uniform bankruptcy law within the Circuit. As a District Judge who on occasion hears bankruptcy appeals, which can be very challenging for a generalist judge with no prior bankruptcy experience, I am grateful for the Ninth Circuit BAP's existence and its availability to those many parties who chose to file their appeals there.

In sum, the Ninth Circuit has developed an efficient system of judicial administration that aggregates resources, using economies of scale effectively, while developing critical masses of

talented professionals. Dividing or splitting off a portion of the Circuit would result in a dilution of resources, fewer staff resources available to assist with handling of cases and in particular, as I understand it, the non-oral argument calendar appeals, which account for at least 75 percent of the Circuit's work.

With respect to the possibility of shifting several states currently within the Ninth Circuit to the Tenth Circuit, to the extent proponents of such a shift assume it would improve case processing time, the data do not appear this conclusion. Rather, it appears such a shift would make no improvement in processing time, if not increase delays. Figures from the Administrative Office of the U.S. Courts for FY 2020 show a median appellate case processing time in the Ninth Circuit of 9.1 months from the filing of Notice of Appeal to decision. The Tenth Circuit had a longer median processing time of 10.1 months.[11] The statistics are noteworthy because they demonstrate that processing time is not related to circuit size, given that the Tenth Circuit has a smaller aggregate caseload.[12] Rather, it appears the efficiencies the Ninth Circuit has been able to achieve, through its use of economies of scale as reviewed above, make a meaningful difference for processing times in our Circuit.

[11] U.S. Courts of Appeals—Median Time Intervals in Months for Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2020, Table B-4, https://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2020.pdf.

[12] U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 2020, Table B-1, https://www.uscourts.gov/sites/default/files/data_tables/jb_b1_0930.2020.pdf.
United States Courts Caseload Statistics Data Tables, https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=&pn=All&t=37&m%5Bvalue%5D%5Bmonth%5D=9&y%5Bvalue%5D%5Byear%5D=2020, (search Table B-4 / Topic: U.S. Courts of Appeals).

Questions for the Record
Rep. Henry C. "Hank" Johnson, Jr., Chairman
House Judiciary Committee
Subcommittee on the Courts, Intellectual Property, and the Internet "The Need for New Lower Court Judgeships, 30 Years in the Making"
February 24, 2021

Marin K. Levy, Professor of Law, Duke University School of Law:

1. In your opinion, what should the subcommittee consider as it looks at the question of whether the Ninth Circuit should be split?

Question for the Record
Rep. Henry C. "Hank" Johnson, Jr., Chairman
House Judiciary Committee
Subcommittee on the Courts, Intellectual Property, and the Internet
"The Need for New Lower Court Judgeships, 30 Years in the Making"
February 24, 2021

Response by Professor Marin K. Levy, Professor of Law,
Duke University School of Law
April 16, 2021

Chairman Johnson, Ranking Member Issa, and distinguished members of the Subcommittee:

Thank you for your question, regarding the factors to consider in assessing whether the U.S. Court of Appeals for the Ninth Circuit should be split.

I will say at the outset—I do not think there is an obvious right or wrong answer to the larger question of whether the Ninth Circuit should be divided into two circuits. In my view, there are two reasons why this question has been raised repeatedly for nearly fifty years. First, there are compelling points on both sides. Second, when it comes to how one might actually split the Circuit, there are no perfect solutions. What follows, then, is a discussion of what factors I think are (and are not) relevant in the decision to split the Circuit, and the difficulties inherent in any proposal to effectuate a split.

The most natural place to begin, I think, when considering whether the Ninth Circuit should be split is the Circuit's size. And by "size," here, I mean the number of judges on the court. Quite plainly, the Ninth Circuit is the largest circuit out of all of the regional courts of appeals as measured by the number of authorized judgeships—and by a large margin. This is plain from reviewing 28 U.S.C. Section 44:

CIRCUITS	NUMBER OF JUDGES
District of Columbia	11
First	6
Second	13
Third	14
Fourth	15
Fifth	17

Sixth	16
Seventh	11
Eighth	11
Ninth	29
Tenth	12
Eleventh	12

As you can see, the Ninth Circuit has 12 more authorized judgeships than the next largest circuit, the Fifth. And particularly if the Ninth Circuit were to receive additional judgeships, as the U.S. Judicial Conference has requested,[1] it would be more than twice the size of nearly all of the courts of appeals. Accordingly, I think there is a natural inclination to view the Circuit as a prime candidate for splitting just by virtue of the fact that it is considerably larger than the others.

But, of course, the relevant question for those in judicial administration is—so what? One court has to be the largest, just as one court has to be the smallest. The fact that a court enjoys such a status should not be reason alone for Congress to intervene. (And as a side note, from this same perspective, one could focus on the First Circuit and the fact that it is just about half the size of the next biggest court and wonder if it should be combined with another, etc.) And so the question then becomes, what are the relevant consequences of the Ninth Circuit's size?

To my mind, the most understandable concern with a large court is that at some point, it might no longer feel like a cohesive body—or, to rely on the words of the first report from the Hruska Commission, there might be difficulty in "maintaining institutional unity."[2] But here, too, it is worth pressing on the concern to see what underlies it (and whether it ultimately holds up).

One concern under the heading of "institutional unity" might sound in collegiality. With 29 active judges (and 50 senior judges), the members of the court might not all be able to engage with each other on a regular basis. (And on this point, one former Chief Judge of the Ninth Circuit mentioned that some time ago, when the court was smaller, the judges used to regularly meet for lunch. That practice became difficult to maintain as the court grew.) And while I think there is something attractive about the idea that the judges on the courts all know each other well, I'm not sure that this translates into something that is so crucial that a circuit should be split in order to create the conditions for it. I am also quite mindful of a comment by a former Chief Judge of one of the smallest circuits, who noted that maintaining collegiality in those settings can be difficult if there is tension on the court. By contrast, this Judge thought that the bigger courts might have an advantage in this respect, as the judges do not have to see each other every day.

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[1] *See* "Additional Judgeships or Conversion of Existing Judgeships Recommended by the Judicial Conference 2021," https://www.uscourts.gov/sites/default/files/2021_judicial_conference_recommendations_0.pdf

[2] *See* ROMAN L. HRUSKA ET AL., COMM'N ON REVISION OF THE FED. CT. APP. SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE 13 (1973).

A more pressing concern under the heading of "institutional unity" might have to do more with ensuring that circuit law is consistent—that the court is acting as one, larger decision-making body. Part of how this may be achieved is by the circulation of opinions to the other members of the court before they are filed. And indeed, some circuits have provisions for circulating proposed opinions to at least all active judges on the court before filing, including the Third, Fourth, Sixth, District of Columbia, and Federal Circuits.[3] Such a practice enables the judges to keep abreast of other panel decisions (and comment upon them), which would seem helpful in maintaining intra-circuit uniformity of law. Now one response to this point is that clearly not every circuit has such a practice in place, and so the Ninth Circuit is not an outlier in this respect. But the more salient point is that the larger a circuit becomes, it stands to reason that the more challenging it is to review all of the opinions being published by one's colleagues.

A separate concern under the heading of "institutional unity" that relates to the consistency of circuit law touches on the subject of rehearing matters en banc. As you will know, by statute, an en banc court consists of all active judges of a court and any senior judge who was a member of the panel whose decision is being reheard,[4] except that a court with more than 15 active judges may determine by local rule the number of judges that serve on an en banc court.[5] Only the Ninth Circuit has implemented this exception; an en banc court in that Circuit consists of the Chief Judge and 10 other active judges selected at random.[6] One concern that has been raised about this arrangement is that it is possible that a majority of the limited en banc court would reach a decision that is at odds with what the majority of the court as a whole believes to be the correct result.[7] Now the Ninth Circuit itself has studied this concern, and concluded, based on the research of different scholars, that such a possibility would arise in only a tiny fraction of cases.[8] I myself think it would be valuable to have scholars re-run this type of modeling, particularly to take into account how the degree of "representativeness" of the court as a whole changes if the number of authorized judgeships increases. This is all to say that the concern over the limited en banc may not be as well-placed as it might seem initially, though I think it is also fair to say that a limited en banc is not ideal and, absent other considerations, a full court en banc would be far preferable.

The final factor that I think is worth considering—apart from the Circuit's size and, under that heading, concerns about institutional unity—is the views of the judges themselves. This factor will, of course, point in different directions, as some Ninth Circuit judges has been outspoken in favor of splitting the Court, and others have been outspoken in favor of keeping it intact. For my own part, I put the most weight on the views of current and past Chief Judges, as they are most familiar with the Court's administration. And so I will note here that Chief Judge Sidney Thomas—who is very well-respected as a Chief—has provided Congress with reasons against splitting the Circuit on a few different occasions. I would put a great deal of stock into his analysis.

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[3] 3D CIR. IOP 5.5.4; 4TH CIR. IOP 36.2; 6TH CIR. IOP 32.1(A)(3); D.C. CIR. HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES, XII.C.; FED. CIR. IOP 10(5).

[4] 28 U.S.C. § 46(c).

[5] Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633.

[6] 9TH CIR. R. 35-3.

[7] *See* Pamela Ann Rymer, *The "Limited" En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317, 321–23 (2006).

[8] *See* 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).

Having noted some factors that I think are worth considering, here are a few that I think should not come into play.

First, other considerations of "size"—such as the geographic size of the Circuit or the size of the Court as measured by input of filings / output of decisions. I certainly appreciate the rhetorical value of these factors—that it might seem meaningful for someone to say that the Ninth Circuit encompasses the largest number of states (across several times zones) or produces the largest number of opinions each year. But again, without more, it is not clear why size itself—as measured in these respects—is a consideration that should be relevant to the question of whether to split the Circuit. And again, one circuit has to be the largest—and there's certainly no suggestion that Congress should continually be in the business of splitting "the largest."

Second, it has been suggested by some that the Ninth Circuit is the "slowest" of the circuits, and that this should push Congress to consider splitting it. As a factual matter, this claim is not true—at least, not according to the most recent statistics provided by the Administrative Office of the U.S. Courts. Now there are different ways to measure aggregate speed, to be sure, but if we look to two that seem the most reasonable—the median time interval from filing of notice of appeal or docket date to the last opinion or final order, and the median time interval from filing in lower court to the last opinion or final order in the appeals court, we can see that the Ninth Circuit is not the slowest. Focusing on the first metric—again, the median time interval from filing of notice of appeal or docket date to the last opinion or final order—the Ninth Circuit at 12.5 months is faster than two other circuits (the First (12.6 months) and the Second (12.8 months), which are, of course, considerably smaller).[9] Focusing on the second metric—again, the median time interval from filing in lower court to the last opinion or final order in the appeals court—the Ninth Circuit at 32 months is ahead of the First (37.2 months), Second (35.9) months, and Third (36.7 months) Circuits.[10]

Moreover, even if the Ninth Circuit were the slowest in processing cases, it is not clear why that would be relevant here. Indeed, when I hear that a circuit is slow, I wonder if perhaps more judges are needed; I do not immediately think that the circuit should be split. There needs to be more to make that claim. For example, perhaps there is an argument to be made that it is easier for Chief Judges to monitor the prompt filing of opinions with a smaller set of judges. It is possible this is so, but someone would need to make that case—and then also explain why a slower circuit is the First, which is the smallest. In short, it is not clear why a lack of celerity in filing dispositions should require the splitting of a circuit (and again, as noted above, this point seems academic at the moment as the Ninth Circuit does not appear to be the slowest).

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[9] *U.S. Courts of Appeals—Median Time Intervals in Months for Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2020*, ADMIN. OFF. OF THE U.S. CTS., tbl.B-4 (2020), https://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2020.pdf

[10] *Id.*

Third, some have suggested that the Ninth Circuit is the most reversed of the circuits by the Supreme Court—and that this should be grounds for splitting the Circuit. From what I can tell, like the claim regarding the Circuit's speed, this claim is not accurate—or at best is selectively accurate. If one focuses on how often the Circuit is reversed of the cases in which the Supreme Court has granted cert, the Ninth does not have the highest percentage of reversals in recent years.[11]

Furthermore, as with the claim about speed, it is not clear how much stock one should put into such a claim even if it were true. Again, one circuit will always be "the most reversed." And it is not pellucidly clear why having the highest reversal rate would then lead to a need to split that circuit. The arguments could be there but they are not obvious.

The final factor I will touch on here briefly is one concerning, for lack of a better way to put it, representativeness of the interests of the states within the circuit. One argument in favor of splitting the Ninth, advanced by those in smaller, more conservative states, is that they would like to be "out from underneath" the sway of the California judges. Here I will just say that it is true that we have federal courts and not national courts; regionalism and attentiveness to state interests is not irrelevant here. But it is also true that circuit courts are not meant to be state courts—the interests of the states are pooled. I do not suspect that Congress would look kindly upon Vermont saying that those urban New York judges have an outsized voice in the interpretation of federal law that affects their largely rural state, for example. The system would simply look quite different if these concerns carried the day (and, indeed, we would end up with many more circuits).

So in short, I appreciate the impulse behind wanting to split the Ninth Circuit, but I think that many of the arguments in favor of splitting seem less favorable upon closer examination. I am left thinking that it is certainly true that circuits can become too large to function well, as a single body, but I am unsure where that threshold lies. And at this point what enters into the calculation is that when it comes to actually splitting the Ninth Circuit, there are no easy options.

I will not dwell long on the past proposals. Briefly, I put them into two camps: those that would split the state of California and those that would leave California intact. Regarding the first type of proposal, the Hruska Commission itself first famously proposed to split the Ninth Circuit by dividing California into two different federal courts of appeals.[12] I will not rehash the arguments that many others have made about this proposal. I will simply say that I think it would be quite problematic to have, in effect, two different federal legal regimes operating in one state.

Regarding the second type of proposal, I view the most promising as one that would place California along with Hawaii, Guam, and the Northern Mariana Islands into one circuit,

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[11] Here, one can refer to the "Circuit Scorecard" provided in the Supreme Court Statistics Pack by SCOTUSblog. For statistics related to October 2019 Term, see https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf. For statistics related to October 2018 Term, see https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19.pdf.

[12] *See* HRUSKA ET AL., *supra* note 2.

and put Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington into another. While such a proposal would avoid the main difficulties associated with the alternative described above, the circuit that "kept" California would still be quite large. By my count, there are currently 16 "California seats" on the Ninth Circuit. And I would expect that, again, per the requests of the Judicial Conference,[13] more could soon be added. This would create, when combined with Hawaii's seat, a court of say, at least twenty judges—which would make it the largest in the country and would almost certainly mean it would need to rely upon the limited en banc provision provided by Congress.[14] Now this limited en banc would at least be composed of a majority of the judges on the circuit—and this would allay at least some of the concerns about institutional unity. But to be clear, it would not solve the problem that some have articulated about the current Ninth Circuit, but only, at best, improve matters along a spectrum. And, of course, what would be left would be essentially the "California Circuit," which raises concerns of its own.

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So this is all to say that I think one proposal to split the Ninth Circuit is akin to a cure that is worse than the disease, at least at this point. The second proposal is less problematic from a logistical standpoint but ultimately does not completely move the needle along some of the lines that would matter (and could arguably generate its own concerns).

Given the complexity and difficulty of the larger question, I certainly would not move forward with a proposal to split the Circuit without a hearing on the subject. I appreciate that Congress has held several in the past, but I would want one with the most current data and I would want to know how the witnesses' views of the subject might shift if there was the possibility of adding seats to the Ninth Circuit.

Additionally, to those who say that they do not believe the Circuit should be split, I would ask: Do you think that there is an upper bound to the size of a circuit? And if so, how do you know when you have reached or exceeded it?

And to those who say the Ninth Circuit should be split, I would ask: What are the specific factors that are guiding your decision and why are those the relevant ones? For example, let's assume, *arguendo*, that the Ninth Circuit is the slowest—of what import is that in making this decision? Furthermore, how exactly would you go about dividing the Circuit and what problems do you think would arise from implementing your proposal?

Many thanks for your consideration,

Marin K. Levy

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[13] *See supra* note 1.
[14] *See supra* note 5.

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