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

Hearing Titled:
"Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit"

Thursday, March 16, 2017
10:30 a.m. 2141 Rayburn House Office Building

Statement for the Record
Submitted by Rep. Andy Biggs (AZ-05)

Chairman Issa and Ranking Member Nadler:

Thank you for holding a hearing before the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet to examine the current structure of the U.S. Ninth Circuit Court of Appeals. This has been a long running debate spanning several decades, but one I believe is imperative in our responsibility to provide access to justice.

Currently, the Ninth Circuit is the largest Circuit Court of Appeals in the nation. It contains nine western states in addition to Guam and the Northern Mariana Islands, totaling over 60 million people. For comparison, this number is double the population of the next largest circuit court, and is four times the size of the First and Tenth Circuits. It accounts for more than one-third of all pending appeals in the United States, and takes an average of 15 months to resolve a case – more than twice as long as the average circuit. Such conditions inherently require a large number of judges. Today, the Ninth Circuit has 29 active judges and 19 senior judges – also the highest in the country; and the U.S. Judicial Conference recently recommended that Congress authorize an additional five. Simply put, this court is too large.

Despite these facts and the obvious need for dividing this circuit, there remains a great deal of opposition, including from three of this hearing's witnesses who currently sit on the Ninth Circuit. In their testimony, they argue in favor of judicial cohesion, increased access to justice through technological advances, and overall administrative efficiency. These judges do not realize that the sheer size of the Circuit prevents any one of these things from happening well.

With 48 judges currently serving on the court, anything beyond a cursory level of cohesion is logistically impossible. Judge Andrew Kleinfeld, one of the few Ninth Circuit Judges who supports a circuit division, points out in a statement submitted to the committee, "[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." Beyond that, Judge Kleinfeld goes on to explain that "[e]ven if the decisions could be read, there are over 3,000 combinations of judges who may wind up on panels, so the exercise would not be worth the time. At best, the bar can predict that we will restate our clear holdings as controlling law, though different panels may apply the same holdings to similar facts in different ways."

Unfortunately, this dilemma is only likely to get worse. As the population and case load in the circuit continues to increase, a greater number of judges will be necessary to keep pace, which will further decrease any judicial cohesion and collegiality that may exist today.

In his testimony, Judge Alex Kozinski argues that a greater geographic scope has actually allowed the court to increase access to the federal courts, namely through technological advances. This is a gratuitous argument that truly should not even be a factor in our decision. I am supportive of such advances and recognize the benefits services like video conferencing can provide, but it is fallacious to argue that such advances could not and would not be carried over and be beneficial to a new Twelfth Circuit. Moreover, even if these advances have assisted the circuit with their caseload, the Ninth Circuit maintains the longest average time for resolving a case, truly delaying justice for those trapped in its boundaries.

Those in opposition to a split of the circuit also argue that maintaining one circuit would prevent unnecessary administrative duplication of core services and use taxpayer funds in a more responsible fashion. I do not agree that this is reason to oppose, and I am not alone in that opinion. Judge Kleinfeld argues in his statement, "[p]eople sometimes talk of the expense of the judiciary as salaries, buildings, air fares, and so forth. Those are a tiny fraction of the expenses occasioned by cases in courts. The expense of counsel to litigate, and the expense of uncertainty and time for the parties engaged in litigation, is far greater than the out of pocket expense of the court system to the taxpayers. There is no expense caused by the law that can be so great as the expense of not being able to know what the law is without having to litigate."

Finally, as we in Congress continue to debate this matter, I believe it is important to point out that the opinions of judges in the Ninth Circuit should have little influence in our decision. Current U.S. Supreme Court Justice Anthony Kennedy, who previously sat on the Ninth Circuit, agrees. In a statement before the House Appropriations Subcommittee on Financial Services and General Government in 2007, he stated, "I do not think it's appropriate for the judges of the Ninth Circuit to lobby terribly hard against it, which they are."

It is imperative for us to realize that there is both historical precedent for dividing circuits that have gotten too large, as Congress did in 1980 with the First and Eleventh Circuits, and constitutional authority for us to make this decision. The American people elected each one of us, not the judges of the Ninth Circuit, to look out for their interests and protect the rights granted to them under the United States Constitution. In my view, creating a new Twelfth Circuit Court of Appeals is a necessary action in our responsibility to provide full and equal access to justice. To accomplish this, I introduced the *Judicial Administration and Improvement Act*, H.R. 250. Under my bill, Alaska, Arizona, Idaho, Montana, and Nevada would be removed from the Ninth Circuit and into the jurisdiction of the Twelfth. I look forward to continuing this discussion and to passing H.R.250.