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

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

Thursday, March 16, 2017, 10:00 A.M.
Rayburn House Office Building Room 2141
Washington, D.C.

Written Testimony of:

Brian T. Fitzpatrick
Professor of Law
Vanderbilt Law School
Nashville, TN

Mr. Chairman and Members of the Committee: it is an honor to appear before you today. My name is Brian Fitzpatrick and I am a Professor of Law at Vanderbilt Law School in Nashville, TN. Before I became a professor, I worked on Capitol Hill for Senator John Cornyn of Texas.

Although I live in Tennessee now, I have personal experience with the subject of today's hearing: the United States Court of Appeals for the Ninth Circuit. After law school, I served as a law clerk on the Ninth Circuit for Judge Diarmuid O'Scannlain, where I saw the Circuit operate first hand. After my clerkship with Judge O'Scannlain, I served as a law clerk on the United States Supreme Court for Justice Antonin Scalia, where I helped the Court examine petitions to review decisions of the Ninth Circuit. 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 the Ninth Circuit.

I also have experience with the Ninth Circuit as an academic. I am a scholar of the federal judiciary, and, for many years now, I have tracked the Ninth Circuit's reversal rate in the United States Supreme Court. As I will explain, my research shows that the Ninth Circuit has been the most reversed Court of Appeals in the country for the last 20 years. As I will further explain, I do not believe this is an accident: I think it may have been caused, at least in part, by the Circuit's large size.

For these reasons, it is my view that Congress would be well within its rights to restructure the Ninth Circuit into smaller pieces. I understand that whether to do so has been wrapped up in partisan politics here. But my views today are not based on partisan politics. They are based on something even less popular: math. As I show, mathematical theory suggests that smaller courts are better than larger courts at issuing mainstream decisions.

In my view, 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 we cannot let the perfect become the enemy of the good. In my view, pretty much any split is better than the status quo, but, if I had to choose, I would favor splits that create 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.

I should add, of course, that I speak only for myself and not for Vanderbilt Law School or Vanderbilt University. I should further add

that, although I think Congress would be well within its rights to restructure the Ninth Circuit, I also think that reasonable people can come to different views on this question. I have the greatest respect for the other witnesses at this hearing. Nonetheless, I think Congress has more than enough reason to act, and to act now.

Indeed, what to do with the Ninth Circuit is not exactly a new question. As the Committee is well aware, you have been talking about restructuring it for over 40 years now, ever since the Hruska Commission of 1973.[1] You have been talking about it for good reason. By any measure, the Circuit continues to be by far the largest in the United States. The Committee is well aware of this and I will not restate the statistics here.[2] 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[4] 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.[5]

Now, in fairness, on this last point, no one has ever measured whether the Ninth Circuit issues more inconsistent opinions than other Circuits do. We also cannot know for certain whether the Circuit's size is the cause of either the slow pace or the inconsistent decisionmaking. But it certainly stands to reason that it might be: bigger courts churn out more law, and it is harder and more time consuming for each judge to

---

[1] *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).

[2] Instead, I commend to you the excellent analysis of my former boss, Judge O'Scannlain. *See, e.g.,* Diarmuid F. O'Scannlain, *Ten Reasons Why the Ninth Circuit Should be Split*, 6 Engage 58 (2005).

[3] *See, e.g., id*. at 60-61; Hruska Comm'n, *supra*, at 234-35.

[4] *See* U.S. Courts of Appeals—Federal Court Management Statistics–Summary—During the 12-Month Period Ending September 30, 2016, *available at* http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2016/09/30-2 (showing a backlog in the Ninth Circuit of over 13,000 appeals—more than twice any other Circuit—and a median time from notice of appeal to disposition 30% longer than any other Circuit).

[5] *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.")

find it all, review it all, and reconcile it all. In my view, these are reasons enough to consider restructuring.

But I think the case for restructuring is much stronger than even that. There is good evidence that the Ninth Circuit has more trouble following the precedents of the U.S. Supreme Court than other Circuits do, and there is reason to believe—indeed, there is more than reason, there is math—that the Circuit's size may be one of the causes of it.

First, the evidence. For many years, with the great help of the Vanderbilt law library and many research assistants, I have kept track of how often the U.S. Supreme Court reverses the Ninth Circuit compared to its sister Circuits. I became interested in this subject when I was a law clerk on the U.S. Supreme Court. My impression was that a majority of the Court thought the Ninth Circuit was a bit out of control. This is probably why many Justices have gone on record in support of restructuring the Ninth—Justices as diverse as Stevens, O'Connor, Kennedy, and Scalia.[6] For this reason, I began to collect numbers on the reversal rates in the various Circuits. The numbers did not look good for the Ninth Circuit back then, and they still don't look good today: for the last twenty years, the Ninth Circuit has been the most reversed Circuit in America—and it isn't even close. (Note: I have not kept track of the two non-numbered Circuits—the Federal Circuit and the D.C. Circuit—because they have special dockets.)

I should note that, when I say "reversal rate," I do not mean the Ninth Circuit's win-loss record in the Supreme Court. Sometimes you hear that record invoked when people complain about the Ninth Circuit, but it is not very probative of Circuit performance. The Supreme Court usually takes cases because it thinks something is wrong; it reverses the Courts of Appeals most of the time; it is largely happenstance when a Circuit is affirmed. It is more probative to focus on the number of times a Circuit is reversed, but even that metric is incomplete because some Circuits decide more cases than others, and we would expect bigger Circuits like the Ninth to be reversed more often than smaller Circuits, everything else being equal. For these reasons, the right metric, in my view, is reversal rate: how often is a Circuit reversed as a percentage of the total appeals it decides.

---

[6] *See* Comm'n on Structural Alternatives for the Fed. Courts of Appeals , Final Report 38 & n.90 (1998) ("[T]he Justices expressed concern about the ability of judges on the Ninth Circuit . . . to keep abreast of the court's jurisprudence and about the risk of intracircuit conflicts . . . .").

As I said, for the last 20 years, the numbers have not been good in the Ninth Circuit. I show this in Table 1, below, 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. (I include as reversals in this chart cases that the Supreme Court reversed or vacated on the merits even in part.) 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). (Although I do not report them separately here, the numbers have been 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.)

Table 1: Number of Supreme Court reversals per 1,000 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 Teminated on the Merits After Oral Arguments or Submission on Briefs, Table B-10, 1994-2015; SCOTUSBlog; Harvard Law Review.

It is true that the numbers are not large for any Circuit—for example, the Ninth is reversed only 2.5 times for every 1000 appeals it decides. But this is because the vast majority of appeals are not even remotely difficult to resolve; frankly, the vast majority of appeals should never even be filed. The number of appeals where the appellant actually has a plausible argument is much smaller.

I should also stress that these are aggregate statistics. The Ninth Circuit did not have the highest reversal rate every single year over the last twenty years (although it did in many, many of them). Moreover, I should add that the Ninth Circuit's reversal rate has fallen some during this period; things looked worse twenty years ago than they do today—but they still look bad today. Finally, I should note that some people do not find a high reversal rate a problem. If you do not like the Supreme Court's decisions, you may think it is just fine if lower courts try to evade them. Indeed, there are liberal academics who do not like the Supreme Court very much these days and who have called into question the entire notion of judicial review.[7]

I do not share these views. I think lower courts should do their best to follow what higher courts want them to do. I do not think our system will function very well if lower courts feel free to do whatever they want. The Supreme Court can only take 100 or so cases every year; lower courts decide tens of thousands. We lose uniformity and legitimacy in the law if we welcome lower court resistance. For me, the Ninth Circuit's persistently high reversal rate suggests we may have a problem.

But is the size of the Circuit one of the causes of the high reversal rate? The existing studies are inconclusive,[8] and, admittedly, this is a difficult question and one that I cannot answer rigorously here. There are undoubtedly many causes. Frankly, I think one of the biggest is the ideological make up of the Circuit. According to statistics compiled for me by the Vanderbilt law library, unlike any other Circuit, the Ninth Circuit has been comprised of more Democratic appointees than Republican appointees during the entirety of the last twenty years. (Many of us wonder whether it will ever be any other way!) During the same time, of course, the Supreme Court has always had more Republican appointees. We know that judges of different ideological persuasions tend to interpret the law differently. There is little doubt in my mind that this has contributed to the Ninth Circuit's reversal rate. This is confirmed by noting that the two Circuits with the lowest

---

[7] *See, e.g.,* Mark Tushnet, Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law (Princeton 2009).

[8] *See* 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).

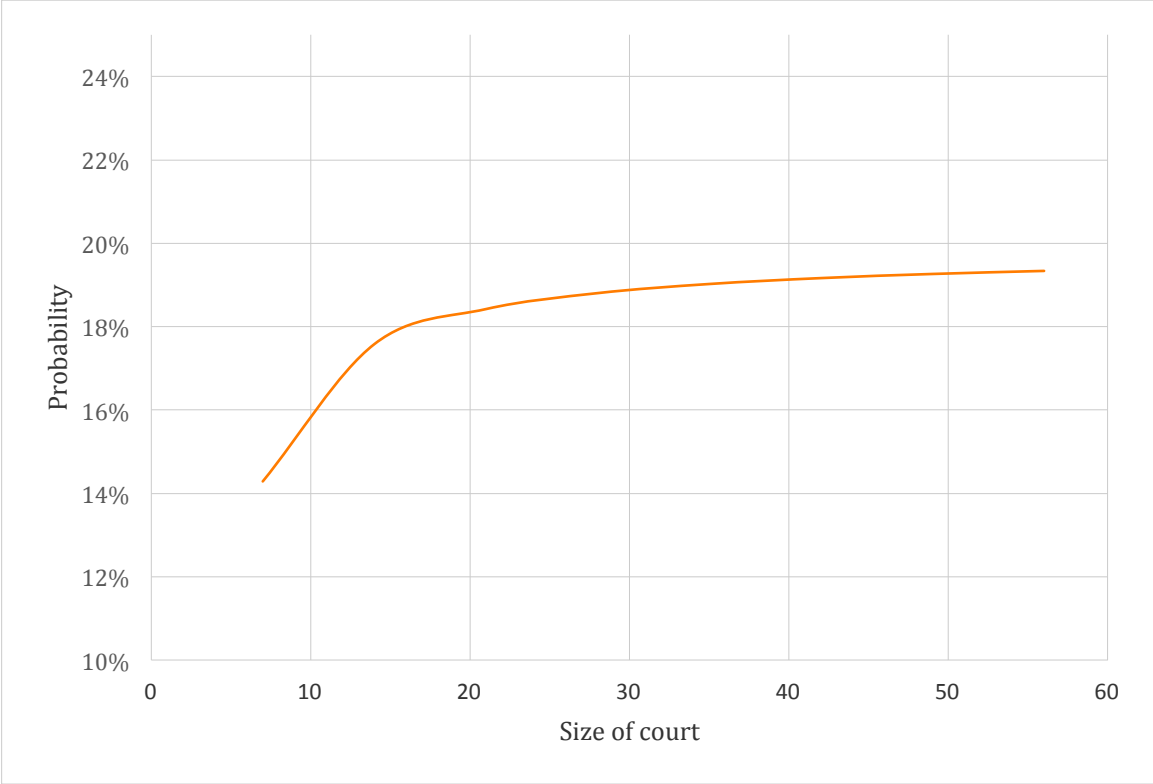
reversal rates in Table 1 are also bigger Circuits but ones that have often had Republican majorities.

But might size play a role as well? I think it might very well because mathematical theory predicts that it will. In particular, mathematical theory suggests that larger courts of appeals will more often issue opinions that are outside the mainstream. These are the decisions that the Supreme Court often has to correct.

The math says the following: suppose you have a court of appeals with judges who fall along a spectrum of ideological fervor. In the middle there are moderate judges, but on the flanks there are right- or left-wing judges. Further suppose that, if two or more judges from one of the flanks are randomly selected for the same three-judge panel, there is a greater likelihood that the opinion they issue will be outside of the mainstream. (This is not much of a supposition; I think most people would say this describes our system pretty well.) If you hold the fraction of moderate judges on a court constant, the probability of randomly selecting two or three judges who hail from a flank increases as the size of the court increases. In the margin, I set forth the formula for determining that probability,[9] but it might be easier to see how size matters with a graph. In Figure 1, I plot the probability of randomly selecting two or three flank judges on a court with a 5-2 moderate-to-flank ratio (e.g., a 28-person court with 8 judges on the flank and 20 in the middle) as a function of the total size of the court.

[9] The formula is based on the combination function from 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 F flank judges on the court and C is the number of total judges on the court.

Figure 1: Probability of selecting a non-mainstream panel on a court with a 5-2 mainstream-non-mainstream ratio



As one can see, the probability increases with the size of the court, but the effect eventually tapers out. The problem is that the effect does not taper out over the sizes of our courts of appeals. It is a quirk of smaller numbers. Everything else being equal, the probability of a non-mainstream panel increases by several percentage points depending on whether a court is made up of 7 persons or 28 persons. The difference between a court of 14 judges and a court of 28 judges like the Ninth Circuit is over one percentage point. Although that does not sound like much, when you multiply one percentage point over the thousands of appeals decided every year by a big Circuit, it really adds up.

I should emphasize a number of caveats here. First, the numbers I selected for Figure 1 are just examples. I do not mean to suggest those numbers are a description of the judges on the Ninth Circuit. Different numbers will yield different results, but they should all follow the same general pattern: everything else equal, bigger courts randomly select more non-mainstream panels. Second, for ease of demonstration, the Figure assumes only one flank. Things are more complicated—but the pattern nonetheless persists—if there are two flanks because judges

from different flanks may cancel each other out and leave the balance of power in the hands of a moderate judge. Third, as I have said, this analysis assumes that the ratio of mainstream-to-flank judges remains constant. If splitting the Ninth Circuit means one Circuit will have all flank judges and the other Circuit will have all moderate judges, then splitting the Ninth Circuit may not decrease the number of non-mainstream panels. I know of no a priori reason why one Circuit might get all the flank judges in the long run, but anything, of course, can happen in the short run.

It should be noted that one solution to the problem of non-mainstream panels is en banc review: if non-representative judges make up a majority of a panel, then the full court can take the case en banc and set the panel straight. This might be a solution in many circuits—and it might be one reason why the larger Fifth and Eleventh Circuits fall at the bottom of Table 1—but it is not much of a solution in the Ninth Circuit. The Ninth Circuit does not hear cases en banc with a full court; it hears cases en banc with a randomly-selected, eleven-judge panel. This random selection 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. I distinctly remember one en banc panel on the Ninth Circuit during my clerkship year that was comprised of 10 Democratic appointees and one Republican appointee.[10] Although, as I said, the Ninth Circuit has long had more Democrats on it, it has never had ten times as many! But it sometimes does on the en banc court.

I suppose we could wait for more studies to try to tease out how much of the Ninth Circuit's reversal rate is caused by ideological distance from the Supreme Court and how much is caused by size or other factors. We could also wait for studies that compare the Ninth Circuit's inconsistent decisionmaking frequency with those of other Circuits. But we can always wait for more studies. In a world of limited resources, we will never know everything that we wished we could know before we make decisions. To put it mildly, a decision to restructure the Ninth Circuit now would not come lightly. We have had 40 years of debate, discussion, and experience. We have 20 years of reversal data. And now we even have math. This is mountains more

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

than Congress usually has in front of it when it makes decisions. In my view, Congress should not be afraid to act.

Thank you for the opportunity to appear before you today.