



United States Court of Appeals

THE PIONEER COURTHOUSE  
700 S. W. SIXTH AVENUE  
PORTLAND, OREGON 97204-1396

Chambers of  
DIARMUID F. O'SCANLAIN  
United States Circuit Judge

March 14, 2017

(503) 833-5380

Hon. Darrell Issa, Chairman  
Subcommittee on Courts, Intellectual Property, and the Internet  
U.S. House of Representatives Committee on the Judiciary  
2269 Rayburn House Office Building  
Washington, DC 20515

Re: Hearing on "Bringing Justice Closer to the People: Examining Ideas  
for Restructuring the 9th Circuit" – March 16, 2017

Dear Mr. Chairman:

I regret that I am unable to accept the kind invitation to participate in this week's hearing regarding proposals to restructure the U.S. Court of Appeals for the Ninth Circuit. I am aware of four different bills to divide the Ninth Circuit that have recently been introduced in either the United States House of Representatives or the Senate. I am pleased to support these latest efforts to restructure what is far and away our nation's largest and busiest Court of Appeals.

I

The time has come to implement a solution to a problem that has long plagued the Ninth Circuit. Since at least 1973, Congress has been aware of the "striking" size of the Ninth Circuit compared to all other circuits and of its attendant administrative difficulties, including delay and inconsistency.<sup>1</sup> It was

---

<sup>1</sup> Commission on the Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 224, 228–29, 234–35 (Dec. 1973) ["Hruska Commission Report"]. The report recommended that the then-Fifth and Ninth Circuits both be split; Congress did not implement either recommendation at the time. Later, the judges of the Fifth Circuit petitioned Congress to divide the circuit; Congress complied and on October 15, 1980, President Carter signed a bill to create the

(continued...)

then, so far as I know, that it was first seriously recommended that the Ninth Circuit be divided into more manageable and reasonably sized circuits, consistent with the rest of the country's judicial system.

More than forty years of population growth in the West has not eased the problem. Although the Ninth Circuit is only one of twelve regional Courts of Appeals, it is home to one fifth of our nation's population.<sup>2</sup> Likewise, one fifth of all federal appeals filed during 2016 came from the Ninth Circuit.<sup>3</sup> The Ninth Circuit's backlog is even more staggering. Almost one third of all federal appeals pending on December 31, 2016, were in the Ninth Circuit—a total of more than 13,000 cases.<sup>4</sup> No other Circuit had more than 5,300 cases pending.<sup>5</sup> Perhaps unsurprisingly, this immense burden has also caused the Ninth Circuit to become the slowest in the nation to resolve federal appeals. Last year, it took the Ninth Circuit more than 15 months on average to resolve a case—more than twice as long as the average circuit and more than two months longer than the next-slowest circuit.<sup>6</sup>

## II

The administrative difficulty of managing a circuit so large and unwieldy

---

<sup>1</sup>(...continued)

Eleventh Circuit out of three states from the former Fifth Circuit.

<sup>2</sup> Population totals are based on figures reported by the U.S. Census Bureau in its 2010 United States Census.

<sup>3</sup> See Admin. Office of the U.S. Courts, Table B: U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2015 and 2016, *available at* <http://jnet.ao.dcn/sites/default/files/statistics/caseloads/AppealsTablesDec2016.pdf>.

<sup>4</sup> See *id.*

<sup>5</sup> *Id.*

<sup>6</sup> See Admin. Office of the U.S. Courts, Table B-4: U.S. Courts of Appeals—Median Time Intervals in Months for Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending December 31, 2016, *available at* <http://jnet.ao.dcn/sites/default/files/statistics/caseloads/AppealsTablesDec2016.pdf>.

cannot be remedied simply by adding more judges to the court, as might be proposed by some. It is too late for that; we are already at 29 judgeships now, more than twice as many as the average circuit. If we were to be provided an additional 5 judges (as was recommended just today by the Judicial Conference of the United States<sup>7</sup>), we would be at 34 judgeships, double the size of the next-largest circuit, nearly three times the size of the average circuit, and almost six times larger than the smallest. While additional judicial seats may well be necessary to help resolve valid concerns over the judges' workload, and may speed up the pace of work, they would only exacerbate the inefficiencies and inequities of the circuit's inordinate size.

### III

In short, I can find no justification for indefinitely retaining the Ninth Circuit as currently structured, stretching from the eastern border of Montana, up to the Arctic Circle, down to the Mexican border, and across to Guam and the Northern Mariana Islands on the Western edge of the Pacific Ocean. It is difficult to comprehend why one of twelve regional circuits should so dominate the others. The many important values that we seek to foster through our nation's system of smaller, regional circuits can find no home in a court so vast, especially if we were given additional judges.

In 1980, similar concerns over the size and scope of the Fifth Circuit led to its division and the creation of the Eleventh Circuit. Today, the Ninth Circuit has nearly 94% of the total population of the Fifth and Eleventh Circuits combined. The same justifications that led to their split more than 30 years ago counsel a similar division of the Ninth Circuit today.

### IV

In my view, each of the currently pending restructure bills—while different

---

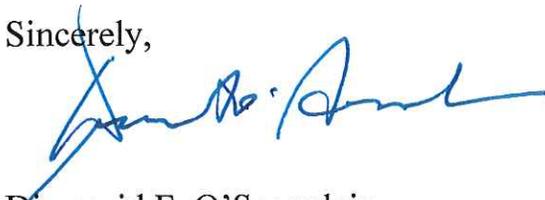
<sup>7</sup> See Press Release, Judicial Conference of the U.S., Judicial Conference Asks Congress to Create New Judgeships (Mar. 14, 2017), *available at* <http://www.uscourts.gov/news/2017/03/14/judicial-conference-asks-congress-creat-e-new-judgeships>; Judicial Conference of the U.S., Table 1: Additional Judgeships or Conversion of Existing Judgeships Recommended by the Judicial Conference (2017), *available at* [http://www.uscourts.gov/sites/default/files/2017\\_judicial\\_conference\\_judgeship\\_recommendations\\_0.pdf](http://www.uscourts.gov/sites/default/files/2017_judicial_conference_judgeship_recommendations_0.pdf).

in its proposal for how precisely to divide the circuit—recommends a welcome solution to this problem. In light of the obvious need to restructure the Ninth Circuit so as to correspond more closely to every other U.S. Court of Appeals, the Subcommittee’s focus should be on which proposed division would best achieve that goal. Alternatively, the Subcommittee may wish to follow the approach of yet a fifth pending bill, which would create a study commission appointed by the Chief Justice to recommend to Congress the most appropriate split. Opponents of any restructuring should bear the burden of persuasion when they attempt to argue for simply retaining the status quo.

V

Thank you for scheduling this hearing. I stand ready to respond to any questions you or your staff may have.

Sincerely,



Diarmuid F. O'Scannlain  
United States Circuit Judge  
for the Ninth Circuit

cc: Hon. Bob Goodlatte, Chairman, House of Representatives  
Committee on the Judiciary  
Hon. John Conyers, Jr., Ranking Member, House of Representatives  
Committee on the Judiciary  
Hon. Jerry Nadler, Ranking Member, Subcommittee on Courts,  
Intellectual Property, and the Internet