BRINGING JUSTICE CLOSER TO THE PEOPLE: EXAMINING IDEAS FOR RESTRUCTURING THE 9TH CIRCUIT

HEARING

BEFORE THE

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AND THE INTERNET

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CONTENTS

MARCH 16, 2017

OPENING STATEMENTS

WITNESSES

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Statement submitted by the Honorable Diarmuid F. Scannlain, Circuit Judge, United States Court of Appeals for the Ninth Circuit. This material is available at the Committee and can be accessed on the Committee repository at:
http://docs.house.gov/meetings/JU/JU03/20170316/105706/HHRG-115-JU03-20170316-SD004.pdf.

Statement submitted by Professor Brian T. Fitzpatrick, Vanderbilt University Law School. This material is available at the Committee and can be accessed on the Committee repository at:
http://docs.house.gov/meetings/JU/JU03/20170316/105706/HHRG-115-JU03-20170316-SD006.pdf.

Statement submitted by Professor Arthur D. Hellman, University of Pittsburg School of Law. This material is available at the Committee and can be accessed on the Committee repository at:
http://docs.house.gov/meetings/JU/JU03/20170316/105706/HHRG-115-JU03-20170316-SD007.pdf.

BRINGING JUSTICE CLOSER TO THE PEOPLE: EXAMINING IDEAS FOR RESTRUCTURING THE NINTH CIRCUIT

THURSDAY, MARCH 16, 2017

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The subcommittee met, pursuant to call, at 10:40 a.m., in Room 2141, Rayburn House Office Building, Hon. Darrell Issa [Chairman of the Subcommittee] presiding.

Present: Representatives Issa, Goodlatte, Collins, Chabot, Franks, Jordan, Poe, Chaffetz, Marino, Labrador, Farenthold, DeSantis, Biggs, Nadler, Conyers, Richmond, Lieu, Schneider, and Lofgren.

Also Present: Representative Gohmert.

Staff Present: Joe Keeley, Chief Counsel; Zack Walz, Clerk; Jason Everett, Minority Chief Counsel, Subcommittee on Courts, Intellectual Property, and the Internet; David Greengrass, Minority Counsel; and Rosalind Jackson, Minority Professional Staff Member.

Mr. ISSA. The Subcommittee on Courts, Intellectual Property, and the Internet will come to order.

Without objection, the chair is authorized to declare a recess of the committee at any time.

We welcome everyone here today for the day's hearing, "Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit." And I now recognize myself for a short opening statement.

It has been more than a decade since we last considered a bill to, if you will, split the Ninth Circuit. The Ninth Circuit is by far the largest circuit of the 12. Additionally, the Ninth Circuit hears, more or less, 20 percent of the appeals. And some would say from this side of the dais throughout the various States that it also is the most reversed circuit.

Notwithstanding that, it is my circuit. It includes my State. And I am deeply concerned today, and will be until we find resolution, that stripping away the other States of the Ninth Circuit would still leave California as by far the largest circuit.

So when we come together today, we come together with two challenges: one, that there is no way without splitting a State to have, at current, California not be, if it were all by itself, the largest circuit.

Secondly, we have wrestled with this for now decades. During that time, the Ninth Circuit has grown, and today, with four vacancies, there is additionally five more requested. If all were granted, the Ninth Circuit would be 34 judges. And we're honored to have some of those judges with us today.

I am here to say I'm pleased to see that the Fifth Circuit in 1980 was done—its splitting was done in less than a year, no ill effects, and, in fact, passed both the House and Senate by unanimous consent. I hope today to have the same result to whatever we propose.

It's now my pleasure to recognize the ranking member of the full committee, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman.

Members of the committee, today's hearing provides an important opportunity to examine whether the Ninth Circuit Court of Appeals is able to adequately perform its duties as it is currently structured.

The hearing takes on an added importance in the wake of a series of decisions in the Ninth Circuit and elsewhere overturning President Trump's Muslim/refugee ban. Instead of coming to terms with the legal flaws with his own executive order, President Trump has chosen to attack the Ninth Circuit, which he has said is in chaos and, frankly, in turmoil. Those are quotes.

Last night, after learning of the Hawaii court's decision again rejecting his ban, he said: "People are screaming to break up the Ninth Circuit. You have to see how many times they've been overturned with their terrible decisions," end quotation.

Of course, none of what the President has charged about the Ninth Circuit is true. The Ninth Circuit is as well-organized as any in the country. Of the very few Ninth Circuit cases the Supreme Court takes up, a significant portion are overturned, but that's true for every circuit, several of which are overturned at a higher rate than the Ninth Circuit. And, overall, less than one-tenth of 1 percent of the Ninth Circuit decisions are overturned by the Supreme Court.

The reality is this is not a new debate President Trump has brought us to. It is one that we have had for decades. Although I will not speculate why there continues to be such an interest by some of my conservative colleagues to divide the Ninth Circuit, there are several points we should keep in mind.

To begin with, splitting the Ninth Circuit would not bring justice closer to the people. Instead, it would likely result in further delay, reduce access to justice, and waste the taxpayer dollars. If the Ninth Circuit were divided, there would not be sufficient judicial resources, particularly with respect to addressing the significant caseload demands of the district and bankruptcy courts.

Although legislative proposals introduced this Congress take differing approaches to dividing the Ninth Circuit and creating a new 12th Circuit, inevitably all of these have one common problem: Such restructuring would result in a significant financial cost to

American taxpayers, because millions of dollars would be needed to construct the new circuit headquarters and for other costs.

Another concern I have is that splitting the Ninth Circuit would do little to improve judicial efficiency. And none of the legislative proposals would actually resolve the heavy caseload problem, because a clear majority of the Ninth Circuit cases come from California. Any circuit that includes all of California will still have the largest number of judges and appeals, and it would serve the largest population.

Finally, I am particularly skeptical of any legislative proposal ostensibly intended to assist certain entities when, in fact, those very same entities oppose or question the need for such a legislative fix. Dividing the Ninth Circuit is opposed by a majority of the judges in that circuit as well as by the bar, including the American Bar Association itself. In fact, the White Commission, which Congress established to study the issue, concluded in 1998 that splitting the circuit was impractical and unnecessary.

And so I ask my colleagues to very carefully listen to the witnesses today and join me in opposition to dividing the Ninth Circuit.

I thank you, Mr. Chairman.

Mr. ISSA. And I thank you.

With that, we recognize the chairman of the full committee for his opening statement, Mr. Goodlatte.

Chairman GOODLATTE. Thank you, Mr. Chairman.

This morning, the subcommittee will hear testimony on the longstanding issue of the vastly large Ninth Circuit Court of Appeals.

For the past several decades, the size of the circuit has continued to grow, far in excess of other circuits. Twenty percent of the U.S. population now resides in this circuit, with nine States and two territories, making it twice the size of any other circuit.

Today, the Ninth Circuit has 29 authorized judgeships, also far exceeding the next closest circuit, the Fifth, with only 17 judges. The Judicial Conference has already asked for five additional judgeships for the Ninth Circuit, and more requests may be coming this summer.

As noted by Justices Kennedy and Thomas in their 2005 testimony before the House Appropriations Committee, judicial collegiality is an important component for the consistent rule of law. Oversize circuits, wherever they may be located, undercut such collegiality by limiting the interactions of the entire circuit as a collective whole.

In our creation of a court system below the Supreme Court, Congress envisioned an appellate system that limited the initial appellate panel to a subset of the whole circuit that was then followed by the circuit, sitting as a whole, hearing any further appeals.

It is unfortunate that a prior Congress authorized the Ninth Circuit to operate with 11-judge en banc panels that masquerade as true en banc panels. This has resulted in an important component of our appellate system being lost. Although the Ninth Circuit has procedures to use true en banc panels, they have never done so, despite some of the critical cases they have handled.

In response to a similar crowding issue in the Fifth Circuit, this committee in 1980 enacted legislation to move three of its six

States to a new 11th Circuit and provided only a year of transition time. I highlight the fact that the legislation passed in both the House and Senate by unanimous consent. The transition required by that bill occurred smoothly.

Various groups have studied the size of the Ninth Circuit. The 1998 White Commission recommended that the Ninth Circuit not be formally split but, instead, be divided into three separate adjudicative divisions. Whatever one may think of this commission and its recommendations, it, too, recognized the need to do something about the Ninth Circuit, by splitting it into three divisions in conjunction with a process to resolve intradivision splits. There is not a huge logical leap between dividing the Ninth Circuit into three adjudicative divisions and dividing into separate circuits outright.

And in response to those who might argue against the split by stating that size creates efficiencies, I would point out that no one has suggested combining other circuits to make them bigger.

As this committee moves forward on legislation addressing issues facing the Federal courts this year, I look forward to addressing the Ninth Circuit, in addition to other issues.

Thank you, Mr. Chairman. I yield back.

Mr. ISSA. I thank the chairman.

We now recognize the gentleman from New York, the ranking member of the subcommittee, Mr. Nadler, for his opening statement.

Mr. NADLER. I thank the chairman.

Mr. Chairman, proposals to split up the Ninth Circuit Court of Appeals have been floated since at least 1941. What was a bad idea at the time of Pearl Harbor remains a bad idea today.

Proponents of splitting up the Ninth Circuit generally mask their arguments in concerns over its size and the supposed detrimental effect this has on judicial efficiency and on the consistency of its rulings. They say that it covers too much geographical distance and too large a population to be effective. They argue that, because it is so large, there is administrative waste, there are procedural delays, and the judges aren't able to work together to produce a consistent and rational jurisprudence.

However, the facts say otherwise.

It is true that the Ninth Circuit is the largest of the 11 regional circuit courts of appeal in terms of physical area, of population covered, and of caseload. With a district that includes Alaska, Hawaii, and the territories of Guam and the Northern Mariana Islands, it is no surprise that judges must occasionally travel great distances to serve the entire circuit. But we have things called jet planes and email that make it possible to minimize the disruption that any physical distance may cause. Indeed, that disruption is less today than it was in 1941.

And with California as the anchor State in the circuit, it is unavoidable that it will cover a large population. Unless you were to split the State in half, which would be disastrous from the point of view of judicial coherence, a large circuit is just a fact of life.

But there is simply no evidence that the Ninth Circuit's size has impeded its ability to administer justice to the people within its jurisdiction. To the extent that there is a somewhat higher backlog of pending cases in the Ninth Circuit compared to other circuits,

more resources can be devoted to resolving those issues. Indeed, just yesterday, the Judicial Conference recommended adding an additional five judges to the Ninth Circuit, which would certainly reduce the workload per judge. And technology is being deployed in a variety of ways to help improve administrative efficiency.

There is also no evidence to support the frequently made claim that the Ninth Circuit is a renegade court with wild and unpredictable rulings. Even the often-cited statistic that the Ninth Circuit is allegedly the most reversed circuit at the Supreme Court is wildly misleading. Given the very small sample size since so few cases ever reach the Supreme Court, it is hard to conclude much from the sometimes modestly higher rate of reversal that the Ninth Circuit faces by the most conservative Supreme Court in many generations. Indeed, the worst numbers cited by critics is 2½ reversals per 1,000 decisions.

What this debate is really all about is that conservatives do not like the more liberal rulings that occasionally emerge from the Ninth Circuit. They believe they can manufacture a new circuit that would produce more conservative results. That is a very different and a more dangerous matter.

Like clockwork, we see proposals to split up the Ninth Circuit whenever it delivers a controversial decision with which conservatives disagree. Whether it is ruling that the Pledge of Allegiance should not include the words "under God," overturning restrictions on abortion or gay rights, or, most recently, its unanimous decision to uphold the temporary stay on President Trump's unconstitutional Muslim and refugee ban, the Ninth Circuit has long been in the sights of Republican politicians.

Just last night, President Trump said at his campaign rally: "People are screaming, break up the Ninth"—this is a quote. Quote: "People are screaming, break up the Ninth Circuit. And I'll tell you what, that Ninth Circuit you have to see. Take a look at how many times they've been overturned with their terrible decisions," unquote.

But to manipulate the Federal courts in order to achieve the political ends you seek is highly inappropriate. Just as there is a nationwide movement to end legislative gerrymandering, we should resist this form of judicial gerrymandering as well.

Proponents of splitting up the Ninth Circuit will present a vast array of reasons why it is too large and must be broken up, but none of their arguments withstand scrutiny. And the proposals they have advanced to solve the alleged harms they cite would not actually achieve the results they say they want. Any proposed 12th Circuit would still cover a significant distance and leave in place the large Ninth Circuit base in California, all while introducing uncertainty into the law at great taxpayer expense.

While I believe that splitting up the Ninth Circuit would be both unnecessary and unwise, I appreciate having the opportunity to hear from all our distinguished witnesses on this issue.

I would note that all three of the judges appearing today, like a majority of their colleagues on the Ninth Circuit, oppose such a split, as does the American Bar Association and numerous other practitioners and experts who have studied this issue in great depth.

I look forward to the judges' testimony and to the testimony of our other witnesses, and I yield back the balance of my time.

Mr. ISSA. I thank the gentleman.

All members may have 5 legislative days in order to have their opening statements and other comments placed in the record. Without objection—we'll waive other ones.

Before I do that, I will recognize the gentleman from Texas for purpose of a unanimous consent.

Mr. GOHMERT. Thank you, Mr. Chairman.

As a member of the full committee, I'd ask unanimous consent to include a letter in the record with an attachment as to how the cases would be broken up if it was California in the Ninth Circuit and all the other States in another circuit.

Mr. ISSA. Without objection, it will be placed in the record.

This material is available at the Committee or on the Committee repository at: *http://docs.house.gov/meetings/JU/JU03/20170316/105706/HHRG-115-JU03-MState-G000552-20170316.pdf.*

Mr. ISSA. We have a distinguished panel here today. The witnesses' written statements will be entered into the record in their entirety.

And I will ask you to summarize, when you give your statements, in 5 minutes or less. I will not hold you to it, but the light will indicate that your time has expired.

Additionally, I want to thank the judges who came and, in some cases, stayed for a protracted period through the snowstorm to be here today. I know it was a personal sacrifice, and I very much appreciate it.

Before I introduce the witnesses, it is the committee rule that all witnesses be sworn. So would you all please rise, raise your right hand to be sworn?

Do you solemnly swear or affirm that the testimony you will give today will be the truth, the whole truth, and nothing but the truth?

Please be seated.

Let the record indicate that all witnesses answered in the affirmative.

Our witnesses today include the Honorable Sidney Thomas, Chief Judge of the United States Court of Appeals for the Ninth Circuit; the Honorable Carlos Bea, Circuit Judge for the United States Court of Appeals, Ninth Circuit; the Honorable Alex Kozinski, Circuit Judge for the United States Ninth Circuit.

You guys are critical to this, of course.

We are also joined by Professor John Eastman of Chapman University School of Law and Professor Brian Fitzpatrick of Vanderbilt University School of Law.

And, with that, we'll go straight down, starting with you, Chief.

TESTIMONY OF THE HONORABLE SIDNEY R. THOMAS, CHIEF CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; THE HONORABLE CARLOS T. BEA, CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; THE HONORABLE ALEX KOZINSKI, CIRCUIT JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; JOHN EASTMAN, PROFESSOR, DALE E. FOWLER SCHOOL OF LAW, CHAPMAN UNIVERSITY; AND BRIAN T. FITZPATRICK, PROFESSOR, VANDERBILT UNIVERSITY SCHOOL OF LAW

TESTIMONY OF THE HONORABLE SIDNEY R. THOMAS

Judge THOMAS. Thank you, Mr. Chairman.

Mr. ISSA. I think you're going to have to turn your mike on. See if the button in front——

Judge THOMAS. Yeah. Thank you, Mr. Chairman. It's a privilege to be here, and thank you for the opportunity to testify. My name is Sid Thomas, and it's my privilege to serve as Chief Judge of the Ninth Circuit Court of Appeals, but the views I express today are my own.

The Ninth Circuit is effectively and innovatively managed and provides tremendous service to the district courts. Splitting the circuit would have a devastating effect on the administration of justice in the western United States. It would increase case delay and cause expensive, unnecessary, and wasteful bureaucratic duplication.

A circuit split would be costly. Under the current legislative proposals, a new circuit headquarters in Phoenix would cost an estimated $136 million; required renovations in Seattle could reach $54 million; and the construction of a new space for holding court in Las Vegas, Anchorage, and Missoula would cost about $2 million at each location. And those facilities would have to be staffed yearround but only used a few weeks a year. A circuit split would result in two clerks of court and staff, two circuit executives and staff, and the creation of two circuit libraries. And none of that expense is necessary.

Over the past decade, the Federal judiciary has made a concerted effort to save taxpayer money by cost containment, consolidation, and shared administrative services. Creating a new expensive, duplicative, and unnecessary bureaucratic structure would be a giant step in the wrong direction.

When a circuit split is discussed, most of the focus is on the court of appeals, but the court of appeals is only a small part of our circuit. The circuit includes 14 separate district courts, bankruptcy courts, and pretrial probation offices, and these courts are the ones that do the nuts-and-bolts work that directly affect the largest number of citizens. A circuit division would substantially reduce the services we could provide to them. We provide support for cybersecurity, judicial disability and wellness, human resources, court policy, and many other aspects.

For example, the Ninth Circuit resources allow the quick deployment of visiting judges to districts in need. When Arizona was in a state of judicial emergency, with a skyrocketing criminal docket,

we were able to quickly dispatch visiting judges from within the circuit to solve it.

And we do this all the time in the circuit. Since 1999, we've made 200 visiting judge designations to Arizona, 300 to Idaho, 100 to the Southern District of California, and 80 judges took 15 cases each recently to resolve 1,500 cases in California's Eastern District. We simply would not have sufficient judicial resources to mount this kind of effort with a circuit split.

The Ninth Circuit has also been aggressive in finding ways to save money. We reduced our physical space, saving taxpayers $7 million a year in rent. Our capital case budget review process and electronic fee voucher systems have saved hundreds of thousands, if not millions, of dollars. And the list goes on. But most of these initiatives would not be possible if the circuit were split because we would lack personnel and money.

On the appellate side, a circuit split would significantly increase delay; it would not reduce it. The Ninth Circuit is known for its innovative and effective case management. For example, the Ninth Circuit appellate commissioner, a position unique to the Ninth Circuit, resolved over 4,000 motions and over 1,700 fee vouchers that would otherwise have been assigned to judges. Staff motions attorneys disposed of over 5,000 noncontroversial motions through clerk orders that would otherwise be handled by judges.

On staff presentation, judicial motions and screening panels resolved almost 2,400 merits appeals, 1,300 habeas appeals, and 3,200 motions. Our pro se unit analyzed 5,000 cases last year for jurisdictional and procedural defects.

Last year, our mediation unit settled 1,135 appeals, and that exceeds the output of many of the smaller circuits. The year before, it was around 1,500 appeals. And we've had great success with our mediation efforts. The continuing mediation efforts arising out of the California energy blackout cases has resulted in $8.7 billion being refunded to consumers, businesses, and local governments.

We've only been able to achieve the success because the Ninth Circuit has economies of scale and a critical mass of resources, which would be lost in a circuit split. One cannot divide one budget between two circuits, unnecessarily duplicate staff positions, put substantially more administrative tasks on judges' desks, significantly reduce staff support, and expect faster resolutions of appeals or better service to the public. A circuit division would create more appellate delay, significantly reduce support to our judicial districts, and would be wastefully expensive.

Can we do better? Certainly, we can, and we will continue to try. But the best way to assure the effective administration of justice in the West and to bring justice closer to the people is to keep the Ninth Circuit intact.

Thank you, Mr. Chairman.

Judge Thomas's written statement is available at the Committee or on the Committee repository at: *http://docs.house.gov/meetings/JU/JU03/20170316/105706/HHRG-115-JU03-Wstate-ThomasS-20170316.pdf.*

Mr. ISSA. Thank you.

Judge Bea.

TESTIMONY OF THE HONORABLE CARLOS T. BEA

Judge BEA. Good morning, Mr. Chairman and members of the subcommittee.

Mr. ISSA. I'm afraid the same affliction happens to every witness.

Judge BEA. Good morning, Mr. Chairman, members of the subcommittee, and thank you for taking time to hear the views of the judges of the Ninth Circuit on the restructuring.

My name is Carlos Bea, and I've served on the Ninth Circuit since October 2003, when my nomination by President George W. Bush was confirmed by the Senate. And the views I express here are my own.

Based on my 13 years of experience on the circuit court, I am opposed to the geographical division proposed by the several bills in the Senate and House hoppers. I would like to discuss three topics regarding the advantages of the present circuit and answer a couple of criticisms.

First, I point to the great advantage to our business and professional communities in having a uniform body of law which covers the nine western States and the Pacific islands. A decision by our court binds courts and litigants in the whole western area. This minimizes the risk that law of intellectual property—copyrights and trademarks, for instance—maritime trade, labor relations—employment discrimination, for instance—will be different in Phoenix or San Francisco or Seattle.

You can easily grasp this is not an abstract advantage. Who has standing to sue on a copyright infringement claim is now uniform in Washington State, home of Microsoft Corporation, and California, home of Google Corporation, thanks to our Silvers case.

Whether an employee qualifies as a whistleblower if he has or has not informed his superiors but has not informed the Securities and Exchange Commission calls for the same elements of proof in San Francisco and in Tucson.

Mr. Neukom, the general counsel of Microsoft and former general manager of the three-time World Series champion San Francisco Giants——

Mr. Issa. You've made your case.

Judge BEA [continuing]. Pointed out the practical effect of this predictability in his opposition to splitting the circuit back in 2006.

A practical illustration of the advantage of a single western circuit would be the intellectual property rights litigation over the past 30 years between Microsoft, based in Seattle, and companies such as Apple Computer and Sun Microsystems, based in Silicon Valley. While this litigation proceeded before trial courts in the Northern District of California, we were reassured by the fact that the district court there would apply the same interpretations of copyright law that a district court in Seattle would apply because they are both part of a single Federal circuit.

The very size of the Ninth Circuit gives foreign and domestic traders confidence against the perception that they will be hometowned. Indeed, the advantage of a large circuit may point to a different sort of restructuring of the appellate courts nationwide, which is the concentration of circuits, rather than the dispersal. The best size for the circuit depends a great deal upon the issue

that is being framed. Uniformity of tax laws is best achieved by a large circuit.

A second reason why I favor retaining our present structure is that we sit on panels with judges of other States who come to the circuit with many different backgrounds and experiences. This is especially true in environmental law cases, where the judge is someone who has lived and practiced and judged where the trees involved actually grow or the streams that flow actually are and the jobs of harvesting the trees and controlling the streams are affected. That helps determine the analysis and the outcome. This predictability and uniformity of law based on diversity of thought and backgrounds of the judges would suffer under any balkanization.

A couple of words on two other points.

The most frequently heard criticism of the Ninth Circuit is large geographic size. It's already been mentioned by Member Nadler that we no longer travel between circuits on overnight trains and we don't wait for postmen to bring us our decisions and our memoranda, so the size of the circuit is not a cause of any delay or any malfunction.

And, also, as mentioned by the Chief Judge, the additional costs of creation of the proposed 12th Circuit are unnecessary.

So, in conclusion, I think you should take into consideration the views of the people on the ground. Ask the judges of the Ninth Circuit whether they want to be split, and I think you'll find a very small minority saying it should be split. The overwhelming majority of the people directly involved are against a circuit split.

Thank you for giving me this opportunity to share my thoughts with you.

Judge Bea's written statement is available at the Committee or on the committee repository at: *http://docs.house.gov/meetings/JU/JU03/20170316/105706/HHRG-115-JU03-Wstate-BeaC-20170316.pdf.*

Mr. ISSA. It is my pleasure.

Judge Kozinski.

TESTIMONY OF THE HONORABLE ALEX KOZINSKI

Judge KOZINSKI. Mr. Chairman, members of the committee, it is a real honor to be here and a real pleasure to join my good colleagues Chief Judge Thomas and Judge Bea, my good friend Professor Eastman, and my former extern, Professor Fitzpatrick. I thought he would have learned more during the summer I had him there, but I'll see if I can set him straight this time.

I will rely largely on my written testimony, the burden of which addresses the aspect of the hearing that deals with bringing justice closer to the people, which, after all, is an objective that we all must share.

And the bottom line—and I say this throughout my testimony—is that the Ninth Circuit is at the very cutting edge in bringing justice close to the people, and for two reasons.

One of them is, because it is so large, our courthouses are so much further away from most of the people in our circuit, so we have been forced by necessity to use the advantages of modern technology to bring justice home, to make it accessible.

We also have, because we are such a large circuit and have so many judges, we have a concentration of resources. Unlike other courts that have small staffs and then have to duplicate circuit executive offices and clerk's offices and other central staff, we have central staff unified, and we have resources to buy excellent equipment.

Now, what this means is that, if you are a litigant in the Ninth Circuit, you don't have to travel from Honolulu or Saipan or Billings or Fairbanks or Nome or Phoenix to see the arguments in your case, see the judges. What you can do is, so long as you have a computer, you can watch oral arguments anywhere in the world and in real-time, and you can see the hearings archived on our website.

We are the only circuit that does that, and we do it because we have a commitment to the concept of open access. We also have a commitment to the idea that we are there to serve the people, and our function is to make it easier and cheaper for parties and their lawyers to take advantage of our resources that we have available. So this is a commitment that we share, and this advantage would be lost if we were a smaller court. The concentration of resources that we have would be gone.

I think the case speaks for itself, so I need not belabor it. I do want to talk about three points that were raised during the hearing.

Chairman Goodlatte mentioned collegiality. And my colleagues have mentioned and I want to reiterate it, when the Fifth Circuit was split, every single judge on the Fifth Circuit wrote Congress and said, "We must be split." That is not the case in the Ninth Circuit.

With two or three exceptions, literally fewer exceptions than I have fingers on my right hand, our judges are strongly united on the idea that we should remain a single circuit. This involves judges appointed by different Presidents. Our Chief Judge was appointed by President Clinton, and I was appointed by President Reagan, and our junior colleague here was appointed by President George W. Bush. And that is true of all of our judges but two or three.

Now, that should speak something to the functionality of the court, that the actual people who are involved in operating the court do not believe that the split would be a benefit. And the committee ought not to impute to us a lack of collegiality that, in fact, does not exist.

The chairman also mentioned the fact that no one has talked about melding other circuits into larger circuits. Well, in fact, not the case. Our Chief Judge Emeritus, Cliff Wallace, has been advancing that idea for years, and, Mr. Chairman, I commend it to this committee. I think other circuits would benefit and other regions of the country would benefit from having circuits the size of California.

Mini circuits, like the First, Second, and Third that are hardly as large as the Central District of California, would, I think, benefit from being brought together in larger circuits. And the larger the circuits, of course, the fewer circuit conflicts there will be for the Supreme Court to handle.

You said you wouldn't stop me, but I see my time is up. I do want to leave this idea on the table, however, that splitting the Ninth Circuit is really going in the wrong direction. What this committee ought to be looking at is bringing together smaller circuits to help them gain the efficiency and the collegiality that the Ninth Circuit now enjoys.

Judge Kozinski's written statement is available at the Committee or on the committee repository at: *http://docs.house.gov/meetings/JU/JU03/20170316/105706/HHRG-115-JU03-Wstate-KozinskiA-20170316.pdf.*

Mr. ISSA. Thank you.

Would you put up the map of the combined circuits, please? There we go.

Before the next two witnesses, Your Honor, since you brought it up, we have the existing circuits, including the First, Second, and Third, which are 6, 13, and 14 judges, and combined would be 33 judges, 1 less than the Ninth Circuit will be after the additions.

So, as we go through the remainder, I do want to make sure—and it's sort of a theme for today—that if the Ninth Circuit is too big, then the others are too small. And this would be the combination. If the Ninth Circuit were to be left at 34 judges, which is what it's recommended to go to, then you'd have 33, 33, 31, and 29 by combining the other circuits, including the First, Second, and Third being combined.

Although the gentleman from New York told me that the sophistication of the New York cases might be a problem for the Maine folks. But we'll cover that at a later hearing.

Mr. NADLER. Mr. Chairman.

Mr. ISSA. Yes.

Mr. NADLER. If you combine the First, Second, and Third, you would still, I assume, call it the Second?

Mr. ISSA. We would do whatever the gentleman from New York wants to get his vote.

Anyhow, Professor Eastman, on that point of privilege, we'll continue.

TESTIMONY OF JOHN EASTMAN

Mr. EASTMAN. Chairman Issa, thank you, and thanks to all the members of the committee for taking up this important issue. I testified before the U.S. Senate more than a decade ago about the same subject, and I think the problem remains as it was then.

I was struck by Chief Judge Thomas and Judge Bea's comments, thinking we ought to be here to discuss consolidation of the other circuits, and so I was happy to hear my good friend Judge Kozinski actually say that explicitly.

I want to focus on the part of my testimony dealing with collegiality. What we're not talking about is how friendly the judges are amongst themselves. I have a great deal of respect for the judges on the Ninth Circuit, almost all of them, and I think they have a high level of collegiality in the normal way we use that word.

I'm talking about something more specific, something that Judge Harry Edwards described in a Pennsylvania Law Review article

back in 2003: the common interest in getting the law right. And it's that collegiality that I think suffers the larger the court goes.

We've got a lot of evidence for that and a lot of testimony to that effect over the years. First Circuit Judge Frank Coffin once said: "You increase the size of the courts, you militate against old-fashioned collegiality that existed when judges sat often with each other."

That's the kind of collegiality I'm talking about. It checks the tendency of some judges to, quote, "fly solo," as Judge Coffin described. We know who those judges are on the Ninth Circuit. One's published that the Supreme Court can't reverse him all the time.

We have an extraordinarily high number of combinations on the Ninth Circuit. Just if you look at the active judges and run the math, 3,654 different combinations of 3-judge panels. If you add in the existing senior judges, it's a whopping 17,296 different combinations of 3-judge panels.

Judge Bea talked about a uniform law in the West. Well, I practice out there, and I've got to tell you it's more like the Wild West. My clients ask me what my prediction is on how the Ninth Circuit's going to rule on their case, and I said, "I have no idea. I might be able to give you a better assessment once I see the random draw of the panel." And those draws, as I said, are extraordinarily high in the number of combinations you might get. That necessarily fosters an inability to have a coherent body of law.

You know, if we do break the circuit up and we end up with some more conflicts on important issues, like patents, as Judge Bea focused on, or environmental law, we might actually add back some more cases to the Supreme Court's docket. People have complained that it's getting a little too light in recent years, so maybe that's a good thing.

But the main thing I'm looking at is the ability to get the law right. With the extraordinary number of opinions that come out, it's hard for the practitioners to keep up with everything that's going on in the court. I know it's got to be hard for the judges as well. That necessarily creates intra-circuit conflicts, oftentimes in nuanced decisions that don't manifest themselves for years or decades because of the large size.

As the White Commission reported, consensus among appellate judges throughout the country, including about a third of the Ninth Circuit judges—now, this was a while ago—thought that 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. The White Commission concluded that the optimal size of a circuit court was somewhere between 11 and 17. That's roughly half the size that we have on the Ninth Circuit now.

And it's not just the reversal rate. And I want to take this up. And I know my colleague is going to talk about the statistics on the reversal rate. As Judge Posner pointed out in a thorough study, the Ninth Circuit had the highest summary reversal rate, by far, over any other circuit court in the country. This, I think, goes to the outliers, those judges that fly solo, that can be unchecked by the lack of familiarity and frequent meetings with each other. It's six times as high as the next circuit.

Judge O'Scannlain, who, as I understand it, submitted written testimony to the court—I hope it will be entered into the record—notes that 1 in 10 of the Ninth Circuit's decisions taken up by the Supreme Court are summarily reversed without even oral argument, and roughly half are reversed unanimously. And this on a Supreme Court that we know is very ideologically divided.

That demonstrates there is something going on, an outlier effect, an effect of judges flying solo on the Ninth Circuit that, quite frankly, doesn't exist nearly as frequently on the other courts of appeals. And I think it is correlated and perhaps caused by the size of the court.

Thank you very much.

Mr. Eastman's written statement is available at the Committee or on the committee repository at: *http://docs.house.gov/meetings/JU/JU03/20170316/105706/HHRG-115-JU03-Wstate-EastmanJ-20170316.pdf*.

Mr. ISSA. Thank you.

Professor Fitzpatrick.

TESTIMONY OF BRIAN T. FITZPATRICK

Mr. FITZPATRICK. Mr. Chairman, members of the committee, thank you so much.

Mr. ISSA. But the gentleman will remember that your old mentor is there. He wants you to at least strike some balance of what you remember him teaching you, as you dispel what his opinion is.

Mr. FITZPATRICK. Well, yes, I—thank you for having me, Mr. Chairman. And I was an extern to Judge Kozinski. I also clerked for one of his colleagues after that, Judge O'Scannlain. And there's no question the Ninth Circuit is a very fine circuit. But I think we can have two even finer circuits if we split it.

Like everything in life, there are costs and there are benefits to splitting the Ninth Circuit. I have no doubt that Chief Judge Thomas is correct; if we split the Ninth Circuit, we're going to have to spend more money to create another administrative apparatus in the new circuit. I don't doubt that.

But there are benefits to splitting the Ninth Circuit, as well. And the benefit that I want to talk about today was alluded to by my colleague Professor Eastman here. If we go to smaller circuits, we reduce the number of outlier decisions that the courts make. And when I say outlier decisions, I don't mean it in a partisan way. We can have conservative outliers; we can have liberal outliers. Smaller courts lead to fewer outlier decisions.

Let me first talk about the Ninth Circuit's reversal rate. This is good evidence that the Ninth Circuit is issuing more outlier decisions.

It is indisputable that the Ninth Circuit has the highest reversal rate of any court of appeals in America, and it has been that way for many, many decades. When people dispute that number, as Chief Judge Thomas did in his testimony, they usually talk about the win-loss rate of the Ninth Circuit at the Supreme Court. Given the cases the Supreme Court has chosen to review, the Ninth Circuit win-loss rate is sometimes the worst, sometimes the best. But that's not how serious empiricists and scholars measure reversal rate. We look at how many reversals are there compared to how

many underlying appeals does the court decide. There's no doubt the Ninth Circuit is an outlier in reversal rate. It is reversed much more often than any other circuit as a percentage of the appeals it decides.

You don't have to take my word for it. There are serious scholarly studies that I cite in my written testimony. One of them was written, as my colleague noted, by Judge Richard Posner on the United States Court of Appeals for the Seventh Circuit. He sits in Chicago, one of the most well-respected judges in the history of the American judiciary. He looked at how often was the Ninth Circuit summarily reversed by the Supreme Court. Quote: "The Ninth Circuit has the highest rate of reversal by the Supreme Court." He looked at how often the Ninth Circuit was unanimously reversed by the Supreme Court. Quote: "Again, the Ninth Circuit is at the top."

He's not the only one. I also cite in my written testimony a study by Dr. Kevin Scott. He's a Ph.D. in political science who now works for the Federal judiciary. He works in the Administrative Office of the Courts. He, too, looked at the Ninth Circuit's reversal rate. What did he find? Quote: "The frequency with which the Ninth Circuit is reversed is a statistical anomaly."

The Ninth Circuit is on its own island when it comes to reversal rate. Why? Size is the reason. Math tells us that size will cause a circuit to issue more outlier decisions. Why is that? It's simple statistics. Circuits decide cases in three-judge panels. Three-judge panels are randomly selected from a larger group. You can run the numbers. I do it in my written testimony. The probability of selecting a panel of three with a majority of outlier judges increases as the size of the circuit increases. I did a graph of it in my written testimony for you.

The math on this is not disputable. When I first raised these mathematical arguments several years ago the last time the split was on the table, the Ninth Circuit's own statistical consultant, Professor David Kaye—he's now a law professor at Penn State; he was back then a law professor at Arizona State—he wrote a response to my mathematical points that I raised in my testimony here and 10 years ago. He's a defender of the Ninth Circuit. He likes the current Ninth Circuit. But he didn't disagree with the math. Professor Kaye said, quote, Fitzpatrick's "mathematics have bearing on the optimal size of appellate courts." Quote: "To the extent that panels of extreme judges are undesirable, the smaller court is superior." This is the Ninth Circuit's own statistical consultant, agrees smaller courts are superior.

Nothing here has anything to do with Republicans or Democrats. It's about the optimal design of a circuit court. Smaller courts are better because smaller courts lead to less extreme panels.

It is possible to overcome the math with a good en banc process. A full court could see an outlier panel and take the case en banc and reverse it. The Ninth Circuit is too big for a good en banc process. Not all the judges can sit en banc because there's so many of them, so they randomly select 11 to sit en banc. And you can have outliers making up a majority of an 11-person en banc panel, just like you can have outliers in a majority on a 3-judge panel.

The Ninth Circuit's en banc process doesn't work. That's why the reversal rate is so high. And other bigger circuits, like the 11th and the Fifth, don't have as high reversal rates because their en banc process catches the outliers.

Thank you, Mr. Chairman.

Mr. Fitzpatrick's written statement is available at the Committee or on the committee repository at: *http://docs.house.gov/meetings/JU/JU03/20170316/105706/HHRG-115-JU03-Wstate-FitzpatrickB-20170316.pdf*.

Mr. ISSA. I want to thank all of you for your testimony. Again, your entire written statements will be placed in the record. And, additionally, the other written statements are in the record.

Mr. ISSA. With that, I'll recognize myself for my line of questioning.

And I'd ask that that map be put back up on the board. Pick the combined one. Thank you.

It will get there.

Judge Thomas, in your opening statement, you very wisely pointed to bureaucracy, efficiency, all the benefits that you feel bigger has. Does that mean that, perhaps like Judge Kozinski, you would support combining these into similar sizes for the others, essentially reversing when the Fifth was split? Because right now it's still smaller than your circuit would be if we put it back together.

Judge THOMAS. Well, if we were designing circuits from scratch, my answer might be yes. But we have established circuits with established jurisprudence, and I think combining circuits now would certainly wreak more havoc on the rule of law and their existing administrative structures than if we were starting——

Mr. ISSA. But let me follow up with——

Judge THOMAS. Go ahead.

Mr. ISSA. If you disagree with putting them back together, then let's go through a couple of things.

First of all, that means that, for example, the First is incredibly inefficient. It only has six judges. It's very small. It represents a small population and a small amount of caseloads by comparison to the other circuits.

So I appreciate the fact that New Hampshire and Maine have different law than New York or Massachusetts, but the fact is that you mentioned that your judges, the vast majority, support staying together. And, of course, unanimously or nearly unanimously, the judges of the Fifth Circuit supported breaking up.

Well, without trying to be disrespectful, this is, in fact, not your business. The business of the size of the courts, the efficiencies, the financial contribution our appropriators give is disproportionately our obligation.

And so, when you say that it's, on one hand, more efficient to run the Ninth Circuit as a large group, and Professor Fitzpatrick says that it is, in fact, a highly reversed, then I have a bit of ambiguity to deal with in my position, which is that you say it will cost me a few million dollars to break up the circuit.

Professor, I don't know if you've done this, but what does it cost for the Supreme Court to take up cases? And what are the costs of the ones they don't have time to take up and reverse that are decided wrong, the bad law?

So I guess I would look and say I appreciate the dollar figures you gave us, but those dollar figures probably don't add up to one bad case that's decided that goes to the Supreme Court, would they? I mean, a typical patent case is $8 million or $9 million for each side now. If it goes all the way to the Fed circuit and Supreme Court, it's more.

But the cases that you get wrong that end up in the Supreme Court have legal fees greater than you've described as your cost of having a few more courtrooms, wouldn't you agree?

Judge THOMAS. Well, I have to respectfully disagree, Mr. Chairman. The first—and I want to say that——

Mr. ISSA. Have you looked at what legal bills in cases before you cost?

Judge THOMAS. Oh, I know they're tremendous legal bills. But, first of all, we aren't the most reversed circuit. We haven't been during the Roberts era. Last year, we were the second most reversed; the year before, the 10th; the third most the year before that; the fourth, the year before, the fourth most——

Mr. ISSA. Well, let's go back to—Professor, is that true, that they've been doing better lately?

Mr. FITZPATRICK. It is true they're not as bad as they used to be, but they're still the most reversed.

Now, in any given year, does another circuit have a higher reversal rate? Occasionally. But over the run of the last 20 years, the Ninth Circuit is 44 percent more often reversed than the next closest circuit.

Mr. ISSA. Okay.

Well, let me put my questioning on a piece of history. The White Commission, which was mentioned multiple times, their final report from December 1998, in that, Byron White, Justice White, does not call for breakup of the circuit.

Judge THOMAS. That's right.

Mr. ISSA. He does call for effective breakup of the circuit. It says: We propose the Ninth Circuit Court of Appeals be organized into three regional-based adjudication divisions. Those divisions would be Alaska, Idaho, Montana, Oregon, and eastern and western Washington; second one, the middle division would be the northern/eastern California, Guam, Hawaii, Nevada—"Nevada," if you prefer—and Northern Marianas; and the southern division, which would be Arizona, the Central and Southern Districts of California, where I reside.

Basically, his recommendation was to break your circuit into three circuits so there would be regional adjudication. Do you support that today?

Judge THOMAS. I do not. And——

Mr. ISSA. Okay. So when people refer to the White Commission, he did support breaking up your circuit; he simply had a different way of doing it, such that you could have one set of law, no matter where it was decided, but it would achieve what Professor Fitzpatrick was talking about.

And I'm going to come back to you, because time is limited, and I want to make sure I get at least the organizational.

If we were to have these large ones or go back, go to the other smaller one, the 12th, or with the existing ones, the only way to

get the equivalent of the Ninth Circuit being broken up to meet the requirements that you mentioned, the smaller, the more predictive, not to have the random—and your numbers were staggering, I must admit.

So I'm going to just assume that if you followed White's recommendation and created three regionals, you would get all of the advantages that Judge Thomas is talking about of the large and the administration, but you would get en bancs that were able to meet. They'd be, more or less, 11 judges. You would have three-judge panels that were from a definable group that would be similar to the other circuits that exist today. Is that correct?

Mr. FITZPATRICK. I think you are absolutely right, Mr. Chairman.

Mr. ISSA. Okay.

So if anyone has any further comments before we go on to other members, I just want to give you a chance. Because, today, when I look at one side of the body that must decide saying, "Break it up," and then I look at the history of a recommendation not taken in 1998, and I look at the testimony, I find that the middle ground between break it up and don't break it up may very well be the long-ago-forgotten White report.

Any comments by any of you?

Yes, of course. Go ahead, Judge.

Judge BEA. As an old trial lawyer from California, let me tell you why the White Commission recommendation is not practical.

If you divide California into northern California and southern California, when we apply California law on diversity cases, which we do all the time, especially insurance coverage cases, we'll have one interpretation of California law in San Francisco and another one in Los Angeles. That is not good judicial administration.

Mr. ISSA. Okay. By the way, I think when I read the White report, what I saw was that that did not prohibit the regions from resolving their ambiguity, such that California effectively wouldn't be split, if they did have for some reason a northern and southern split. But I appreciate that.

We now go to the ranking member of the full committee, the honorable gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, sir.

Back to you, Judge Thomas. Did I get you correct when you said that supporters claim that the reversal rate of the Ninth Circuit is much higher than for other circuits? Because during the Roberts Court era, the most reversed circuit was the Sixth Circuit.

Judge THOMAS. That's true.

Mr. CONYERS. So, now, advocates for splitting the Ninth Circuit argue that the circuit is the Nation's largest in terms of geography, population, and corresponding workload. Why shouldn't these factors warrant dividing the Ninth Circuit?

Judge THOMAS. Well, if you take—you know, the current proposals don't really solve the land mass problem. If you create a new 12th, it has 80 percent or more of the land mass, depending on the proposal, with 20 percent of the cases. Because judicial budgets are caseload-driven, it would create the largest land mass with the smallest amount of money in any of the circuits in the Nation.

Correspondingly, California would be underfunded for the same reason. It would have to duplicate the resources with a diminished budget.

So it's not a good answer, but——

Mr. CONYERS. Okay.

Judge Bea——

Judge BEA. Yes, sir.

Mr. CONYERS [continuing]. When Congress considered splitting the Fifth Circuit into the 11th Circuit, the overwhelming majority of judges and members of the bar in the circuit supported splitting the circuit. Is this the same case with the Ninth Circuit?

Judge BEA. No, Mr. Conyers. Just the opposite is true.

I think you have in your records a 2006 letter signed by the judges of the Ninth Circuit then. I was a junior judge then, and I signed it. And with the exception of 3 of the some 45 judges at the time—because senior judges also signed that letter. There were three judges who are presently also in favor of the split, and, as far as I know, they're the only ones in favor of the split. They have written letters to the committee: Judges Kleinfeld, O'Scannlain, and Tallman.

As far as I know, the rest of our judges are against the split or, agreeing with the chairman, think that it's none of their business, it's your business.

Mr. CONYERS. A-ha.

Let me turn now to Judge Thomas again.

What are some of the adverse impacts, sir, that splitting the Ninth Circuit would have on the provision of justice?

Judge THOMAS. Well, there's certainly increased delay on the appellate level, not decreased delay. We would be stripped of our administrative innovations. We simply couldn't afford them. You can't divide the budget, reduce staff, put more work on judges' desks administratively, and expect them to decide cases more quickly.

In addition, I think the central point is we would really lose delivery of services to the public. And they're served at the district courts and bankruptcy courts. We provide consolidated and effective service to that. And I mentioned some in cybersecurity, wellness support, building support. The smaller districts benefit from our advice on how best to construct buildings. So the districts would suffer enormously if the circuit were divided.

Mr. CONYERS. Thank you.

If the Ninth Circuit were split, would judicial resources be duplicated?

Judge THOMAS. Certainly, with the administrative level, they would be. We'd have two clerks of court and staff, two circuit executives and staff, and the list goes on. It's really an enormous infrastructure for a circuit to have. So you'd be unnecessarily duplicating those functions, and also then reducing the ability for those offices to deliver services, because they would be doing the same service functions in each circuit.

So, for example, you take the mediators now, we have about eight mediators that settle more than the output of some smaller circuits, we couldn't afford that in smaller circuits. And we know from practice that the mediation efforts in some other circuits

aren't as successful because they lack critical mass. So we would lose the critical mass resources that we would need.

Mr. CONYERS. Now, finally, what are some of the costs attendant to a division of the Ninth Circuit?

Judge THOMAS. Well, you start with construction costs, because we don't have places of sitting to hold court in the places designated by the legislation. You'd have to build a new circuit headquarters in Phoenix, and we've estimated that cost to be $136 million. The renovations of Nakamura in Seattle to accommodate would be $54 million, $2 million each for holding places of court in Las Vegas, Missoula, and Anchorage.

And those would be just the start of the costs, because, obviously, we would have some increased travel when you have a circuit that extends from the Arctic Circle to the Sonoran Desert and no center of gravity.

So overall the duplication would cost a significant amount of money.

Mr. CONYERS. Finally, my last question, to Professor Fitzpatrick. Does California have the greatest share of cases among the various States and territories comprising the Ninth Circuit?

Mr. FITZPATRICK. By far, yes.

Mr. CONYERS. And if so, could the Ninth Circuit be reconfigured into two circuits having roughly the same caseload without splitting California?

Mr. FITZPATRICK. No, but I really don't see any reason why California could not be split. There's no reason why Federal law could not vary from one part of the State to another in the same way that Federal law now varies from one State to another.

Mr. CONYERS. That's true.

Thank you, Mr. Chairman.

Thank you.

Mr. ISSA. I thank you. Thank you. Great questioning.

I now go to the gentleman from Georgia for his questions.

Mr. COLLINS. Thank you, Mr. Chairman.

In looking at this, I have some more general questions. I think the questions I want to move to is how we'd go about splitting.

And, Judge Thomas, I didn't—we were just discussing your last answer. Can you clarify better what you were talking about as far as cost? Because we sort of—from the question, I'm not sure the answer. Maybe I just misunderstood it. But your last answer about costs in these different places and being all over, clarify that briefly for me.

Judge THOMAS. Well, certainly. The current legislative proposals call for the creation of a Twelfth with a new circuit headquarters in Phoenix and a secondary headquarters at Seattle. We don't have space there right now. We don't have space to hold court. We don't have visiting judge space. We don't have space for the circuit staff.

So we asked our staff and GSA to come up with a cost estimate of what that would be in Phoenix, and they came up with $136 million. And the same was true for Seattle, because we have some upgrades we need to do and some infrastructure needs. We'd have to move out Federal agencies from that courthouse. And the estimated cost from that is about $54 million. That would obviously change.

And there are no places for holding Circuit Court hearings in the designated places of sitting, like Missoula. You can borrow a district courtroom for a day, but if you're going to sit for a week, you need a courtroom, you need visiting judge chambers and infrastructure. We have that situation a bit in Honolulu. We are fortunate to be able to share with the Bankruptcy Court. But you need staffing to secure that facility year round. Based on caseload, it's only used a couple times a year.

Mr. COLLINS. But also I think if——

Judge THOMAS. That's one example.

Mr. COLLINS. And I appreciate that. But I think, looking at it creatively here, I mean, businesses, other things, we all have to change places all the time. I'm not sure of the size.

In fact, I want to go to Mr. Fitzpatrick on this. One of the things that I hear about this—and, again, being from the Eleventh Circuit and when it split—but I want to go back to something that's often talked about: the reason we can't do the en banc, true en banc. And the good justices were actually saying, we use technology, we're making good use of that.

Explain to me why you can't do the en banc. If you've got the good technology, if you have the ability, if you don't even have to bring them in. You could do them from actual interchange. We do it in classrooms all the time.

Is there possibly another reason why they don't want to do the true en banc hearings?

Mr. FITZPATRICK. You know, I really don't know why they don't. It is theoretically available in the Ninth Circuit to have a full court en banc rehearing. As Chief Judge Thomas noted in his written testimony, it's never been done, but it's theoretically possible. Why they don't see the need to do it is beyond me.

One of the things that I noted in my written testimony is when I served as a law clerk on the Ninth Circuit, we had an 11-judge en banc panel with 10 Democratic appointees and 1 Republican appointee. It is not a representative en banc process. And I think if they did go full court en banc, then the reversal rate might very well fall, because they'd be able to catch some of these outlier panels better.

Mr. COLLINS. Could, possibly, if they did—and I'm just asking the judges, if you did more en banc, you might actually see a need to split the circuit? Because I think this is something we've got to look at.

And the question here is, one of the noticeable—and I want to come back to Mr. Fitzpatrick. because I'm interested in what you have to say—one of the noticeable differences between current bills—and one of the things is there's different ideas, not just the ones that were mentioned are pending.

What factors do you see as the priority in deciding which States—namely, Oregon, Washington—going to a new Ninth Circuit and which States would go in the Twelfth? What would it be as we look forward to that?

Mr. FITZPATRICK. I think it's a hard question. There are probably a lot of factors that go into that analysis. I think one of the most important factors is to try to get the circuits to be as close as possible in terms of the number of judges, for some of the reasons

we've been discussing here, to cut down on outlier panels, to make an en banc process more meaningful.

If you keep California by itself in one circuit, the analyses suggest you're going to need over 20 judges for that circuit still. It'll still be the biggest circuit out there.

And so I would encourage the committee to consider some kind of division of California, if not what the chairman mentioned from the White Commission, then some other way to divide up California, because it's really the elephant in the room.

Mr. COLLINS. And I'm interested, and I'll open it up to everyone very quickly if anybody wants to or they can get back to us as well, looking back, and I was the district that was last affected, an area in Georgia, in the Fifth and the Eleventh, when the circuit split. What kind of lessons can we learn from that that would help the transition if we moved ahead with the Ninth?

Judge THOMAS. Well, I think the lessons from the division of the Fifth, there was a logical division geographically, there was a proportionality of caseload, they had places of sitting intact, and all of the judges supported it. So it was seamless.

You don't have that circumstance with the Ninth Circuit. There's no proportionality in any of the splits, there are—either in land mass or in population. The judges do not support it. And it would lack jurisprudential and geographic coherence.

So the good judges of the Fifth made that decision, and it was a logical one, I think, at the time. It's not logical for us.

Mr. COLLINS. Well, I appreciate the judges' opinion on that. And I think, like I said, I think whether the judges of the Fifth or Eleventh actually agreed or not, frankly, comes down to a matter of concern, but not also a matter of opinion on this body as well.

I appreciate you coming.

And with that, Mr. Chairman, I yield back.

Mr. ISSA. I thank the gentleman.

We now go to the ranking member of the subcommittee, Mr. Nadler. for his questions.

Mr. NADLER. I thank the chairman.

Judge Thomas, last night, President Trump attacked the Ninth Circuit, which he said is in chaos and, frankly, in turmoil. He said, "People are screaming to break up the Ninth Circuit. You have to see how many times they have been overturned with their terrible decisions," unquote.

Now, less than one-tenth of 1 percent of Ninth Circuit decisions are overturned by the Supreme Court. Do you think that that statistic gives weight to the President's opinion, to the President's characterization, or do you think it's important that courts stand up to the executive when necessary?

Judge THOMAS. Well, judicial independence is important, and I know this committee has recognized that. I would certainly not want to comment on the President's remarks.

Mr. NADLER. Okay. And many supporters of legislation to split up the Ninth Circuit are upfront about the fact that they support a split because they perceive it to be a liberal court. If politicians were able to gerrymander a new court that would, presumably, rule more in line with their political beliefs, what impact do you think

this would have on the public's respect for the rule of law and for the Federal court system as a fair and neutral arbitrator?

Judge THOMAS. Well, I think it would diminish the public's respect for rule of law, no question about that, and I hope and trust this committee would not be engaging in that kind of endeavor. I trust the chair that he would not.

Mr. NADLER. Thank you. And the testimony was—I think it was your testimony before—that it would cost $130 million to split up the circuit. Can you give us an idea of what you could do with $130 million if we dedicated those funds toward increasing availability of legal services for low-income civil defendant—civil litigants in the Ninth Circuit, or the United States as a whole for that matter?

Judge THOMAS. One of the great problems we have in the appellate courts, generally, in the Ninth Circuit are pro se litigation—pro se litigators. It approaches 50 percent of the volume of our cases.

We've been engaged in a prison litigation reform effort to solve the problems in the prisons and take them away from the courts, improving mediation and grievance procedures, and providing prison staff with more effective and efficient ways of doing things. We had a summit in Sacramento and a task force for each district.

We are going to save money that way. But if we could use $130 million, that would go a long way to solving that problem.

Mr. NADLER. Thank you.

Judge Kozinski, supporters of splitting up the Ninth Circuit argue that its rulings suffer from a lack of predictability, in part because it uses a truncated en banc process in which only a subset of 11 judges serve in any en banc. Professor Eastman alluded to this before.

Given that only 19 out of almost 12,000 cases that were terminated in all 2016 were heard en banc, do you think that the Ninth Circuit's en banc process has a measurable effect on the jurisdiction of the court?

Judge KOZINSKI. It has some effect, but the important point there is that we have 19 cases. We actually had 21 cases this past year. Other circuits take much fewer en bancs, take en bancs in the single digits and often the low single digits.

So whereas we have a truncated en banc, we actually go en banc much more often, we are able to go en banc much more often and police our panels much more effectively than other circuits that have to convene in a full en banc.

We have worked this out mathematically. And, as we know, sampling is not perfect, but we often poll smaller groups to give us a good indication of what is the outcome in a larger group. And it turns out that 11 judges, the outcome—if you take a group of 29 judges, which is the size of active judges in the Ninth Circuit, and you select at random 11, that the outcome of the 11 is almost always, 90 percent of the time, will be the same as the full group.

So Professor Fitzpatrick's concerns about predictability, I think, are vastly overstated.

Mr. NADLER. Thank you.

Professor Fitzpatrick, your testimony points out that over the 20 years, the majority of judges in the Ninth Circuit were nominated by Democratic Presidents while the Supreme Court Justices during

that period were nominated predominantly by Republican Presidents. Thus, you reach the unsurprising conclusion that this is a major factor in the somewhat higher reversal rate in the Ninth Circuit over that time.

Won't the ideological makeup of both courts change over time as new Presidents and Governors take office and make knew nominations? And why would you think we should make a permanent change to the structure of the Ninth Circuit to address a temporary issue?

Mr. FITZPATRICK. You're absolutely right, but my view does not in any way depend upon the current ideological makeup of the Ninth Circuit versus the Supreme Court. That was just a note that I made that size is not the only factor in the Ninth Circuit's reversal rate. My testimony is simply based on neutral principles about——

Mr. NADLER. Excuse me. Your testimony was very clear that a major—perhaps the major reason for the disparity is the difference in appointments. And then you say: "But might size play a role as well? I think it might very well, because mathematical theory predicts that it will."

There's no certainty. There's no evidence for that at all. You say: It might very well.

We know about the ideologic—I'm sorry—about the political disparity in appointments. That's clearly going to have an effect. Then we have a theory that: Maybe, because mathematical theory predicts that it might. So you have no evidence for that at all, really.

Mr. FITZPATRICK. If I may, I do. So the same studies that show that ideology matters to reversal rate also show that size matters. One of the things that I cite in my testimony is a study by Dr. Kevin Scott. He works for the Federal courts, and he concluded that the dual factors of the Ninth Circuit's greater size and its limited en banc procedure added nine reversals a year to its success at the Supreme Court. That's what he came up with when he ran all the numbers. This is a Federal judiciary guy. He's a Ph.D. in political science.

Mr. NADLER. Lots of Federal judiciary guys are wrong.

Mr. ISSA. On that shining note, we now go to the gentleman from Utah, Chairman Chaffetz.

Mr. CHAFFETZ. Thank you.

I appreciate you all being here. And to the three judges on the panel today, thank you for your time and commitment to this country and your service to our country. Thank you for your good work.

Professor Eastman points out this paper that was written by Seventh Circuit Chief Judge Richard Posner, and I'm going to read part of Mr. Eastman's testimony here: The quality of judicial output declines as the number of judges on an Appellate Court expands was the premise of—or the conclusion of Richard Posner's—Chief Judge Posner's paper here.

And I'm going to read, again, from Mr. Eastman's testimony: "Thus, although the Fifth Circuit had nearly the same caseload as the Ninth Circuit, the Ninth Circuit experienced a rate of summary reversal more than six times higher than the next busiest circuit." Now, to be fair, that was looking at from 1985 to 1997.

But he went on: "As Ninth Circuit Judge O'Scannlain"—I'm sure I'm mispronouncing his name—"noted in a 2013 article, quote, 'Approximately 1 in 10 Ninth Circuit cases reviewed by the Supreme Court results in a summary reversal,' end quote, and another half are reversed unanimously in a nonsummary disposition by an otherwise ideologically divided court. Moreover, "according to Mr. Eastman's testimony," the combined reversal rate of the Fifth and the Eleventh Circuit is much lower than it was before the two circuits were split from the old Fifth."

And so the question goes, was Chief Judge Posner wrong in his conclusion that the quality of judicial output declines as the number of judges on an Appellate Court expands? And if he is wrong, why is he wrong? I mean, he's citing some fairly strong evidence over a 12-year period.

Judge THOMAS. Well, I guess I'll start, if you don't mind.

Of course, when I hear those statistics, you recall that he's talking about a period before I even joined the court 20 years ago. So there, if you look at different periods of time on summary reversals, you actually get much different data. And I have looked at that, because the subject seems to come up a fair amount, because I want to use that statistic.

But I think the more important question is: Does size affect the quality of deliberation? And in the Ninth Circuit I would say absolutely not. And I think our deliberations now are even better than when I joined the court because of technology. We are exchanging views every single day in rapid form.

And we have different judges who take different interests. Some are interested in intellectual property, some are very concerned about the consistency of even our unpublished decisions, some are concerned about bankruptcy law, and some are concerned about environmental law. And all of these judges bring different perspective to the court, and we have free and robust exchanges every day in terms of the kind of collegiality that Professor Eastman was talking about.

So I think——

Mr. CHAFFETZ. Well——

Judge THOMAS. I don't mean to——

Mr. CHAFFETZ. No, go ahead. Go ahead.

Judge THOMAS. But my colleagues may have a different——

Mr. CHAFFETZ. He looked at very statistical information and drew the conclusion that there is a direct relationship.

I can tell Professor Fitzpatrick wants to jump in here.

Go ahead.

Mr. FITZPATRICK. Well, Judge Posner is simply one of the most respected judges in the history of our court system. Perhaps the only Federal judge that is smarter than Judge Posner is Judge Kozinski. So I think that he deserves great weight when he runs the numbers and comes to the views that he does. And, again, it's consistent with everyone else that has looked at the data. Again, the study by Dr. Kevin Scott of the Federal Judicial Center. It all says the same thing, which is size matters.

Mr. CHAFFETZ. And representing some—I think the number is more than 65 million people—I'm just not buying that it's faster and it supports services. I mean, our population has grown over the

years by tens of millions of people, and there does come a time when I think you need to split.

And I've got to tell you, there is a great deal of frustration with the Ninth Circuit. There are people that are absolutely fed up with some of these things. As a Member of Congress, I've got to tell you, the rulings that we've had coming out against President Trump to protect our borders and secure this Nation, while none of you on this panel made that decision, it's infuriating to us to look to the Ninth Circuit, to see people say: Well, there's, you know, 70 people here that we've got to protect and 80 people here. What about protecting the United States of America?

And it's the Ninth Circuit that is causing these problems and taking away the duties that the Judiciary Committee, the Congress, has given to the President of the United States to protect our borders.

There are people that are outraged about this. And those are specific cases with specific judges, but I've got to tell you, according to some others that I hear on this panel say, where is the outrage? There are a lot of us that are outraged.

The President was duly given by Congress the authority to protect our borders. And for these injunctions to come in place and prevent the President from doing his job is absolutely, totally wrong.

I do think, Mr. Chairman, this is the right way to do this and to look at it. I do think that, certainly, Chief Justice Posner and some of the panelists here are on the right track. I think being able to deal with things en bloc too should also be given some heavy weight, and that is clearly not happening in the Ninth Circuit.

I yield back.

Mr. ISSA. I thank the gentleman.

Judge KOZINSKI. Mr. Chairman, since I've been compared to Judge Posner, can I venture an answer? It won't take very long.

Mr. ISSA. Your Honor, I might some day be in your court. How could I deny you?

Judge KOZINSKI. Good answer.

You know, a model is—I have a great deal of respect for Judge Posner, but Dick and I disagree all the time on all such things. And the model is only as good as the input you put into it. If you leave out important considerations, the model is going to give you the wrong answer.

The period in question that Judge Posner looked at overlooked the makeup of the two courts. And the reality is that in the late 1970s, the Ninth Circuit moved from 13 judges to 23 judges, and President Carter was able to appoint 11 or 12 judges to the Ninth Circuit, some of the most liberal judges the world has ever seen. Good friends of mine, with whom I disagree a great deal. And they had a tremendous influence on the jurisprudence of the court at that time.

At the same time, the Supreme Court was very much going in the other direction. And so much of the disparity that Professor Fitzpatrick and Judge Posner refer to, you can only attribute to size if you think that judges are blank spheres. If you take into account who the judges were that populated the two courts, that explains it. It's not a question of size.

The problem with Dick's analysis, Dick Posner's analysis, is he looked at the wrong thing. He looked at size, whereas, really, it was the composition of the panels that made the difference.

Now, the fact that we're reversed by the Supreme Court doesn't mean we're wrong. It may mean that the Supreme Court was wrong, at least in the view of my colleagues. But I think that's what was going on there.

Mr. ISSA. Well, I thank you. And I'm going to be forced to move on, if you don't mind.

We now recognize the gentleman from California for his round of questioning. And I trust that we'll continue this lively back and forth of size matters, it doesn't matter; ideology matters, it doesn't matter. But I would admonish all of us that we are trying to figure out whether to split the court for reasons that should not be ideological by definition. Thank you.

Mr. LIEU. Thank you, Mr. Chairman.

I clerked on the Ninth Circuit Court of Appeals for the late Judge Thomas Tang. The Ninth Circuit had awesome judges then. It has awesome judges now.

And what I want to ask—and, first of all, thank you, Judge Kozinski, for being here. My friend, Beverly Hills School Board Member Lisa Korbatov, says very kind things about you. I want to ask you, as an Appellate Court, you have to take all cases. Isn't that correct?

Judge KOZINSKI. Of course.

Mr. LIEU. Unlike the Supreme Court, you can't decide to pick and choose?

Judge KOZINSKI. Of course.

Mr. LIEU. And it is no secret that States like California are just more progressive, for example, than a State like Kentucky? And isn't it possible that because you have to take all cases, you are just going to get a higher proportion of cases that push the envelope, that challenge the status quo, that are more progressive, and as a result, some of the statistics you are seeing are because of the cases that are brought before you? Is that correct?

Judge KOZINSKI. That's certainly right. And of course it would be exacerbated if California were isolated.

One of the ideas of regional circuits is that you have no single State dominates a circuit. If you have a large State, you will have surrounding States that will provide other perspectives—the rural perspective, the mountain perspective, the environmental perspective. And isolating California would only exacerbate the problem of which you speak.

Mr. LIEU. Thank you. Because I see many of the statistics that my colleagues on the other side bring up, and they are statistics without any meaning. I don't think the relevance is what percent does any particular circuit get reversed. I think the relevance is the quality of the opinions coming out of the circuit and are they doing some groundbreaking opinions.

So, for example, in 2014, when the Ninth Circuit went out and said bloggers have the same free speech protections as traditional press, that was a pretty awesome and amazing opinion, and that's the kind of things that we see out of the Ninth Circuit. And so I think the real statistic is, what are the quality of opinions coming

out? Are the judges putting down their rationales? Are they explaining to the American people what they are doing?

And for the record, I note that multiple judges have imposed a block on Donald Trump's bigoted travel ban. So just today, a Maryland judge and a Fourth Circuit blocked Donald Trump's bigoted travel ban.

Do any of you believe we should break up the Fourth Circuit?

That would be a no, no witnesses.

Judge KOZINSKI. I believe in melding it.

Mr. LIEU. All right.

The other thing I think we ought to look at is in terms of how these circuits are configured. You do have efficiencies from the way the Ninth Circuit is operated. I clerked on there. And it's interesting that my colleagues on the aisle don't want to have those efficiencies. But because of the way it's structured, I don't see any reason why we should change the Ninth Circuit. I think doing so would be purely for ideological reasons.

But keep in mind, Federal judges get paid to follow the Constitution regardless of where they sit, whether they sit in Maryland or in California or in Washington. And those Federal judges have struck down—or actually put a block on Donald Trump's travel ban. So it's not ideological. It's the judges across the Nation that have made this decision.

So I think it's strange to say let's break up the Ninth Circuit, as the President said last night, because a judge in the Ninth Circuit said that his executive order was based on bigotry and unconstitutional, because today the Maryland judge said the same thing. And I'm waiting for the President to also say, let's break up the Fourth Circuit.

But even if you broke up all these circuits, if you had 50 circuits, you'd still have the same number of Federal appellate judges sitting there being paid to follow the Constitution. You'd still get the same decisions. It would just be out of the Twenty-ninth Circuit instead of the Ninth Circuit. You wouldn't get any change in the law that's coming out. So I think this entire hearing is sort of bizarre and useless.

And with that, I happily yield back.

Mr. ISSA. I thank the gentleman.

We now go to the gentleman from Florida, Mr. DeSantis.

Mr. DESANTIS. Thank you, Mr. Chairman.

And thanks to the members of the court and the professors.

Judge Kozinski, do courts—your court, District Court, Supreme Court—just have a roving authority to review actions of the political branches?

Judge KOZINSKI. No.

Mr. DESANTIS. So it needs to require a concrete legal case or controversy, correct?

Judge KOZINSKI. Absolutely.

Mr. DESANTIS. So if the President does things, Congress does things, it may end up in front of the court, properly, but there may just be no way people can get into court for you guys to adjudicate if no one has standing to bring a legal case, right?

Judge KOZINSKI. Absolutely.

Mr. DESANTIS. Do you believe that Article III courts possess the institutional competence to second guess national security decisions made by the President or the Congress?

Judge KOZINSKI. In general, not.

Mr. DESANTIS. Why?

Judge KOZINSKI. I would have to be presented with an actual legal issue to understand. I mean, there are certainly possibilities that the Congress passes a law that gives us authority to adjudicate such an issue.

But in general courts are very poorly informed in terms of making foreign policy decisions. We don't have information. We don't——

Mr. DESANTIS. So, yeah, is it safe to say there would be a difference between a court passing judgment in a proper case between whether action was lawful or constitutional versus whether it was politically wise or the correct policy, correct?

Judge KOZINSKI. I agree with you entirely.

Mr. DESANTIS. What are the checks on the courts as you understand the Constitution? I mean, Congress can pass a statute, maybe the President signs it, it goes beyond Congress' authority or infringes the Bill of Rights, you guys can have a case before you, you can effectively check the Congress through a concrete case. You guys get it wrong. Your District Court gets it wrong. The Supreme Court gets it just grievously wrong. How do the American people check bad court decisions?

Judge KOZINSKI. Well, if I may say so, when the Supreme Court speaks, by definition, it gets it right. The Supreme Court interprets the Constitution. That's the way—that's what the Constitution says. That's the way our system works.

Mr. DESANTIS. I disagree with that. I mean, I think if you look at cases from, like, the Dred Scott decision and other States, the courts are not infallible.

I think you're a very smart guy. I like a lot of your opinions, and I think you are very principled. But I really disagree with that. This is not speaking ex cathedra from this building over here. They do get it wrong.

And I guess your argument to me is that there is no recourse for the Supreme Court. Five to four decision, even if we think it's way outside what the Constitution is, there's no mechanism for us to check that, correct?

Judge KOZINSKI. Well, yes, we can amend the Constitution. There is a mechanism, and we can amend the Constitution.

We can also—the Supreme Court does—and let me just make clear, I disagree with any number of opinions of the Supreme Court, particularly those where I was reversed. I disagree with every single one of those, they got it totally wrong. But as a matter of constitutional law, the Supreme Court says that's what the Constitution says.

Mr. DESANTIS. Well, yes, you as a circuit judge are bound by it, of course.

Judge KOZINSKI. We're bound by it. But the Supreme Court does reconsider its views from time to time. We saw that happened with the case Bowers v. Hardwick that held that homosexual sodomy

was—could be criminalized, and 17 years later the Court changed its mind and reversed course.

So the Court does reconsider its rulings. And one possibility and one way in which those of us who disagree with the Supreme Court's—some of the Supreme Court's rulings—can seek to reverse a decision is by bringing other cases and making a stronger case and persuading the Court to change its mind.

Mr. DESANTIS. But that requires private parties. That requires them. That's not Congress as the representatives of the people checking. Now, there are different things in the Constitution, circumscribing your jurisdiction and whatnot.

But here's why I think I'm concerned, because I think that some of the courts in your circuit are playing a dangerous game here. I mean, when you talked about analyzing an executive action that's taken directly pursuant to a very broad congressional statute and you basically say: If the President was somebody else, it would be lawful, but because this President campaigned and said things that we disagree with, oh, no, call it off, it's illegal——

Mr. ISSA. Would the gentleman suspend? I'll give you back the time.

But consistent with the judges' other role, they can answer any hypothetical question they want, but nothing related to——

Mr. DESANTIS. I wasn't going to—I was going to end with a statement. So I'm not expecting them to answer.

Mr. ISSA. Oh, I apologize. Go ahead.

Mr. DESANTIS. But my concern is, is that when that's being done and you're invoking these campaign statements, I don't see a principled way where that's going to end up making sense over the long term. And I understand there's antipathy in our country that is reflected on some of your courts for the current President, but that is not enough of a reason to wade into some of these sensitive matters of national security.

And so I think the courts, you know, while they think they're saving the day from some people's perspectives, I think they may be—end up in the long run undermining their proper role.

So I don't expect them to respond. But that's my view, and I'm concerned. I yield back.

Mr. ISSA. I thank the gentleman.

And I might note that our former President thought Citizens United was badly decided and told the Supremes in the well of the House. So many people don't like decisions, but I side with Judge Kozinski. Ultimately, theirs is the last word at the time they make it.

With that, we go to my friend——

Judge KOZINSKI. Us California boys have to hang together.

Mr. ISSA. We will hang. If some of this legislation pass, we will hang separately, I guess.

With that, we go to the gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

First, I'd just like to say we often get professors—and that's not to diminish your presence here today—but it is a rare day when we have justices. And it is really an honor that you have come here to share your thoughts with us, and I, for one, appreciate it a great

deal. It's great to see the faces after I've seen the names on the decisions, and it's really an honor to hear from you.

Just getting to some of the meat of the issue. You know, Mr. Eastman has testified that it takes extra time for the Ninth Circuit when deciding decisions. But it seems to me that if that's the case, that could relate to the complicated cases that come before the Ninth Circuit.

I come from Silicon Valley. There's a lot of litigation coming out of the Valley that's highly technical. I think we're very lucky to have very skilled District Court judges in San Jose who can sort through this. But these are complicated cases. It's not a trip and fall that ends up in a diversity case. I mean, it's complicated. And inefficiencies aren't just related to time. It's related to the complication of the case.

In looking at Mr. Fitzpatrick's testimony, it talks about the various reversal rates. But it's interesting, if you look at, instead of the 20 years, if you look at a 10-year reversal rate using the very same methodology and data sources, my staff crunched the numbers, and instead of the number that was in the testimony, you come up with a 1.84 for every 1,000 cases. And if you look at the last 5 years, it's 1.55 per 1,000, which is a little bit more, but not much more, than the Sixth District.

So I think these statistics, really, are not very enlightening. And for me, as chair of the California Democratic delegation, it's important to me that the State of California not be divided. You know, unless the State itself were to divide into two States, which is really not something the people of California want or the Congress wants, it's very important that there be a cohesive rule of law in the State of California on these diversity case decisions, I think Justice Bea or Kozinski mentioned earlier.

I just want to say there's some other reasons for—I mean, you could, theoretically, take Montana and Idaho out, but it wouldn't materially make a difference in terms of it's just too small a State. And as, I think, Judge Kozinski said, there is value in the diversity.

Judge BEA. It would make a great deal of difference if I lost my Montana——

Ms. LOFGREN. It might make a personal difference, but in terms of the number of cases, it wouldn't materially affect it, and why make a change for no little—for such a little impact?

I just wanted to say, I mean, I think it's unfortunate in a way—and I don't blame the chairman, I'm sure this was planned long before the decisions yesterday in Maryland and Hawaii. One of the things that's important for us to do, all of us as Americans, is to defend our structure of government. And that's the judiciary, the executive, and the legislative branch.

And there's a lot of criticism. The President just said recently, I think just today, that the judge who decided—I don't know whether it was the Hawaii or Maryland judge he was criticizing—had done so for political reasons. I think that's unfortunate. I mean, we've all had cases where we disagreed—I mean, I certainly have—with circuit, trial court, and Supreme Court decisions. But disagreeing with the outcome is very different than undercutting the rationale

for the decisionmaking, and I think it's important that we not do that.

You know, yes, the President has—is given the power to do a variety of actions by the Congress. He's not given the power to violate the Constitution. And there's certainly—there will be a lot of litigation. We'll see what, in the end, what the decision is. But I, for one, am confident that the judges who will be hearing this case will hear it with an open mind, with an eye on the facts and the precedents, and come to the best decision that they can.

And I don't see how busting up the Ninth Circuit or threatening to do so, sort of in retaliation for a judge in Hawaii—I'm not saying that that is what is intended, but it might look like that. And I think that that is the last thing that the Congress ought to be perceived as doing, because we ought to have respect for the judicial branch. I do, and I'm sure all the members here do.

So with that, Mr. Chairman, I would yield back the balance of my time with thanks, once again, to especially the justices for coming and honoring our branch of government with their testimony.

Mr. ISSA. Thank you.

I'm going to ask unanimous consent that the gentleman from Arizona, Mr. Biggs, be allowed to speak, even though he's not a member of the committee.

Without objection, it will be ordered.

Additionally, I ask unanimous consent that Senator Flake's written statement be placed into the record at this time.

Without objection, so ordered.

Mr. ISSA. So the gentleman from Arizona will follow the gentleman from Arizona's written statement.

The gentleman is recognized.

Mr. BIGGS. Thank you, Mr. Chairman, but I do believe I am a member of this committee, so—at least I was so informed. To be informed this way that I'm not a member of the committee is actually quite shocking.

Mr. ISSA. I apologize. Not a member of the subcommittee.

Mr. BIGGS. I am a member of the subcommittee.

Anyway——

Mr. ISSA. I apologize. I apologize that is a staff telling—and I'm not blaming the staff, but they did——

Mr. BIGGS. It's good to be where you feel wanted. I mean, I could tell you that.

Mr. ISSA. I ask unanimous consent that as an important member of this committee and subcommittee that you be allowed to speak for the full 5 minutes, and we'll reset the clock.

Mr. EASTMAN. It's the problem of large numbers.

Mr. ISSA. You will notice that the size of the dais is about the size of the Ninth Circuit.

Mr. BIGGS. Thank you, Mr. Chairman. I do appreciate it.

And thanks to all the panel for being here today.

And when you are the last guy, as I typically am in these types of committees, even when I am on the committee, there's just so much to talk about that it's piqued my interest.

This really is the largest circuit—someone—one of the judges mentioned the new Twelfth Circuit was going from the Arctic Circle to the Sonoran Desert, unlike the current Ninth Circuit, which

runs from the Arctic Circle to the equator. This is part of the problem, the circuit represents over 60 million people, which is at least double the size of any other circuit and four times the size of the First and Tenth Circuits. And not counting the Ninth, the average Federal geographical circuit has a population of 22 million. The Ninth Circuit accounts for more than one-third of all pending appeals in the country, totaling about 13,000 as of the end of last year.

At the same time, no other circuit had more than 5,300 cases pending. And last year, it took the Ninth more than 15 months on average to resolve a case, more than twice as long as the average circuit and more than 2 months longer than the next slowest circuit.

When Justice Anthony Kennedy sat on the Ninth Circuit, he wrote to the Commission on Structural Alternatives in support of circuit split. Justice Kennedy noted that any circuit that claimed the right to bind—and I'm quoting here—"to bind nearly one-fifth of the people of the United States by decisions of its three-judge panel must meet a heavy burden of persuasion." And he later said on a different occasion that, "I do not think it's appropriate for the judges of the Ninth Circuit to lobby terribly hard against it," meaning a proposed split.

By the 1980s, the United States Fifth Circuit Court of Appeals was in a similar situation, albeit not as grave as it is today in the Ninth Circuit. It had 26 authorized judges and an overburdened caseload. In fact, today the Ninth Circuit has nearly 94 percent of the total population of the Fifth and Eleventh Circuits combined. But at the time, there were similar heightened arguments like we've heard today about the many detrimental effects of splitting the Fifth. But Congress succeeded in splitting it in 1980 through the Fifth Circuit Court of Appeals Reauthorization Act. And the question that comes to my mind is, who here would today argue that we would be better off without the split?

Now, we've actually heard some enticing proposals today, and in one of the arguments—or, excuse me, one of the summaries presented to us today that I refer to now, the reference was made that there are advantages to a large circuit. For instance, uniformity of tax laws is best achieved by a large circuit. And then in some issues, the reference was made that maybe a smaller circuit's better.

And this constant position today that maybe a larger circuit may be better leads me to ask this: Should we even have circuits anymore? Should we have a delineation by circuits? And if so, should you have some sort of fluctuating number of judges ascertaining or coming on, depending on what the issue is, of the case before you?

So if it's a tax case, should you have 50 judges deciding? If it's some local zoning regulation, should you have two judges?

The point is, I think that to make the argument that you should adjudicate or potentially adjudicate based on the issue, which is what is suggested by this position, doesn't make a lot of sense. There's no predictability either.

Another statement was made about people on the ground, that we should listen to people on the ground. And that was a reference to the judges in the Ninth Circuit. But I live in the Ninth Circuit.

I've litigated, and I've litigated as a litigant and as an appellant where I've had cases go. I've talked to many litigators, and it's similar to what Professor Eastman was describing. We had no idea where we were going to go.

As a client, my attorneys, very experienced attorneys—I won't mention their names, because they might have appeared before you—would tell me, "We have no idea because we cannot decide, because the panel that we will get could be anybody. We will have to wait, clearly, on who the panel is." By then, it's too late. By then, it's too late. It actually prevents predictability. It prevents actually due process.

And that is the position that I am in, having led the Arizona Senate for a number of years, having been in the legislature where we've had cases go to the Ninth Circuit. We had to try to make decisions, because it was taxpayer dollars we were spending, and it was virtually impossible to predict, and that's the problem with a circuit the size of the Ninth Circuit.

I just, when I realize—I'm out of time, but there's just so much to talk about with regard to this and to deal with each one of the issues that you raised. But I just can get down to this: Justice Sandra Day O'Connor also supported a split of the Ninth Circuit. These are thoughtful people who understand that when you live outside of California and you're dragged in over and over to that district, you are at an incredible disadvantage in getting due process for your client.

So thank you.

Thanks, Mr. Chairman.

Mr. ISSA. I thank the gentleman.

Andy, again, I'm sorry I misstated that.

Mr. BIGGS. It's okay. It's all right.

Mr. ISSA. I'm going to do some quick wrap-ups. Perhaps the minority would want a couple. And I'll try to stay outside of my admonishment of others.

Judge Thomas, you had said that combining circuits would be a problem. But isn't it true that to the extent that there is different case law in different circuits, that actually works to the detriment of the greater good of our country, one law?

So if, in fact, you were to combine, for example, the First and the Second Circuits and essentially wipe away their case law, make it as though you were in a Third Circuit, so that the precedents would then be essentially open to be considered again by the larger group, would it really be any different than the equivalent of asking the Supreme Court to hear all those ambiguities and resolve them?

Judge THOMAS. Well, yes, in this sense. If you are combining—if you split a circuit, the circuit law applies to the new circuit.

Mr. ISSA. Sure. I understand the split being easy. We've never—I don't know that we've ever combined before. But the rhetorical question here really is, at six judges, would you admonish that the First Circuit is too small to be efficient and organized and meet the same set of high standards the Ninth Circuit reaches?

Judge THOMAS. Well, my answer is that the litigants and litigators in those circuits depend on the long history of circuit law. And to the extent there are inconsistencies in that law that creates

some unpredictability in the uniformity of law, and it would be undesirable in my view.

What I do think is helpful is our national initiatives to national cost containment and shared administrative services to the extent we have even across circuits.

Mr. ISSA. I would certainly agree that we can have a separate hearing on the ability to encourage the court to use its funds more efficiently through those practices.

Back to the White Commission, and I'm going to hit it tangentially, and this is a somewhat political question. So I think I'll go to my friend, Judge Kozinski.

To the extent that political appointments do matter, and you used the Jimmy Carter appointments with some accuracy, then isn't, in fact, one of the problems not on your side of the dais but on my side, the use of blue slips by Senators to essentially have a veto over members that they do not like ideologically, regardless of which President is choosing them? Doesn't that essentially exacerbate the partisan nature of your bench?

Judge KOZINSKI. Well, I hesitate to speak on a matter that's in the purview of another branch. But the matter is quite complicated because, of course, these kinds of decisions are made by the executive branch, by the President in selecting nominees, and then there's pushback from——

Mr. ISSA. Well, let me ask it another way, then, perhaps to any of you.

If, in fact, these bodies, the House and the Senate, were able to resolve—were unable to resolve the question of blue slips, then if we were to do, as the gentleman who has departed would indicate, and essentially make California an island onto itself, wouldn't we essentially create a situation in which the two Democratic Senators in California would ensure that only judges, based on blue slip, only judges to their liking would ever get to your seat?

Judge KOZINSKI. I think by definition what you are asking must be true. If the only Senators that—the circuit involves a single State, then the blue-slipping power of those Senators would be essentially unlimited.

Mr. ISSA. And, Professor Fitzpatrick, I'm going to ask you this, because as I look at the for-and-against, and with some bias for being a Californian, I look at the situation of a single State, I'm sensitive to splitting a State. But I'm looking at a single-State solution and saying that essentially, under current Senate rules, would indicate that you would have very little diversity for as long as the Senators had no diversity. And at least in the case of my have State, I am, with some trepidation, willing to predict that there will be no diversity for a very long time.

So how would you deal with that, which is a reality of the political structure, if we were to take what the gentlemen, Mr. Flake and Mr. Biggs, had suggested and effectively split off everything but California?

Mr. FITZPATRICK. I think it's a big problem, and I think it's even a problem if you're going to throw Hawaii in with California. Still the two Senators in California would have almost complete control over the circuit's judges.

That's why I really commend solutions that break California into pieces in some way or another. And you cited the White Commission proposal earlier, and I think there are other ways to do it. But I think that over the long run, that's the only thing that's going to satisfy people.

Mr. ISSA. Judge Thomas, I'll put you on the spot a little bit, because, like all three of you, you were political appointees, you went through a process. The Senators did matter.

If we cannot change the structure of Senators essentially in their home State having, effectively, a veto—and I'm trying not to be partisan in any way, shape, or form, because if you go to Arizona, you end up with the exact opposite—but if we—if that is a reality, isn't that something that this committee should guard against, a—any circuit which would be essentially politically tilted, if we can do it?

Judge THOMAS. Well, I would hope the committee would make its decision based on not ideological factors, and I take it with confidence from the chairman's prior remarks that that's not the intent. And, frankly, I just don't want to opine on what the Congress should do internally. I'd have to leave that to you.

Mr. ISSA. I was asking actually for your observation of the effect if there was a single-State solution with—let's hypothetically say if Arizona were a circuit and California were a circuit, would you, by definition, two States, two very different pairs of Senators, the current way that the process works—and some of you have gone through the process once, some twice—do you think that you would end up with vastly different circuits and they would be one-State circuits? And is that something we should generally guard against?

Judge THOMAS. Well, if I might answer more generally. I think one-State circuits are a bad idea for a whole variety of reasons, some of which you've just identified.

Mr. ISSA. Okay.

Any other questions?

Okay. I'd ask, would you all be willing to take some follow-up questions? A number of members were not able to get here. They had competing markups.

Judge BEA. Of course.

Mr. ISSA. We'll leave the record open for 5 days, plus whatever time it takes for you to respond.

With that, this concludes today's hearing. Again, I want to thank all of you. The weather is clear. Your ability to get home should be unrestricted.

With that, we stand adjourned.

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