

**AMERICAN BAR ASSOCIATION**

**STANDING COMMITTEE ON THE AMERICAN JUDICIAL SYSTEM**

**SECTION OF LITIGATION**

**TORT TRIAL AND INSURANCE PRACTICE SECTION**

**CRIMINAL JUSTICE SECTION**

**WASHINGTON STATE BAR ASSOCIATION**

**HAWAII STATE BAR ASSOCIATION**

**KING COUNTY BAR ASSOCIATION**

**BEVERLY HILLS BAR ASSOCIATION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1 RESOLVED, That the American Bar Association reaffirms its opposition to restructuring the  
2 United States Court of Appeals for the Ninth Circuit because there is no compelling empirical  
3 evidence of adjudicative or administrative dysfunction in the existing structure; and  
4

5 FURTHER RESOLVED, That the American Bar Association supports ongoing efforts by the  
6 United States Court of Appeals for the Ninth Circuit and other federal courts to utilize  
7 technological and procedural innovations in order to continue to enable them to handle caseloads  
8 efficiently while maintaining coherent, consistent law in their respective jurisdictions.



## REPORT

### I. Introduction

The federal circuit courts of appeals were established by Congress in 1891.<sup>1</sup> Over time, the number of circuits has increased from the original nine circuits to the current 12 circuits. The federal circuits vary in size (i.e., the number of judges comprising the courts of appeals and the total number of judicial officers within the circuit), have differing caseloads and cover differing numbers of states, territories, residents and total geography. Proposals are occasionally made to divide the existing circuits,<sup>2</sup> and on a few occasions such proposals have been adopted, e.g., the division of the old Fifth Circuit into the current Fifth Circuit and the Eleventh Circuit. Like the emergence of cicadas from the soil, periodic proposals have arisen in recent decades to split the Court of Appeals for the Ninth Circuit. Characterized by one of its critics as a “supersized appellate court,”<sup>3</sup> the Ninth Circuit has been said to be in need of division for several reasons, including the oft-cited assertion that the circuit allegedly has a “high rate of reversal” by the United States Supreme Court. Current legislative proposals focus on the large geography of the circuit, promising that division of the circuit will “bring justice closer to the people.”<sup>4</sup>

The proponents of the Resolution have studied all of the legislative proposals for splitting the Ninth Circuit and the relevant factual record. The proponents urge the American Bar Association (ABA) to oppose these proposals because there is no compelling empirical evidence of either adjudicative or administrative dysfunction in the existing structure that would warrant a split. The proponents believe that adoption of the Resolution is necessary because the House of Delegates needs to articulate clear policy on this important issue based upon the current factual record. The proponents also ask the House to adopt policy supporting the ongoing efforts of the Ninth Circuit and other federal courts to utilize technological and procedural innovations

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<sup>1</sup> Fed. Judicial Ctr., *The U.S. Courts of Appeals and the Federal Judiciary*, <https://www.fjc.gov/history/courts/u.s.-courts-appeals-and-federal-judiciary> (last visited Apr. 4, 2017).

<sup>2</sup> While proposals to divide or restructure the circuits usually focus on the appellate court and the states that would be included in any new circuits, division would also result in the realignment of the lower courts and restructuring of the administrative and ancillary functions within the court system.

<sup>3</sup> *Bringing Justice Closer to the People: Examining Ideas for Restructuring the Ninth Circuit: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 115<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Mar. 16, 2017) [hereinafter House Judiciary Subcomm. Hearing] (written statement of Dr. John C. Eastman, Professor, Chapman University Fowler School of Law).

<sup>4</sup> See the title of the House Judiciary Subcomm. Hearing, *supra* note 2. Some have suggested that the true objective of these recurring proposals to divide the Ninth Circuit is to “gerrymander” a circuit whose decisions are considered by some to be “too liberal.” See, e.g., House Judiciary Subcomm. Hearing, *supra* note 2, <https://www.c-span.org/video/?425486-1/ninth-circuit-court-appeals-judges-testify-court-restructuring> (transcript of opening statement at 6:25 by John Conyers, Jr., Ranking Member, House Comm. on the Judiciary, and transcript of statement at 15:34 by Jerrold Nadler, Ranking Member, Subcomm. on Courts, Intellectual Property, and the Internet). The authors take no position on this issue.

to enable the courts to handle caseloads efficiently while maintaining coherent, consistent law within their respective jurisdictions.

## II. Past Congressional Inquiries and Legislative Proposals to Restructure the Ninth Circuit

The federal courts of appeals have long been the subject of study, primarily because of concerns about the persistent growth in the appellate caseload.<sup>5</sup> The Ninth Circuit—the largest circuit in geographic size, population, judgeships, and annual caseload—has been the subject of numerous studies and proposals over the years.<sup>6</sup>

In 1972, Congress created the Hruska Commission, formally called the Commission on Revision of the Federal Court Appellate System, to study the federal appellate system. In 1975, the Hruska Commission issued its final report, which included recommendations for dividing both the Fifth and Ninth Circuits (then composed of 15 and 13 judges respectively) on the basis of an announced preference for smaller circuits.<sup>7</sup> The ABA endorsed those recommendations.

At that time, Congress declined to divide the circuits and instead implemented other Hruska Commission recommendations. These included substantially increasing the number of authorized judgeships in both circuits and authorizing any circuit with 15 or more judges to use limited en banc panels or to divide into administrative units to deal with rising caseloads.<sup>8</sup> The Ninth Circuit chose to adopt these new procedures; the judges of the Fifth Circuit preferred division.

In 1980, Congress divided the Fifth Circuit by placing Florida, Georgia, and Alabama into a new Eleventh Circuit.<sup>9</sup> This was the second (and last) time that Congress has

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<sup>5</sup> In 1960, almost 4,000 appeals were filed in the regional courts of appeals, which were composed of 68 judges. In 1970, almost 12,000 appeals were filed and the number of authorized judgeships increased to 97. By 1980, appeals almost doubled and authorized judgeships increased to 132. In 1990, there were 40,898 appeals filed and 156 judgeships. The number of authorized judgeships increased to 167 in 1991 as a result of an omnibus judgeship bill. No additional judgeships have been created since then, despite more growth in caseload. In 2016, over 61,000 appeals were filed.

<sup>6</sup> When it was established in 1891, the Ninth Circuit included California, Idaho, Montana, Nevada, Oregon and Washington. Hawaii, Arizona, Alaska, Guam and the Northern Mariana Islands were added subsequently. Fed. Judicial Ctr., History of the Federal Judiciary, [http://www.fjc.gov/history/home.nsf/page/courts\\_coa\\_circuit\\_09.html](http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_09.html). The total number of authorized court of appeals judgeships has increased from 2 in 1891 to 29 today. *Id.*

<sup>7</sup> Comm'n on Revision of the Fed. Court Appellate Sys., Structure and Internal Procedures: Recommendations for Change 57-59 (1975).

<sup>8</sup> Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629, 1633 (1978).

<sup>9</sup> Appellate Court Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980).

divided a circuit since 1891, when it created the system of regional circuit courts of appeals as we know them today.<sup>10</sup>

Although the ABA originally supported the Hruska Commission's recommendation to split both the Fifth and Ninth Circuits, it rescinded that position in 1990 with respect to the Ninth Circuit, on the basis that procedural changes and court management innovations allowed the circuit to manage its rising caseload without sacrificing quality or timeliness.

In 1993, at the request of the Federal Courts Study Committee, which had been established three years earlier by Congress, the Federal Judicial Center (FJC) undertook a 15-month examination of the appellate court system and issued a report titled *Structural and Other Alternatives for the Federal Courts of Appeals*. The FJC concluded that the expansion of federal jurisdiction without a concomitant increase of resources was creating a burden for the federal courts of appeals and that it did not appear to be a stress that would be significantly relieved by structural changes to the appellate system. Its report stated that it could not "conclude, as some assert, that the justness of appellate outcomes has been detrimentally affected by caseload volume."<sup>11</sup> It advocated for non-structural efforts to deal with the problem of increased volume.

In 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by Justice Byron R. White (the "White Commission"), to study the structure and alignment of the federal appellate system, with particular focus on the Ninth Circuit, and to submit recommendations on changes in circuit boundaries or structure to the President and Congress.<sup>12</sup> The White Commission's report to Congress concluded that the Ninth Circuit should not be split:

There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.<sup>13</sup>

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<sup>10</sup> The first split occurred in 1929, only after almost unanimous consensus was reached among members of Congress and judges on how to divide the circuit. A new Tenth Circuit was carved out of five contiguous western-most states of the existing Eighth Circuit. Tenth Circuit Act of 1929, ch. 363, 45 Stat. 1346 (1929). The ABA supported this division.

<sup>11</sup> Fed. Judicial Ctr., *Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States* 155 (1993).

<sup>12</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440, 2491 (1997).

<sup>13</sup> Comm'n on Structural Alternatives for the Fed. Courts of Appeals, *Final Report* 29 (1998).

The White Commission noted that there were benefits from the current makeup of the Ninth Circuit, including the development of a consistent body of law that applies to the entire western region of the United States and governs relations with the other nations of the Pacific Rim. It also noted financial and practical advantages of the circuit's administrative structure.

The White Commission nevertheless recommended that Congress restructure the Ninth Circuit into three regionally based adjudicative divisions. The ABA opposed this recommendation on the ground that the only rationale for the recommendation—a subjective preference for smaller decisional units—was an insufficient reason to restructure a judicial circuit.<sup>14</sup> Congressional reaction to the White Commission's report was tepid, and legislation introduced during the 106<sup>th</sup> Congress by Senator Frank Murkowski (R-AK) received minimal attention.

During the 107<sup>th</sup> Congress, bills were introduced in the House and Senate by Representative Simpson (R-ID) and Senator Murkowski to split the Ninth Circuit into two circuits, with Arizona, California, and Nevada remaining in the Ninth Circuit and Alaska, Hawaii, Oregon, Washington, Idaho, and Montana forming a new Twelfth Circuit.<sup>15</sup> Hearings were held, but no further action was taken.

During the 108<sup>th</sup> Congress, bills proposing three different ways to divide the Ninth Circuit were introduced. Representative Simpson reintroduced his previous bill; he and Senator Murkowski introduced bills with only California and Nevada remaining in the Ninth Circuit, and Representative Renzi (R-AZ) and Senator Ensign (R-NV) introduced bills containing a novel three-way split. Although the House Judiciary Committee had not held a hearing on the three-way circuit restructuring proposal, House members attempted to secure the bill's passage by attaching it to an omnibus judgeship bill that had already passed the Senate. The strategy succeeded in the House, but failed in the Senate.

During the 109<sup>th</sup> Congress, seven circuit restructuring bills were introduced. Three bills (introduced by Senators Murkowski and Ensign and Representative Simpson) proposed keeping California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and placing the remaining states in the new Twelfth Circuit. A separate House bill (introduced by Representative Sensenbrenner (R-WI)) combined Representative Simpson's bill with the omnibus judgeship bill from the previous Congress. With 10 cosponsors—more than any other circuit-splitting bill has garnered to date—it was reported to the House, but never scheduled for a vote.

During the 110<sup>th</sup>–114<sup>th</sup> Congresses, similar bills were introduced by many of the same members, but none received any action.

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<sup>14</sup> The ABA House of Delegates adopted policy in August 1999 opposing the recommendations of the White Commission.

<sup>15</sup> See Appendix A and Appendix B for visual representations of the circuit realignments proposed by the bills discussed in this report.

### III. Current Congressional Activity

In the current 115th Congress, four circuit restructuring bills have been introduced. S. 295 and H.R. 196, introduced by Senator Daines (R-MT) and Representative Simpson respectively, share the same circuit reconfiguration but differ in other details. These bills would retain California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and assign the other states to the new Twelfth Circuit. Representative Biggs (R-AZ) has introduced H.R. 250, which would retain Oregon and Washington along with California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit, and assign the other states to the new Twelfth Circuit. S. 276, introduced by Senator Flake (R-AZ), would tweak that arrangement a bit by assigning Washington to the new Twelfth rather than the Ninth Circuit. In addition to these realignment bills, legislation to establish a new Commission on Structural Alternatives for the Federal Courts of Appeals has been introduced by Senator Sullivan (R-AK).

### IV. Existing ABA Policy

One of the primary goals of the ABA is to promote improvements in the administration of justice. It is therefore not surprising that the ABA has examined the issue of restructuring the Ninth Circuit on multiple occasions over the past 50 years. Originally supportive of realignment of the Ninth Circuit in the 1970s, the ABA continued to examine the issue over the next several decades in light of the emergence of technological developments that increasingly bridged geographical distances, the successful use of limited en banc review panels, and the circuit's innovative use of case management techniques. This culminated in the ABA rescinding its earlier position and adopting policies in the 1990s opposing division of the Ninth Circuit.<sup>16</sup> Since then, the ABA has periodically reviewed new proposals to split the circuit.<sup>17</sup> On March 16, 2017, the ABA submitted testimony, based upon previously adopted policy, opposing the current legislative proposals to restructure the Ninth Circuit at a hearing of the Subcommittee on Courts, Intellectual Property and the Internet of the House Committee on the Judiciary.<sup>18</sup>

### V. No Compelling Evidence Exists that the Ninth Circuit Needs Restructuring

The ABA has found no compelling evidence to support claims that the Ninth Circuit is failing to deliver quality justice.<sup>19</sup> The perceived problems identified by supporters of

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<sup>16</sup> In 1998, the ABA Board of Governors adopted a resolution that opposed restructuring of the Ninth Circuit “in view of the absence of compelling empirical evidence to demonstrate adjudicative or administrative dysfunction.” A resolution adopted by the ABA House of Delegates in 1999 opposed enactment of legislation that mandated restructuring of the Ninth Circuit into “adjudicative divisions” in view of the “absence of compelling evidence to demonstrate adjudicative dysfunction.”

<sup>17</sup> The ABA last expressed opposition to circuit restructuring in a statement submitted to the Senate Judiciary Committee on September 20, 2006, for a hearing on proposals to split the Ninth Circuit.

<sup>18</sup> See House Judiciary Subcomm. Hearing, *supra* note 2.

<sup>19</sup> The ABA’s findings are consistent with recent analyses and studies conducted by the Ninth Circuit. See House Judiciary Subcomm. Hearing, *supra* note 2 (written statements of Sidney R. Thomas, Chief Judge, and Alex Kozinski and Carlos T. Bea, Circuit Judges, United States Court of Appeals for the Ninth Circuit).

the legislation do not justify restructuring and would not be remedied by any of the various proposed circuit divisions. Two examples will demonstrate this disconnect between perception and intent.

**A. Delay and Backlog**

Critics often complain that the circuit has a backlog of pending cases and is slow to process new cases. Even if true, neither of these concerns would be resolved by realignment. Circuit division does not reduce caseload or eliminate backlog; it only reallocates it. Circuit size is not the critical factor in appellate delay—too many vacancies, too few authorized judgeships, and national policy decisions that increase workload without providing concomitant resources are the prime causes of delay and backlog.

The Ninth Circuit does indeed have the slowest median processing time for cases terminated on their merits, but that one statistic does not convey very much about the way the Ninth Circuit is handling its caseload. Statistics compiled by the Administrative Office of the U.S. Courts (AO) for the 12-month period ending June 30, 2016<sup>20</sup> show that in recent years the Ninth Circuit has been getting ahead of the curve by terminating more cases than are commenced. It is also notable that the circuit's disposition times have steadily improved over the past decade. In fact, Judge Sidney R. Thomas, Chief Judge of the Ninth Circuit, reported that case processing time has been reduced by almost 35%. Furthermore, while the circuit may lag behind others in the median time from the date of filing to final disposition, once cases are ready for oral argument, they move expeditiously through the system and are closed in record time. The Ninth Circuit was the second fastest circuit in terms of median time from the date of the oral argument to final disposition with a rate of 1.1 months. It also shared with four other circuits the distinction of having the fastest median time from submission on the briefs to disposition—a record-breaking 0.2 months.

One of the reasons that the Ninth Circuit has been able to function so well despite its growing caseload is because it has been on the forefront of utilizing technology to enhance administrative efficiency. In fact, the Ninth Circuit was the first to institute automated docketing and electronic web-based filing. It also developed and uses to great advantage an automated issue identification system that inventories cases in a way that flags potential conflicts for early resolution and facilitates efficient resolution of cases that share the same central issue. The system also enables the court to issue pre-publication reports to court members to advise them in advance of the filing of every published opinion and to identify pending cases that might be affected by the lead opinion. In addition to using technology effectively, the Ninth Circuit has introduced case management solutions, such as the creation of the positions of Appellate Commissioner and Circuit Mediator, to help resolve cases that do not require resolution by an Article III judge. These programs, available to the circuit because of its aggregate resources, have produced administrative efficiencies that have improved case management and increased productivity.

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<sup>20</sup> The AO's statistical tables are available on its website at <http://www.uscourts.gov/statistics-reports>.



Moreover, dividing the Ninth Circuit would not be a likely cure for whatever delay problems exist. Wherever California goes, with or without any other states, the system will be overburdened unless and until new judgeships are created. Indeed, one of the primary academic proponents of dividing the Circuit admitted in his testimony before the Congress that the purported benefits that he believes would flow from splitting the Circuit could not be achieved without dividing California and placing the state in two circuits.<sup>21</sup> Because California has far fewer judges on the Ninth Circuit than its proportion of the cases in the Circuit, splitting off other states from California would effectively increase the caseload for the judges that remained in the Circuit with California.

The Ninth Circuit is also the only federal circuit that currently has live streaming of its video arguments. In commenting on the leadership role that the circuit has taken in allowing cameras in the courtroom, Chief Judge Thomas recently remarked that “[t]he more transparent we are the more confidence people will have in our judicial institutions.”<sup>22</sup>

## **B. Reversal Rate**

Contrary to often-repeated statements, the rate of reversal of Ninth Circuit decisions by the Supreme Court is not the highest of all the circuits and, even if it were, there is no evidence that size has any bearing on reversal rates.<sup>23</sup>

The Supreme Court, not surprisingly, reverses more cases than it affirms. According to an analysis by Politifact, between 2010 and 2015, the Supreme Court reversed about 70% of the cases it reviewed.

During the same time period, 79% of the Ninth Circuit cases were reversed, and the Sixth Circuit, with a reversal rate average of 87%, had the highest reversal rate.<sup>24</sup> Our review of reversal rates, as reported by SCOTUSblog, confirms these statistics.<sup>25</sup> Further proof that reversal rate has nothing to do with the size or volume of cases decided by a circuit is readily

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<sup>21</sup> House Judiciary Subcomm. Hearing, *supra* notes 2 and 4 (transcript of testimony at 1:57:28 by Professor Brian T. Fitzpatrick).

<sup>22</sup> Bonnie Eslinger, *9<sup>th</sup> Circ. Chief Favors Cameras To Promote Trust in Courts*, Law360 (Mar. 27, 2017), [https://www.law360.com/trials/articles/906731/9th-circ-chief-favors-cameras-to-promote-trust-in-courts?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=trials](https://www.law360.com/trials/articles/906731/9th-circ-chief-favors-cameras-to-promote-trust-in-courts?utm_source=newsletter&utm_medium=email&utm_campaign=trials).

<sup>23</sup> Indeed, one academic proponent of splitting the Ninth Circuit conceded in recent written testimony submitted to Congress that “the existing studies are inconclusive” on whether the “size of the Circuit [is] one of the causes of the high reversal rate.” House Judiciary Subcomm. Hearing, *supra* note 2 (written statement of Brian T. Fitzpatrick, Professor, Vanderbilt Law School).

<sup>24</sup> See Lauren Carroll, *No, the 9th Circuit isn't the 'most overturned court in the country,' as Hannity says*, Politifact (Feb. 10, 2017), <http://www.politifact.com/punditfact/statements/2017/feb/10/sean-hannity/no-9th-circuit-isnt-most-overturned-court-country-/>.

<sup>25</sup> See SCOTUSblog, Statistics, [www.scotusblog.com/statistics](http://www.scotusblog.com/statistics) (last visited Apr. 4, 2017).

apparent when one reviews reversal rates year-by-year; there simply is no discernable correlation.

## **VI. Views of Judges and Lawyers of the Ninth Circuit Court**

We believe that the views of judges and the lawyers who practice daily before the courts in the Ninth Circuit should be accorded great deference. In his testimony before Congress, Ninth Circuit Chief Judge Sidney R. Thomas stated: “I oppose division of the Ninth Circuit. Circuit division would have a devastating effect on the administration of justice in the western United States. A circuit split would increase delay, reduce access to justice, and waste taxpayer dollars. Critical programs and innovations would be lost, replaced by unnecessary bureaucratic duplication of administration. Division would not bring justice closer to the people; it would increase the barriers between the public and the courts.”<sup>26</sup> In his testimony, former Chief Judge Alex Kozinski of the Ninth Circuit stated: “Our geographic size has forced us to experiment and innovate. The size of our judicial corps has given us the resources to develop and deploy innovative techniques. Because circuits are funded based on the number of judicial positions they have, we have the resources with which to hire staff and purchase equipment that will bring our courts closer to the people we serve.”<sup>27</sup> In his testimony, Judge Carlos T. Bea of the Ninth Circuit stated: “In conclusion, I think you should take into consideration . . . the views [of] people on the ground—the litigants practitioners and judges in the circuit. The overwhelming majority of the people directly involved is against a split of the Circuit. Talk to the people who deal with the issue daily, and I think you will come around to agreement with them.”<sup>28</sup>

As the Ninth Circuit judges who appeared before the Congress testified, there are substantial advantages to the region being under a consistent body of case law. Technology companies present a good example. The tech corridors in Seattle, Silicon Valley, Los Angeles and Phoenix are presently under a consistent regime that promotes understanding and balance for the players in each location. Settled laws promote economic growth. Balkanized or disparate interpretations are not good for commerce.

In the past, Congress has agreed that the views of the affected legal community carry great weight and has refrained from using its power to restructure a circuit unless there was consensus within Congress and the affected legal community that it was absolutely necessary, and there was agreement over how best to reconfigure the circuit. There are, of course, some judges in the circuit who support division, but we surmise that they comprise a scant minority. While we do not know the exact number of judges of the Ninth Circuit that oppose division, we do know that the past three chief judges of the Ninth Circuit, spanning back to 2000, have strongly opposed division and have been vocal in their support for the benefits derived from the circuit’s size. We also know that neither the Judicial Council of the Ninth Circuit nor the

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<sup>26</sup> House Judiciary Subcomm. Hearing, *supra* note 2 (written statement of Chief Judge Thomas).

<sup>27</sup> *Id.* (written statement of Judge Kozinski).

<sup>28</sup> *Id.* (written statement of Judge Bea).

Judicial Conference of the United States supports restructuring. These facts strongly suggest that there is no groundswell of support among the judges of the Ninth Circuit or elsewhere in the legal community for division.

In addition to the ABA and its thousands of members who practice daily before the courts of the Ninth Circuit, many other segments of the organized bar have also spoken out in opposition to splitting the circuit. In 2006, all but one of the state bar associations that had adopted a policy position on the issue opposed division, and several specialty bars, including the Federal Bar Association, likewise opposed division. Outside of those state and local bar associations that are co-sponsors of this Resolution, we do not have statistics with regard to the current positions of the organized bar in the Ninth Circuit but we are in the process of updating our information and will share the results as soon as possible.

Critics often mention that large circuits suffer from a loss of collegiality and cite it as a reason to divide the Ninth Circuit. While one could just as easily argue that collegiality is fostered by the diversity of voices in a large circuit, the judges of the Ninth Circuit are in the best position to comment on their working relationships.

## **VII. Circuit Restructuring Is a Costly Proposition**

This is not a minor point, especially at a time when budgets continue to be slashed and the national deficit continues to grow. Splitting the circuit would not only result in the loss of efficiencies mentioned earlier, it would also result in steep startup costs (especially if new courthouses needed to be constructed) and duplicative overhead costs. In 2006, the AO estimated that startup costs for a two-way split could run as much as \$96 million, with recurring annual costs ranging from \$13–\$16 million, and that a three-way split could cost as much as \$134 million initially and an additional \$22 million annually thereafter. The potential cost of circuit restructuring alone counsels against division, absent verifiable compelling evidence of dysfunction.

## **VIII. Conclusion**

In conclusion, we respectfully request that the House of Delegates adopt the Resolution, thereby (i) opposing restructuring of the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure and (ii) supporting ongoing efforts of the United States Court of Appeals for the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

Respectfully submitted,

Michael H. Reed.  
Chair, Subcommittee on Federal Courts of the  
Standing Committee on the American Judicial System  
August 2017

**APPENDIX A**  
 Current Proposals to Divide the 9<sup>th</sup> Circuit



115<sup>th</sup> Congress  
 H.R. 250  
 (Biggs, R-AZ)

114<sup>th</sup> Congress  
 H.R. 4457  
 (Salmon, R-AZ)  
 S.2490  
 (Flake, R-AZ)



115<sup>th</sup> Congress  
 S. 295 (Daines, R-MT)  
 20/14 Judgeships split  
 H.R. 196 (Simpson, R-ID)  
 25/9 Judgeships split

114<sup>th</sup> Congress  
 H.R.166 (Simpson, R-ID)  
 S. 2477 (Daines, R-MT)

113<sup>th</sup> Congress  
 H.R.144 (Simpson, R-ID)

112<sup>th</sup> Congress  
 H.R.162 (Simpson, R-ID)



111<sup>th</sup> Congress  
 H.R.191 (Simpson, R-ID)  
 S. 1727 (Ensign, R-NV)

110<sup>th</sup> Congress  
 H.R.221 (Simpson, R-ID)

109<sup>th</sup> Congress  
 H.R.3125 (Simpson, R-ID)  
 S. 1845 (Ensign, R-NV)  
 S. 1296 (Murkowski, R-AK)



115<sup>th</sup> Congress  
 S. 276  
 (Flake, R-AZ)

**KEY:**  
 = New 9<sup>th</sup> Circuit  
 = New 12<sup>th</sup> Circuit

Earlier Proposals to Divide the 9<sup>th</sup> Circuit



109<sup>th</sup> Congress  
H.R. 212  
(Simpson, R-ID)



108<sup>th</sup> Congress  
H.R. 1033  
(Simpson, R-ID)



108<sup>th</sup> Congress  
S. 562  
(Murkowski, R-AK)



109<sup>th</sup> Congress  
H.R. 211 (Simpson, R-ID)  
S. 1301 (Ensign, R-NV)

108<sup>th</sup> Congress  
H.R. 2723  
(Simpson, R-ID)

108<sup>th</sup> Congress  
H.R. 4247 (Renzi, R-AZ)  
S. 2278 (Ensign, R-NV)

107<sup>th</sup> Congress  
H.R. 1203  
(Simpson, R-ID)  
S.346  
(Murkowski, R-AK)

**KEY:**

- = New 9<sup>th</sup> Circuit
- = New 12<sup>th</sup> Circuit
- = New 13<sup>th</sup> Circuit

## GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on the American Judicial System

Submitted By: Michael H. Reed, Chair, SCAJS Subcommittee on Federal Courts

1. Summary of Resolution(s).

This Resolution opposes restructuring the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure. It further supports ongoing efforts by the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

2. Approval by Submitting Entity.

The Standing Committee on the American Judicial System approved this Resolution by email on April 25, 2017. The Section of Litigation Council approved this Resolution on May 6, 2017. The Tort Trial and Insurance Practice Section Council approved this Resolution on April 29, 2017. The Criminal Justice Section Council approved this Resolution on May 6–7, 2017. The Washington State Bar Association Board of Governors approved this Resolution on May 19, 2017. The Hawaii State Bar Association approved this Resolution on May 25, 2017. The King County Bar Association approved this Resolution on May 19, 2017. The Beverly Hills Bar Association approved this Resolution on May 23, 2017. The Judicial Division Council provided notice on May 3, 2017 of its support for this Resolution. The Standing Committee on Legal Assistance to Military Personnel provided notice of its support on May 9, 2017.

3. Has this or a similar resolution been submitted to the House or Board previously?

A similar resolution has not been submitted previously.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

This Resolution would build upon and enhance existing ABA policy, but would not change any current ABA policy.

Originally supportive of realignment of the Ninth Circuit in the 1970s, the ABA continued to examine the issue over the next several decades in light of the emergence of technological developments that increasingly bridged geographical distances, the successful use of limited en banc review panels, and the Ninth Circuit's innovative use of case management techniques. This culminated in 1990, when the House of Delegates adopted Resolution 123 at the Annual meeting, rescinding its earlier position in support of realignment of the Ninth Circuit. In 1998, the ABA Board of Governors adopted a resolution that opposed restructuring of the Ninth Circuit

“in view of the absence of compelling empirical evidence to demonstrate adjudicative or administrative dysfunction.” Resolution 110A, adopted by the ABA House of Delegates at the Annual Meeting in 1999, opposed enactment of legislation that mandated restructuring of the Ninth Circuit into “adjudicative divisions” in view of the “absence of compelling evidence to demonstrate adjudicative dysfunction.”

Since then, the ABA has periodically reviewed new proposals to split the circuit. The ABA last expressed opposition to circuit restructuring in a statement submitted to the Senate Judiciary Committee on September 20, 2006, for a hearing on proposals to split the Ninth Circuit. On March 16, 2017, the ABA submitted testimony, based upon previously adopted policy, opposing the current legislative proposals to restructure the Ninth Circuit at a hearing of the Subcommittee on Courts, Intellectual Property and the Internet of the House Committee on the Judiciary.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation. (If applicable)

In the current 115th Congress, four circuit restructuring bills have been introduced. S. 295 and H.R. 196, introduced by Senator Daines (R-MT) and Representative Simpson (R-ID) respectively, share the same circuit reconfiguration but differ in other details. These bills would retain California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit and assign the other states to the new Twelfth Circuit. Representative Biggs (R-AZ) has introduced H.R. 250, which would retain Oregon and Washington along with California, Guam, Hawaii, and the Northern Mariana Islands in the Ninth Circuit, and assign the other states to the new Twelfth Circuit. S. 276, introduced by Senator Flake (R-AZ), would tweak that arrangement a bit by assigning Washington to the new Twelfth rather than the Ninth Circuit. As of the date of filing this Form, the Senate bills have been read twice and referred to the Committee on the Judiciary and the House bills have been referred to the Subcommittee on Courts, Intellectual Property, and the Internet.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The adoption of this Resolution will enhance the ability of the ABA to oppose the restructuring of the Ninth Circuit and to support technological and procedural innovations by the federal courts.

8. Cost to the Association. (Both direct and indirect costs)

None.

9. Disclosure of Interest. (If applicable)

N/A.

10. Referrals.

Business Law Section  
Criminal Justice Section (Co-Sponsor)  
Government and Public Sector Lawyers Division  
Judicial Division (Supporter)  
Judicial Division Appellate Judges Conference  
Judicial Division Lawyers Conference  
Judicial Division National Conference of Federal Trial Judges  
Law Practice Division  
Section of Administrative Law and Regulatory Practice  
Section of Intellectual Property Law  
Solo, Small Firm and General Practice Division  
State and Local Government Law Section  
Tort Trial & Insurance Practice Section (Co-Sponsor)  
Young Lawyers Division  
Standing Committee on Election Law  
Standing Committee on Legal Aid and Indigent Defendants  
Standing Committee on Legal Assistance for Military Personnel (Supporter)  
Commission on Immigration  
Alaska Bar Association  
State Bar of Arizona  
State Bar of California  
Hawaii State Bar Association (Co-Sponsor)  
Idaho State Bar  
State Bar of Montana  
State Bar of Nevada  
Oregon State Bar  
Washington State Bar Association (Co-Sponsor)  
Guam Bar Association  
Commonwealth of the Northern Mariana Islands Bar Association  
King County Bar Association (Co-Sponsor)  
Beverly Hills Bar Association (Co-Sponsor)

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House?  
Please include name, address, telephone number, cell phone number and e-mail address)

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution

This Resolution opposes restructuring the United States Court of Appeals for the Ninth Circuit because there is no compelling empirical evidence of adjudicative or administrative dysfunction in the existing structure. It further supports ongoing efforts by the Ninth Circuit and other federal courts to utilize technological and procedural innovations in order to continue to enable them to handle caseloads efficiently while maintaining coherent, consistent law in their respective jurisdictions.

### 2. Summary of the Issue that the Resolution Addresses

There is no compelling empirical evidence of either adjudicative or administrative dysfunction in the existing structure of the United States Court of Appeals for the Ninth Circuit that would warrant a split. Nevertheless, members of Congress continue to propose splitting the Ninth Circuit without justification.

### 3. Please Explain How the Proposed Policy Position Will Address the Issue

This Resolution clarifies the ABA's position and enhances the ABA's ability to oppose restructuring of the United States Court of Appeals for the Ninth Circuit absent compelling evidence justifying restructuring.

### 4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None known at the time this Summary was prepared.