

April 12, 2004

California Congressional Delegation  
House of Representatives  
Washington, D.C.

Re: Opposition to Proposed Division of Ninth Circuit Court of Appeals

Dear Representative:

We are writing to encourage you to oppose proposed legislation that would divide the presently-configured Ninth Circuit Court of Appeals. We are hopeful that you and your colleagues in the California delegation will present a unified and vocal opposition to this misguided effort.

The position we urge is one of those rare ones that has joined together – regardless of political affiliation – a substantial majority of those lawyers, judges and elected public officials who call themselves Californians. Indeed, we are joined in our position on this issue by various of California's present and former governors, its senators, and other public officials, including Arnold Schwarzenegger, Gray Davis, Pete Wilson, Dianne Feinstein and Barbara Boxer. We understand that a substantial majority of those Ninth Circuit judges hailing from California, too, opposes a Circuit division.

There are two simple reasons, we submit, why the pending effort to divide the Ninth Circuit is properly opposed:

First, there is no good reason to divide the Circuit. The Ninth Circuit not only functions well at present but, furthermore, faces no problem of a quality or magnitude any different than faced by any other circuit of the federal courts of appeals. For example:

- Although the Ninth Circuit contains the largest number of judges of any federal circuit, the ratio of published opinions to the number of Circuit judgeships is well within that ratio applicable to other circuits;
- Although critics have alleged conflicts of decisional law within the Ninth Circuit, there is no cognizable evidence of such a conflict; indeed, the Circuit's active use of its *en banc* review process is designed to resolve – and has effectively resolved – precisely such conflicts;
- Although supporters of a split often cite statistics involving U.S. Supreme Court reversal of the Ninth Circuit, it must be remembered that the Ninth Circuit decisions selected for Supreme Court review reflect a minuscule fraction (approximately 0.3%) of those cases decided by the Ninth Circuit in any given year; and
- Although critics have called into question the merits of certain judicial decisions emanating from the Ninth Circuit, it is well to remember the apples-and-oranges difference between the *structure* of, and those *judges* who sit on, the Ninth Circuit at any given time.

Second, either of the two pending legislative proposals would mire the presently-configured Circuit into more, and different, problems than might presently be argued to exist. Presently before the Congress are two measures: Senate Bill S 562 would cleave California and Nevada from the other seven states that presently form the Ninth Circuit, creating (with a displaced Arizona) the first non-contiguous circuit court in U.S. history, and adding ten circuit judgeships to the combined circuits. House Bill HR 2723 would separate California, Arizona

and Nevada from, and add five permanent and two temporary judgeships to the area now covered by, the present Circuit. Among other problems with these bills:

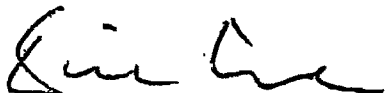
- Neither proposal would achieve any proportionality or balance with respect to the Circuit's present caseload; to illustrate the point, the House resolution would leave the "former" circuit with a staggering 82% of the caseload of the present Circuit; and
- Each proposal would add a brand new circuit headquarters, a new judicial bureaucracy, and new and significant administrative costs, to enable the creation of the new circuit; in so doing, the proposed legislation would vitiate existing economies of scale, and undermine various initiatives that are unique to the Ninth Circuit – including a staff attorney's office that recommends dispositions for the large number of routine appeals; a Bankruptcy Appellate Panel to resolve bankruptcy appeals that would otherwise be handled by the Circuit; and a mediation program that resolves over 1,000 cases per year).

In our country's history, there have been only two instances in which a circuit was divided, and both times – unlike at present – the division was supported by a substantial majority of the judges and attorneys who were to be affected by the division. Just five years ago, a commission headed by the late Supreme Court Justice Byron White – entitled the Commission on Structural Alternatives for the Federal Courts of Appeals – recommended against a division of the Ninth Circuit. There is yet less reason today than then to divide the Circuit; moreover, it is apparent that a substantial majority of the judges and attorneys who would be affected by a division *opposes* any split of the Circuit.

The ultimate question to be addressed by Congress in considering these bills is whether justice will be better administered under any new regime than by the presently-configured Ninth Circuit. We submit that proponents of either bill have not – and cannot – successfully make that case. We accordingly urge your opposition to any measure proposing such a division.

If we can be of any assistance to you in addressing these or other related points any further, please do not hesitate to contact us.

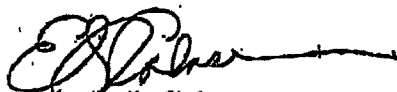
Sincerely,



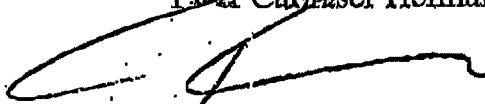
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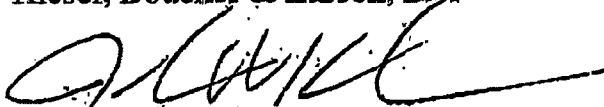
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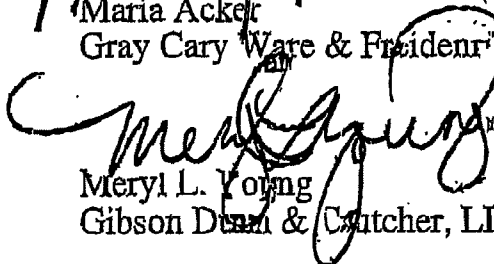
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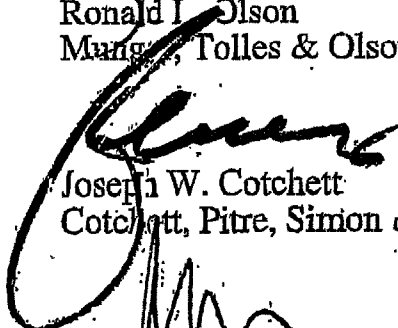
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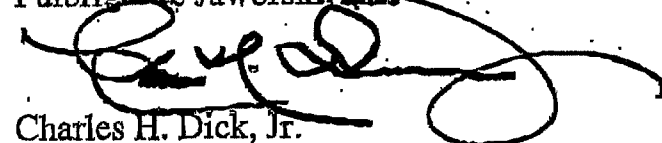
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