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April 6, 2004

The Honorable Dianne Feinstein
Senate Judiciary Committee
Subcommittee on Administrative Oversight and the Courts
Washington, DC 20510

Dear Senator Feinstein:

We are delighted to provide you with these comments in response to your inquiry regarding our views on S. 2278, proposing a novel division of the Ninth Circuit.

We are surprised that the Senate Judiciary Subcommittee on Administrative Oversight and the Courts is holding a hearing tomorrow to examine the bill, which was just introduced late last week. We think this is unfortunate because it thwarts the deliberative process and may limit the scope and depth of comments the Subcommittee might otherwise receive. It is quite likely that many organizations with a keen interest in the subject do not know about the bill (which just became available on the *Thomas* website yesterday) or tomorrow's hearing.

The ABA is opposed to S. 2278. Its novel approach to division of the Circuit does nothing to advance the debate on restructuring because the issue is not how to split the Circuit, but whether there are serious problems with the administration of justice in the Ninth Circuit, and, if so, whether circuit division is the appropriate remedy. We believe that the Ninth Circuit is functioning well as presently structured.

Circuit restructuring is a remedy of last resort and should only be used if there is compelling evidence that justice is being denied to individual litigants and the integrity of the law of the circuit is threatened. After reviewing the most current statistical data and research available, we remain convinced that there is no justification for, nor overall benefit to be derived from, dividing the Ninth Circuit. There is no compelling evidence to suggest that the Ninth Circuit is failing to deliver quality justice or that any of the perceived problems identified by supporters of the legislation would be remedied by the proposed circuit division.[1]

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[1] The ABA has not always opposed circuit restructuring. In 1928, the Association supported splitting the Ninth Circuit, and in 1973 the ABA supported the Hruska Commission's recommendation to split both the Fifth and Ninth Circuit. The ABA however, rescinded that position in 1990 with respect to the Ninth Circuit because of the belief that the procedural changes implemented during the preceding decade, in conjunction with other innovations, gave the Circuit the tools it needed to handle rising caseloads.

Statistics compiled by the Administrative Office of the U.S. Courts and submitted to Congress annually demonstrate that the Circuit is functioning very well and utilizing its resources effectively.[2] In fact, even though filings increased by 13% during the 2003 fiscal year, the Ninth Circuit terminated 11.7% more cases in 2003 than in 2002 (11,220 compared to 10, 042), rendering decisions on the merits in 5,295 cases. Disposition times for the Ninth Circuit also have steadily improved over the last few years and compare favorably with times of other circuits in many respects. For example, the Ninth Circuit was the second fastest circuit in terms of median time from the date of the first hearing to final disposition -- 1.5 months; similarly the Ninth Circuit's median time from submission to disposition was a record-breaking .2 months. These and other statistics readily available from the statistical reports prepared by the A.O. amply demonstrate that the Ninth Circuit continues to cope admirably with its rising caseload without jeopardizing the quality of justice, and that its overall performance is on par with that of the other judicial circuits.

Division of the Ninth Circuit does not have the affirmative support of a majority of the bench and bar in the Ninth Circuit. We believe that the views of the judges of the circuit in question and the lawyers who practice daily before them should be accorded great deference. They are in the best position to know how the Circuit operates on a day-to-day basis and to evaluate its strengths and weaknesses.[3] We urge Congress to continue its past practice of refraining from using its power to restructure a circuit absent the substantial support of the affected legal community out of deference for a co-equal, independent branch of government.

One of the major benefits derived from the current alignment of the Ninth Circuit, noted by the White Commission Report in 1995[4] is that it provides a unified body of law for the vital Pacific Rim economic area that would be impossible to duplicate under any of the proposed reorganizations. Conversely, the White Commission also pointed out that circuit restructuring has many disadvantages because it profoundly affects every component of the justice system and creates its own set of serious problems which may be temporary or may linger for years, including: substantial start-up expenses for new construction or renovation of existing facilities and for relocation of personnel and tangible property; administrative disruption; and, of course, fostering an unpredictability of case law in the circuits whose boundaries are moved. The Commission also counseled against creating a circuit out of less than three states, the minimum necessary to serve an appropriate federalizing function, according to the Commission. These are very important considerations and we hope that Congress will keep them in mind.

Since the 98th Congress, every legislative proposal to split the Ninth Circuit (a total of 17) has been introduced and cosponsored by Congressional members from the Pacific Northwest – i.e., those jurisdictions that would be severed from the Ninth Circuit to create a new circuit.[5] None of the legislative proposals were ever supported by the Judicial Council of the Ninth Circuit or more than a few state bar associations. These observations sadly give rise to the suggestion that

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[2] Administrative Office of the U.S. Courts, JUDICIAL BUSINESS OF THE FEDERAL JUDICIARY (2003). Same-titled reports are produced annually by the A.O.

[3] A supplemental statement, submitted by the ABA Litigation Section reaffirming the opposition of its members who practice in the Ninth Circuit to restructuring proposals is attached.

[4] COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 29 (1998).

[5] A chart listing the original sponsors and cosponsors of all the circuit splitting bills introduced since the 98th Congress is attached.

Congressional concerns over the quality and administration of justice in the Ninth Circuit may not reflect the views of the affected legal community as much as they reflect geographic concerns.

Improving the quality and administration of justice is not only a goal in the Ninth Circuit, but throughout the federal judiciary. Problems in the Ninth Circuit and elsewhere, such as rising caseloads, persistent backlogs of pending appeals, scheduling delays, increased reliance on court management techniques and non-judicial personnel, are far more likely to be solved by restraining the expansion of federal jurisdiction and providing the Federal judiciary with adequate resources than by circuit realignment. The Federal Judiciary is presently facing record-breaking caseloads and operating under serious budgetary constraints: existing judicial vacancies need to be filled; additional judgeships need to be authorized; courthouses need renovation; security systems need updating; adequate staffing levels need to be maintained; court technology programs need to be funded; and concomitant resources need to be channeled to the federal courts when federal jurisdiction is expanded or implementation of national policies, such as enhanced surveillance of our borders, results in huge increases in criminal case filings in some courts. We hope the Senate Judiciary Committee will re-direct its efforts and focus on developing legislative solutions to these and other serious problems facing the Third Branch.

Thank you for this opportunity to present our views. We stand ready to assist you in whatever way we can.

Sincerely,

Robert D. Evans

Robert D. Evans

Supplemental Statement
of
Patricia Lee Refo, Chair

ection of Litigation
American Bar Association

on

Proposed Legislation to Split the Ninth Judicial Circuit

submitted to

Subcommittee on Administrative Oversight and the Courts
Committee on the Judiciary
U.S. Senate

April 6, 2004

I am the Chair of the Section of Litigation of the American Bar Association, and I write to reaffirm the Section's opposition to S. 2278 and other proposed legislation to divide the United States Court of Appeals for The Ninth Judicial Circuit.

The Section of Litigation is the largest section in the ABA and represents over 72,000 members in the United States. I want to emphasize at the outset that the Litigation Section is not "pro-plaintiff," "pro-defendant" or "pro-anyone." Our charter is to improve the quality of justice among practicing lawyers and their clients. We therefore have no axe to grind other than making sure that our nation's justice and judicial administration are the best they can be.

I, along with some 14,000 of the Section's members, practice in the states and territories that comprise the Ninth Circuit. We regularly appear in both the federal District Courts within the Ninth Circuit, and also in the Ninth Circuit itself. More importantly, our clients will be directly affected by any action taken to modify the current structure of the Ninth Circuit.

The key point that we, as practicing lawyers, would like to underscore — as so many others, including the report of the White Commission in 1998, have concluded — is that there is still "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."

The ABA itself, Chief Judge Schroeder and other affected bar groups have pointed out the significant short- and medium-term costs and dislocations that a split would produce. They have also demonstrated that there has been no showing that splitting the Ninth Circuit would produce any meaningful benefits to anyone, including litigants or the public at large, much less that they clearly outweigh the downsides of doing so, which should be the touchstone for making such a significant change. We join in their statements and fully support them.

The fact that the majority of Judges on the Ninth Circuit — including those whose appointments came from "both sides of the aisle" — are opposed to a split and see no benefits from one is itself compelling.

It is extremely useful to have both the collective and individual views and experiences of appellate judges from Arizona to Alaska and from Idaho to Hawaii in framing the Ninth Circuit's jurisprudence. The Court's diversity also helps to bring balance to the other states within its boundaries. The Ninth Circuit may be large, both in geography and the number of its judges, but it serves the important purpose of collecting all of the western-most states together in one appellate judicial unit to arrive at an overall, balanced perspective on the important legal issues that come before it.

Most importantly, as noted above, the Ninth Circuit is working, and it is working well with support from not only its own judges, but the bar associations and lawyers within its jurisdiction.