Statement

of the

American Bar Association

on

H.R. 2723, the "Ninth Circuit Court of Appeals Judgeships and Reorganization Act of 2003"

submitted to the

Subcommittee on Courts, the Internet and Intellectual Property

Committee on the Judiciary

U.S. House of Representatives

October 21, 2003

The American Bar Association appreciates the opportunity to present this written statement for the hearing record of the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property on H.R. 2723, the "Ninth Circuit Court of Appeals Judgeships and Reorganization Act of 2003." The ABA has examined the issue of appellate court restructuring multiple times since 1925. After reviewing the most current statistical data and testimony, we reaffirm our position conveyed to this committee last year: there continues to be no compelling reason to restructure the Ninth Circuit and, therefore, we oppose enactment of H.R. 2723 or any other legislative proposal that would divide the Ninth Circuit into two separate circuits.

I. Historical Overview of Congressional Interest in Restructuring the Ninth Circuit Court of Appeals

The federal courts of appeals have been the subject of intense study and debate for over three decades, primarily because of concerns generated by the dramatic and persistent growth in federal appellate caseload.[1] The Ninth Circuit -- the largest circuit in terms of geographic size, population served, number of authorized judgeships and total annual caseload -- has often been, and continues to be, at the vortex of the debate.

In the early 1970s, the congressionally created Hruska Commission, formally called the Commission on Revision of the Federal Court Appellate System, recommended several procedural and structural changes, including division of both the Fifth and Ninth Circuits, then composed of 15 and 13 judges respectively, because they were considered too large. Congress declined to implement that recommendation and instead substantially increased the number of authorized judgeships in both circuits and authorized any circuit with 15 or more judges to adopt the use of limited en banc panels or administrative units (other recommendations of the Hruska

Commission) to deal with rising caseloads.[2] The Ninth Circuit chose to adopt these new procedures. The Fifth Circuit, having resisted these innovations, subsequently chose to petition Congress for division. Congress agreed in 1980 and created a new Eleventh Circuit. The only other time Congress has divided a circuit occurred in 1929, after a consensus was reached among members of the circuit bench and bar of the Eighth Circuit that the western states should be placed in a new Tenth Circuit.

Although there was general consensus in the legal community that the various techniques adopted in the 1980s were working well in the Ninth Circuit, some Members of Congress who resided in the Pacific Northwest were not satisfied and repeatedly introduced legislation during the 1980s and 1990s to split the Ninth Circuit into various configurations. None of the proposals received serious legislative attention until the 105th Congress, when an attempt to press Ninth Circuit restructuring resulted in passage of compromise legislation creating the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by the late Justice Byron R. White.[3] The Commission was directed to study the structure and alignment of the federal appellate system, with particular reference to the Ninth Circuit, and to submit its final recommendations regarding changes in circuit boundaries or structure to the President and to Congress by December 1998.

The "White Commission," as it was popularly known, concluded that the Ninth Circuit should not be split. In its final report, released at the end of the 105th Congress, the Commission stated:

> 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

---

[1] In 1960, 3,899 appeals were filed in the regional U.S. Courts of Appeals, on which a total of 68 judges sat. In 2002, 57,555 cases were filed before an appellate judiciary consisting of 179 judges.

[2] Omnibus Judgeship Act of 1978, Pub.L. No. 95-486.

> 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.[4]

The Commission also acknowledged that certain benefits derived from the current alignment of the Ninth Circuit, including the development of a consistent body of law that applies to the entire far western region of the United States and governs relations with the other nations of the Pacific Rim, and the practical advantages of the Circuit's administrative structure. Nevertheless, the White Commission recommended that Congress restructure the Ninth Circuit Court of Appeals into three regionally based adjudicative divisions. The ABA opposed the recommendation, observing that it was not supported by the Commission's findings and conclusions, but rather by the Commission's stated subjective preference for smaller decisional units. Congressional reaction was similarly tepid, and implementing legislation introduced during the 106th Congress by Senator Murkowski (R-AK) received minimal attention.

During the 107th Congress, identical bills were introduced in the House and Senate by Representative Simpson (R-ID) and Senator Murkowski (R-AK) 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. This Subcommittee held a hearing on H.R. 1203 on July 23, 2002. The ABA submitted a written statement for the record opposing the legislation.

This Congress, Representative Simpson and Senator Lisa Murkowski again have introduced circuit-splitting bills. Representative Simpson, in fact, introduced two: H.R. 1033,

---

[3] Pub.L.No. 105-119.

[4] Final Report, *supra note 2 at 29.*

would fashion California and Nevada into a new Ninth Circuit, while H.R. 2723 -- the subject of this hearing -- proposes a different circuit reconfiguration by retaining Arizona, California and Nevada in the Ninth Circuit and creating a new Twelfth Circuit out of the remaining states and territories. In response to concerns raised during last year's hearing, H.R. 2723 includes new provisions authorizing seven new judgeships for the newly configured Ninth Circuit and permitting inter-circuit transfer of judges between the new Ninth and Twelfth Circuits upon mutual consent of their chief judges.

Despite these modifications in design, the ABA remains opposed to H.R. 2723. Its new provisions do not advance the debate: 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 they would be remedied by dividing the circuit into two circuits.

II. Circuit Restructuring Should Not Occur Absent Compelling Evidence of Current Dysfunction.

The standard by which the ABA assesses the need for circuit restructuring states: "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload." This standard, first suggested by the Judicial Conference of the United States in its *Proposed Long Range Plan for the Federal Courts*,[5] clearly embodies the principle that 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. Contrary to the views expressed by Professor Hellman in his testimony before this subcommittee, we believe that Congress should

adhere to this very stringent standard because circuit restructuring 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.

In determining whether this standard is met, 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.[6] Unless there are truly extraordinary circumstances, Congress should 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.

It is noteworthy that, since the 98th Congress, every legislative proposal to split the Ninth Circuit (a total of 16) 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 Twelfth Circuit.[7] 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 give rise to the inference that Congressional concerns over the quality and administration of justice in the Ninth Circuit do not reflect the views of the affected legal community as much as they reflect geographic concerns. This certainly may not be the case, but

[5] Judicial Conference of the United States, LONG RANGE PLAN FOR THE FEDERAL COURTS, 44 (1995).
[6] See Appendix A for a supplemental statement submitted by the ABA Litigation Section reaffirming the opposition of its members who practice in the Ninth Circuit to restructuring proposals.

the insistence by legislators from such a prescribed geographic area that Congress mandate a split, in the absence of widespread support, raises questions whether issues other than judicial efficiency are involved.

III. No Compelling Evidence Exists To Support Claims That The Ninth Circuit Needs Restructuring at This Time.

After examining the most recent judicial statistics and evaluating the claims of those who support division, we do not detect a deterioration of conditions in the Ninth Circuit. The ABA, therefore, again concludes that 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.[8] In fact, court statistics compiled by the Administrative Office of the U.S. Courts and submitted to Congress annually suggest that the Circuit is functioning very well and utilizing its resources effectively.[9] The Ninth Circuit terminated more than 10,000 cases in 2002, rendering decisions in over 5,000 of them. Each judge terminated, on the average, 492 cases on the merits, making the Circuit the fourth most productive out of the thirteen circuits in 2002.

---

[7] Appendix B contains a chart listing the original sponsors and cosponsors of all the circuit splitting bills introduced since the 98th Congress.

[8] 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.

[9] Administrative Office of the U.S. Courts, JUDICIAL BUSINESS OF THE FEDERAL JUDICIARY (2002). Same-titled reports are produced annually by the A.O. Unless otherwise noted, statistics relied on in this statement were extracted from this report, which covers the twelve-month period ending 9/30/02.

IV. Complaints Raised About The Ninth Circuit Do NOT Justify Its Restructuring.

1. Collegiality

A small group of the judges of the Ninth Circuit Court of Appeals have voiced their concern that collegiality among judges of the Circuit is harmfully diminished because of its size. While concerns about collegiality, even if voiced by only one judge of the circuit, deserve attention, the degree of collegiality among a court's judges, its impact on a court's functioning and its relation to size of the court evade measurement.

Subjective notions regarding the relationship between collegiality and the size of a court do not provide a basis for splitting a circuit. For one thing, such notions change over time. As an example, the 1975 Report of the Hruska Commission reported that many people believed that nine judges were the optimal, or even the maximum, number of judges for circuit efficiency and collegiality (p.127). Currently, all but one Circuit exceed that number of judges, and it is doubtful that anyone seriously adheres to that view anymore. Another discounting factor is that such notions, even if valid, do not provide any substantiation of actual dysfunction in the Ninth Circuit today.

2. En Banc Panels

Many critics of the Ninth Circuit's current configuration claim that the en banc procedures, necessitated by its size, prevent the Court from ever delivering an opinion that is truly representative of the view of a majority of its judges. Judge Kozinski convincingly countered this assertion while he was testifying before this subcommittee by explaining how the en banc process works. He noted that every active judge participates in deciding whether to take a panel decision for en banc review. Extensive memoranda and emails are exchanged before a vote. A majority of the active judges can have a limited en banc decision reviewed by the full

court. Since 1980, there have only been five such requests, and a majority of judges has never voted to consider a limited en banc before a full court en banc. Furthermore, if an en banc panel renders a decision by a 6-5 vote that is inconsistent with the view rendered by the three-judge panel, circuit rules provide for review by the full court upon request of any judge. That, likewise, has never happened. These facts suggest that a majority of the circuit judges do agree with en banc determinations.

3. Quantity of Published Opinions

Restructuring proponents argue the large number of annual filings in the Ninth Circuit is causally related to the large number of opinions it publishes each year. According to them, by splitting the Circuit, the two new resulting circuits, with their smaller numbers of filings, would produce fewer published opinions with which the judges and attorneys practicing in each new circuit would need to be familiar.

The argument is flawed; the casual connection between number of filings and number of published opinions is not at all clear. One example will suffice. Last year, the Seventh Circuit issued 602 signed, published opinions and the Ninth Circuit issued 718 signed, published opinions; however, 3, 418 appeals were filed in the Seventh Circuit, which has eleven authorized judgeships, and 11,421 appeals were filed in the Ninth Circuit, which has twenty-eight authorized judgeships.

The Ninth Circuit, like all the other circuits, has worked out various systems to monitor its published opinions and examine them for consistency and legal soundness. The Circuit's size may in fact give it an advantage here, since the sheer number of judges and law clerks monitoring decisions in combination with the number of en banc reviews conducted almost guarantees a high level of scrutiny for every published opinion.

4. Reversals by the Supreme Court

Critics who point to the number of Ninth Circuit cases reversed by the Supreme Court each year as proof of the need for division often fail to provide other relevant information that would provide perspective. When the public hears that 12 appeals from the Ninth Circuit were reversed by the Supreme Court compared to two or three from a smaller circuit, it sounds like the Ninth Circuit has an extraordinarily high error rate on appeal. In fact, when the number of reversals is viewed as a percentage of the total number of cases that the Supreme Court has reviewed from each circuit the Ninth Circuit's average reversal rate is not significantly different than the reversal rate for the other circuits. And when the number of Supreme Court reversals is compared with the total number of opinions rendered by the Court for any specific year the reversal rate is miniscule.

5. Backlog of Pending Appeals

It is unlikely that division will alter the backlog of appeals since the actual number of cases waiting to be heard will remain the same. In a well-administered circuit such as the Ninth Circuit, backlog is created when the workload outweighs the judicial resources, not because the circuit is too large. The number of pending appeals in the other circuits supports the thesis that there is a lack of correspondence between size and backlog. The Courts of Appeals for the District of Columbia and the First Circuit concluded last year with approximately the same number of appeals pending, yet the D.C. Circuit has twelve authorized judgeships and the First Circuit has six authorized judgeships. As another example, the D.C. Circuit and the Eleventh Circuit both have twelve authorized judgeships, yet the D.C. Circuit had 1,092 pending appeals at the end of 2002, while the Eleventh Circuit had 3,490.

The Ninth Circuit does have a significant backlog of pending appeals that is indeed troubling. Substantial numbers of long-standing vacancies on the Court during the 1990s, not circuit size, are primarily responsible for the Ninth Circuit's backlog. The best and most expedient way to reduce the backlog and prevent its recurrence is for Congress to authorize additional, needed judgeships for the Ninth Circuit and to promptly fill existing and future vacancies.

6. Delay in Processing Appeals

The degree to which the Ninth Circuit varies from other circuits in its disposition time depends on how you evaluate the statistics. If one compares the median processing time from the date of the first hearing to final disposition, then the Ninth Circuit was the second fastest in 2002 -- 1.5 months. The Second Circuit, moderate in size, ranked first, disposing of cases in .7 months. Similar results are obtained when one compares the time from submission to disposition: the Ninth Circuit's time was .3 months (shared by the Eighth Circuit) while the Second and Seventh Circuits shared the fastest disposition time of .2 months. However, if one compares the median processing time of each of the federal circuits from the filing of an appeal to final disposition, the Ninth Circuit was the second slowest -- 15.1 months. The Sixth Circuit experienced the most delay, with median disposition time of 16.0 months.

There is no agreement among court administration scholars whether a correlation exists between circuit size and disposition time. Even if some correlation does exist, other factors, such as vacancy rates, the adequacy of the number of judges and support staff, and case management techniques also exert an influence. We believe that the Ninth Circuit's delay in processing cases is not due to circuit size, but rather to the lingering effects of the high number of vacancies that existed in the 1990s and, to a lesser extent, a few years ago. This is borne out by the fact that the

only significant delays in disposition in the Ninth Circuit, occur in the interval between brief completion and submission or oral argument. As further evidence that the vacancy rate is causally related, recall that the Sixth Circuit Court of Appeals, which has labored under a 50% vacancy rate for several years, has the second slowest rate of disposition from filing date to final action. It is also worth noting that in the last six months the overall disposition time has been reduced in the Ninth Circuit, where vacancies have been filled, whereas the overall disposition time in the Sixth Circuit, where no vacancies have been filled, has deteriorated.

V. Conclusion

The case for restructuring the Ninth Circuit has not been made. There is no compelling evidence 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 circuit division. Congress can best address the Ninth Circuit's most pressing problems by promptly filling existing vacancies, authorizing the creation of – and immediately filling – needed judgeships and providing adequate funding for all components of the federal judicial system.

Thank you for the opportunity to submit this statement for the hearing record.

Defending Liberty
Pursuing Justice
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5662
Fax: (312) 988-6234
http://www.abanet.org/litigation

SECTION OF LITIGATION
American Bar Association

APPENDIX "A"

Supplemental Statement of
Patricia Lee Refo, Chair
Section of Litigation
American Bar Association
on Proposed Legislation to
Split the United States Court of Appeals
for the Ninth Judicial Circuit

submitted to

Subcommittee on Courts, the Internet and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives

October 31, 2003

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

The Litigation Section 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 treating 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. This is particularly important for states such as Arizona and Nevada, which should not be relegated to a minor role as judicial satellites of a much more populous California. 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.

Appendix B

Sponsors of Legislation to Divide the Ninth Circuit
1984-2003

Note: Names in bold are original sponsors.

Congress Bill #	CA	I. NV	AZ	OR	WA	ID	MT	AK	HI
98th									
S. 1156					**Gorton**				
101st									
HR 4900				Smith	**Morrison,** Chandler	Stallings, Craig	Marlenee	Young	
S 948				Hatfield, Packwood	**Gorton**	McClure, Symms	Baucus, Burns	Stevens, Murkowski	
102nd									
S. 1686				Hatfield, Packwood	**Gorton**	Symms, Craig	Burns	Stevens, Murkowski	
103rd									
HR 3654	Farr			**Kopetski,** Smith	Unsoeld			Young	

Congress Bill #	CA	I. NV	AZ	OR	WA	ID	MT	AK	HI
104th									
S. 956				Hatfield, Packwood	**Gorton**	Craig, Kempthorne	Baucus, Burns	Stevens, Murkowski	
HR 2935				**Bunn**, Cooley	Dunn, Hastings, Tate, White			Young	
S. 853				Hatfield, Packwood	**Gorton**	Craig, Kempthorne	Burns	Stevens, Murkowski	
105th									
HR 639						Chenoweth	**Hill**		
S. 431				Smith	Gorton	Craig, Kempthorne	Burns	Stevens, **Murkowski**	
106th									
S. 253								Stevens, **Murkowski**	

Congress Bill #	CA	I. NV	AZ	OR	WA	ID	MT	AK	HI
107th									
S. 346								Stevens, **Murkowski**	
HR 1203						**Simpson**			
108th									
S. 562								**Murkowski**	
HR 1033						**Simpson**			
HR 2723						**Simpson**			