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March 8, 2005

The Honorable Dianne Feinstein
U.S. Senate
One Post Street, Suite 2450
San Francisco, CA 94104

Re: Proposals to Split the Ninth Circuit Court of Appeals

Dear Senator Feinstein:

I write on behalf of The Northern District of California Chapter of the Federal Bar Association to reiterate our Chapter's opposition to the pending proposals to split the Ninth Circuit Court of Appeals. Members of the Federal Bar Association practice before the federal courts, including the Northern District of California and Ninth Circuit Court of Appeals. This letter expresses the position only of the Chapter, and not that of the Federal Bar Association itself.

The proposals to split the Ninth Circuit are wrong, whether judged on the basis of practical judicial administration or as a legislative reaction to unpopular court decisions.

The assertion that the Circuit is too big to work effectively is based only on the size of the Circuit, not its effectiveness. But size alone does not warrant splitting the Circuit. While the failure of the Circuit to work effectively would weigh in favor of splitting it, the fact is that the Circuit does work effectively.

Chief Judge Schroeder and her administrative staff have succeeded in effectively managing the Circuit. The Ninth Circuit has requested additional judges so that it can deal with the increased workload, largely attributable to a spike in the number of immigration cases on the Court's docket, a spike that is by no means limited to the Ninth Circuit. These additional judgeships can be added without splitting the Circuit.

While any large circuit faces the challenge of avoiding inconsistent decisions, the Ninth Circuit has effectively dealt with that challenge. It has established procedures to minimize inconsistent decisions, and where inconsistency appears, the Court's limited *en banc* procedure is designed to restore consistency.

The most recent study of the federal courts, by the Commission on Structural Alternatives for the Federal Courts of Appeal, known as the White Commission, examined the structure of the Ninth Circuit and, in

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December 1998, recommended against splitting the Circuit. The White Commission concluded:

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.

The Long Range Planning Commission in 1995 reached the same conclusion. "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." *Long Range Plan of the Federal Courts (1995) of the Judicial Conference of the United States* 44. No such evidence of either adjudicative or administrative dysfunction has been shown.

The proposed legislation is not only unnecessary, it is not reasonably calculated to solve any problems relating to size or judicial efficiency that might exist, because there is no equitable way to split the Ninth Circuit without splitting California. Under either of the pending proposals – for a two way split (H.R. 212) or a three way split (H.R. 211) – the resulting Circuits would be significantly unequal, and the workload for the new Ninth Circuit disproportionately heavy. After adding new judges for the new Ninth Circuit as contemplated in the proposed legislation, the Ninth Circuit, would have 21 judges under a three-way split and 26 judges under a two-way split.¹ Either proposed split would impose a proportionately greater workload on the judges of the Ninth Circuit. Under the proposed three-way split, the Ninth Circuit would have 60% of the judges for the three circuits and 71% of the caseload. Under the proposed two-way split, the Ninth Circuit would have 74% of the judges and 82% of the caseload.

Moreover, the cost of splitting the Court will be expensive, at a time when crippling cutbacks are impairing the work of the federal courts. Under a three-way split, a new courthouse would be needed for the new Twelfth Circuit, and under either a three-way or two-way split substantial renovation of the courthouse in Seattle would be necessary. Staff, programs and facilities would have to be duplicated.

There are significant advantages to the Ninth Circuit in its current configuration. The Ninth Circuit provides a single body of law for the Pacific Rim economic area, which would be lost if the Circuit is split. Businesses that conduct business or are regularly involved in litigation throughout the Pacific Rim economic area will see increased legal expenses as their legal teams will have to deal with inter-circuit

¹ These number includes two temporary judgeships.

conflicts in the interpretation of federal laws. Separation of California from neighboring states with which it has strong business ties may also create incentives to forum shop. If the Circuit is divided, the current administrative advantage of being able to move judges from one district of the Circuit to another in response to changing case loads, without requiring the judges to become familiar with the laws of a different circuit, will be lost. And important, pioneering programs of the Ninth Circuit, such as the Bankruptcy Appellate Panel, The Public Information and Community Outreach Program, the Circuit's mediation program, and circuit-wide educational programs may be lost.

Finally, it appears that at least some proponents of the legislation are doing so in reaction to Ninth Circuit decisions with which they disagree. If there is one thing upon which legal scholars and thoughtful citizens should agree, it is that a decision by Congress to split the Ninth Circuit, or indeed take any punitive action against a part of the judicial branch, because of unpopular Court decisions, would be antithetical to the principles of our Constitution and its careful construct of separation of powers. As the White Commission found:

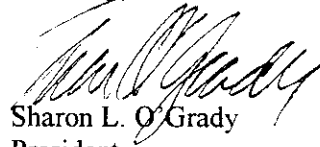
There is one principle that we regard as undebatable: It is wrong to realign circuits (or not realign them) and to restructure courts (or leave them alone) because of particular judicial decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.

In the past, Congress has split circuits only when there existed a consensus in the affected legal community that a split was warranted. Both of the earlier circuit splits – the creation of the Tenth Circuit from the old Eighth Circuit and the creation of the Eleventh Circuit from the old Fifth Circuit, occurred only after the a consensus had been reached in legal community in the affected region that division was warranted. When the old Eighth Circuit was split in 1929, and again when the old Fifth Circuit was split in 1980, all of the affected judges had expressed their approval, and division was supported by the bar associations in the affected states. The notion that a consensus should first exist ensures that the decision is not a political one. No consensus for splitting the Ninth Circuit exists: Only three of 24 active judges are in favor of splitting the Circuit, and an overwhelming majority of the chief judges of the district courts within the Ninth Circuit oppose division of the Circuit.

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For all of these reasons, we urge that you oppose the proposed legislation to split the Ninth Circuit.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sharon L. O'Grady".

Sharon L. O'Grady
President