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CHIEF JUDGE
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FOR THE NINTH CIRCUIT

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October 28, 2003

Honorable Lamar Smith
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Honorable Howard L. Berman
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Re: H.R. 2723

Gentlemen:

I submit this letter as part of the record for H.R. 2723, the Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003, in which a hearing was held October 21, 2003 before the House Judiciary Subcommittee on the Courts, the Internet and Intellectual Property.

During the hearing, a number of questions were raised concerning the length of time it takes for a case to be decided in the Ninth Circuit, and whether or not there is any correlation between the size of a court and its disposition time. To answer that question, the Subcommittee must look at the components of the appellate process that make up the total disposition time. With regard to the most important time frame, and the only one over which judges have complete control, is the time it takes judges to decide the cases following argument or submission. Here, the Ninth Circuit is one of the most efficient circuit courts and has been consistently so for many years. For argued cases, it takes 2.1 months[1] nationally

[1] AO Table B-4, 6/30/03

the filing of a decision compared to 1.4 months in the Ninth Circuit; and for submitted cases it takes .5 months nationally and .2 months in the Ninth Circuit. The Court has done this while still providing the parties with a reasoned, written disposition of its holding, not a one word judgment order.

The first stage of the appellate process is record preparation and briefing by the parties. Unlike some circuits that have taken the position that no extensions of time should be permitted, our Court has allowed the parties some say in how long they need to prepare their case. We could limit their time and make our stats look better, but in response to many outreach programs with the bar, they legitimately noted that until the court had a full complement of judges that allowed the cases to proceed to argument more promptly, it made no sense for them to file briefs and then "hurry up and wait." Also, stale briefs are of little assistance to any court, and result in more work when judges and law clerks must update the research presented in the briefs.

The middle time frame, the period from briefing completion to oral argument, is where our Court has experienced delay. This is due to the many long years of vacant judgeships; our reluctance to borrow substantial numbers of outside judges; and our desire to retain the opportunity for hearing oral argument in most counseled cases.

At last year's hearing on H.R. 1203, my colleague Judge Sidney Thomas of Billings, Montana, described the program the Court adopted in 2002 to address the backlog of cases that had accumulated during the years when our court was down almost one third of its authorized judgeships. That program has been successful. Indeed, our court's internal statistics demonstrate that we have cut the time from completion of briefing to argument in non-priority civil cases from more than fourteen months to closer to six or seven months within the last two years. Criminal appeals and cases that with statutory hearing priorities are scheduled even more promptly. The Court has also dramatically reduced the backlog of certificates of appealability in habeas corpus cases, required by 28 U.S.C. § 2253(c), from more than 1500 to fewer than 400.

As the Subcommittee is well aware, the Commission on Structural Alternatives for the Federal Courts of Appeal ("the White Commission") studied the subject of delay thoroughly in 1998 and concluded that circuit size was not a

critical factor in appellate delay. Specifically, the White Commission wrote:

> We have reviewed all of the available objective data routinely used in court administration to measure the performance and efficiency of the federal appellate courts, but we cannot say that the statistical criteria tip decisively in one direction or the other. While there are differences among the courts of appeals, differences in judicial vacancy rates, caseload mix, and operating procedures ***make it impossible to attribute them to any single factor such as size.*** (emphasis supplied).

Commission on Structural Alternatives for the Federal Courts of Appeal, Final Report, p. 39 (1998).

Our Court continues to review and refine its case management procedures to address the changing caseload that comes before it. Currently, this Circuit and the Second Circuit are experiencing a large increase in the number of immigration appeals. The increase is a result of the Attorney General's efforts to streamline the processing of immigration cases before the Immigration Judges and the Board of Immigration Appeals. Due to our issue tracking and case weighting systems, as well as increasing uses of technology, we anticipate that a large majority of these cases will be dealt with expeditiously through our screening program once the lead cases in the circuit are decided.

I wish to address specifically the chart Chairman Smith displayed at last week's hearing that was included as Table 1, page 45, in Professor Hellman's statement. The data from that table was excerpted from statistics produced by the Administrative Office of the U.S. Courts Table B-4, from 1980 to 2002. I offer some observations about that data as well as some additional and more complete information.

The table does not take into account the judicial vacancy rate. If it did, we would see a correlation between vacancies and disposition time. Since it takes about a year in all the circuits for an appeal to be terminated on the merits, one must look at the data with the number of vacant judgeships during the previous year. In 1983, there were no vacancies on the Court; in 1984, the Court's disposition rate was 12.1 months, roughly the national average. In the mid 1990s, when almost a third of the court's judgeships remained vacant, our median

disposition time reflected the lack of judge-power, as well as some lingering impact of the 1989 Loma Prieta earthquake in San Francisco and the three sequential moves of court operations.

In the past year, as the Court has gotten more of its vacancies filled, our disposition time has decreased to 14.1 months. We expect that trend should continue in the next year or so as our remaining vacancies get filled.

The same correlation is reflected in the statistics for the Sixth Circuit. That Court has been down almost half of its sixteen authorized judgeships for the last few years. It has repeatedly come in last in terms of the time lapsed from filing the notice of appeal to disposition. In the most recent AO Table B-4 (6/30/03), its disposition time is 16.6 months, two a half months longer than the Ninth Circuit.

Although we must respond to criticisms rooted in statistics, we should also step back and ask what role statistics should play generally. The circuit courts are not engaged in a competition as to who can be the fastest court. I believe *all* circuit courts strive to decide the cases that come before it in a just and prompt manner.

The division proposed in H.R. 2723 cannot serve that objective for most litigants in our circuit. The new Ninth Circuit, composed of Arizona, California and Nevada would have 82% of the filings, and only 19 of the current judges, or 398 filings per judge. This compares to the new Twelfth Circuit that would have 18% of the filings, at 190 filings per judge. We would appreciate and welcome the new judges proposed in the bill, but they could not come on board in time to provide any relief to the overburdened judges in Arizona, California and Nevada, and thus division would doubtless create more, not less, delay.

In conclusion, I reiterate what I stated on October 21, 2003. There was no reason to divide the Circuit two weeks after the issuance of the Pledge of Allegiance decision and there is absolutely none now. Further, as stated by my colleague Alex Kozinski and also worth repeating, dividing a circuit should not take place to make the lives of judges or lawyers easier or cozier, or to reduce travel burdens. It should only take place when there is demonstrated proof that a circuit is not operating effectively, and there is a consensus among the bench and bar and public that it serves that division is the appropriate remedy. That burden

has not been met.

I also attach an exhibit prepared by the office of our Circuit Executive relating to the projected additional financial costs of creating a new circuit that were of interest to the subcommittee at last year's hearing. As the Members of Congress are well aware, there are serious shortages in the federal budget, and the possibility of an 11% across-the-board cut, which will impact staffing. That coupled with the increase in immigration cases, will put a severe strain on court operations. This is no time to complicate matters further by dividing and unnecessarily duplicating resources.

Thank you for allowing me the opportunity to supplement the record.

Sincerely,

Mary M. Schroeder
Chief Judge

Attachment

Costs for Establishing a New Circuit
Addendum to the Statement of the
Honorable Mary M. Schroeder
Chief Judge
United States Court of Appeals for the Ninth Circuit

1. Space and facilities- Constructing a new courthouse estimated up to **$100 million.** Nakamura US Courthouse is too small to serve as a new circuit headquarters and this is a rough estimate of what it would cost to acquire a site, design and construct a new courthouse. For comparison on construction costs the new Seattle US district courthouse is estimated to cost $208 million. This no-growth estimate is based on ten resident chambers and nine visiting judge chambers, based on projected needs to 2013. GSA would need to prepare a definitive estimate of total expenses based on the projected number of authorized judges and staff.

   $100 Million

2. Personnel- To staff a new court of appeals clerks office, staff attorneys, mediators, library system and circuit executive office - **$10.23 million.** This is a 2002 cost estimate prepared by the AOUSC. The staffing formula is dependant upon caseload. Establishing the circuit headquarter's unit executives alone, a fixed administrative overhead cost irrespective of circuit size, will have an annual reoccurring cost of more than $650,000.

   $10.23 Million

3. Personnel transitions-This is an estimate based on the need to transfer some employees to Seattle and the need to terminate excess personnel in San Francisco (severance) **$2.3 million.**

   $2.3 Million

4. Telecommunications, Computer Equipment and Library Costs are estimated by the AOUSC at **$3 million.**

   $3 Million

5. New Furniture, Office Equipment, and Offices Supplies are estimated by the AOUSC at **$4.83 million.**

   $4.83 Million

ESTIMATED TOTAL START-UP COST: **$120.36 million**[2]

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[2]With additional annual costs of at least **$4.2 million** for rent, duplication of personnel and equipment.