

# WITHERSPOON, KELLEY, DAVENPORT & TOOLE

A PROFESSIONAL SERVICE CORPORATION  
ATTORNEYS & COUNSELORS

1100 U.S. BANK BUILDING  
422 WEST RIVERSIDE AVENUE  
SPOKANE, WASHINGTON 99201-0300  
Telephone: (509) 624-5265  
Telecopier: (509) 458-2728

COEUR D'ALENE OFFICE  
THE SPOKESMAN REVIEW BUILDING  
608 NORTHWEST BOULEVARD, SUITE 401  
COEUR D'ALENE, IDAHO 83814-2146  
(208) 667-4000

April 21, 2004

Dianne Feinstein  
United States Senate  
SH-331 Hart Senate Office Bldg.  
Washington, D.C. 20510-0504

Honorable Jeff Sessions  
SR-335 Russell Senate Office Bldg.  
Washington, D.C. 20510-0104

Re: *H.R. 2723, S.562, S.2278: Proposals to Split the Ninth Circuit*

Dear Senators:

I write to address the recent proposals to split the United States Court of Appeals for the Ninth Circuit into two separate Circuit Courts of Appeal. I respectfully oppose the proposals.

That you may evaluate my qualifications to comment on the topic, permit me to say that I am a member of the Bars of four states within the Ninth Circuit (Washington, Oregon, Idaho, and Hawaii), and I have also practiced in Guam, one of the territories within the Circuit. I have practiced in the federal courts of the Ninth Circuit for 23 years. I am a Fellow in the American College of Trial Lawyers. I have served for six years in the Ninth Circuit Judicial Conference, three of which I served on its Executive Committee, and I served as the Chair of the lawyer delegates to the Ninth Circuit. I currently serve on the Ninth Circuit Advisory Board, and will serve as its Chair in 2004-2005.

I respectfully say that the Ninth Circuit should not be split.

The pending proposals are similar to a bill introduced some five years ago. At that time, the Congress wisely elected to commission a blue-ribbon Commission to study whether splitting the Circuit was a sensible and responsible solution to problems that the Congress then perceived to exist. The Commission (chaired by the late Justice Byron White) concluded that it was not. Indeed, the Commission found that splitting the Circuit would magnify, rather than solve perceived problems. Instead, the White Commission recommended a number of

ROBERT L. MADWISON  
WED M. BARNER  
WILLIAM D. SYMMER\*\*  
ROBERT M. LAMP  
E. THOMAS CONNOLLY  
THOMAS D. COCKRAN  
DIANE M. SWINSON  
KEITH B. WERSMAN  
KRYLEY L. SWINGER\*  
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CHRISTOPHER G. VABALLI\*  
KIMBERLY A. SAMES\*  
RYAN M. BRADSHAW\*  
LARA L. BRADSHAW\*  
RICHARD A. EBY\*\*  
ROBERT J. CALDWELL\*  
BENJAMIN S. COLEMAN  
STACY A. BURDICK  
D. TONY MALLAMORTHIN  
RYAN S. BERSEN  
J. ROBERT HOBENBACH, III\*\*

#### OF COUNSEL

Wm. A. Darnovsky  
John E. Bantz, Jr.  
Alan P. Tombs  
Carl E. Krays

\*Also admitted in Idaho  
\*\*Also admitted in New York  
†Also admitted in California  
\*Also admitted in Alaska only  
\*Also admitted in Oregon  
\*Also admitted in Montana

administrative changes that would improve the Circuit's performance. Many have been gradually introduced by the Circuit, to good effect.

I would respectfully suggest that the grounds for splitting the Circuit are no more substantial than they were five years ago -- they are less so.

The pending legislative proposals do not recite what specific problems they seek to solve. Assuming the perceived issues now are the same as they were five years ago, I would invite you to submit them to careful scrutiny. The main argument then for splitting the circuit was that the Court of Appeals was too slow to resolve cases. The criticism may or may not have merit (though the Ninth Circuit is roughly even with its peers in case resolution statistics, to this practicing lawyer and his clients *all* courts seem slow), but splitting the Circuit is no solution. Taking half the work and assigning it to half the judges (which, by the way, the current proposals would not accomplish, rather they would assign half the work to fewer than half the judges on one side) will not address the real issue, which is that there are not enough judges to do the work the court is assigned to do. Caseloads have grown exponentially in the past twenty years as Congress has created additional crimes, expanded the law-enforcement capabilities of federal agencies, and created new civil remedies enforceable in federal courts. There has not been a commensurate growth in judgeships, and the size of the Ninth Circuit Court of Appeals has actually contracted in recent years, owing to difficulties in filling vacancies. To speed up the courts, if that is necessary, what is required is the creation of more judgeships.

One hears by the water cooler (though this view has rightly not been publicly voiced by responsible leadership) that some, being disappointed by certain rulings of the Ninth Circuit Court of Appeals with which they disagree, would wish in retaliation to diminish the breadth of the geographic area in which its (sometimes unpopular) rulings apply by reducing the size of the Ninth Circuit. If (though I doubt it) these views have currency with any of the membership on your committee, I would offer two observations. The first is that the Ninth Circuit is not defined by the occasional celebrity attending a very few of its decisions, but by the sound moderation of the *hundreds* of decisions it renders every month. The second and more significant point is that as a matter of constitutional principle stretching back to the Founding of our nation, it is the highest duty of the courts to render unpopular rulings when the constitution and law demand it. To the extent that any legislation might be aimed, even in minor aspect, at diminishing the precious independence of our federal judges (by, for example, causing them to fear that their courts will be sanctioned by the legislature for having rendered unpopular decisions) it should be staunchly resisted. Especially in these parlous times, when fears of heightened dangers to our security have led us to grant extraordinary powers to those who police us, the urgent importance of the full independence of our judges to give daily effect to our constitutional guarantees of our freedom cannot be exaggerated.

Splitting the Ninth Circuit would also entail prohibitive costs.

Splitting the Ninth Circuit would hamper the highly desirable goal of uniform application of federal law among Western states which confront the same issues, including, for example, maritime law, water (and other natural resource) management and conservation law, federal lands management law, Pacific Rim trade questions, and so on.

Forming and staffing a new circuit would be expensive. Creating a new Circuit would necessarily involve the creation of a duplicate administrative bureaucracy to run it. Tax dollars are scarce, and spending them on more clerks instead of more judges seems highly illogical to me.

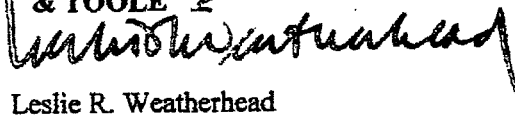
The most recent historical precedent for splitting a circuit involved the breakup of the Fifth Circuit into the Fifth and Eleventh Circuits. I have reviewed the legislative history of the legislation providing for the realignment, to attempt to gain an understanding of why that step was taken. I learned that when the Fifth Circuit was split, there was virtually unanimous sentiment among the judges, the Circuit Bar, and the Bars of the affected states that dividing the Fifth Circuit was the correct thing to do. There is nothing like that uniformity of opinion in connection with any proposal to split the Ninth Circuit. The Circuit Bar has opposed the split. So have the state Bars of many affected states (including, historically, the Washington State Bar Association). A majority of the judges in the Circuit also oppose the idea. Where those with the most direct stake in the efficient functioning of the Ninth Circuit are on record doubting whether the proposed alteration is sound, the Congress ought to act only for the very strongest of reasons.

In sum, I am convinced that neither logic nor practical common sense lead to a conclusion that the Ninth Circuit should be split. I thank you for having considered my views, and for your continuing efforts on behalf of our country.

Very truly yours,

WITHERSPOON, KELLEY, DAVENPORT  
& TOOLE

By:



Leslie R. Weatherhead

LRW: sh