

# **LAW PROFESSORS OPPOSED TO SPLITTING THE NINTH CIRCUIT**

September 18, 2006

The Honorable Arlen Specter  
Chairman, Senate Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Patrick J. Leahy  
Ranking Member, Senate Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Chairman Specter and Ranking Member Leahy:

The undersigned law professors write to urge that Congress reject current proposals that would split the boundaries of the Ninth Circuit Court of Appeals.

While our ranks include professors belonging to both major political parties, we wish to emphasize that the basis for our position is not partisan, but grounded in the belief that a circuit split would be unnecessary, costly and inefficient.

The split proposal that is being considered by the Senate Judiciary Committee this month would leave the current Ninth Circuit with just California, Hawai'i, Guam and the Northern Mariana Islands, and create a new Twelfth Circuit composed of Arizona, Nevada, Idaho, Montana, Oregon, Washington and Alaska.

Dividing the court isn't necessary. To be sure, the Ninth Circuit bears the most cases of any federal appellate court (about 16,000 new cases were filed this year, versus 1,300 in the D.C. Circuit; the next highest is the Fifth Circuit, which includes Texas, with 9,300). But it also has more

judges than any other circuit in the country and appears to face no problem of a quality or magnitude any different than those faced by any other court.

For example, although it has a much higher caseload, the real measure of whether too much pressure harms quality is the number of cases decided and opinions written by each judge. On this score, Ninth Circuit judges appear to write opinions and dispose of cases at the average for all federal appeals court judges. Although critics have alleged conflicts of decisional law within the Ninth Circuit, there is no serious evidence of such a conflict; indeed, the circuit's active use of its en banc review process (when the Court sits in groups larger than its standard three-judge panels) has effectively resolved precisely such conflicts. And although supporters of a split often cite statistics involving U.S. Supreme Court reversal of the Ninth Circuit, it must be remembered that the Ninth Circuit decisions selected for Supreme Court review reflect a minuscule fraction (approximately 0.3 percent) of those cases decided by the Ninth Circuit in any given year.

Nor does a split make sense from a budgetary perspective. Dividing the Ninth Circuit would require the creation of an additional costly bureaucracy to administer the new circuit, eliminating the economies of scale achieved by a single administration. Furthermore, a split would require expenditures for expanded courthouses and administrative buildings. The Administrative Office of the U.S. Courts estimates start-up costs of almost \$100 million and annual recurring additional costs of almost \$16 million.

Finally, a split would result in judicial inefficiency. A "new" Ninth Circuit comprised of California and Hawai'i would maintain 72 percent of the caseload, but only 60 percent of the judges. Such a circuit would yield 536 cases per judge, moreover, contrasted with 317 cases per judge in the proposed Twelfth Circuit. These statistical disparities in fact understate the true extent of the inequity resulting from a circuit split, given that the more than 600 death penalty cases originating in California are enormously time-consuming for judges and at present can be divided among all Ninth Circuit judges.

In our country's history, there have been only two instances in which a circuit was divided, and both times -- unlike at present -- the division was supported by a substantial majority of the judges and attorneys who were

to be affected by the division. The Ninth Circuit judges themselves believe a circuit split to be a bad idea. Only three of the active judges (out of 26) on the Ninth Circuit support the breakup. The state bar associations that have voted on the idea -- Alaska, Arizona, Hawai'i, Montana, Nevada and Washington -- all oppose it. California's present and former governors Arnold Schwarzenegger, Gray Davis and Pete Wilson; California's senators Dianne Feinstein and Barbara Boxer; Arizona Governor Janet Napolitano and former Washington State Governor Gary Locke; and many other public officials oppose a division of the Ninth Circuit.

We thus believe that splitting the Ninth Circuit is unwise and urge you to vote against any such split.

Sincerely,

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