ARGUMENTS FOR RETAINING THE PRESENT STRUCTURE OF THE NINTH CIRCUIT

On June 20, 2003, Ninth Circuit Chief Judge Mary M. Schroeder wrote U.S. Senator Orrin Hatch regarding two bills that would divide and restructure the current Ninth Circuit, S. 652 and H.R. 1033, both entitled the "Ninth Circuit Court of Appeals Reorganization Act of 2003." Chief Judge Schroeder enclosed with her letter a 12-page Position Paper in Opposition to S. 652 and H.R. 1033. What follows is a brief summary of the points presented in this Position Paper.[1]

- No Circuit should be divided without compelling empirical evidence justifying division. The most recent study of the federal circuit courts conducted by the congressionally created Commission on Structural Alternatives for the Federal Courts of Appeals[2] concluded that, "There is no persuasive evidence that the Ninth Circuit . . . is not working effectively, or that creating new circuits will improve the administration of justice." The major conclusion of the Commission was that the Ninth Circuit should not be split.

- No Circuit should be divided due to unpopular decisions or unpopular judges. Another important conclusion of the White Commission was that, "It is wrong to realign circuits . . . and to restructure courts . . . because of particular judicial decisions or particular judges."

- The Ninth Circuit is efficient and productive in handling a large caseload. The Ninth Circuit terminated more than 10,000 cases in 2002, 25% more cases than it terminated ten years ago with the same number of authorized judges and despite four current vacancies. The productivity of the Ninth Circuit is fourth highest among thirteen circuits in merit terminations per active judge. Although the time from filing a notice of appeal to final disposition exceeds the national average by a few months, the Ninth Circuit is the second fastest in the nation in rendering decisions after oral argument.

- The Ninth Circuit maintains a high degree of consistency in its case law. The White Commission concluded that problems having to do with consistency, predictability, and coherence of circuit law did not provide a basis for restructuring the Ninth Circuit. The Federal Judicial Center, the research arm of the Federal Judiciary, likewise concluded that, "there is currently little evidence that intra-circuit inconsistency is a significant problem" or that "whatever intra-circuit conflict exists is strongly correlated with circuit size." Moreover, the

[1] A complete copy of this position paper and Chief Judge Schroeder's letter to Senator Hatch is available from Office of the Ninth Circuit Executive.

[2] This Commission is often referred to as the "White Commission" because it was chaired by former Supreme Court Justice Byron White.

Ninth Circuit has instituted a series of case management techniques to reduce the possibility of conflicting decisions and continues to work on methods to improve the timely and consistent disposition of cases. In addition, the Court has successfully used a limited en banc court of eleven judges for 23 years to resolve the occasional conflict between different panel decisions. During all of this time, a majority of active judges has never voted to reconsider a limited en banc decision before the full court, a significant indication that the full court is satisfied with the limited en banc approach.

- The Ninth Circuit's rate of reversal by the U.S. Supreme Court is not relevant to how the court functions or is administered. Because the Supreme Court grants certiorari in so few cases (approximately 80 per year), a circuit reversal rate statistic is not a meaningful indicator of the quality of jurisprudence. In any event, the reversal rate of the Ninth Circuit for the last six years has been roughly equivalent to the national average. Although in 1996 the Court did have a reversal rate higher than the national average, that has not been the case since.

- Creating two new circuits would be a costly proposition and all of the proposed alternative structures have serious disadvantages. The costs associated with any circuit division would be substantial; an estimate prepared by the Administrative Office of the U.S. Courts in conjunction with a similar proposal placed initial startup costs at around $131 million, with annual additional costs of about $22 million. If this money were simply made available to the courts, it could be better used elsewhere, especially at a time when the federal courts are facing a severe budget crisis.

- A Circuit split would have severe and adverse consequences on performance of the Court's other adjudicative and administrative functions. Many critically important institutions and procedures would be jeopardized by a circuit split including the Bankruptcy Appellate Panel, the system for temporary intra-circuit transfer of district judges to assist other districts, and the bankruptcy workload equalization project.

- The Ninth Circuit is functioning well and should not be divided. The Ninth Circuit continues to operate efficiently despite ongoing and long-standing judicial vacancies, lack of new judgeships and increases in caseload. Like other circuits, the Ninth Circuit is not perfect but it has embraced the congressional invitation of 1984 to function with a large appellate court. It is in the national interest to keep the Ninth Circuit intact to continue on its path of innovation that could serve as one model of operation as all circuit caseloads continue to grow.