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Letter to the Editor

THE NINTH CIRCUIT SHOULD STAY INTACT

We are in the middle of an expensive war in the Middle East, the deficit is exploding, and important domestic programs are being curtailed or threatened. The White Commission as recently as December 1998 examined the structure of the Ninth Circuit and recommended against splitting the circuit. The cost of splitting the court has been estimated at in excess of \$100 million, a price tag that does not add a single new judge, and does not even take into account estimated annual increased costs of at least \$10 million for duplication of staff and other resources. So one well may fairly wonder why Greg Mitchell has concluded that it is now time to split the circuit ["It's time to split the circuit," March 21].

Mr. Mitchell concedes, as surely he must, that the recent Ninth Circuit decision on the Pledge of Allegiance is not a basis for splitting this or any other circuit, but suggests that Congress will ignore its duty and act in such a punitive matter eventually, and urges Chief Judge [Mary] Schroeder to work now with Congress to accomplish a split that is acceptable to the court. We disagree with this premise. 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."

The notion that preemptive action is necessary to avoid congressional lawlessness is a repugnant one, and we do not accept it.

Those in favor of dividing the circuit identify the most persuasive reason for doing so as size. But size alone is not a justification for splitting the circuit.

The only genuine justification would be failure of the circuit to operate effectively. On that issue, 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 concluded that, "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." No such evidence has been shown.

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. Last month the Judicial Conference announced that it will ask Congress for seven new judges for the Ninth Circuit, surely a more economical way to deal with heavy case loads than the enormous expense of creating new infrastructure involved in splitting the circuit, which will need those new judges anyway.

Mr. Mitchell also incorrectly implies that Chief Justice Schroeder alone or (nearly alone) carries the torch for an intact Ninth Circuit. Not so. Chief Judge Procter Hug Jr. noted in his statement to the House Judiciary Committee last summer that "a great majority of the judges and lawyers in the Ninth Circuit" have opposed efforts to split the circuit, including all of the past chief judges. As Professor Hellman indicated in his statement to the congressional

subcommittee, 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 legal community in the affected region had reached a consensus that division was warranted." Professor Hellman noted that 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. No consensus for splitting the Ninth Circuit exists.

Mr. Mitchell also ignores the positive benefits of a large circuit, and specifically the areas in which the Ninth Circuit has been an innovator. The Ninth Circuit Bankruptcy Appellate Panel (BAP) has been so effective that Congress has urged other circuits to follow suit, and other circuits now have begun to follow suit. The BAP offers litigants an alternative appeal procedure where single judge bankruptcy orders can be determined by a panel of experienced bankruptcy judges. While hypothetically a smaller circuit could have led the way on this issue, it was the Ninth Circuit that did so. The Ninth Circuit also was early to embrace technology to facilitate court administration and communications among the circuit judges.

A single circuit also promotes uniformity of judicial decisions. Separate circuits, even if guided by historical Ninth Circuit precedent, will inevitably strike their own paths. Indeed, the House bill would shift Arizona to the Tenth Circuit, a stare decisis nightmare in which thousands of cases decided by district courts in the Ninth Circuit will be heard by circuit court judges in the Tenth Circuit, which will mean either that those litigants will find that the law governing their appeal may be irreconcilably inconsistent with the law administered by the district court, or that the Tenth Circuit itself potentially will be following distinctly different federal law precedent in different cases, the kind of "wildly inconsistent decisions" Mr. Mitchell deplors.

The Ninth Circuit has established procedures to minimize inconsistent decisions, and where inconsistency appears, the court's limited en banc procedure is designed to restore consistency. Mr. Mitchell's observation that the limited en banc structure "can't be expected to keep up" ignores the empirical data, which shows that suggestions for en banc review were virtually the same in 2002 as in 1996, and that there has been only a moderate rise in en banc hearings from 12 in 1996 to 17 in 2002.

The Ninth Circuit needs more judges, not the greater bureaucracy that comes with splitting one circuit into two or even three circuits. There may come a time when the circuit cannot effectively remain intact, and the considerations in favor of a single circuit may be outweighed by the problems attendant to it. Now is not that time.

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FNNote 1. The authors are present and former officers of the Northern District of California Chapter of the Federal Bar Association. The views expressed here are those of the authors and the chapter, and not those of the Federal Bar Association itself.

4/18/2003 RECORDER-SF 5
4/18/2003 Recorder (San Francisco) 5

Page 3

4/18/2003 RECORDER-SF 5

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