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Re: H.R. 2723, The Ninth Circuit Court of Appeals – Judgeship
and Reorganization Act of 2003

Dear Judiciary Committee Members:

The Northern District of California Chapter of the Federal Bar Association submits this letter in opposition to H.R. 2723, the Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003. This letter expresses the position only of the Chapter, and not that of the Federal Bar Association itself.

Size alone does not warrant splitting the Circuit. The only genuine justification would be failure of the Circuit to operate effectively. The most recent study of the federal courts, by the Commission on Structural Alternatives for the Federal Courts of Appeal, known as the White Commission, examined the structure of the Ninth Circuit and, in December 1998, recommended against splitting the Circuit. 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.

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The Long Range Planning Commission in 1995 reached the same conclusion. "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." *Long Range Plan of the Federal Courts (1995) of the Judicial Conference of the United States* 44. No such evidence of either adjudicative or administrative dysfunction 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. These additional judgeships can be added without splitting the Circuit, by Congressional action on S. 9920, The Federal Judgeship Act of 2003.

While any large circuit faces the challenge of avoiding inconsistent decisions, the Ninth Circuit has effectively dealt with that challenge. It has established procedures to minimize inconsistent decisions, and where inconsistency appears, the Court's limited *en banc* procedure is designed to restore consistency. The empirical evidence is that this system works. And the Court's recent *en banc* decision in *Southwest Voter Registration Education Project v. Shelly*, demonstrates that the size of the Circuit does not impair its ability to invoke and complete *en banc* proceedings quickly.

The proposed legislation is not only unnecessary, it is not reasonably calculated to solve any problems relating to size or judicial efficiency that might exist. It would create two dramatically unequal Circuits and do little to decrease the size of the Ninth Circuit. The proposed new Ninth Circuit would consist of Arizona, California and Nevada, which states currently have 82% of the filings for the existing Ninth Circuit, while the proposed new Twelfth Circuit would consist of Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam and the Northern Mariana Islands, which have only 18% of the filings of the existing Ninth Circuit. And even after adding new judges for the new Ninth Circuit, the workload per judge would be substantially less for the judges in the proposed Twelfth Circuit, imposing a

proportionately greater workload on the judges of the Ninth Circuit.

Moreover, the cost of splitting the Court will be expensive, because a new Court of Appeal headquarters building would have to be built and substantial administrative expenses for duplication of staff and other resources would be necessary. The fact that Congress could be considering such an action in the absence of any official estimate of the costs associated with the split, and in light of the skyrocketing national deficit and the marginal reduction in the size of the Ninth Circuit that would result, suggests that politics and not policy are in play.

If there is one thing upon which legal scholars and thoughtful citizens should agree, it is that a decision by Congress to split the Ninth Circuit, or indeed take any punitive action against a part of the judicial branch, because of unpopular Court decisions, would be antithetical to the principles of our Constitution and its careful construct of separation of powers. As 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.

In the past, Congress has split circuits only when there existed a consensus in the affected legal community that a split was warranted. 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 a consensus had been reached in legal community in the affected region that division was warranted. 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. The notion that a consensus should first exist ensures that the decision is not a political one. No consensus for splitting the Ninth Circuit exists, and any action to do so will fairly be perceived to be politically motivated.

Members of the
Committee on the Judiciary
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For all of these reasons, we urge that your Subcommittee
kill this bill.

Sincerely,

A handwritten signature in black ink, appearing to read "Sharon L. O'Grady". The signature is fluid and cursive, with the first name being the most prominent.

Sharon L. O'Grady
Vice President – San Francisco