AMERICAN BAR ASSOCIATION

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STATEMENT

OF THE

AMERICAN BAR ASSOCIATION

submitted to the

SUBCOMMITTTE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

on the subject of

"Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem"

OCTOBER 26, 2005

The American Bar Association appreciates the opportunity to present this written statement for the hearing record of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts on "Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem." The ABA has examined the issue of appellate court restructuring multiple times since 1925. After reviewing the most current statistical data and testimony, we remain convinced that there is no compelling reason to restructure the Ninth Circuit and are opposed to the various legislative proposals to divide the Circuit that have been introduced this Congress.

1. Historical Overview of Congressional Interest in Restructuring the Ninth Circuit Court of Appeals

The federal courts of appeals have been the subject of intense study and debate for over three decades, primarily because of concerns generated by the dramatic and persistent growth in federal appellate caseload.[1] The Ninth Circuit – the largest circuit in terms of geographic size, population served, number of authorized judgeships and total annual caseload has often been, and continues to be, at the vortex of the debate.

In the early 1970s, the congressionally created Hruska Commission, formally called the Commission on Revision of the Federal Court Appellate System, recommended several procedural and structural changes, including division of both the Fifth and Ninth Circuits, then composed of 15 and 13 judges respectively, because they were considered too large. Congress declined to implement that recommendation and instead substantially increased the number of authorized judgeships in both circuits and authorized any circuit with 15 or more judges to adopt the use of limited en banc panels or administrative units (other recommendations of the Hruska Commission) to deal with rising caseloads.[2] The Ninth Circuit chose to adopt these new procedures. The Fifth Circuit, having resisted these innovations, subsequently chose to petition Congress for division. Congress agreed in 1980 and created a new Eleventh Circuit. The only

[1] In 1960, 3,899 appeals were filed in the regional U.S. Courts of Appeals, on which a total of 68 judges sat. In 2004, 60,847 cases were filed before an appellate judiciary consisting of 179 judges.
[2] Omnibus Judgeship Act of 1978, Pub.L. No. 95-486.

other time Congress has divided a circuit occurred in 1929, after a consensus was reached among members of the circuit bench and bar of the Eighth Circuit that the western states should be placed in a new Tenth Circuit.

Although there was general consensus in the legal community that the various techniques adopted in the 1 980s were working well in the Ninth Circuit, some Members of Congress who resided in the Pacific Northwest were not satisfied and repeatedly introduced legislation during the 1980s and 1990s to split the Ninth Circuit into various configurations. None of the proposals received serious legislative attention until the 105th Congress, when an 11th- hour effort to pass a circuit splitting bill resulted in passage of compromise legislation creating the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by the late Justice Byron R. White.[3] The Commission was directed to study the structure and alignment of the federal appellate system, with particular reference to the Ninth Circuit, and to submit its final recommendations regarding changes in circuit boundaries or structure to the President and to Congress by December 1998.

The "White Commission," as it was popularly known, concluded that the Ninth Circuit should not be split. In its final report, released at the end of the 105th Congress, the Commission stated:

> 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. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.[4]

The Commission also acknowledged that certain benefits derived from the current alignment of the Ninth Circuit, including the development of a consistent body of law that applies to the entire far western region of the United States and governs relations with the other nations of the Pacific Rim, in addition to the practical advantages of the Circuit's administrative structure.

[3] Pub.L.No. 105-1 19.
[4] COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 29(1998).

Nevertheless, the White Commission recommended that Congress restructure the Ninth Circuit Court of Appeals into three regionally based adjudicative divisions. The ABA opposed the recommendation, observing that it was not supported by the Commission's findings and conclusions, but rather by the Commission's stated subjective preference for smaller decisional units. Congressional reaction was similarly tepid, and implementing legislation introduced during the 106th Congress by Senator Murkowski (R-AK) received minimal attention.

During the 107th Congress, identical bills were introduced in the House and Senate by Representative Simpson (R-ID) and Senator Murkowski to split the Ninth Circuit into two circuits, with Arizona, California and Nevada remaining in the Ninth Circuit, and Alaska, Hawaii, Oregon, Washington, Idaho and Montana forming a new Twelfth Circuit. Hearings were held, but no further action was taken.

During the 108th Congress, Representative Simpson and Senator Murkowski again introduced circuit-splitting bills. Representative Simpson, in fact, introduced two bills: one would have retained California and Nevada in the Ninth Circuit and fashioned a new Twelfth Circuit out of the remaining states and territories, while the other proposed a different circuit reconfiguration by retaining Arizona, California and Nevada in the Ninth Circuit. In addition, identical bills introduced in the House and Senate during the 2nd Session proposed a novel three-way split. Even though no hearings were held in the House on this new proposed split, an unsuccessful attempt was made to secure the bill's passage by attaching it to an omnibus judgeship bill that had already passed the Senate. That action ultimately doomed the bill to which it was attached.

II. Current Efforts to Restructure the Ninth Circuit

Various restructuring proposals again have been introduced this Congress. Some propose different configurations for a two-way split while others propose a three-way split. Some include a proposal for additional judgeships for what would be the newly constituted Ninth Circuit while others pair circuit restructuring with a much needed omnibus judgeship bill. None of the proposed splits would evenly distribute the caseload or the authorized judgeships among the newly created circuits. In fact, according to statistics developed by the Circuit's Executive last year, the newly constituted Ninth Circuit would still handle three-quarters of the caseload .More

importantly, there is no evidence to suggest that any of the proposals, if enacted, would improve the administration of justice.

Every recent legislative proposal to split the Ninth Circuit, including those introduced this Congress, has been primarily cosponsored by Congressional members from the Pacific Northwest -- i.e., those jurisdictions that would be severed from the Ninth Circuit to create a new circuit or circuits[5]. None of the legislative proposals has been supported by the Judicial Council of the Ninth Circuit or more than a few state bar associations. These observations give rise to the inference that Congressional concerns over the quality and administration of justice in the Ninth Circuit do not reflect the views of the affected legal community as much as they reflect geographic concerns. This raises questions over whether issues other than judicial efficiency are involved.

III. Circuit Restructuring Should Not Occur Absent Compelling Evidence of Current Dysfunction.

The standard by which the ABA assesses the need for circuit restructuring states: "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." This standard, first suggested by the Judicial Conference of the United States in its *Proposed Long Range Plan for the Federal Courts*,[6] clearly embodies the principle that circuit restructuring is a 'remedy" of last resort and should only be used if there is compelling evidence that justice is being denied to individual litigants and the integrity of the law of the circuit is threatened. Congress should adhere to this very stringent standard because any circuit restructuring profoundly affects every component of the justice system and creates its own set of serious problems which may be temporary or may linger for years, including: substantial start-up expenses for new construction or renovation of existing facilities and for relocation of personnel and tangible property; administrative disruption; and, of course, fostering an unpredictability of case law in the circuits whose boundaries are moved.

[5] Appendix A contains a chart listing the original sponsors and cosponsors of all the circuit splitting bills introduced since the 98th Congress.
[6] Judicial Conference of the United States, LONG RANGE PLAN FOR THE FEDERAL COURTS 44 (1995).

In determining whether this standard is met, we believe that the views of the judges of the circuit in question and the lawyers who practice daily before them should be accorded great deference. They are in the best position to know how the circuit operates on a day-to-day basis and to evaluate its strengths and weaknesses. Unless there are truly extraordinary circumstances, Congress should continue its past practice of refraining from using its power to restructure a circuit absent the substantial support of the affected legal community out of deference for a coequal, independent branch of government.

IV. No Compelling Evidence Exists to Support Claims That the Ninth Circuit Needs Restructuring. In Fact, Circuit Restructuring Is Likely to Have a Deleterious Effect on the Administration of Justice.

After examining the most recent judicial statistics and evaluating the claims of those who support division, we do not detect a deterioration of conditions that would indicate adjudicative dysfunction in the Ninth Circuit[7]. We remain convinced that is no compelling evidence exists that the Ninth Circuit is failing to deliver quality justice in a timely fashion or that any of the perceived problems identified by supporters of the legislation would be remedied by the various proposed circuit divisions.[8]

Statistics compiled by the Administrative Office of the U.S. Courts and submitted to Congress annually suggest that the Circuit is functioning very well and utilizing its resources effectively.[9] In fact, even though filings increased by 10.9% during the 2004 fiscal year (primarily due to an increase in immigration appeals), the Ninth Circuit terminated 8.3% more cases in 2004 than in 2003 *(12,151* compared to 11,220), rendering decisions on the merits in *5,783* cases. Disposition times for the Ninth Circuit also have steadily improved over the last years and are more

[7] The ABA submitted a written statement for the hearing record of this to the Subcommittee on April 6, 2004 that expressed the same opinion.

[8] The ABA has not always opposed circuit restructuring. In 1928, the Association supported splitting the Ninth Circuit and in 1973 the ABA supported the Hruska Commission's recommendation to split both the Fifth and Ninth Circuit. The ABA however, rescinded that position in 1990 with respect to the Ninth Circuit, because of the belief that the procedural changes implemented during the preceding decade, in conjunction with other innovations, gave the Circuit the tools it needed to handle rising caseloads.

[9] Administrative Office of the U.S. Courts, JUDICIAL BUSINESS OF THE FEDERAL JUDICIARY (2004). Same-titled reports are produced annually by the AD. Unless otherwise noted, statistics relied on in this statement were extracted from this report, which covers the twelve-month period ending 9/30/04.

favorable than those of a majority of the other circuits in many respects. For example, the Ninth Circuit was the second fastest circuit in terms of median time from the date of the first hearing to final disposition -- 1.2 months; similarly the Ninth Circuit's median time from submission to disposition was a record-breaking .2 months . These and other statistics readily available from the statistical reports prepared by the Administrative Office of the U.S. Courts (AO) amply demonstrate that the Ninth Circuit continues to cope admirably with its rising caseload without jeopardizing the quality of justice, and that its overall performance measures favorably against that of the other judicial circuits.

One of the reasons that the Ninth Circuit has been able to function so well even though its caseload keeps growing (primarily because of increased immigration appeals) is because it has been on the forefront of utilizing technology to enhance administrative efficiency. For example, the Ninth Circuit was the first to institute automated docketing and is on the brink of instituting electronic web-based filing. It is the only circuit to use an automated issue identification system that inventories cases in a way that flags potential conflicts for early resolution and facilitates efficient resolution of cases that share the same central issue. The system also enables the Court to issue pre-publication reports to Court members to advise them in advance of the filing of every published opinion and to identify pending cases that might be affected by the lead opinion.

Division of the Ninth Circuit does not have the affirmative support of a majority of the bench and bar in the Ninth Circuit. According to Chief Judge Mary Schroeder, only three of the 24 active circuit judges and only nine of the Court's total complement of 47 active and senior judges favor a split. Neither the Judicial Council of the Ninth Circuit nor the Judicial Conference of the Unites States support realignment. Similarly, a preponderance of the major bar associations in the Ninth Circuit do not favor division and ABA members who belong to the Section of Litigation and practice daily before the courts of the Circuit oppose circuit restructuring . We urge Congress to continue its past practice of refraining from using its power to restructure a circuit absent the substantial support of the affected legal community out of deference for a co-equal, independent branch of government.

One of the major benefits derived from the current alignment of the Ninth Circuit, noted by the White Commission Report in 1995[10] is that it provides a unified body of law for the vital Pacific Rim economic area that would be impossible to duplicate under any of the proposed reorganizations. Conversely, the White Commission also pointed out that circuit restructuring has many disadvantages because it profoundly affects every component of the justice system and creates its own set of serious problems which may be temporary or may linger for years, including: substantial start-up expenses for new construction or renovation of existing facilities and for relocation of personnel and tangible property; administrative disruption; and, of course, fostering an unpredictability of case law in the circuits whose boundaries are moved.

The AO estimates that start-up costs for a two-way split could run as much as $ 96 million, with recurring annual costs ranging from $13 - $16 million. Last year, it estimated that a three-way split could cost as much as $134 million initially and an additional $22 million annually thereafter. It would be particularly troubling to incur this kind of national expense at a time when budget cuts have detrimentally affected the daily operations of the federal judiciary and the national deficit continues to climb as the nation tries to cope with the enormous costs of war overseas and natural disasters at home.

The identified disadvantages and potential costs associated with circuit restructuring are very important considerations that counsel against division absent verifiable compelling evidence of dysfunction and consensus over how best to remediate the identified problems.

The federal judiciary is presently facing record-breaking caseloads and operating under serious budgetary constraints. Existing judicial vacancies need to be filled; additional judgeships need to be authorized; courthouses need renovation; security systems need updating; adequate staffing levels need to be maintained; innovative technology and case management programs need to be funded; and concomitant resources need to be channeled to the federal courts when federal jurisdiction is expanded or implementation of national policies results in significant increases in case filings. Resources also need to be directed toward improving the quality of administrative immigration determinations to avoid further unprecedented increases in the number of immigration appeals handled at the circuit level. We hope that the Senate Judiciary Committee

[10] *Supra*, note 4.

will re-direct its efforts and focus on developing legislative solutions to these and other serious problems facing the Third Branch.

Thank you for this opportunity to present our views. We stand ready to assist you in whatever way we can.

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LEGISLATIVE PROPOSALS TO DIVIDE THE NINTH CIRCUIT:

ORIGINAL SPONSORS (IN BOLD) AND COSPONSORS*

1998-2005

Congress Bill #	CA	NV	AZ	OR	WA	ID	MT	AK	HI	Other Members
98th										
S. 1156					**Gorton**					
101st										
HR 4900				Smith	**Morrison** Chandler	Stallings Craig	Marlenee	Young		
S 948				Hatfield Packwood	**Gorton**	McClure, Symms	Baucus Burns	Stevens Murkowski		
102nd										
S. 1686				Hatfield Packwood	**Gorton**	Symms Craig	Burns	Stevens Murkowski		
103rd										
HR 3654	Farr			**Kopetski** Smith	Unsoeld			Young		
104th										
S. 956				Hatfield, Packwood	**Gorton**	Craig, Kempthorne	Baucus, Burns	Stevens, Murkowski		

Congress Bill #	CA	NV	AZ	OR	WA	ID	MT	AK	HI	Other Members
HR 2935				**Bunn**, Cooley	Dunn Hastings Tate White			Young		
S. 853				Hatfield Packwood	**Gorton**	Craig Kempthorne	Burns	Stevens Murkowski		
105th										
HR 639						Chenoweth	**Hill**			
S. 431				Smith	Gorton	Craig Kempthorne	Burns	Stevens **Murkowski**		
106th										
S. 253								Stevens **Murkowski**		
107th										
S. 346								Stevens **Murkowski**		
HR 1203						**Simpson**				
108th										
S. 562				Smith		Craig, Crapo	Burns	**Murkowski** Stevens		Inhofe-OK
S. 2278		**Ensign**				Craig Crapo	Burns	Stevens **Murkowski**		Inhofe-OK Cornyn-TX

Congress Bill #	CA	NV	AZ	OR	WA	ID	MT	AK	HI	Other Members
										Hatch-UT
HR 1033					Walden	Hastings, Nethercutt	**Simpson** Otter		Young	
HR 2723				Walden	Hastings	**Simpson** Otter		Young		
HR 4247		Porter	**Renzi**							
***109th**										
S. 1296			Kyl	Smith		Craig Crapo	Burns	Stevens **Murkowski**		
S. 1301		**Ensign**				Craig Crapo				Coburn- OK Inhofe-OK Cornyn- TX
S. 1845		**Ensign**	Kyl	Smith		Craig Crapo	Burns	Stevens Murkowski		Inhofe-OK
HR 211				Walden	Hastings	**Simpson** Otter		Young		Delay-TX
HR 212						**Simpson**				

* This chart does not list bills that combine omnibus judgeship provisions with court restructuring because it would be impossible to determine the reason for cosponsorhip.