AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1022 • (202) 662-1760

**STATEMENT**

**OF THE**

**AMERICAN BAR ASSOCIATION**

**submitted to the**

**COMMITTEE ON THE JUDICIARY**

**UNITED STATES SENATE**

**on the subject of**

# Proposals to Split the Ninth Judicial Circuit

**September 20, 2006**

The American Bar Association appreciates the opportunity to present this written statement for the hearing record of the Senate Judiciary Committee regarding proposals to restructure the Ninth Judicial Circuit. After carefully reviewing the current functioning of the Ninth Circuit, we reaffirm our opposition to current legislative efforts to restructure the Ninth Judicial Circuit.[1]

The structure and function of the federal courts of appeal have been the subject of intermittent congressional concern and debate during the past thirty-five years. Congressional interest initially was sparked by growing concerns over the persistent growth in population and dramatic increase in federal appellate caseload, which became evident in the early 1970's and continues today.[2] It is worth briefly summarizing congressional activity during this period to provide context for evaluating current restructuring efforts.

## Early Efforts to Restructure the Regional Federal Courts of Appeal

In 1972, Congress created the Hruska Commission, formally called the Commission on Revision of the Federal Court Appellate System, to study the federal appellate system. The Commission issued its final report a year later, which 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 divide the circuits and instead substantially increased the number of authorized judgeships in both circuits, providing the Fifth Circuit with 26 judgeships and the Ninth Circuit with 23. Congress also authorized any circuit with 15 or more judges to

[1] The Association has expressed opposition to circuit splitting proposals in separate statements submitted earlier this Congress and in 2003. *See* Statement of the ABA submitted to the Senate Judiciary Subcommittee on Administrative Oversight and the Courts October 26, 2005); and Statement of the ABA submitted to the Senate Judiciary Subcommittee on Courts, the Internet and Intellectual Property (October 21, 2003).

[2] To understand the dynamic growth of the appellate courts, consider these facts: In 1950, 2,830 appeals were filed in the regional courts of appeal, consisting of 68 judges. In 1960, appeals rose to 3, 899 and judgeships remained the same. In 1970, 11,662 cases were filed and judgeships increased to 97. By 1980, 23,200 appeals were filed and the regional appellate courts consisted of 132 authorized judgeships. In 1990, there were 40,898 appeals filed and 156 judgeships. That year, an omnibus judgeship bill was enacted, which increased judgeships for the regional appellate courts to 167. Judicial Conference of the United States, LONG RANGE PLAN FOR THE FEDERAL COURTS 15-16 (1995).

No additional appellate judgeship have been authorized by Congress, a fact that is astounding, given that the Administrative Office of the U.S. Courts has reported that 68,473 appeals were filed in the preceding 12-month period ending June, 2005.

use limited *en banc panels* or to divide into administrative units to deal with rising caseloads.[3] The Ninth Circuit chose to adopt these new procedures; the judges of the Fifth Circuit preferred division. In 1980, at the behest of the judiciary, Congress enacted legislation to divide the Fifth Circuit by placing Florida, Georgia and Alabama into a new Eleventh Circuit.[4] This was the second -- and last -- time that Congress has divided an existing circuit since creation in 1891 of the regional circuit courts of appeal as we know them today.[5]

Although the ABA originally supported the Hruska Commission's recommendation to split both the Fifth and Ninth Circuits, it rescinded that position in 1990 with respect to the Ninth Circuit, stating that procedural changes implemented during the preceding decade, in conjunction with other court management innovations, gave the Circuit the tools it needed to handle rising caseloads without sacrificing quality or timeliness.

In 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by the late Justice Byron R. White, 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.[6]

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.[7]

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[3] Omnibus Judgeship Act of 1978, Pub.L. No. 95-486, 92 Stat.1633 1978).
[4] Pub. L. No. 96-452, 94 Stat. 1994.
[5] The first split occurred in 1929, only after almost unanimous consensus was reached among Members and judges on how to divide the circuit: a new Tenth Circuit was carved out of five contiguous western-most states of the existing circuit. Pub .L. 71-840, 45 Stat. 11407. Interestingly, the ABA urged Congress to split the 8th Circuit, citing the vast size of the circuit and unequal work load of the judges as main cause of concern.
[6] Pub.L.No. 105-1 19.
[7] COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 29 (1998).

Further, the White 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.

Despite these findings and conclusions, the White Commission recommended that Congress restructure the Ninth Circuit into three regionally based adjudicative divisions. The ABA opposed this recommendation, asserting that the only rationale the Commission offered for the recommendation -- its stated subjective preference for smaller decisional units --was an insufficient basis for restructuring a judicial circuit.[8] Congressional reaction to the final report of the White Commission was tepid, and implementing legislation introduced during the 106th Congress by Senator Frank 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, bills proposing three different strategies for dividing the Circuit were introduced. Representative Simpson reintroduced the previous Congress's bill proposing a two-way split. He and Senator Lisa Murkowski (who took her father's seat when he became governor) introduced identical bills in their respective chambers calling for a different reconfiguration of the Circuit, whereby only California and Nevada would remain in the Ninth Circuit and a new Twelfth Circuit would be fashioned out of the remaining states and territories.

Later, during the 2nd Session, yet another formula for splitting the Ninth Circuit was presented to Congress by Senator Murkowski and Representative Renzi (R-AZ). Their identical bills proposed a novel three-way split, with California, Hawaii, Guam and the North Marianas Islands to compose the Ninth Circuit; Arizona Nevada, Idaho and Montana, the Twelfth Circuit; and Alaska, Oregon and Washington the Thirteenth Circuit. The Senate Judiciary Committee held a hearing on the bill just days after the bill was introduced. Even though the House Judiciary Committee had not held a hearing to examine this novel circuit restructuring proposal, House members attempted to secure the bill's passage by attaching it to a omnibus judgeship bill that had already passed the Senate. The strategy failed,

[8] The ABA House of Delegates adopted policy in August 1999 opposing the recommendations of the White Commission.

ultimately dooming restructuring legislation as well as the much needed judgeship bill to which it was attached. A prominent House member stated that the future success of any omnibus judgeship bill was dependent on successful enactment of legislation to divide the Ninth Circuit.

## Current Efforts to Restructure the Ninth Circuit

Seven circuit restructuring bills have been introduced this Congress.[9] None of them would evenly distribute the caseload or the authorized judgeships among the newly created circuits, even after factoring in the additional judgeships that some of the bills authorize for the new circuits. One bill proposes a two-way split with Arizona, California and Nevada composing the new Ninth Circuit; two other bills propose the same three-way split that was introduced last year; and four bills propose a two-way split, with the new Ninth Circuit comprising the same two states and territories that the three–way split bills propose and assigning all the remaining states to the new Twelfth Circuit. One of these four bills -- H.R. 4093 -- combines circuit division provisions with a new omnibus judgeship bill, and was reported out of the House Judiciary Committee. As with last year's combination bill, it is unlikely to see further action this Congress. If duplication is any measure of support, the heretofore unseen reconfiguration proposed in these four bills appears to be the preferred method of division this Congress.

We have provided some historical context and described with particularity the various circuit reconfigurations proposed during the last three Congresses to make four important points.

- First, even the most ardent proponents of Ninth Circuit restructuring do not concur over the best method to accomplish restructuring; in fact, individual sponsors do not appear to be committed to any one methodology.[10] This stands in stark contrast to the kind of congressional bipartisanship and solidarity that existed over legislation that resulted in the division of the Eighth and Fifth circuits, a point to which we will return later.

- Second, even though the operational definition of what constitutes a "large" circuit is relative and has changed over the decades, there has been a consistent historical presumption favoring small circuits that dates back to the first circuit division in 1929. At the time, it was a logical, even

[9] Appendix A contains a chart comparing the reconfigurations of the Ninth Circuit proposed by legislation, introduced this Congress.
[10] Appendix B contains a chart that compares circuit restructuring proposals introduced over the last six years.

intuitive presumption, given the state of private and public transportation, and the absence of electronic forms of communication outside of telephone or wire services. The presumption appears to have become so accepted over the decades that it has taken on the aura of a "truism," even though no empirical evidence exists to support the conclusion in today's world, where individuals in any area of the country can communicate with others instantly through a variety of electronic means and people can now travel from place to place in this country quickly and comfortably and relatively inexpensively.

- Third, only a handful of Members have demonstrated enough interest in circuit restructuring to become co-sponsors. In fact, from 1983 to the present, no legislative proposal has enjoyed the co-sponsorship of more than eight congressional members, the majority of whom represent (or represented) those jurisdictions that would be severed from California in creating a new circuit or circuits.[11]

- Fourth, despite the absence of a reasoned, well-supported reconfiguration plan and the concomitant conviction that the chosen plan will accomplish the purported goals, a few Members of Congress have been willing to try to circumvent the deliberative process or hold other legislation hostage in order to achieve their focused objective of dividing the Ninth Circuit into whatever reconfiguration seems feasible at the time.

**Circuit Restructuring Should Occur Only if There is Compelling Evidence of 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,*[12] 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

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

of the circuit is threatened. Furthermore, as with any remedial legislation, circuit restructuring legislation should not be supported unless there is broad bipartisan consensus that it is the best solution and that the benefits of the proposed reconfiguration, if enacted, will outweigh any negative consequences.

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 that 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.

## No Compelling Evidence Exists to Support Claims that the Ninth Circuit Needs Restructuring or that Restructuring would Improve the Federal Judicial System

We have examined the most recent judicial statistics and evaluated the claims of those who support and oppose division, and we remain steadfast in our assessment that no compelling evidence exists to support claims 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.

Statistics compiled by the Administrative Office of the U.S. Courts (AO) and submitted to Congress annually establish that the Ninth Circuit is functioning very well and utilizing its resources effectively.[13] In fact, even though there were 12.4 per cent more filings in 2005 than in 2004 (primarily due to an increase in immigration appeals), the Ninth Circuit terminated 10.3 per cent more cases in 2005 *(13,399 compared to 12,151*), rendering decisions on the merits in *6,197* cases.

Disposition times for the Ninth Circuit also have steadily improved over the last several years and are more 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 -- 1.4 months. The Tenth Circuit was the slowest- 4.3 months. The Ninth Circuit shared with the Second Circuit the fastest median time from submission on the briefs to disposition -- a record-

[13] Administrative Office of the U.S. Courts, JUDICIAL BUSINESS OF THE FEDERAL JUDICIARY (2005). Same-titled reports are produced annually by the AO. Unless otherwise noted, statistics relied on in this statement were extracted from this report, which covers the twelve-month period ending 9/30/05.

breaking .2 months. While the Circuit may lag behind others in the median time from the date of filing the appeal to final disposition, once the judges of the Ninth Circuit receive case files, they move them expeditiously through the system and close the cases in record time.

One of the reasons that the Ninth Circuit has been able to function so well even though its caseload keeps growing 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.

We believe that it is very significant that that the vast majority of the Ninth Circuit's bench and bar believe that the Circuit is functioning well and should not be divided. The views of Circuit judges and the lawyers who practice daily before them should be accorded great deference because 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. In the past, Congress has agreed that the views of the affected legal community carry great weight and has refrained from using its power to restructure a circuit unless there was consensus within Congress and the affected legal community that it was absolutely necessary and there was agreement over how best to reconfigure the circuit.

Division of the Ninth Circuit does not have the affirmative support of a majority of the judges of the Ninth Circuit. According to Chief Judge Mary Schroeder, only three of the 24 active 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 supports realignment.

The opposition of the organized bar in the Ninth Circuit is just as strong.[14] All but one of the state bar associations that have adopted a policy position on the issue over the last several years oppose division of the Ninth Circuit: Idaho supports division, while the state bars in Alaska, Arizona, Hawaii, Montana, Nevada, Oregon and Washington oppose division. Guam, the North Marianas Islands and the State Bar of California have not taken official positions. However, the Litigation Section of the State Bar of California and the following local bars oppose division: the Bar Association of San Francisco, the

[14] Appendix A lists the bars who have indicated their position on divisions of the Ninth Circuit. While we have done our best to research this point, there may be other bar associations in the Circuit that have adopted a position that are not included on this list.

Beverly Hills Bar Association, the LA County Bar Association, the Orange County Bar Association, the Santa Clara County Bar Association and the San Diego County Bar Association. In addition, the California Public Defenders Association and the California Academy of Appellate Lawyers also oppose division. Specialty bars that oppose division include the Hispanic National Bar Association, Los Abogados Hispanic Bar Association and the Federal Bar Association.

Finally, thousands of ABA members who belong to the Association's Section of Litigation and practice daily before the courts of the Circuit also oppose restructuring. The Section prepared a supplemental statement, which is attached as Appendix D, to emphasize the conviction of its members that the Ninth Circuit is functioning well and should not be divided.

Based on the overwhelming consensus among the Circuit's judges, lawyers and litigants that the Circuit is functioning well and should not be divided, the Circuit's effective use of innovative case management practices and statistical proof of its sound and efficient judicial operations, we firmly believe 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.

**Circuit Restructuring is a Costly Proposition**

The Administrative Office of the U.S. Courts estimated last year 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, and 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 potential cost of circuit restructuring, alone, counsels against division, absent verifiable compelling evidence of dysfunction.

## Conclusion

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.

These problems need to be addressed because insufficient resources (including too few authorized judgeships and inadequate staffing) and persistent vacancies undermine the ability of our federal courts to operate with maximum efficiency and timeliness. We therefore urge Members of Congress not to pursue legislation to divide the Ninth Circuit and instead to commit their time, energy and influence to enacting legislation that will provide the federal judiciary with the resources it needs to perform its adjudicatory functions efficiently and impartially and ensure that every litigant has an opportunity to have his or her case heard in a timely manner.

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

For more information regarding the position of the ABA, please contact:
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Governmental Affairs Office
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202/662-1761

# APPENDIX A

## 109th Congress

CONFIGURATION OF PROPOSALS TO SPLIT THE NINTH JUDICIAL CIRCUIT
& BAR ASSOCIATION POSITIONS **RE:** ANY FORM OF DIVISION

| | S 1296 | S 1301 | S 1845 | HR 211 | HR 212 | HR 3125 | HR 4093 | BAR/GOV POSITION |
|---|---|---|---|---|---|---|---|---|
| CA | | | | | | | | * Bar, lawyer groups & Gov OPPOSE |
| HI | | | | | | | | HI St. Bar Ass'n OPPOSE |
| NMI | | | | | | | | No Position |
| GUAM | | | | | | | | No Position |
| AK | | | | | | | | AK Bar Ass'n OPPOSE |
| AZ | | | | | | | | St. Bar of AZ & Gov OPPOSE |
| NV | | | | | | | | St. Bar of NV OPPOSE |
| OR | | | | | | | | OR St. Bar &Gov. OPPOSE |
| WA | | | | | | | | WA St. Bar Ass'n OPPOSE |
| MT | | | | | | | | St. Bar of MT OPPOSE |
| ID | | | | | | | | ID St. Bar SUPPORT |

KEY:

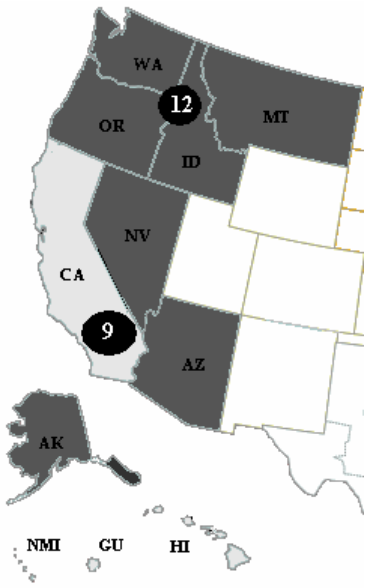
| | |
|---|---|
| | New 9th Circuit |
| | New 12th Circuit |
| | New 13th Circuit |

- The State Bar of CA has taken no position; however, the Litigation Section of the St. Bar of CA opposes splitting the 9th Circuit, as do the following local bars: The Bar Ass'n of San Francisco, Beverly Hills Bar Ass'n, LA County Bar Ass'n, Orange County Bar Ass'n, Santa Clara County Bar Ass'n and the San Diego County Bar Ass'n. In addition, the CA Public Defenders Ass'n and the CA Academy of Appellate Lawyers oppose division. Specialty bars that oppose division include the Hispanic National Bar Ass'n, Los Abogados Hispanic Bar Ass'n and the Federal Bar Ass'n.

Prepared by:
Governmental Affairs Office, American Bar Association
September 20, 2006

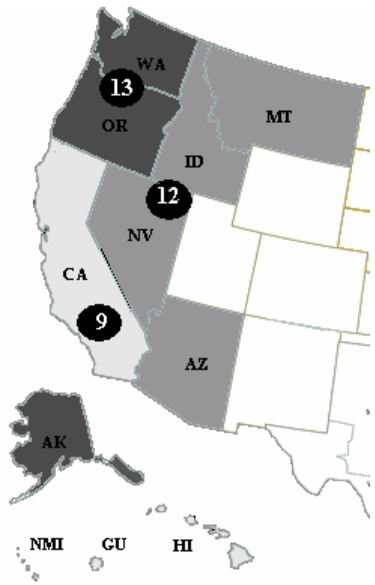
# APPENDIX B

## COMPARISON OF PROPOSALS TO SPLIT THE NINTH CIRCUIT INTRODUCED DURING THE 107TH, 108TH & 109TH Congress




**109th Congress**
*H.R. 4093
H.R. 3125
S. 1845
S. 1296

*This bill contains both circuit–splitting and omnibus judgeship provisions.



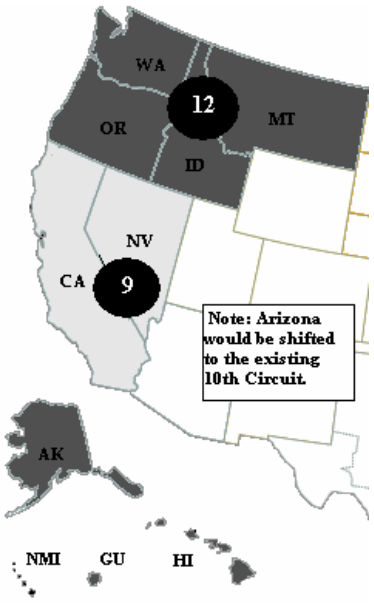

**108th Congress**
H.R. 4247
S. 2278

**109th Congress**
H.R. 211
S. 1301

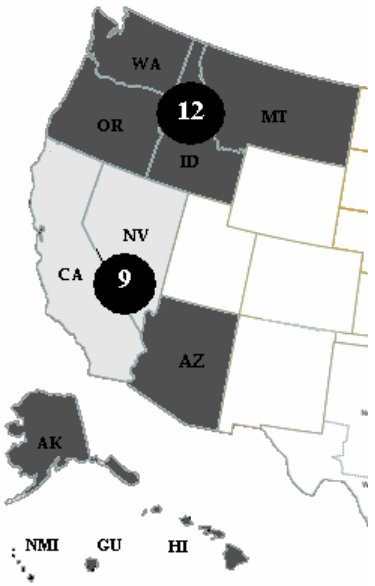

**107th Congress**
H.R. 1203
S. 346

**108th Congress**
H.R. 2723

**109th Congress**
H.R. 212




**108th Congress**
H.R. 1033




**108th Congress**
S. 562

# APPENDIX C

## LEGISLATIVE PROPOSALS TO DIVIDE THE NINTH CIRCUIT:

### ORIGINAL SPONSORS (IN BOLD) AND COSPONSORS*

### 1998-2006

| 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 | | |

| Congress Bill # | CA | NV | AZ | OR | WA | ID | MT | AK | HI | Other Members |
|---|---|---|---|---|---|---|---|---|---|---|
| **104th** | | | | | | | | | | |
| S. 956 | | | | Hatfield<br>Packwood | **Gorton** | Craig<br>Kempthorne | Baucus<br>Burns | Stevens<br>Murkowski | | |
| HR 2935 | | | | **Bunn**<br>Cooley | Dunn<br>Hastings<br>Tate<br>White | | | Young | | |
| S. 853 | | | | Hatfield<br>Packwood | **Gorton** | Craig<br>Kempthorne | Burns | Stevens<br>Murkowski | | |
| **105th** | | | | | | | | | | |
| HR 639 | | | | | | Chenoweth | **Hill** | | | |
| S. 431 | | | | Smith | Gorton | Craig<br>Kempthorne | Burns | Stevens<br>**Murkowski** | | |
| **106th** | | | | | | | | | | |
| S. 253 | | | | | | | | Stevens<br>**Murkowski** | | |
| **107th** | | | | | | | | | | |
| S. 346 | | | | | | | | Stevens<br>**Murkowski** | | |
| HR 1203 | | | | | | **Simpson** | | | | |
| **108th** | | | | | | | | | | |

| Congress Bill # | CA | NV | AZ | OR | WA | ID | MT | AK | HI | Other Members |
|---|---|---|---|---|---|---|---|---|---|---|
| S. 562 | | | | Smith | | Craig, Crapo | Burns | **Murkowski** Stevens | | Inhofe-OK |
| S. 2278 | | **Ensign** | | | | Craig Crapo | Burns | Stevens **Murkowski** | | Inhofe-OK Cornyn-TX 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 |

| Congress Bill # | CA | NV | AZ | OR | WA | ID | MT | AK | HI | Other Members |
|---|---|---|---|---|---|---|---|---|---|---|
| HR 212 | | | | | | **Simpson** | | | | |
| HR 3125 | | | | | | **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 cosponsorship.

# APPPENDIX D

Supplemental Written Statement of Kim J. Askew
Chair, ABA Section of Litigation
Regarding
Proposed Legislation to Split the United States Court of Appeals
for the Ninth Judicial Circuit

Submitted to the
Senate Judiciary Committee

September 2006

I am Chair of the American Bar Association Section of Litigation, and I write to reiterate the American Bar Association's opposition to the proposed legislation to divide the United States Court of Appeals for the Ninth Judicial Circuit.

The Section of Litigation is the largest section in the ABA, with more than 77,000 members in the United States. The Section is not "pro-plaintiff, "pro-defendant" or "pro-anyone." Our charter is to improve the quality of justice among practicing lawyers and their clients. We have no axe to grind other than making sure that our nation's justice system and judicial administration are the best they can be.

As Brad Brian, my predecessor as Chair of the Section, previously noted in his November 2005 statement to the Senate Judiciary Committee, he and thousands of Section members practice in the states and territories that comprise the Ninth Circuit. They regularly appear in all of the federal District Courts within the Ninth Circuit and before the Ninth Circuit itself. Their clients will be directly affected by any action taken to modify the current structure of the Ninth Circuit. Our members do not report that the proposed Circuit split is necessary.

As also demonstrated by Ninth Circuit Judge Sidney R. Thomas' previous testimony before the Senate Judiciary Committee, splitting the Circuit "would be costly, disruptive and would create enormous inefficiencies." Judge Thomas' testimony confirms the conclusion by the White Commission in 1998 that 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 ABA itself, Ninth Circuit Chief Judge Mary Schroeder and other affected bar groups have repeatedly pointed out the significant costs and dislocations that a split circuit would produce. Contrary to the views expressed by some advocates of a circuit split, there has been no showing that splitting the Ninth Circuit would produce any meaningful benefits to anyone, including litigants or the public at large, much less that they clearly outweigh the downsides of doing so. We join in their statements and fully support them.

Although some have criticized the geographic size of the Circuit, we believe it is extremely useful to have both the collective and individual views and experience of appellate judges from Arizona to Alaska and from Idaho to Hawaii in framing the Ninth Circuit's jurisprudence. The Court's diversity also helps to bring balance to the other states within its boundaries. The Ninth Circuit may be large, both in geography and the number of its judges, but it serves the important purpose of collecting all of the western-most states together in one appellate judicial unit to arrive at an overall, balanced perspective on the important legal issues that come before it.

Perhaps most telling is the fact that the vast majority of Judges on the Ninth Circuit – including those whose appointments came from "both sides of the aisle" – are opposed to a split and see no benefits from one. This is itself compelling. Congress should give great weight to these Judges, who know firsthand whether the Ninth Circuit is working effectively.

The truth is that the Ninth Circuit is working, and working well with support from not only its own judges, but the bar associations and lawyers within its jurisdiction.

We urge you to oppose any efforts to split the Ninth Judicial Circuit and would be pleased to provide any additional information to assist the Committee in its important work.