September 13, 2018

Honorable Robert W. Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Honorable Jerold Nadler
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Nadler:

I am writing on behalf of the American Bar Association and its over 400,000 members to express our concern over four federal courts bills that are scheduled for markup by your committee this morning – H.R. 3487 (diversity jurisdiction); H.R. 6754 (restructuring the Ninth Circuit); H.R. 6730 (injunctive authority); and H.R. 6755 (multi-subject federal courts reform bill). Our overriding concern, and one that we shall reiterate throughout this letter, is that each of these bills deserves thoughtful review and full consideration prior to markup because each proposes substantive changes that will profoundly affect litigants who seek civil redress through our federal and state court systems. Instead of having an opportunity to thoroughly review these bills, your committee members are being asked to mark up these bills, even though three of them were introduced only a few days ago. To further diminish the possibility of deliberative consideration, seven additional significant bills also are noticed for this markup session.

Given the time constraints, the ABA, likewise, has not had the opportunity to review each bill in depth. Nonetheless, we offer the following general comments for your consideration.

I. H.R. 3487 – Diversity of Citizenship Jurisdiction

H.R. 3487 (King, R- IA), which was introduced on July 27, 2017, would dramatically alter the long-standing judicially created requirement that diversity of citizenship jurisdiction may be invoked only when there is complete diversity between each and every plaintiff on the one hand
and each and every defendant on the other.\(^1\) It would replace the current requirement with a minimal diversity standard requiring that only one plaintiff be diverse from one defendant.

The ABA opposes this bill, along with any other alternative proposal that would change the current requirement for complete diversity. Enactment of a minimal diversity standard would recalibrate our current system of coordinate federal-state jurisdiction and result in a significant increase of diversity jurisdiction cases being filed in the federal courts. In turn, untenable caseloads would inevitably create inefficiencies and delays throughout the federal court system. We believe that federal courts should be preserved as a distinctive forum of limited jurisdiction in our system of federalism, and any expansion of federal court jurisdiction should occur only when there is a demonstrated need; we have seen no such need demonstrated to support this radical a change in federal jurisdiction. We further believe that when legislation is considered that may affect the federal courts, Congress should take into account the impact on judicial resources of the proposed legislation, including any increased caseload and resulting costs for the federal courts. None of these conditions has been met.

As expressed in a September 2016 letter sent to this committee when it last explored proposals to alter federal diversity jurisdiction, the ABA does support specific, limited changes to federal diversity jurisdiction that would not change the current requirement of complete diversity, but that would avoid unnecessary confusion in defining the citizenship of unincorporated associations for the purposes of whether complete diversity exists. We invite you to review that letter, available at: https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2016sept20_feddiversityandr es_f.authcheckdam.pdf.

II. H.R. 6754, the Court Imbalance Restructure Concerning Updates to Impacted Tribunals (“CIRCUIT”) Act of 2018

H.R. 6754 was introduced by Representative Issa (R- CA) three days ago, on September 10, 2018. This ABA-opposed measure resurrects legislation proposed in 1998 by the congressionally created Commission on Structural Alternatives for the Federal Courts of Appeals.\(^2\) We urge careful consideration of this proposal, which has not been examined by your committee or by any committee of Congress during the past 20 years, prior to any further action.

As a point of historical reference, the Commission, which was created by the 105th Congress, 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 by December 1998.

\(^1\) Strawbridge v. Curtiss, 7 U.S. 267 (1806).

\(^2\) Pub. L. No. 105-119.
The “White Commission,” as it was popularly known because it was chaired by the late Justice Byron R. White, concluded that the Ninth Circuit should not be split. In its final report, 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.3

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, and the practical advantages of the Circuit’s administrative structure. 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.

Since then, multiple bills have been introduced every Congress to split the Ninth Circuit into various configurations. Some have even included a provision to authorize additional circuit judgeships for the newly reconfigured circuits. Activity during this Congress has been no different. In addition to the bill currently before you, in 2017, Representatives Simpson (R-ID) and Biggs (R-AZ) and Senator Flake (R-AZ) introduced separate proposals to divide the Ninth Circuit into different configurations. The ABA offered a full explanation of its opposition to restructuring the Ninth Circuit and a description of the various circuit restructuring proposals before Congress in its written statement submitted to your committee on March 16, 2017 and available at: https://www.americanbar.org/content/dam/aba/uncategorized/GAO/9th%20Cir%20Statement%20to%20House_3_2017.authcheckdam.pdf. At the time, the White Commission proposal had not been reintroduced and was not before your committee for examination.

The point of mentioning this is that there has never been widespread congressional support for the White Commission recommendations, and even the most ardent proponents of Ninth Circuit restructuring do not concur over how to split it. The current effort to approve a circuit restructuring plan that has not even been the subject of hearings in decades stands in stark contrast to the congressional bipartisanship and judicial support that existed prior to the division of the Eighth and Fifth Circuits in 1929 and 1980, respectively. These are the only times that

Congress has divided a circuit since 1891, when it created a system of regional courts of appeals as we know them today. We urge you to defer action on H.R. 6754.

III. H.R. 6730, the Injunctive Authority Clarification Act of 2018

The ABA has no specific policy on H.R. 6730, which was introduced by the chair earlier this week. This bill seeks to ban the issuance by district court judges of so-called “national injunctions” in non-class action cases that forbid enforcement of a “statute, regulation, or similar authority” against a non-party.

We acknowledge that the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet held a hearing on November 30, 2017, titled “The Role and Impact of Nationwide Injunctions by District Courts,” but the subcommittee never had an opportunity to consider or mark up this specific legislative proposal and other members of the full committee have only had a few days to review the bill and familiarize themselves with the problems it sets out to address.

After reviewing the scholarly statements submitted for the record of that hearing, we are both impressed and concerned by the range of jurisdictional, constitutional, precedential, and policy considerations raised. As several witnesses acknowledged, the issuance of so-called national injunctions was fairly obscure until just a few years ago, and since then, concern over their use has been raised by members from both sides of the aisle. Clearly, determining the proper scope of injunctive relief is not a partisan issue. It is an issue that deserves thoughtful and dispassionate bipartisan consideration, and if problems are identified, non-statutory solutions also should be given due consideration. We therefore urge the Committee also to delay consideration of H.R. 6730.

IV. H.R. 6755, the Judiciary Reforms, Organization and Operational Modernization (“ROOM”) Act of 2018

This sweeping bill also was introduced just a few days ago by Representative Issa. It covers a remarkable range of subjects, most of which have not been examined by the Judiciary Committee this Congress. In fact, it is likely that some of the proposals contained in this bill have not been considered by Congress for years. In prior decades, Congress would consider a federal courts bill that was introduced on behalf of the Judicial Conference of the United States. This does not appear to the case in this instance. The ABA supports some of the provisions in the bill but has no policy on the majority of them.

The ABA has long supported enactment of comprehensive legislation to authorize needed permanent and temporary federal judgeships, as identified by the Judicial Conference, which conducts a biennial survey of the judgeship needs of the U.S. courts of appeals and district courts. Consistent with the findings of the latest survey, which was conducted in March 2017, the Judicial Conference recommended that Congress establish five new appellate court judgeships and 52 new district court judgeships. It also recommended that eight existing temporary district court judgeships be converted to permanent status.
We are appreciative of the fact that Section 101 of Title I of H.R. 6755 proposes the creation (or conversion to permanent status) of district court judgeships, as recommended by the Judicial Conference, and we fully support enactment of this one section of the bill. It is unfortunate, however, that authorization for the desperately needed new circuit court judgeships was only included in the circuit restructuring bill discussed earlier. We thank Representative Issa for holding a hearing on this important issue this past June and supporting the Judicial Conferences recommendation for new district court judgeships. We submitted a letter for the record of that hearing, which is available at: https://www.americanbar.org/content/dam/aba/uncategorized/GAO/ExaminingTheNeedforNewFederalJudges_ABA.authcheckdam.pdf.

In passing, we also note that we have long supported increased electronic media coverage of federal court proceedings, which is the subject of various provisions of Title III of this bill. However, rather than supporting enactment of legislation to accomplish this goal, we continue to urge the Judicial Conference to adopt rules to expand coverage.

There are numerous other provisions in the bill that are being proposed for the first time. These include provisions regarding specific courthouse construction projects that might not be part of the judiciary’s proposed long-range plan for new construction; provisions that would require the Judicial Conference to issue a Code of Judicial Conduct that would apply to each justice and judge of the United States; provisions that would require each justice or judge to undergo a medical examination at intervals determined by the jurist’s age; and numerous provisions governing the Public Access to Court Electronic Records (PACER) System.

This bill, which has been available for review for only a few days, covers too many divergent subjects for consideration at one time. We urge that the Committee only consider Section 101 of the bill during the forthcoming markup and that the rest of the bill’s provisions be reserved for further study at a later date.

Thank you for the opportunity to present these comments.

Sincerely,

Robert M. Carlson