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Justice Byron White
Chair
Commission on Structural Alternatives for the
Federal Courts of Appeals
United States Supreme Court Building
One First Street, N.W.
Washington, D.C. 20543

Re: Splitting of the Ninth Circuit

Dear Justice White and Members of the Commission:

Proposals to split the Ninth Circuit have been made repeatedly beginning as early as 1940. In 1973, the Hruska Commission recommended dividing the Fifth and Ninth Circuits. Although proposals were not adopted, they eventually led to the enactment of Section 6 of the Omnibus Judgeship Act of 1978.

Under the 1978 Act, any Court of Appeals with fifteen or more active judges could divide itself into administrative units and could perform its *en banc* function with less than all of its judges. Congress invited the large circuits to report to Congress on their progress and to recommend additional legislation that might be necessary to provide for the effective administration of their courts. The Fifth Circuit chose to request division of that Circuit, and Congress agreed. The Ninth Circuit accepted Congress' invitation to make recommendations to it; it embarked on an extensive program of administrative innovations, including a shortened *en banc* procedure and repeatedly reported its continuing progress to Congress.

Proponents of Circuit splitting have variously argued that (1) an appellate court of more than 15 judges is "unmanageable", (2) collegiality cannot be preserved in an appellate court with more than nine (or thirteen, or fifteen judges), (3) intra-Circuit conflict results from having more than the "ideal" number of judges, and (4) splitting the Circuit would permit more judges to be appointed without exceeding an ideal number. (More often than not, however, proponents of Circuit splitting have been motivated

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more by political considerations than by concern for the administration of justice in the federal courts.)

No amount of Circuit splitting is going to change the geography of the far West, or to reduce the population growth of the Western States, or to fill the vacancies that languish for many months and, more recently, years, or to reduce the number of filings. Circuit splitting does not make the individual judges more collegial or more like-minded – as the history of appellate courts (federal and state) starkly reveal. Disagreements regularly appear whether the court complement is three judges or twenty-eight and whether the differences of opinion are expressed politely or not. Harmony or disharmony, agreement or disagreement stem from the intellectual and personal characteristics of each of the members of those courts, and not upon their numbers, their geographical location, or the geographical size of their jurisdiction.

No amount of Circuit splitting is going to move Hawaii, the Trust Territories, and the Commonwealth of the Northern Mariana Islands closer to the mainland, or to move Alaska farther south. Unless all judges of a court of appeals choose to live in the same city and to conduct oral arguments only in one city, substantial judicial travel is inevitable even if the Court were split.

Drawing new lines for a federal appellate court does not decrease the number of cases filed in the geographical areas before the division lines were drawn. To the contrary, the net result is to generate more litigation by encouraging forum shopping (especially by such regular litigators in the federal courts in the United States) and by permitting relitigation of an issue decided in one circuit by raising the same issue in a new circuit.

Any effort to balance caseloads in a split Ninth Circuit must face the reality of California -- a huge State with the largest population and most litigation of any other State. The Hruska Commission recognized that the only way to try to balance the caseload was to split California in two – a proposal that would have had disastrous results because all the federal law issues and California law questions in diversity cases would cross that Commission's fracture lines. Resolution of the conflicts between the two proposed Circuits would either have to be resolved by creating a complicated new two-Circuit *en banc* structure or by sending all of those conflicts to the United States Supreme Court.

Furthermore, splitting the Circuit increases the difficulty in providing sufficient judicial personnel to carry the loads in both the district courts and in the court of appeals. For many decades, the Chief Judge of the Ninth Circuit has temporarily assigned judges to heavily impacted district courts from other districts in the Circuit when their own dockets are light. For example, judicial business in Alaska, Montana

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and Idaho is relatively light in the winter, but the docket at that time is very heavy in Arizona and in Southern California. A Chief Judge cannot assign active district judges out of the Circuit to sit temporarily in district courts within the Circuit or to assign them to sit *pro tem* with the Court of Appeals. For obvious reasons, district judges are not assigned to sit on appeals from judgments of their colleagues in the same district.

The bankruptcy appellate panels in the Ninth Circuit have functioned admirably and have significantly reduced the burden of bankruptcy appeals on the Court of Appeals. If the Circuit is split, the unintended effect will be to destroy the present bankruptcy appellate panels because, like district judges, bankruptcy judges serving on those panels do not sit on cases from their own districts. Because the overwhelming majority of bankruptcy appeals come from California, there are simply not enough bankruptcy judges who could serve on the appellate panels if the Circuit is split; it is the bankruptcy judges outside of California who must be called upon to fill the appellate panels to deal with the majority of the caseload.

When the judicial vacancies have been filled and the judgeships created are sufficient to keep up with an ever-escalating caseload, conflicts within the panels on the existing Court of Appeals can be and often are sorted out informally among the judges on the disagreeing panels. Moreover, the case weighing and sorting system adopted by the Ninth Circuit make a very good, although not perfect effort to bring the same issue before the same panel when the appeals involving those issues have been ripened within a relatively short time of one another. When accommodation is not practical, the Court will take the case *en banc* before the shortened *en banc* panel. If the Circuit is split, both the informal resolution of conflicts and *en banc* proceedings cannot be used as effectively as they are today. Instead, intra-circuit conflict becomes inter-circuit conflict.

A small minority of judges who sit on the district courts and on the court of appeals prefer much smaller judicial complements, although the majority of circuit judges do not want the Ninth Circuit to be split. It is very true that a court of seven, nine or eleven is cozy, at least if the members of the Court have harmonious dispositions and views on legal issues that are not intractable. Nostalgia aside, very large courts can function very well if they are timely staffed by competent and diligent judges. A direct analogy can be found between the functioning of very large appellate courts and large law firms. Thirty years ago, a law firm of forty lawyers or more was deemed to be a big firm. Today, such firms would be deemed medium sized in major metropolitan areas. Large law firms, like large courts, make management adjustments to fit changed needs and, because they are staffed with lawyers (as are courts) the quality of work and collegiality of the members depends upon the personalities and skills of those in the firm and not simply upon their numbers or their geographical location.

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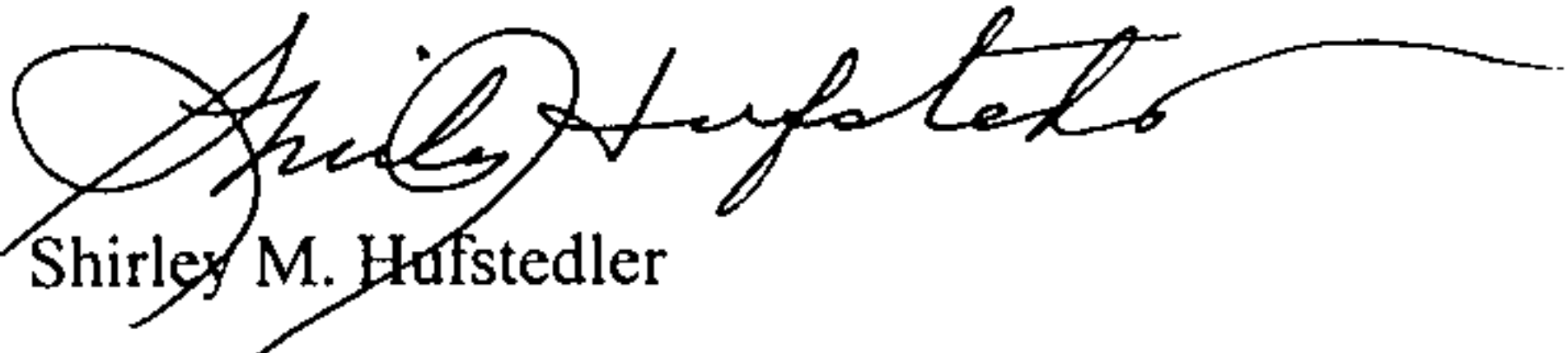
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Creating a new circuit is very expensive because it requires the duplication of both physical facilities and of supporting personnel that now perform the necessary services and provide the facilities for the whole court. The administration of justice, not job creation, is the business of the federal courts.

I do not oppose the insertion of a new level of review between the district courts and the Ninth Circuit, together with a permissive form of review to the Circuit from the new court, rather than review as a matter of right – a proposal that my husband and I made more than twenty years ago when the appellate docket was less formidable than it is today.

I have not changed my views opposing the split of the Circuit for many decades. Those views are based upon my many years of experience as an appellate jurist in two State courts in California and almost twelve years of service on the United States Court of Appeals for the Ninth Circuit and on my thinking, speaking, testifying and writing on the composition and functioning of appellate judicial systems here and abroad for more than thirty years.

Respectfully submitted,


Shirley M. Hufstedler

SMH:sh
cc: Hon. James R. Browning