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May 28, 1998

VIA U.S. Mail and Fax - 202/208-5102:
Commission on Structural Alternatives for the
Federal Courts of Appeal
Washington, D.C. 20544

Re: GSJ&W File No.: 94002-000

Gentlemen:

I write as an attorney admitted to practice before the United States Court of Appeals for the Ninth Circuit since 1972. I have presented in excess of 20 matters to the Circuit Court since then.

I submit there is no justification to divide the Ninth Circuit. Its work is timely done; it has developed procedures to avoid conflicts between panels; and its *en banc* procedure gives attorneys meaningful opportunities to have a full court review of appellate matters when appropriate. Indeed, I would argue not that the size of the Ninth Circuit causes the administration of justice to be inadequately served, but rather that the example of the procedures of the Ninth Circuit should be followed by a number of other circuits.

The reality is the debate over dividing the Ninth Circuit has continued, off and on, for the past 50 years. The dominance of California in the case load of the circuit has always made a proposed division either politically difficult or practically adverse to the effective administration of justice. A circuit should not consist of just one state; a state should not be divided into two separate circuits. The reality of the population and case load size of California makes division of the circuit impractical and illogical. Those problems remain to date and none of the other proposals advanced adequately resolve this dilemma.

The current thrust to divide the circuit is driven by two issues. First, a protracted death penalty case in Montana caused one victim's family members to seek a "solution" to the delays experienced by promoting a division of the Ninth Circuit to get rid of "liberal" anti-death penalty judges. Second, northern tier political leaders wanted to create a circuit more "sensitive" to the needs of timber interests, to avoid delays which had developed due to environmental considerations.

The first justification for division was based upon a complete misunderstanding of the legal developments in the death penalty case. The Ninth Circuit, in fact, did not cause or contribute to any of the delays which occurred in the case. This justification died, in any event, when Montana carried out its first execution in almost 50 years in 1995.

The second justification for the division was likewise never the correct basis for proceeding to divide the circuit. The concept of federalism is to develop and apply uniform laws across the United States. Suggesting creation of a "Northern Tier" court to permit development of a pro-logging, anti-environmental circuit is the anthesis of the doctrine of federalism which develops and applies one body of federal law for all 50 states and the territories of the United States.

Further, as individuals looked at the proposed alignment, one of many, judicial commentators noted the "new" circuit would have the lowest case load of any circuit, while increasing the costs of judicial administration considerably.

The proponents of division of the Ninth Circuit have moved beyond the northern tier alignment. The revised alignments ignore justification of developing a northern tier circuit, in any event. The new alignments however add other states to the new circuit merely to increase the case load of the new circuit, to produce some justification for the enormous cost without considering the natural commercial and other connections the states have with each other within the Ninth Circuit. California, Oregon, Washington, Alaska, Hawaii and the Pacific Territories all have a common interest in development of common maritime law. While Montana, Washington, Idaho and Oregon have significant lumber interest, so also does Northern California. The commercial enterprises in California, Nevada and Arizona all interconnect in ways that having a common court of appeals to develop the law makes good judicial sense.

In short, there is no compelling case to divide the Ninth Circuit. It functions well administratively. Cases move through the system at a good rate. Indeed, a case before the Ninth Circuit is adjudicated about as promptly as a case

before the Supreme Court of Montana. There are adequate procedures to assure conflicting precedent does not develop within the circuit. The political arguments advanced have either been based upon an incorrect understanding of facts or have failed to consider that the circuit must strive to develop uniform application of federal law and that a circuit must avoid regional balkizaniation of its decisions just to benefit local economic reasons and interests.

Over 100 years ago the United States Court of Appeals for the Ninth Circuit was created to address the needs of the western "frontier" states. While the frontier has changed, the common commercial and historic interests which tied those states together then remain valid today.

The United States Court of Appeals for the Ninth Circuit should not be divided.

Hopefully, this Commission will focus not upon structural alternatives for the Federal Courts of Appeal but will highlight the very real crisis that has developed in the Court of Appeals. Court vacancies have remained for a substantial period of time. The political process has slowed and, virtually stopped, moving new judges into vacancies on the Court of Appeals. Since the late 1970's the United States Court of Appeals for the Ninth Circuit have 28 members. To the best of my knowledge, the court has never been staffed to the full level authorized. The level authorized in 1978 is far below the number of judges the Court of Appeals should have based upon its current case load. Congress should consider increasing the size of the Court of Appeals across the United States to reflect the increased case load burden imposed upon all courts.

If there is revision in the work the Court of Appeals does, it should come in more narrowing scope of federal jurisdiction. Studying and considering dividing courts of appeals will never address the principal problems courts of appeals currently face today. Those problems are not filling vacancies in a timely manner and not having sufficient numbers of judges to perform the work required by the several courts of appeals throughout the United States.

Very truly yours,

GOUGH, SHANAHAN, JOHNSON & WATERMAN

Ronald F. Waterman

RFW/lb

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