



**LACBA**

**Los Angeles County  
Bar Association**

STREET ADDRESS:  
617 South Olive Street  
Los Angeles CA 90014-1605

MAILING ADDRESS:  
P O Box 55020  
Los Angeles CA 90055-2020

TELEPHONE: 213.627.2727  
FACSIMILE: 213.896.6500  
WEB SITE: www.lacba.org

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RECEIVED IN  
THE OFFICE OF

April 14, 1999

JUN 0 1 1999

Hon. Barbara Boxer  
US Senate  
Hart Building #112  
Washington DC 20510

CIRCUIT EXECUTIVE

Re: Senate Bill 253 -- Federal Ninth Circuit Reorganization Act of 1999

Dear Senator Boxer:

We are writing to express our concerns over and opposition to the restructuring of the Ninth Circuit, as proposed in Senate Bill 253 ("S.253"). As set forth below and in the enclosed analysis, we have seen no reliable evidence or data justifying the unprecedented and problematic structural changes proposed by the pending legislation.

Some twenty-five years ago, the Hruska Commission cautioned that any realignment of courts of appeal should proceed with care: "[T]he present [circuit] boundaries ... have stood since the nineteenth century.... Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents." Commission on Revision of the Federal Court Appellate System, *The Geographic Boundaries of the Several Judicial Circuits: Recommendations for Change* (Dec. 1973), reprinted in, 62 F.R.D. 223, 228 (1973). These sentiments were echoed more recently in the United States Judicial Council's Long Range Plan for Federal Courts (1995): "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." *Id.* at 44.

Proponents of the reorganization of this Circuit have identified no compelling evidence that the current structure and performance of the Ninth Circuit satisfies the requisite high standards justifying change. We thus were heartened to see that the report of the Commission on Structural Alternatives (the "White Commission") embraced these conclusions and that the pending legislation does not seek a division of this Circuit. Indeed, the White Commission's analysis of the more frequently proposed options for splitting the Ninth Circuit amply demonstrates the problems associated with any attempt to disturb an appellate court that is operating reasonably well.

While S.253 does not propose a split of the Ninth Circuit, it does adopt the White Commission's recommendation that the Circuit be reorganized into three "divisions" staffed by judges located both within and outside that division, that the state of California be split among two divisions (thereby subjecting litigants in the state to potentially conflicting interpretations of state law and encouraging problematic forum shopping), and that significant cases raising far reaching issues of law be resolved by newly created "division en banc courts," with Circuit wide en banc adjudication limited to cases involving inter-divisional conflicts. It is our firm belief that this proposed restructuring of the Circuit is ill advised and would create a great many more problems than it solves. Our view is premised on the conclusions and concerns set forth in the attached analysis.

Practitioners have been well served over the years by the existence of an independent and high caliber federal appellate system that has worked to minimize the incidence of unwarranted, disparate interpretations of law. Any determination that the Ninth Circuit, or any other court of appeal, requires restructuring should result from the presentation of data and evidence establishing compelling reasons to change the status quo, and not from any particular political or ideological agenda.

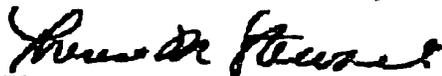
While we applaud the White Commission's opposition to the split of the Ninth Circuit and its willingness to consider creative vehicles for improving the operation of our courts of appeals, we question the wisdom of the proposed statutorily mandated creation of divisions. This de facto split of the Ninth Circuit will require the Circuit to implement an unprecedented structure that has grave implications for businesses and litigants in California and throughout the Circuit. In lieu of this unworkable proposal, we urge Congress to allow the Circuit the flexibility and opportunity to continue to experiment with innovative reforms designed to improve the operations of this and other federal appellate courts in the coming years.

We greatly appreciate your consideration of our views on this important issue and welcome the opportunity to provide any further information that may be of assistance.

Very truly yours,



Lee Smalley Edmon  
President, Los Angeles County Bar Association



Therese M. Stewart  
President, Bar Association of San Francisco



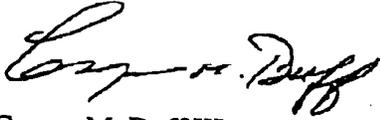
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President, San Diego County Bar Association



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President, Beverly Hills Bar Association

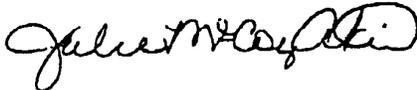


James I. Fisher  
President, Alameda County Bar Association



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President, Federal Bar Association, Northern District of California Chapter

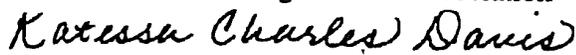
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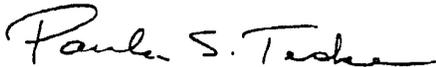
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Co-President, LHR: The Lesbian and Gay Bar Association



Hugh Biele  
Co-President, LHR: The Lesbian and Gay Bar Association

## ANALYSIS OF PROPOSED RESTRUCTURING OF THE NINTH CIRCUIT

For the reasons enumerated below, we urge Congress to reject the unprecedented restructuring of the Ninth Circuit advanced in Senate Bill 253. This ill conceived proposal to divide the Circuit into adjudicative "divisions" will resolve none of the concerns raised by its proponents and will, instead, create many new problems that will adversely impact the resolution of cases and the development of appellate law in this Circuit.

### A. Under No Circumstances Should California, Or Any Other State, be Divided Among Either Circuits or Divisions

Practitioners in California, many of whom advise clients and businesses -- both public and private -- about issues of state law, have grave concerns about any proposal that could result in disparate interpretations of California law. Decisions resolving issues of California law form the bedrock of our practitioners' ability to advise statewide clients on a litany of issues. Restructuring the Ninth Circuit in a manner which could result in a different rule of law for different parts of the state would be tremendously problematic not only for institutional litigants such as the California District Attorneys and Attorneys General, but also for commercial enterprises seeking to conduct business and structure transactions on a statewide level. Thus, it is not surprising that there is virtually no precedent for splitting one state between two federal circuits.

The White Commission aptly identified the problems associated with assigning California to two different Circuits; in our view, the proposed split of California between divisions implicates the very same concerns. Although the contemplated creation of a Circuit en banc court to resolve conflicts among divisions will facilitate the ability to reconcile different interpretations of California law, the proposed structure, with its added layer of mandated divisional en banc review, necessarily will result in delays and uncertainty in the resolution of cases involving interpretation of state law, while also creating the potential for problematic forum shopping. Indeed, cases most in need of speedy resolution, such as litigation over the validity of statewide initiatives or appeals regarding the constitutionality of state law, could linger in the system for years under a process that requires both divisional and Circuit en banc review to resolve conflicting interpretations of state law.

For all these reasons, we urge Congress to resist any and all efforts to split California among different judicial bodies, whether those adjudicative units are Circuits or simply "divisions."

### B. The Proposed Creation of "Divisions" in the Ninth Circuit Would Not Remedy Any of the Concerns Identified By Its Proponents

Supporters of the creation of divisions within the Ninth Circuit have identified various concerns that they seek to address by the proposed reorganization: the excessive workload of Ninth Circuit judges, the desire for regionally based decision making, the need for greater

collegiality, improving the predictability and consistency of Ninth Circuit adjudications, and improving the frequency and efficacy of en banc procedures. We question whether any of these objectives are furthered by the proposed realignment of the Circuit's judges.

1. Regional Parochialism

Proponents of the divisional approach champion the notion that appellate judges drawn from throughout the vast geographic area of the Ninth Circuit lack sensitivity to regional concerns implicated by appeals stemming from a particular area. We seriously question, however, whether regionally based decision making is consistent with the notion of federal courts of appeals and the desire for a reasonably uniform interpretation of federal law nationwide. The role of courts of appeals should be, in the first and last instance, to interpret all issues of federal and state law faithfully, accurately, and unaffected by the supposed wishes of those in any particular geographic region. Former Chief Justice Burger succinctly conveyed this sentiment years ago when he stated, "I find it a very offensive statement to be made that a United States Judge, having taken the oath of office, is going to be biased because of the economic condition of his own jurisdiction." Record, Aug. 2, 1991, S 12277.

Even if one sought to achieve decision making with greater sensitivity to regional concerns, however, the proposed divisional arrangement would not serve to promote that goal. As proposed, divisions would consist of a share of judges who "float" on a periodic basis. Thus, with three-judge panels binding a division, the rule of law for a particular region of the Circuit could be made by judges with no geographic tie to that area. Moreover, with no right to Circuit en banc review of significant decisions (only interdivisional conflicts would be adjudicated by the Circuit en banc court), particular judges from a region who hold strong views about certain regionally based issues or concerns may never have an opportunity to weigh in on the rule of law ultimately crafted.

2. Excessive workload

There is general agreement that Ninth Circuit judges, already overloaded with the demands resulting from an understaffed Circuit, currently are required to keep abreast of a large body of published decisions.<sup>1</sup> The recommended creation of smaller decisional units stems, in part, from a desire to alleviate the workload of Ninth Circuit judges by reducing the volume of cases they would need to monitor to the law of their respective divisions.

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<sup>1</sup> It is interesting to note, however, that the Ninth Circuit produces anything but the highest number of published opinions in the federal appellate system. While largest in geographic size and caseload, the Ninth Circuit is third -- behind the Seventh and Eighth Circuits -- in the number of published decisions it issued in 1998. Table S-3, Annual Report of the Director of the Administrative Office of the United States Courts (Fiscal Year 9/30/98).

Our difficulty with this analysis is that it assumes that Ninth Circuit judges will no longer be required to keep up on the law of all divisions in the Circuit. In that the proposed divisional arrangement would require judges to shift divisions on a periodic basis, it is unlikely that judges in the Circuit will deem it advisable to disregard the development of the law in other divisions of the Circuit. Moreover, judges in the Circuit will need to be aware of interdivisional conflicts as they develop (thereby requiring Circuit en banc review), and may also be asked to consider decisions of other divisions for persuasive value. Accordingly, the judges will face no less daunting a volume of opinions to review and their workload will remain a constant.

In lieu of instituting an unprecedented restructuring of the Circuit, any problems associated with under staffing and excessive workload in the Ninth Circuit are more appropriately remedied by filling the Circuit's longstanding judicial vacancies and revisiting the need for additional judicial allocations to this body.

### 3. Judicial Collegiality; Predictability of Decisions

The notion that a divisional arrangement promotes collegiality or more effective decision making appears to stem from the premise that a smaller group forced to make decisions together on a frequent basis (even though they are geographically spread far and wide) will be more likely to operate over time in a stable and effective manner. We sincerely doubt the validity of this premise.

There are many notable examples in our current judicial system of smaller decisional units where relations among judicial colleagues are less than "collegial." Judges who have sat in small adjudicative units report that when judges with differing ideologies are required to sit in a static group over time, views tend to harden and tense relations can result. To the extent that the primary aim of a judicial system can and should be to maximize the ability of a group of judges to carefully and deliberately interpret the law, a constant exchange and flow of ideas -- as achieved under the current Circuit/panel system -- is the preferable approach.

We also question the notion that the divisional arrangement provides litigants with a greater sense of predictability by creating a smaller pool of judges from which a panel would be selected. In that divisions would change on a periodic basis (the length of which is left somewhat open in the pending legislation) and very few appeals reach fruition in short order, litigants could face every bit as much uncertainty over the likely decision makers in their case. In addition, even within a division, the particular three judge panel selected may make a vast difference in the outcome of a given case. Thus, divisions are unlikely to alleviate the uncertainty faced by appellate litigants.

### 4. "Improved" En Banc Procedures

The White Commission's report asserts that dissatisfaction has arisen regarding the infrequency of the Ninth Circuit's use of en banc rehearing and the size, credibility, and composition of the current limited en banc court. The divisional arrangement alleviates none of these concerns.

Under S.253, in cases involving divisional conflicts the law of the Circuit would be crafted by an even smaller share of Circuit judges; indeed, a majority of seven judges on the Circuit en banc court could bind the entire Circuit. This hardly assures greater credibility or a larger representation of judicial voices in critical cases.

Nor does the proposal assure any greater frequency of en banc rehearing. As to divisional en banc grants, a party would face the nearly impossible task of convincing a majority of judges in a 7 to 11 member division -- three of whom participated in the panel decision and at least two of whom embraced the rule of law under attack -- that the decision is in error. Circuit en bancs would be even more difficult to achieve in that they would be limited to divisional conflicts and could not be used to review the more common scenario where a panel adopts an approach at odds with other Circuit courts of appeal and of far-reaching import. Litigants would be left with only the Supreme Court as recourse in those cases. In lieu of the proposed restructuring, we would urge the Ninth Circuit simply to be more willing to consider en banc review of significant cases.

### C. The Proposed Divisional Arrangement Would Create A Litany of New Problems

Not only does the divisional arrangement advanced in S.253 inadequately address the concerns identified by the White Commission and others, it also creates a host of new problems and concerns.

#### 1. Inconsistent Interpretation of California State Law; Forum Shopping and Delay Tactics

As noted above, by splitting California into two divisions, the proposal set forth in S. 253 invites inconsistent decisions regarding the meaning of California law. Such conflicting interpretations of state law, especially as to the constitutionality of voter approved statewide initiatives, could result in chaos. Nor would there be any guarantee of quick or certain Supreme Court resolution of these issues. Instead, these cases could require years to resolve under a process with the requisite added layer of Circuit en banc (following divisional en banc) review.

The existence of different divisions could also encourage unfortunate forum shopping among those seeking to assure a more favorable audience to adjudicate questions of state law or the proliferation of delay tactics on appeal in an effort to await the periodic changing of the guard in a division viewed as unfavorable to a litigant's position.

#### 2. Increased Confusion for Litigants

The proposed restructuring would also create undue confusion and an additional burden for lawyers who would be required to master multiple bodies of law -- the law of a division (binding), the law of other divisions (not binding, but must be examined for inter-divisional conflicts), the law of the Circuit en banc (binding), the law of other Circuits, and Supreme Court authority!

### 3. Inconvenience and Cost

The proposal would require certain Ninth Circuit judges to spend a period of time defined by the length of their assignment to a division traveling from their local office to some other part of the Circuit for the monthly oral argument calendar. Those judges who urged a split of the Ninth Circuit stressed the inconvenience of even occasional travel from some of the less convenient geographic areas. The novel approach mandated by S. 253 would compound those problems. In addition, the creation of divisions necessarily would result in additional administrative costs and duplication of administrative efforts.

In sum, S. 253 does little to address or remedy the concerns advanced by proponents of restructuring of the Ninth Circuit. Instead, this proposed de facto split of a longstanding and respected appellate institution would create a litany of new problems, while also stripping the Circuit of the flexibility to continue to seek new and innovative ways to do business. This unprecedented proposal, supported by no empirical evidence or data, should not be embraced.