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CHIEF JUDGE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT



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The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington D.C. 20510-6275
via facsimile 202/224-9102



Dear Chairman Specter:

This letter responds to your letter of October 10, 2006, in which you posed additional questions for me to answer following the Senate Judiciary Committee's September 20 hearing on "Examining Proposals to Restructure the Ninth Circuit."

The questions you posed are as follows:

Background: Under S. 1845, the "Circuit Court of Appeals Restructuring and Modernization Act of 2005, the new headquarters for the 12th Circuit Court of Appeals would be in Phoenix. The Administrative Office has estimated that splitting the 9th Circuit would have \$96 million in startup costs, predominantly for courthouse costs. During the hearing, it was suggested that an existing courthouse in Phoenix would be sufficient to serve as the headquarters for the 12th Circuit.

- *Is there adequate space in federal buildings in Phoenix to accommodate a circuit headquarters?*

Answer: No. Of the two existing federal buildings in Phoenix, the Sandra Day O'Connor United States Courthouse and the Federal Building/Courthouse at 230 North First Avenue are fully occupied. All federal agencies housed in those buildings have occupancy/lease agreements with GSA. If they were to be forced to

move by the judiciary to accommodate a circuit headquarters, the judiciary would be responsible for all associated costs, including (but not limited to) moving costs, unamortized tenant improvements, new build out of their space, and associated telecommunication/data needs. Additionally neither of the existing buildings has the type of courtrooms or space suitable for a circuit headquarters. The judiciary would also have to bear the cost of extensive renovations.

The following information was received from GSA, Region 9 on October 19, 2006:

O'Connor Courthouse - 401 W. Washington (District Court, Court of Appeals, Pretrial Services, Probation)

Rentable:	486,344 s.f.
Usable:	341,238 s.f.
Courts occupy:	241,572 s.f.
Other federal agencies:	99,075 s.f.
Vacant:	591 s.f.

Federal Building and Courthouse - 230 North First (Bankruptcy Court, Probation)

Rentable:	288,783 s.f.
Usable:	215,306 s.f. ¹
Courts occupy:	112,003 s.f.
Other federal agencies:	102,983 s.f.
Vacant:	320 s.f.

Background: During the hearing, it was stated that more than 150 visiting judges participated in 9th Circuit appellate panels last year.

• *How does this usage of visiting judges in the Ninth Circuit compare to other Circuit Courts of Appeals?*

Answer: According to the Administrative Office of the U.S. Courts' most

¹ GSA has recently remeasured the building, which account for previous variations of this number.

recent statistical report (year ending June 30, 2006) on the use of visiting judges in the U.S. Courts of Appeals, visiting judges participated in 4% of cases terminated on the merits in the Ninth Circuit. The national average was 2.5%; the Sixth Circuit, who has had a very high rate of judicial vacancies had the highest usage, 7.9%.

The 150 figure referred to during the hearing comes from internal court statistics which reflect the number of visiting judge participations on three-judge oral argument panels scheduled during a calendar year. For example, in 2006 the Court has scheduled approximately 420 days of three-judge oral argument panels. That equates to 1260 judge participations for the year ($3 \times 420 = 1260$). That means on roughly 12% of the oral argument panels, a visiting judge was a member of the panel. In practical terms, most visiting judges serve multiple days with the court of appeals, so the actual number of different visiting judges is closer to 50 than 150. This practice is common in many other federal circuit courts of appeals, particularly those circuits experiencing a high rate of vacancies, such as the Sixth and Second Circuits. The Eleventh Circuit also uses a very high number of visiting judges as that court has made a policy decision not to seek additional judgeships. As a result, in recent years, the Eleventh Circuit has had visiting judges on anywhere from 40% to 50% of its precedential opinions.

Background: Professor Eastman testified regarding the number of times the Supreme Court has reversed decisions of the Ninth Circuit Court of Appeals.

- *Please provide information on the rate of reversal of the Ninth Circuit.*
- *Please provide information of the rate of reversal of the Ninth Circuit relative to the other Circuit Courts of Appeals.*

Proponents of a circuit split often cite the Ninth Circuit reversal rate as a rationale for a circuit split. There is no evidence that the structure of the Ninth Circuit has any effect on reversal rate, nor any evidence that circuit size has an impact.

In recent years, the reversal rate of the Ninth Circuit has not deviated materially from other circuits. In the 2005-2006 term, the national reversal rate was

73%; the reversal rate for the Ninth Circuit was 83%. The statistics are as follows:

<u>Circuit</u>	<u>Reversal Rate (2005-06)</u>
D.C. Circuit	100%
First Circuit	100%
Third Circuit	100%
Seventh Circuit	100%
Second Circuit	86%
Ninth Circuit	83%
Eleventh Circuit	80%
Sixth Circuit	71%
Fifth Circuit	67%
Fourth Circuit	60%
Eighth Circuit	33%
Tenth Circuit	25%

The statistics for the last few Terms demonstrate that the Ninth Circuit's reversal rate does not differ significantly from other circuits:

<u>Term</u>	<u>Total Average Reversal Rate</u>	<u>Ninth Circuit Reversal Rate</u>
2003-04	77%	76%
2002-03	73%	75%
2001-02	75%	76%
2000-01	63%	71%

Background: At the hearing there was discussion regarding the heavy burden that immigration appeals place on the Ninth Circuit, constituting 40% of its caseload. Starting in 2001, the Department of Justice instituted several changes in the way that immigration appeals are handled.

- *Please provide information on the impact of these changes on the Ninth Circuit.*

The primary cause of the Court's current backlog is the extraordinary increase in immigration appeals. The immigration caseload increased by approximately 590% from 2001 to 2005 while the non-immigration caseload decreased by .2%. The increase stems in large part from more aggressive prosecution of aliens following 9/11, and a decision of Attorney General Ashcroft back in 2000 to eliminate the Board of Immigration Appeals backlog of 56,000 cases. Over half the petitions for judicial review from those cases were venued in the Ninth Circuit. The following numbers illustrate the point:

<u>Fiscal Year</u>	<u>Immigration Appeals</u>	<u>Non-Immigration Appeals</u>
2001	955	9,713
2002	2,662	8,975
2003	4,191	8,919
2004	5,361	9,692
2005	6,520	9,692

But for the unprecedented increase in immigration cases due to executive branch action, the Ninth Circuit would not have any backlog. Because of the court's innovative case management techniques, the Ninth Circuit has been able to absorb the enormous spike in immigration cases without losing too much ground.

Background: During the course of the hearing, some parallels were drawn between the split of the 5th Circuit and proposals to split the Ninth Circuit.

- *Please comment on the similarities and differences in the split of the Fifth Circuit and efforts to split the Ninth Circuit.*

Many of those advocating division disagreed with decisions of both courts. Many disagreed with the integration decision of the Fifth Circuit in the 1950's and 1960's following the Supreme Court's decision in *Brown v. Board of Education*. In the Ninth Circuit, there was much criticism of the court's decisions beginning with the Indian fishing rights cases in 1960s, extending through environmental decisions (e.g. logging and the spotted owl), and more recently the 2002 decision involving the Pledge of Allegiance. For a complete history of the division of the Fifth

Circuit, please see: Barrow & Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform*, Yale University Press (1988).

With respect to both the Fifth and the Ninth Circuits, there were also threats of refusing to provide additional judgeships until there was circuit division.

As to differences with the split of the Fifth Circuit, first, the Fifth Circuit divided after its Judicial Council and a majority of its judges voted in favor of a split. An overwhelming majority of Ninth Circuit Judges - circuit, district and bankruptcy - have consistently opposed a split. Almost every state bar within the Ninth Circuit, the American Bar Association, the Federal Bar Association and many local bar associations throughout the jurisdiction of the Ninth Circuit oppose division.

A second difference is the Fifth Circuit could achieve an equitable division of caseload and states for each new circuit because the old Fifth was anchored at each end by a large state - Texas in the West (that remained in the Fifth) and Florida in the East, that along with Georgia, anchored the new Eleventh Circuit. No such equitable division of caseload would be possible in the Ninth Circuit without dividing California.

Third, the technological advances that have been implemented since the division of the Fifth Circuit in 1980, and continue to be implemented in the courts, make it much more efficient and economic to administer a large appellate court. The best method of establishing and maintaining a sense of community is through the use of technology and through continued contact between the circuit and community it serves. To that end, we have made enormous strides over the past several years. Ninth Circuit opinions are immediately posted on the Circuit's website, which contains an enormous amount of useful information. Digitized audio files of Ninth Circuit arguments are available on the website the day after argument. The Clerk's office has made briefs, orders, and audiofiles of cases in which the public has expressed an interest immediately available via the internet. Video argument and the routine electronic filing in all cases will soon be available to all litigants. Technology allows both the judges of the Ninth Circuit to stay in close contact with one another as well as with the community they serve. However, technology is not always cheap. Because the Ninth Circuit has pooled resources, it can continue to improve the service it provides to litigants and the public. However,

the resources for doing so would be seriously diminished in a small circuit.

To conclude, I hope these responses are helpful to the Committee in your consideration of legislative proposals concerning the Ninth Circuit. If I can provide any additional information, please let me know.

Sincerely,



Mary M. Schroeder