U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 14, 2005

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Department of Justice supports legislation that would improve the administration of justice by providing for additional Federal judgeships and by splitting the United States Court of Appeals for the Ninth Circuit.

The Department believes that dividing the Ninth Circuit would improve the administration of justice at the Federal level in the States located within that circuit. By any measure, whether geography, caseload, or number of authorized judgeships, the Ninth Circuit is the largest Federal appellate court in the country. The States and territories within the circuit extend over more than 1.3 million square miles, or nearly 40 percent of the entire United States. Almost 20 percent of the Nation's population resides within the Ninth Circuit's boundaries. According to the 2000 Census, the States within the Ninth Circuit encompass 54.5 million people, and that figure had swelled to over 58 million by the end of last year. A decision by a three-judge panel of the Ninth Circuit — as few as two judges in the event of a divided panel — therefore binds almost one of every five Americans. The population of the States within the Ninth Circuit grew far faster than that of any other circuit between 1990 and 2000, and the United States Census Bureau projects that it will grow even more, both in absolute terms and relative to other circuits, between 1995 and 2025. Notably, the current Ninth Circuit encompasses the first-, second-, and fourth-fastest growing States: Nevada, Arizona, and Idaho.

The Ninth Circuit's appellate caseload also has increased dramatically in recent years. Between 2000 and 2005, the Ninth Circuit's caseload increased by 70 percent, more than five times the average increase of the other circuits. The Ninth Circuit now hears more than 23 percent of all Federal appeals. During the reporting year ending June 30, 2005, 15,685 appeals were filed — over triple the average of other circuits and 6,000 more cases than the next busiest court. In terms of judgeships, too, the circuit is disproportionately large: Federal law authorizes 28 court of appeals judgeships for the circuit, 11 more than the next-largest circuit. The Ninth Circuit also has 23 senior-status circuit judges, who handle between 25 percent and 100 percent of the caseload an active judge handles.

The sheer size of the Ninth Circuit has led to serious administrative difficulties that have adversely affected its ability to render justice efficiently. The number of appeals the court hears makes it virtually impossible for the judges of the Ninth Circuit to read all of the opinions issued by their court. In addition, the sheer number of opinions rendered by the court has led to intra-circuit inconsistencies.[1] Such inconsistencies make it difficult for citizens, organizations, and government agencies within the Ninth Circuit to conform their actions to the law. They also present unique challenges to lawyers — including those employed by the Department of Justice — litigating before that court. Finally, some judges of the Ninth Circuit have noted that the number of judges on that court, combined with the necessity of asking judges from other courts to hear cases in the Ninth Circuit by designation, undermines the collegiality that many consider essential to the optimal functioning of an appellate court.

To try to address some of these problems, the Ninth Circuit has adopted its unique and frequently criticized *en banc* procedure: the Ninth Circuit currently hears cases *en banc* with only 11 of the 28 active judges participating. As a result, judges who participated in the panel decision may not be selected for *en banc* review at all, and in close cases, six or seven judges may speak for the entire *en banc* court, deciding cases for one-fifth of the population of the United States. The Ninth Circuit has announced amended *en banc* procedures scheduled to go into effect January 1, 2006, pursuant to which 15 judges will participate in *en banc* proceedings. Even with this rule change, eight judges may speak for the entire court of 28 active judges. In addition, even the truncated *en banc* procedure is invoked only rarely. In 2004, the court granted only 22 *en banc* requests. This may be in part because a majority of the court still is required to invoke it and is reluctant to do so in light of uncertainties whether the *en banc* panel will reflect majority sentiment of the court. Accordingly, intra-circuit inconsistencies that should be solved through *en bancs* are not. On a number of occasions, the Department of Justice has sought *en banc* review without success on issues the Solicitor General has deemed to be of great legal significance pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure (where *en banc*

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[1]Compare *United States v. Juvenile*, 347 F.3d 778, 787 (9th Cir. 2003) (limits district courts' authority under the Federal Juvenile Delinquency Act ("FJDA") to consider issues beyond rehabilitation – such as incapacitation or specific deterrence in furtherance of public safety – in fashioning appropriate dispositions in juvenile cases) (Government's request for *en banc* consideration denied)) with other cases holding that the FJDA allows district courts to consider goals other than rehabilitation when determining a proper disposition in a juvenile delinquency case. *See United States v. D.R.L.*, 2003 WL 22735846, at *1 (9th Cir. 2003) (unpublished) ("the sentence also serves the permissible goal of punishing D.R.L. for his involvement in a violent sexual assault upon an unconscious 14-year-old girl"; this unpublished opinion was issued after *United States v. Juvenile*, 347 F.3d 778); *United States v. Juvenile #1 (LWQ)*, 38 F.3d 470, 472 (9th Cir. 1994) (district courts are permitted to "consider punishment in shaping conditions of probation"); *United States v. J.L.B.*, 141 F.3d 1181, 1998 WL 101716 at *3 (9th Cir. 1998) (unpublished) ("rehabilitation is one goal of the juvenile justice system, but it is not the only goal.").

review is necessary to "secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance").

In addition, the court's enormous size and concomitant caseload may be contributing to delays in resolving appeals. According to statistics maintained by the Administrative Office, as of the end of 2004, the Ninth Circuit is the slowest court in deciding cases, with a median time from filing to resolution of over 15 months. In 2004, the court had by far the greatest number of cases that had been pending for three months, six months, nine months, and one year, respectively.

Population and judicial trends indicate that the problems described above will only deepen with time. Previous judicial reorganizations – most recently, the split of the former Fifth Circuit into the current Fifth and Eleventh Circuits – have proven successful in improving the administration of justice at the Federal appellate level. Judge Tjoflat has testified that, based on his experience as a judge on the former Fifth Circuit and currently on the Eleventh Circuit, splitting the Ninth Circuit would be in the best interests of our justice system.

The Department also supports legislation providing for new district and circuit judgeships on courts identified by the Administrative Office of the United States Courts as most in need of additional judges. The Administrative Office identifies districts and circuits in need of new judgeships based on which districts and circuits have the greatest workload per judgeship. We agree with the Administrative Office that adequately staffing the courts is essential to the efficient and timely administration of justice.

Thank you for the opportunity to present our views. The Department looks forward to working with Congress and the Judiciary on these important issues. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member