I write on behalf of the Appellate Courts Section of the Los Angeles County Bar Association regarding the renewed proposal to split the 9th Circuit. We understand that Senator Jeff Flake of Arizona may be holding a field hearing on August 24 to discuss his proposal, and we urge that the proposal be rejected.

The structure of the federal and state appellate court systems is of unique interest to the LACBA Appellate Courts Section, which has more than 300 attorney members who devote much or all of their practice to representing parties in appellate proceedings. They work in private practice at firms large and small; they work for government agencies and entities such as the Office of the Attorney General and the California Court of Appeal; and they work for public interest groups such as Public Counsel. A number of the Section's members have served as law clerks to 9th Circuit judges. The Appellate Courts Section provides a forum for these attorneys to improve the administration of appellate justice by offering continuing education to Section members to raise the quality of appellate advocacy and adjudication, and by serving as a bridge between the appellate bench and the bar on matters of mutual interest. One task the Section undertakes is to monitor, evaluate and comment on proposals affecting appellate practice.

The proposal to split the 9th circuit is, on balance, a bad idea because the proposed split would cause more problems than it would solve.
• **The overall size of the 9th Circuit relative to other circuits is not in itself a compelling reason to split the circuit.**

The population of the states and territories within the 9th Circuit, based on 2010 United States Census figures, is 61,742,908. Last year, the court received 11,405 new appeals. The circuit is authorized to have 29 judges to handle those appeals, and covers nine western states and two territories: California, Oregon, Washington, Montana, Idaho, Nevada, Arizona, Alaska, Hawaii, Guam and the Northern Mariana Islands. By contrast, based on the same census figures, the smallest regional circuit — the D.C. Circuit — is authorized to have 11 active judges, received 1,158 new appeals last year and has a population of 601,723.

However, any circuit that encompasses California will still be the largest circuit in terms of case load in the country. With more than one-tenth of the United States population residing in California, it is the most populous state in the country, and litigation abounds in the Golden State. Criticisms based on size alone thus will not be addressed by any split that keeps California's federal judiciary intact as a body.

Moreover, a split that carves out California as its own circuit will impair one of the great virtues of multi-state circuits, in which the experience and laws of different states provide judges with valuable perspective on the practical and policy implications of the legal questions that come before them.

Nor is the answer a split that divides California into two competing circuits, which would be deciding not only important federal issues but also issues of state law in diversity cases. Such a split would create a host of jurisprudential conflicts and forum-shopping opportunities. For example, litigants challenging the enactment of a new California constitutional initiative might find themselves racing to file suit in the circuit that is perceived to be more receptive to their position. Moreover, businesses operating in both halves of the state could find themselves subject to different law, creating unnecessary uncertainty in the business environment.

In sum, given the size of California, splitting the 9th Circuit presents different practical limitations that did not hinder Congress the prior two times it redrew circuit lines — first when it divided the Eighth Circuit and created the Tenth Circuit in 1929 and again when it split off the Eleventh Circuit from the Fifth Circuit in 1981.
The large number of judges in the 9th Circuit is not a compelling reason to split the circuit.

The 9th Circuit’s pool of 29 authorized (25 active) judges along with its 18 senior judges is considerably larger than the Sixth Circuit—the next largest group, with some 25 active and senior judges. But is that a problem?

The 9th Circuit judges’ ranks are not bloated in comparison to their workload; in fact, those who have studied the issue closely conclude that more judges are needed. Splitting the workload while splitting (and not adding to) the judges’ ranks will do nothing to help manage the cases being processed.

The greater number of judges means a greater number of different panels in the mix-and-match system of choosing three judges for each panel that hears a case. But the resulting cross-pollination of ideas is a feature, not a bug, of this system.

Some have expressed concern that with more panels come more conflicts. But empirical data to support the claimed disconnect is lacking. To those who say it’s simply too hard for judges and their staff to keep track of what’s going on within the busy 9th Circuit, one answer is that a split would do little to change that, because it’s important to be aware of what’s going on nationally, not just within one’s own circuit. Another answer is that modern-day research tools have made it far easier to track jurisprudential holdings and trends. Moreover, the 9th Circuit can and does use other procedures to help judges stay on top of the circuit’s business, such as by issuing daily decision updates. Advocates appearing before the court certainly help in highlighting potential conflicts with other decisions, so if a panel moves in a direction different from that taken in a prior case, that’s not likely to be an accident or otherwise a function of the 9th Circuit’s size. Finally, the en banc process works to address conflicts that do arise, just as is true in other circuits.

Speaking of the en banc process, the 9th Circuit’s is unique in that an “en banc” panel does not include all judges of the Circuit, but rather is a panel of the chief judge plus 10 randomly selected judges, for an 11-member group, which is larger than almost all other true en banc panels in other circuits. This protocol helps to prevent any one voice from dominating the discussion and generally ensures a cross-section of viewpoints are considered. There’s no reason to think that having more than double that number of judges deciding a single case would be more fair or efficient.
Moreover, our collective experience with the California state court system shows that internal differences among panels are not inherently dysfunctional. The California appellate court system is larger than the entire federal court system combined, and yet it has a much weaker custom of stare decisis. The six districts that comprise the state appellate court system are not bound to follow each other; the divisions within the multi-division districts (the Second District in Los Angeles has eight divisions) are not bound to follow each other; and panels within the same division can and do disagree with earlier decisions. There is no resulting chaos. Instead, issues are fleshed out and a consensus generally emerges. Where a clear conflict exists the California Supreme Court steps in. In other words, ensuring consistency within a particular federal Circuit is not, in itself, a goal that warrants splitting up the 9th Circuit as a means to reduce the number of opinions filed and thus reduce the chance for differing approaches.

- **Judicial efficiency and economy provide no compelling reason to split the circuit.**

Critics of the current composition of the 9th Circuit complain that cases take too long to decide. But that is a problem of the judges' headcount being too low, not too high. The Judicial Conference of the United States has recommended that the 9th Circuit receive five more judges to handle the case load.

On a superficial level, one might imagine that an even larger body would be more unwieldy. But that analysis fails to account for the pragmatic concept of "economies of scale." A split would increase the bureaucratic machinery, including physical facilities and technical infrastructure, needed to run a circuit. A split would also potentially give rise to more local rules and practices, which are the bane of lawyers (like the members of the LACBA Appellate Courts Section) who engage in an increasingly multijurisdictional practice. By contrast, the 9th Circuit has by necessity been a leader among the circuits in streamlining procedures and using research attorneys and screening panels to efficiently process cases. For example, the 9th Circuit created the positions of Appellate Commissioner and Circuit Mediator to help resolve cases that do not require resolution by a judge. The Court also developed and uses to great advantage an automated issue identification system to inventory cases in a way that alerts panels of pending cases with common issues. This allows for efficient resolution of many cases at a time once the central issue is decided by a panel. With these programs, available to the 9th Circuit because of its aggregate resources, the Court was able to terminate more appeals than were filed for the 12-month period ending March 31, 2017, according to statistics compiled by the Administrative Office of the U.S. Courts.
• Political ideology and expediency provide no compelling reason to split the circuit.

The LACBA Appellate Courts Section is gravely concerned about the politicization of the judiciary and strongly condemns any rationale for a change in court structure or policy that finds its roots in a partisan desire to sway the outcome of cases on their merits. We are not so naïve as to think that no aspect of politics creeps into the process: federal judges are appointed and confirmed by politicians, after all. But rules for the federal judiciary should apply across the board and should not be motivated by perceived attributes of one particular circuit.

In any event, breaking up the circuit will not necessarily affect its jurisprudence, because the newly created circuit would be bound by prior 9th Circuit precedent. See Bonner v. City of Prichard, 661 F.2d 1206, 1211 (11th Cir. 1981) (holding, in the first opinion published by the new Eleventh Circuit when it was created from the old Fifth Circuit, that it would follow Fifth Circuit precedent “to begin on a stable, fixed, and identifiable base while maintaining the capacity for change.”)

Finally, for those who point to the 9th Circuit’s overall reversal rate as being higher in some years (but not dramatically more so) than that of other circuits, the question remains: how would splitting up the circuit change how the United States Supreme Court approaches these judges’ decisions, whether they come from one circuit or two? Unless one thinks a split would affect a complete sea change in how cases in both newly constituted circuits would be resolved (despite having the same judges deciding the cases), the answer is that the reversal rate would not materially change. It is also worth emphasizing that, as with the decisions of all other circuits, the U.S. Supreme Court denies certiorari in the overwhelming majority of 9th Circuit cases.

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The impetus to split the 9th Circuit has never come from those who appear before it. The judges are well prepared, conscientious, and resolve some of the most challenging cases in our federal system. From practitioners’ perspective, the court is capably carrying out its role in our system of appellate justice.

Most judges of the 9th Circuit, with all their diverse viewpoints, have likewise consistently opposed past attempts to split the circuit. As Judge Alex Kozinski, former chief judge of the 9th Circuit, has stated, “We’ve taken votes of our judges regularly,” and “we always overwhelmingly vote against the split. And these are the folks that know the work of the court.” The same view has been expressed by the federal district court bench and bar, as well as the California delegation to the House of Representatives.
The consensus among those who work in and practice before the 9th Circuit should carry considerable weight. Those of us in the LACBA Appellate Courts Section who actually appear in the 9th Circuit and who otherwise have a direct understanding of appellate court operations believe that a more balkanized court structure is neither more efficient nor more fair. We urge that the current proposal to split the 9th Circuit be rejected.

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