WSBA

WASHINGTON STATE BAR ASSOCIATION

Board of Governors Meeting

Public Session Late Materials

May 18-19, 2017

WSBA Conference Center

Seattle, Washington

SHATZ LAW GROUP

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May 15, 2017

Robin Lynn Haynes
President
Washington State Bar Association
1325 Fourth Avenue, Suite 600
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Paula Littlewood
Executive Director
Washington State Bar Association
1325 Fourth Avenue, Suite 600
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Re: At Large Election 2017

President Haynes, Executive Director Littlewood, Officers, and Governors:

I am writing this letter late because I had intended to be at your May 18, 2017 meeting in person to express my personal support for the At Large election. However, it appears that due to my trial schedule – I may not be able to attend this Thursday.

As such, I would like to put a few words on the record, in support of a few candidates, but primarily I would like you to consider having Karama Hawkins join you on the Board of Governors.

Before addressing my support for Karama, I would like to say a few words as to the other candidates. This is perhaps one of the most difficult at-large elections I have ever witnessed in over 16 years of watching these elections. You are overwhelmed with a slate of competent and interesting people to choose from. In particular, I am familiar with Krista Amerongen, Elizabeth Rene, and Alec Stephens from working with each of them in various capacities. I believe any one of them would also make excellent members of the Board. They all bring qualities of ability and character which would prove constructive and useful to the work of the Board and the WSBA.

However, I write to provide you my personal endorsement of Karama Hawkins, and urge you to give her this opportunity. I became acquainted with Karama through a couple of avenues, but we got to know one another through our shared work as pro tem judges in King County. While you can focus on any single area of accomplishments for her opponents and conclude that they may have more experience in some discreet arena, Karama stands out for the breadth and diversity of her experiences, in the law and in her career before becoming a lawyer.

I have also watched her exercise leadership, both individually and collaboratively. In working on the board, both skills are necessary. Karama is also the kind of leader who rolls up her sleeves and works hard for the common effort, and will always contribute to positive results.

Karama will bring a perspective to the board that continues to need a voice. I know she is dedicated to pro bono work, equal justice, and diversity in our profession, as well as in society at large. While many of the other candidates can speak to discreet diverse perspectives, I believe Karama has the experience and background to be an intersectional bridge on many perspectives.

In making the decision for this position, you have an embarrassment of riches from which to draw from. However, when I look at what the Board needs in the immediate future, and what skills will be needed to help produce compromise and to maintain the vision and integrity of the mission of WSBA, I look at the field and still say "Karama".

I hope you will give these thoughts due consideration in your deliberations. I am sorry that I may not be able to make it there in person, but trust you all to find the right choice for the Board.

Warmest Regards

ANTHONY DAVID GIPE
Past President WSBA

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May 12, 2017

Robin Haynes, President
Paula Littlewood, Executive Director
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Re: Proposals to Restructure the U.S. Court of Appeals for the Ninth Circuit

Dear President Haynes and Executive Director Littlewood:

I understand that the Washington State Bar Association is considering a proposal to endorse an American Bar Association resolution opposing current legislative efforts to restructure the United States Court of Appeals for the Ninth Circuit. I am aware of five such restructure bills pending in the United States Congress, along with one additional bill to establish a commission to study the issue.

At the suggestion of my colleague Judge Richard Tallman, who is a longstanding member of your Bar, I write to express my support for proposals to restructure what is far and away our nation's largest and busiest Court of Appeals, and to underscore that the arguments on this issue should not be reduced to partisan politics.

I

I first must emphasize that, in my view, whether to restructure the Ninth Circuit should not be based on political ideology or partisanship. I disassociate myself from arguments others might make that a restructuring is in order because of disagreement with the outcomes of Ninth Circuit decisions. The decision how to structure our federal courts is of course left to the judgment and discretion of the political branches, but in my view that decision should be based on the efficiency and administration of our courts, not on the substance of those courts' decisions.

II

With this focus in mind, it can hardly be doubted that the time has come to implement a solution to a problem that has long plagued the Ninth Circuit. Since at least 1973, Congress has been aware of the "striking" size of the Ninth Circuit compared to all other circuits and of its attendant administrative difficulties, including delay and inconsistency.[1] It was then, so far as I know, that it was first seriously recommended that the Ninth Circuit be divided into more manageable and reasonably sized circuits, consistent with the rest of the country's judicial system.

More than forty years of population growth in the West has not eased the problem. Although the Ninth Circuit is only one of twelve regional Courts of Appeals, it is home to one fifth of our nation's population.[2] Likewise, one fifth of all federal appeals filed during 2016 came from the Ninth Circuit.[3] The Ninth Circuit's backlog is even more staggering. Almost one third of all federal appeals pending on December 31, 2016, were in the Ninth Circuit—a total of more than

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[1] Commission on the Revision of the Federal Court Appellate System, The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change, 62 F.R.D. 224, 228–29, 234–35 (Dec. 1973) ["Hruska Commission Report"]. The report recommended that the then-Fifth and Ninth Circuits both be split; Congress did not implement either recommendation at the time. On October 15, 1980, President Carter signed a bill to create the Eleventh Circuit out of three states from the former Fifth Circuit; the Ninth Circuit remains unchanged from the 1973 Hruska Commission Report.

[2] Population totals are based on figures reported by the U.S. Census Bureau in its 2010 United States Census.

[3] *See* Admin. Office of the U.S. Courts, Table B: U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2015 and 2016, *available at* http://jnet.ao.dcn/sites/default/files/statistics/caseloads/AppealsTablesDec2016.pdf.

13,000 cases.[4] No other Circuit had more than 5,300 cases pending.[5] Perhaps unsurprisingly, this immense burden has also caused the Ninth Circuit to become the slowest in the nation to resolve federal appeals. Last year, it took the Ninth Circuit more than 15 months on average to resolve a case—more than twice as long as the average circuit and more than two months longer than the next-slowest circuit.[6]

III

The inordinate size of the Ninth Circuit leads to at least one additional and unique problem: our "limited en banc" practice.

In every federal Court of Appeals, a judge may request further review of a three-judge panel decision when necessary to "secure or maintain uniformity of the court's decisions," or to address "a question of exceptional importance."[7] Upon agreement of a majority of the circuit's active judges, such a case will be reheard by the circuit "en banc." In every Court of Appeals but the Ninth Circuit, en banc rehearing is held by the *full* court—that is, every active judge will participate in the rehearing. Accordingly, in every other circuit, an en banc decision will reflect the full court's views on the case.

Because of its extraordinary size, however, the Ninth Circuit will generally conduct only a "limited" en banc review in which a random selection of eleven judges—in comparison to the Court's twenty-nine active seats—participate.[8] Formally, we have a procedure through which even *further* review of a limited en

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[4] *See id.*

[5] *Id.*

[6] *See* Admin. Office of the U.S. Courts, Table B-4: U.S. Courts of Appeals—Median Time Intervals in Months for Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending December 31, 2016, *available at* http://jnet.ao.dcn/sites/default/files/statistics/caseloads/AppealsTablesDec2016.pdf.

[7] Fed. R. App. P. 35(a).

[8] Ninth Cir. R. 35-3.

banc decision can be reconsidered by all active judges.[9] Tellingly, our court has never exercised such procedure and we have never endeavored to hear a case in which nearly thirty separate voices must be accommodated.

This procedure—in which just over one-third of the courts' active judges participate, and through which we have never held a hearing of all active judges—hardly promises to secure circuit "uniformity" and to represent the full court's consideration of an exceptionally important case. With such a limited procedure, and especially with so many cases being decided annually by one court, the threat of intracircuit conflict abounds. In 1980, Congress's decision to split the then-Fifth Circuit was motivated in substantial part by similar concerns over its twenty-six-judge en banc procedures.[10] With three more judges in tow, the Ninth Circuit faces these same problems today.

IV

The administrative peculiarities and difficulty of managing a circuit so large and unwieldy cannot be remedied simply by adding more judges to the court, as might be proposed by some. It is too late for that; we are already at 29 judgeships now, more than twice as many as the average circuit. If we were to be provided an additional 5 judges (as was recently recommended by the Judicial Conference of the United States[11]), we would be at 34 judgeships, double the size of the next-largest circuit, nearly three times the size of the average circuit, and almost six times larger than the smallest. While additional judicial seats may well be necessary to help resolve valid concerns over the judges' workload, and may speed up the pace of work, they would only exacerbate the inefficiencies and inequities of the circuit's inordinate size.

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[9] *See id.*

[10] *See* Robert A. Ainsworth, Jr., *Fifth Circuit Court of Appeals Reorganization Act of 1980*, 1981 BYU L. Rev. 523, 526–27 (1981).

[11] *See* Press Release, Judicial Conference of the U.S., Judicial Conference Asks Congress to Create New Judgeships (Mar. 14, 2017), *available at* http://www.uscourts.gov/news/2017/03/14/judicial-conference-asks-congress-create-new-judgeships; Judicial Conference of the U.S., Table 1: Additional Judgeships or Conversion of Existing Judgeships Recommended by the Judicial Conference (2017), *available at* http://www.uscourts.gov/sites/default/files/2017_judicial_conference_judgeship_recommendations_0.pdf.

V

In short, I can find no justification for indefinitely retaining the Ninth Circuit as currently structured, stretching from the eastern border of Montana, up to the Arctic Circle, down to the Mexican border, and across to Guam and the Northern Mariana Islands on the Western edge of the Pacific Ocean. It is difficult to comprehend why one of twelve regional circuits should so dominate the others. The many important values that we seek to foster through our nation's system of smaller, regional circuits can find no home in a court so vast, especially if we were given additional judges.

In 1980, similar concerns over the size and scope of the Fifth Circuit led to its division and the creation of the Eleventh Circuit. Today, the Ninth Circuit has nearly 94% of the total population of the Fifth and Eleventh Circuits combined, and has three more judges than the Fifth Circuit did in 1980. The same justifications that led to their split more than 30 years ago counsel a similar division of the Ninth Circuit today.

VI

In my view, each of the currently pending restructure bills—while different in its proposal for how precisely to divide the circuit—recommends a welcome solution to this problem. Opponents of any restructuring should bear the burden of persuasion when they attempt to argue for simply retaining the status quo.

Sincerely,

Diarmuid F. O'Scannlain
United States Circuit Judge
for the Ninth Circuit

WSBA

OFFICE OF THE EXECUTIVE DIRECTOR

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Executive Director

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May 15, 2017

Senator John Braun, Chair
Senate Ways and Means Committee

Representative Timm Ormsby, Chair
House Appropriations Committee

Dear Chair Braun and Chair Ormsby,

The Washington State Bar Association Council on Public Defense urges you to support the House budget provision that provides $2.27 million for the state Office of Public Defense to address seriously lagging compensation for its contract attorneys. A 2016 business study found that OPD contractors earn, on average, $32,000 a year less than other government-paid attorneys in Washington state. The additional funding will help slow the nearly 12 percent turnover in attorneys representing indigent parents in dependency and termination proceedings and 15 percent turnover in attorneys representing indigent clients on appeal. The Office of Public Defense must be able to offer competitive compensation in order to meet the state's obligation to provide clients a constitutionally adequate level of representation.

The WSBA Council on Public Defense unites members of the public and private defense bar, the bench, elected officials, prosecutors, and the public to address new and recurring issues impacting the public defense system and the public that depends upon it. The Council, by a supermajority, voted to support the Office of Public Defense request because its members are familiar with the disparity in pay between prosecutors and defenders and the resulting turnover in counsel for parents and clients seeking review in the Court of Appeals. This turnover impacts quality of representation and creates delays harmful to parents, children, defendants, and victims. This position has been approved through the WSBA's legislative and court rule comment policy and the position is solely that of the Council on Public Defense.

Please include the $2.27 million, now provided in the House budget, in the final budget.

Sincerely,

Paula C. Littlewood

cc: Robin Haynes, President, Washington State Bar Association
Mario Cava, Governor, Washington State Bar Association
Joanne Moore, Washington State Office of Public Defense
Senator Dino Rossi, Vice Chair, Senate Ways and Means Committee
Senator Kevin Ranker, Ranking Minority Member, Senate Ways and Means Committee
Representative June Robinson, Vice Chair, House Appropriations Committee
Representative Bruce Chandler, Ranking Minority Member, House Appropriations Committee