

FILE

THE WHITE HOUSE
WASHINGTON

May 14, 2003

Dear Senator Craig and Senator Crapo:


I write to express my sincere appreciation for your extraordinary work on judicial nominations, including with respect to the upcoming vacancy on the Ninth Circuit created by the announced retirement of Judge Thomas Nelson. The President and I are very grateful for your commitment and assistance in ensuring well-qualified nominees for the federal courts in Idaho and throughout the United States.

I also want to reiterate our strong support for creation of an additional district court seat in Idaho. The Judicial Conference of the United States has recommended a new seat for Idaho, and we agree that such a seat is essential. Your ongoing effort for legislation establishing a new seat is a great service to the people of the Idaho who depend on the federal courts to dispense justice fairly and efficiently.

Finally, I also want to make clear the President's commitment to nominate an Idahoan for a second Ninth Circuit seat if Judge Trott retires or assumes senior status while President Bush is still in office. Idaho has had two Ninth Circuit seats for more than a decade, and that allotment is appropriate.

Please do not hesitate to contact me with any questions or thoughts. I look forward to continuing to work with you and your staff on this and other issues.

Sincerely,


Alberto R. Gonzales
Counsel to the President

The Honorable Lary Craig
The Honorable Michael Crapo
United States Senate
Washington, DC 20510



United States Senate
WASHINGTON, DC 20510-0504

February 8, 2005

Senator Larry Craig
520 Hart Senate Office Building
Washington, DC 20510

Senator Michael Crapo
239 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Craig and Senator Crapo:

I am writing about the vacancy on the Ninth Circuit which was created at the end of last year when Judge Stephen Trott assumed senior status. In short, I feel that Judge Trott's seat should be filled by a nominee from California.

As you know, Idaho already has a seat on the Ninth Circuit, namely, the seat that was vacated by Judge Thomas Nelson in 2003. Therefore I wonder why Idaho needs another judge, when the heavy need is elsewhere in the Circuit. That is, if Idaho receives replacements for the vacancies created by Judges Nelson and Trott, there will be a markedly lower ratio of cases to judges for Idaho than for California: 84.5 cases from Idaho for each active Idaho judge, compared to 785 cases from California for each of the remaining 13 active California judges.

As you know, California has many more people and cases than Idaho. According to the most recent numbers available, California has over 61 percent of the population of the Ninth Circuit. If the judges were divided strictly on the basis of population, California would have 17 of the Circuit's 28 active judges, though it now has only 14 seats for active judges. Put another way, if Idaho does receive two judges on the Ninth Circuit, it will have seven percent of the active judges on the Ninth Circuit, though it has only 2.4 percent of the Ninth Circuit's population. I fully agree that each

state deserves a judge on the Circuit. This is an expression of comity between the states. But its scope should not be exaggerated.

I further note that Judge Trott was nominated to fill a seat previously held by a Californian, Judge Joseph Tyree Sneed III. Judge Sneed still has his chambers in my home town of San Francisco.

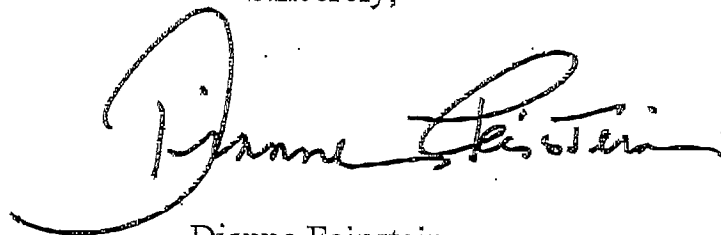
I am of course aware that Judge Margaret McKeown was appointed as a Washington judge, though she has moved her chambers to San Diego. Barring changes in the population distribution between the states, I would expect her successor to be a Washington nominee.

We all know the regrettable situation that recently occurred, when the White House nominated a Virginia resident for a Maryland seat on the Fourth Circuit, leaving the seat vacant. I am hoping to avoid similar tensions on the Ninth Circuit.

I would greatly appreciate hearing your thoughts on this matter. If you agree with my views, then we can all inform the White House that we jointly recommend that this seat should be filled by a California nominee.

Thank you for taking the time to consider this situation. As always, I look forward to working together.

Sincerely,

A handwritten signature in black ink, appearing to read "Dianne Feinstein". The signature is fluid and cursive, with a large initial "D" and a long, sweeping underline.

Dianne Feinstein
United States Senator

cc: Senator Arlen Specter
Senator Patrick Leahy
Ms. Harriet Miers
Judge Mary Schroeder

United States Senate

WASHINGTON, DC 20510

March 8, 2005

Senator Dianne Feinstein
331 Hart Senate Office Building
Washington, DC 20510

Dear Senator Feinstein:

We appreciate having your thoughts about the future nominee to fill the seat left by Judge Stephen Trott on the Ninth Circuit Court of Appeals. We feel strongly that this seat should be retained by Idaho, and we hope that, after reviewing our arguments, you will agree.

In the history of this seat, it has only once been verifiably held by a Californian – yet four out of five times has been held by a citizen of a state in the Northwest. The first judge to fill this seat in 1935, Bert Haney, was an Oregonian; the next two, Homer T. Bone and Frederick G. Hamley, had lifelong ties to Washington State. Judge Trott, as you know, has operated out of Boise, Idaho for sixteen years. And even if Judge Sneed is considered a Californian and the only California judge holding this seat, we note that his connection to California prior to serving on the Court consisted of a nine-year stint at Stanford; he was born in Texas, attended law school in Texas, taught at that Texas school for a decade following his graduation, and served in private practice in Texas, in addition to years of teaching and administration at Cornell and Duke, and service as a Deputy Attorney General.

It is not just history but current reality that adds urgency to Idaho's claim on this seat. We know you have closely studied the unique processes of the Ninth Circuit – processes to which that Court has resorted because of the circuit's extraordinary size. Therefore, you surely understand that the notion of state representation in the Ninth Circuit is hardly a matter of simple percentages based on state population.

For instance, the random three-judge panel system that currently renders the vast majority of Ninth Circuit decisions virtually guarantees a California jurist on nine out of every ten cases, with an Idaho judge on only about one in five cases. Should the Trott seat change from an Idaho to a California judge, those numbers will change dramatically for Idaho and only marginally for California: an Idaho judge would likely sit on a panel in only one in ten cases, including one in ten Idaho cases, while a California judge would participate in more than 90 percent of the cases.

The unfairness of moving this judgeship from Idaho to California is even more dramatically illustrated in the Ninth Circuit's unique, limited en banc review process. Unlike every state in every other circuit, Idaho does not have guaranteed representation in en banc review. On the

other hand, whether the Trott seat is held by an Idaho or a California judge, there is a 99.99 percent chance that there will be at least one California judge on an 11-member en banc review panel.

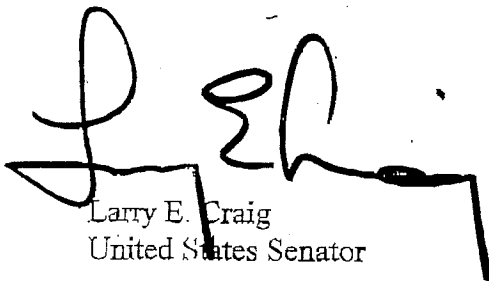
The bottom line is that shifting the Idaho seat to California only marginally strengthens California's representation, while it would cut Idaho's already meager opportunity for representation in half.

You mentioned the controversy over the Fourth Circuit nomination, and we would agree that we do not want to see such a controversy erupt over a nomination in our own Circuit. Nominating a Californian to the Trott seat in Boise would most certainly trigger precisely that controversy.


Finally, with all due respect, it is hard to understand how California can have a grievance when today, half the judges on the Circuit represent California, while none represents Idaho. It would be especially unfortunate to deprive our state of this chance for representation on the court, in view of the fact that Idaho continues unrepresented despite support for Judge Nelson's replacement by a bipartisan majority of the Senate.

It is our strong hope that we can work together collegially and expeditiously to confirm a nominee from Idaho who is acceptable to the President and the Senate, for the seat being vacated by Judge Trott. Thank you for sharing your views on this matter, and for considering ours.

Sincerely,



Larry E. Craig
United States Senator



Mike Crapo
United States Senator



United States Senate

WASHINGTON, DC 20510-0504

March 30, 2005

Senator Larry Craig
520 Hart Senate Office Building
Washington, DC 20510

Senator Michael Crapo
239 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Craig and Senator Crapo:

Thank you for your March 8 letter regarding the Ninth Circuit vacancy left by Judge Stephen Trott. I respectfully disagree with your conclusion that the vacancy should be filled by an Idaho nominee. I still firmly believe that a Californian should replace Judge Trott.

The bottom line is that Idaho, with two judges, will be vastly over-represented compared to its caseload or population. Federal law gives each state one judge on its federal circuit court. (See Title 28, Section 44(c) of the United States Code). You are asking to add to that allocation for Idaho, even though California is already seriously under-represented on the Ninth Circuit. Specifically, if an Idaho resident replaces Judge Trott, California will have 62 percent of the circuit's population, and almost 70 percent of its caseload, but only 46 percent of the circuit's 28 active judges. On the other hand, with two judges, Idaho will have over seven percent of the judges, but only about 2.4 percent of the circuit's population, and approximately one percent of the circuit's caseload. This makes no sense to me.

Your letter raises some additional points that I wish to address.

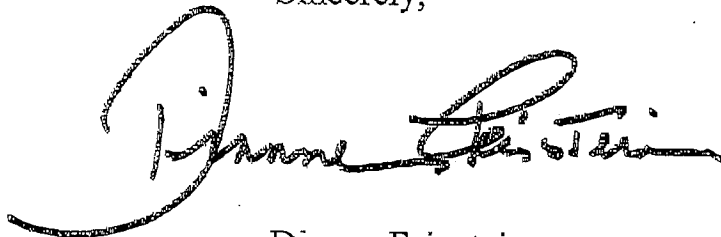
- You stated that Judge Trott's seat has not always been held by a Californian. But it also has not historically been held by a resident of Idaho. The key point is that California's population and caseload require that, today, the seat be filled by a California nominee.

- The Ninth Circuit's en banc procedure is another point you raise in your letter. I note that I have in the past called for revising that procedure. In 1999 in the 106th Congress, I introduced a bill (S. 1403) that would have required a majority of active Ninth Circuit judges to participate in en banc settings. I am still open to discussing the matter. But in my view, it is not appropriate to address en banc procedures by poaching California's judges.
- If every Ninth Circuit state with only one judge is given a second seat, then Montana, Alaska, and Hawaii would also need to be included. Of these states, Montana has a higher caseload than Idaho, and Hawaii has a higher caseload and a higher population. Arguably, those two states have a stronger claim to an additional judge than Idaho, if one of the states with a single judge is to receive a second judge.

Ultimately, this may simply come down to the question of how many judges are on the Ninth Circuit. The Administrative Office of the United States Courts on March 15 recommended that seven judges be added to the Ninth Circuit. If Idaho's Senators work to help secure these additional judges, we might well be able to resolve our disagreement.

Thank you for continuing to consider my views. I look forward to resolving this situation amicably.

Sincerely,

A handwritten signature in black ink, appearing to read "Dianne Feinstein". The signature is fluid and cursive, with a large initial "D" and a long, sweeping underline.

Dianne Feinstein
United States Senator

cc: Hon. Arlen Specter
Hon. Patrick Leahy
Ms. Harriet Miers
Hon. Mary Schroeder