

WRITTEN SUBMISSION OF CHARLES B. RENFREW

**COMMISSION ON STRUCTURAL ALTERNATIVES
FOR THE FEDERAL COURTS OF APPEALS**

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**WRITTEN SUBMISSION BEFORE THE COMMISSION
ON STRUCTURAL ALTERNATIVES
FOR THE FEDERAL COURTS OF APPEALS
BY CHARLES B. RENFREW**

Dear Justice White & Members of the Commission:

While the mandate of this Commission is not restricted to the possible realignment of the Ninth Circuit, my comments are so limited because my experience has been by and large with that Circuit.

My name is Charles B. Renfrew. I served as United States District Judge for the Northern District of California for over eight years (1972 - 1980). During that time I sat by designation on the Ninth Circuit on numerous occasions. I resigned my judicial position to serve as Deputy Attorney General of the United States (1980 - 1981). I have had a continuing interest in judicial administration and am presently a member of the Senior Advisory Board for the Ninth Circuit. During 1995 - 1996 I was President of the American College of Trial Lawyers. My comments represent only my personal views. I do not speak on behalf of any person or group.

The scope of the Commission's inquiry is indeed very broad. Yet it only deals with the output of the pipeline representing appeals in the federal judiciary. It does not purport to address such questions as to the jurisdiction of the federal courts, how appeals are handled; are they automatic or discretionary; the right to or the role of oral argument; the need for a written opinion, whether opinions should be published and the like.

Focusing on the structure of the Federal Appellate Courts directs ones attention to remedies not to causes. In order to most effectively address the operations of the Federal Appellate system one needs to look at the process from beginning to end.

Nevertheless, yours is a most important and timely mission. Important because your deliberations will necessarily look at how the Federal Courts of Appeal can most effectively handle their work, how the courts can most expeditiously and fairly dispose of the cases before them. The geographic boundaries of a Circuit, the number of judges in the Circuit, and the size of its case load will be part of that evaluation. However, regardless of what is done with respect to realignment, the number of cases filed nor the work required to dispose of them will not be reduced.

This is a timely subject because realignment of the Ninth Circuit particularly has been a subject of debate and proposed legislation. Certain people have strongly held views which have offered a wide range of alternative solutions as to what is perceived as a serious problem.

This Commission has correctly asked that witnesses first address whether there is a problem, and if so what are its dimensions and cost. What are the possible solutions which address and rectify the identified problems? Finally, what are the consequences of the proposed solutions?

An important part of the Commission's work is to identify what is working well in the Federal Appellate Courts, the structure, the practices and procedures used by the various circuits which optimize their efficiency and effectiveness. While what works well may not necessarily be expected to relate to a particular circuit boundary, there may well be some practices which can only be followed by a large circuit because of economies of scale.

In this connection I understand that Chief Judge Procter Hug, Jr. will describe in detail the administrative and adjudicative practices followed by the Ninth Circuit in carrying out its appellate responsibilities. He will present statistics and describe practices which relate to a disposition rate of the Circuit and how that rate and those practices compare with other circuits.

My remarks are limited to whether there is a problem with the present alignment of the Ninth Circuit and who has the burden of establishing that a problem exists. Then a look at the standards by which such a problem, if it exists, may be measured and finally whether any of the alternatives proposed address the identified problems and their advantages or disadvantages.

Is there a problem with the present alignment of the Ninth Circuit?

- Not according to the overwhelming number of Circuit Judges of the Ninth Circuit Judges and the lawyers who practice before it;
- Not according to the lawyers and judges who attend the judicial conferences of the Ninth Circuit. Every time that issue has been raised it has been voted down;
- Not according to the State Bars of Arizona, California, Hawaii, Idaho, Montana and Nevada who have opposed any split of this

Circuit. Indeed no State Bar organization in the Circuit has taken a position in favor of the split of this Circuit;

- Not according to the National Federal Bar Association which opposes this split.

While there may be improvements that can be made by the Ninth Circuit, they relate principally to the delay in filling all of its authorized positions and the consequences which flow from those vacancies. I do not believe that the present alignment of the circuit is a problem.

This is in dramatic contrast to what I understand existed with respect to the old Fifth Circuit where both members of the Bench and the Bar favored the split of that circuit.

The proponents of realignment must show by persuasive and convincing evidence that a problem exists. This is particularly so, where, as here, members of the Bench and the Bar most familiar with the operations of the Circuit have voted overwhelmingly against a split of the Circuit.

The statistics supplied by Chief Judge Hug will give this Commission the frame work in which the Circuit's operations may be viewed. There are at least two concerns which have been expressed to date which are not entirely based upon statistics. They are the purported lack of collegiality and the En Banc process. While critics offer numbers as a measure of these problems they involve more subjective feelings and analysis.

As to collegiality the proposed new Twelfth Circuit comprised of the five northern states of Alaska, Idaho, Montana, Oregon and Washington also have substantial distances within such a circuit as well as a large number of judges. While nostalgia may bring back fond memories of the Court of Appeals for the Second Circuit of the 1930s and 40s with only five judges, including the Hands. Those days and that type of circuit are long behind us and can never be replicated. Collegiality depends more upon the personalities of the judges than their numbers.

As to the En Banc process followed by the Ninth Circuit, I leave that subject to those who are more familiar with it.

While not a rational part of this process there is a subsurface driver for realignment which needs to be recognized: for some the need is to be separated from California where they believe there are a number of "liberal" judges who have used the appellate process to

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advance personal social agenda. I do not see this as a problem; even if it were, it is more the result of the selection process than the structure of the Circuit.

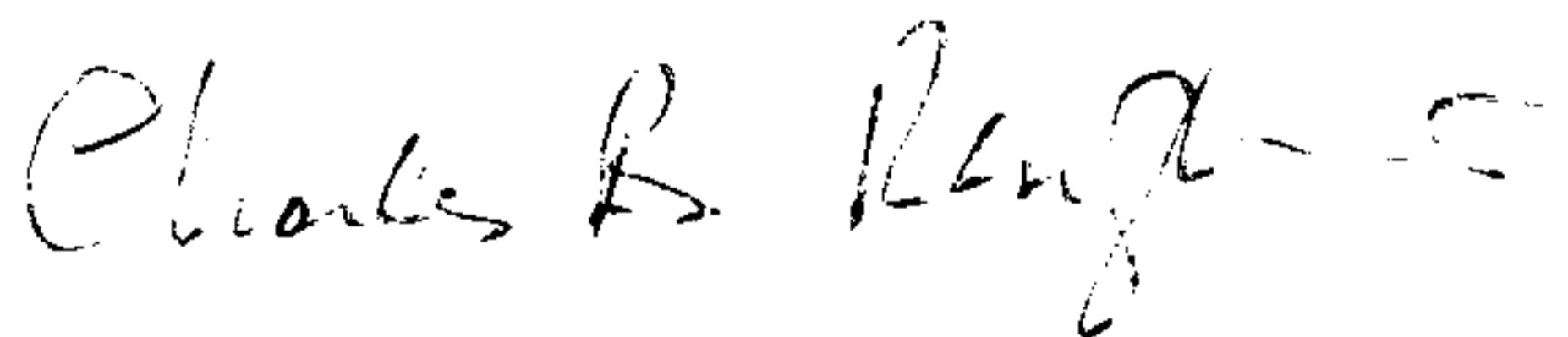
With respect to the proposed alternative structures they all present problems. If the size of the case load is a factor forcing realignment this Commission must be careful that it does not create a precedent which would favor new circuits based solely upon some sort of statistical analysis.

Clearly any realignment which divides California or makes it the single state within a circuit is contrary to the historic considerations which lead to the creation of the circuits.

The historic and economic relationships between the states should not be disregarded. The least dangerous proposal is that of the creation of a new Twelfth Circuit comprised of the five northern states. Yet serious problems exist with that proposal. The Pacific Sea Board will no longer be the subject of the law of a single circuit. There will be the substantial cost of creating a new circuit. It will consist of a large geographic area with a comparatively small case load. I understand it would be the second smallest in the country and there would be a great disparity in the case load per judge between the new circuit and the remaining Ninth Circuit.

This Commission is presented with a challenging responsibility which it must carry out in a very short period of time. In these circumstances where there is a significant opposition to any restructure of the Ninth Circuit we all must remember the famous admonition given to those who practice medicine "First, do no harm."

Respectfully submitted,



CHARLES B. RENFREW

CBR:der
cc: Chief Judge Procter Hug, Jr.