

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 23, 1998

Justice Byron R. White  
Chair, Commission on Structured  
Alternatives for the Federal  
Courts of Appeals  
Thurgood Marshall Building  
One Columbus Circle, N.E.  
Washington, D.C. 20544

Dear Byron:

You have written to invite me to offer any thoughts or suggestions I might have regarding the Commission's work. My comments will doubtlessly echo those of others who have addressed the Commission, but I am pleased to offer some general observations.

Our nation has long been proud of its federal court system. The federal courts have traditionally been perceived as of the highest quality. The ability of the federal circuits to continue to perform work of the highest caliber, however, has recently been placed under the strain of a large number of unfilled vacancies. I serve as the Circuit Justice for the Ninth Circuit and, as you know, there are today seven unfilled vacancies on the Ninth Circuit Court of Appeals, and ten on its District Courts. These vacancies obviously have a negative effect on the ability of the Ninth Circuit to carry out its work in a timely manner. The Chief Justice has already spoken to this issue, and I share his concerns.

The pressures on the federal courts have been escalating rapidly because Congress has been enacting broad provisions under federal law criminalizing conduct historically regulated under state and local police powers. The result has been a significant expansion of federal court jurisdiction. All of this makes the work of your Commission very important indeed.

With respect to the Ninth Circuit in particular,

in my view the circuit is simply too large. It embraces nearly one-fifth of our nation's population. It handles roughly one out of every five appeals in the federal system. With 28 appellate judges, it is nearly twice the size of the next largest circuit. Because of its cumbersome size, the Ninth Circuit alone among the federal circuits is currently forced to use en banc panels comprised of eleven selected judges. See 92 Stat. 1663, Rule 35-3 (CA9 1994).

Such panels, representing less than one-half of the authorized number of judges, cannot serve the purposes of en banc hearings as effectively as do the en banc panels consisting of all active judges that are used in the other circuits. It is important to the federal system as a whole that the Courts of Appeals utilize en banc review to correct panel errors within the circuit that are likely to otherwise come before the Supreme Court. It is also important that every circuit review en banc its rules that are in conflict with other circuits in order to examine the wisdom of perpetuating the conflict. The Ninth Circuit resolved only eight out of 4,841 cases en banc in the twelve months ending September 30, 1997. During that same period, this court granted hearing on 25 cases from CA9, and summarily decided 20 more. These numbers suggest that the present system in CA9 is not meeting the goals of en banc review.

In my view, some division or restructuring of the Ninth Circuit seems appropriate and desirable. I have no particular suggestion regarding how that division should be drawn, but I hope that the Commission will take a fresh and independent look at the alternatives. It is human nature that no circuit is readily amenable to changes in boundary or personnel. We are always most comfortable with what we know, and it is unrealistic to expect much sentiment for change from within any circuit. The main difficulty I expect that the Commission may encounter when weighing the alternatives is the size in population of California, which, even if all alone, would continue to be the largest of the federal circuits. In some proposals I have seen it suggested that Arizona be placed with non-contiguous areas in the Pacific Northwest. I find that proposal troublesome. Perhaps Arizona could be placed in the Tenth Circuit, although I am aware that judges in the Tenth Circuit are opposed to such a change. Or perhaps California itself could be divided and placed within two

different circuits.

There are also other proposals for setting up separate divisions within CA9, or for setting up some district court appellate panels to handle most of the error correction part of the appellate review process. These approaches are untried but should be weighed along with the other options.

If you believe I can be of any more specific assistance, I will be pleased to respond. You have an unenviable task.

Sincerely,

A handwritten signature in cursive script that reads "Sandra Day O'Connor". The signature is written in black ink and is positioned above the printed name.

Sandra Day O'Connor