

# STATE OF ALASKA

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Commission on Structural Alternatives  
for the Federal Courts of Appeals  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle, N.E.  
Washington, D.C. 20544

Re: Proposal to Restructure the Court of  
Appeals for the Ninth Circuit

Honorable Members of the Commission:

I submit these comments on behalf of the State of Alaska in response to the Commission's tentative draft report. Alaska appreciates the considerable effort the Commission has made to devise a solution that resolves many of the problems with the present size of the Court of Appeals for the Ninth Circuit. While the Commission's proposal is well reasoned and achievable, the state has comments on a few aspects of the plan.

The proposal resolves most of the concerns the state raised in its initial comments. The recommended action would alleviate the problems attributable to the large size of the court -- the range and diversity of panels, conflicting decisions, reduced communication and congeniality among judges, and uncertainty. It also mitigates the particular problems that the size of the court creates for small states such as Alaska that are overwhelmed by California and Arizona - few of the judges have sufficient experience with the complex federal statutes exclusive to Alaska or the contextual background to appropriately apply federal law in Alaskan cases. A northern division with its own set of judges will eliminate many of the problems with the current structure of the court.

Alaska does not share the opinion of the Ninth Circuit judges who insist that the West Coast must have a consistent body of federal appellate law. In contrast, the East Coast of the United States comprises six circuits, each apparently operating with fewer problems than the Ninth Circuit. Federal courts of appeals serve as regional courts, and “the western United States” is not a coherent region in any sense relevant to the fair administration of justice. Alaska identifies itself more as a northern than a western state in terms of its cultural and economic characteristics, and has no more in common with Arizona, Nevada, or Southern California than Maine has with Florida.

The state offers the following comments on how the proposed restructuring of the Ninth Circuit could better serve the interests of Alaska and other small states:

**A. THE PROPOSAL SHOULD REQUIRE A STRONGER RESIDENTIAL LINK BETWEEN THE JUDGES AND THE DIVISIONS IN WHICH THEY SERVE.**

The proposal should require that judges reside within the division they serve. The residency requirement for only a “majority of judges” will continue to produce some panels with a minority of the judges residing in the northern division. Therefore the outcome of northern cases still could be determined by judges from the southwest. The current residential distribution of the court might necessitate that some judges sit outside the division of their residence initially, but new appointments to the circuit should be required to reside in the division with the opening.

Alternatively, the proposal could simply proclaim a ten-year transitional period before all judges would be required to live within their division of assignment. Presumably the non-residential judges could be reassigned to their own districts within this time, as vacancies open.

**B. THE PRESIDING JUDGE OF EACH DIVISION SHOULD BE A RESIDENT OF THE REGION.**

The proposal should require each division’s presiding judge to be a resident. Under the current proposal, one of a division’s non-resident judges could be named presiding judge, leaving the division unrepresented by a resident in the circuit division. Residency is necessary for a judge to

be optimally familiar with a region, and thus optimally qualified to apply federal law to its litigants. For the circuit division to resolve conflicts involving cases from a division in which none of the circuit division judges reside unnecessarily compromises the integrity of the system.

**C. THE PROPOSAL SHOULD ADDRESS THE PROBLEMS WITH LONG-DISTANCE ADMINISTRATION.**

The proposal fails to address one of Alaska's major concerns. In its initial submission, Alaska expressed frustration at sometimes receiving orders and decisions days after opposing counsel, reporters, and the public. As explained, this has prejudiced the state's ability to comply with orders and to timely seek stays. In particular, the Commission should urge adoption of the practice of the Alaska Supreme Court of providing copies of decisions to parties four hours in advance of public distribution, thus permitting counsel to review them and to confer with the client about their ramifications before public inquiries begin. In an age of instantaneous electronic transfer of information, this accommodation could be implemented with relative ease.

**D. THE COMMISSION SHOULD CONSIDER ELIMINATING THE PROVISION FOR A CIRCUIT DIVISION.**

As stated in Alaska's initial comments, judges do not decide issues in a vacuum, and judges lacking adequate knowledge about an enormous area like Alaska do a disservice to the citizens of the state in applying federal law here. The proposed circuit division still permits non-regional judges to preponderate the northern perspective. In general, appellate courts are regional courts, and for the overwhelming majority of cases, are the court of last resort. For those cases from Alaska that conflict with cases from the central or southern division, however, the northern division will not be permitted to act as the regional court of last resort. The circuit division will step in and essentially act as a quasi-Supreme Court, with a southwestern rather than a national viewpoint. The effect would be as though one circuit stepped in to clarify the law for another. This is the job of the Supreme Court, not that of a different regional court. For the few cases that conflict with cases from another division, litigants should be able to petition the Supreme Court directly without going through the extra layer that the circuit division would create.

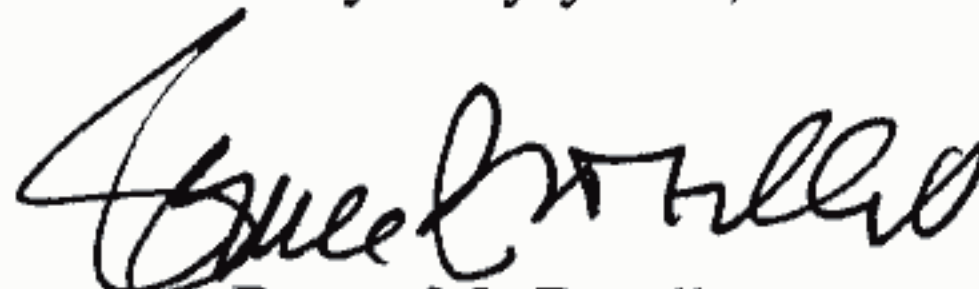
The existence of a circuit division also seems likely to prompt forum shopping among the divisions. Litigants unhappy with the holding of a particular case will be motivated to bring subsequent cases raising the same issue in a different division, thus creating the opportunity to convince the circuit division to overrule the undesirable precedent. Some well-funded litigants might even be tempted to generate new cases to create conflict. This ability to collaterally attack divisional decisions will erode the present force of Ninth Circuit decisions. The public will not be able to depend upon divisional decisions to the same degree, as they will not be quite as immutable, and therefore not quite as reliable as decisions currently are.

E. THE COMMISSION SHOULD ELIMINATE ITS RECOMMENDATION FOR A SUNSET PROVISION.

The state also disagrees with the Commission recommendation that the restructuring legislation sunset in seven years. No other federal court is subjected to the inherent uncertainties of a short-term structure. The possibility that the circuit may be restructured yet again will immediately create uncertainty that will grow for seven years. For example, in only a few years litigants will begin questioning the significance of decisions in a particular division if the circuit might soon reform into a single entity. Prospective judges may hesitate to seek an appointment if the conditions of the position might change. Most fundamentally, all participants may be less willing to contribute to the success of the plan if they are unsure of its permanence. The Commission has designed a good system that will be implemented by bright, capable people; it should have enough faith in the plan to presume its success.

Thank you for the opportunity to comment on the Commission's proposal. The hard work you devoted to this project is apparent and is likely to benefit many people. I hope that you will consider Alaska's suggestions.

Very truly yours,



Bruce M. Botelho  
Attorney General

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cc: The Honorable Ted Stevens, U.S Senate  
The Honorable Frank Murkowski, U.S Senate  
The Honorable Don Young, U.S. House of Representatives  
The Honorable Tony Knowles, Governor