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November 5, 1998

VIA FACSIMILE & U.S. MAIL

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

Dear Justice White and Members of the Commission:

Pursuant to the Commission's public invitation, I submit the following comment on the Draft Report.

1. Need for proposed restructuring. Professor Hellman and others are right that the "perceptions" which have led the Commission to its proposal are not borne out either by empirical research or by the experience of the Ninth Circuit bench or bar. The demand in some quarters for restructuring in our circuit was rooted primarily in the crisis of caseload volume and in the political dissatisfaction of senators from the Northwest. The Commission properly disclaims reliance on either as a justification for restructuring our Circuit Court. It also candidly admits (at 37-38) that neither "objective" nor "subjective" criteria indicate a need to do so. It is left with no more than a general view (rejected 2-1 by the appellate judges in our circuit) that smaller courts work better. In my opinion this does not justify imposing such a sweeping and cumbersome restructuring against the strong opposition of the circuit's bench and bar. Accordingly, my comments on the details of the proposed changes *do not imply agreement* that the proposed changes themselves, *even as modified* by my suggestions, are warranted or justified.

2. Mandatory nature of restructuring. Even if restructuring into divisions were justified, it should not be imposed in such a rigid format. The proposed statute prescribes details which

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should be left to local option. For example, section 2(b) provides that judges may be assigned at random to serve for a year or more in districts where they do not reside, which may cause serious problems in implementation. For another example, the proposal would require trisecting many efficient circuit institutions (for example the screening panel, the motions panel, and the Pro Se Unit). Such micro-management from the center is inappropriate and unnecessary, and would not be imposed on other circuits forced under section 3 of the proposed statute to restructure by divisions. Especially in view of its long history of successful innovation, and its special position as the laboratory for large court procedures, the Ninth Circuit should be given at least as much independence as other circuits in matters of detail.

3. Precedential effect of division opinions. Commentators in our circuit are nearly unanimous that the precedential effect proposed for decisions of the divisions is inadequate, and that a published decision of a division (if there must be divisions) should govern districts not only within the division but throughout the circuit.
- (a) The proposed structure would not give our circuit a uniform law, but a law often only persuasive rather than binding in parts of the circuit. This is unsatisfactory, and fails to meet the core requirements of a circuit. In particular it defeats the Commission's stated goal of preserving a unified maritime and commercial law for the Pacific trade area.
 - (b) If it is thought necessary or useful to vary the coherence of our circuit law by providing precedential autonomy for divisions, I endorse Professor Hellman's suggestion that it should be done on an experimental basis by circuit rule (perhaps by subject) rather than having it imposed wholesale from the outside. The idea of varying precedential effect by subject is a novel one -- having decisions on criminal law, for example, govern only within a division while decisions on admiralty govern circuit-wide -- but would certainly be better than having *no* decisions govern circuit-wide (except those of the Circuit Division resolving conflicts). While this solution might foster collateral disputes about whether a prior divisional decision has precedential force or not, this is inevitable anyway given the limited authority of the proposed Circuit Division (see section 4(c) below), and could be minimized if the rules were carefully enough drawn.
 - (c) It may be thought that giving the decisions of the divisions precedential effect throughout the circuit defeats the purposes for creating them, such as easier monitoring of decisions and more effective en banc procedures. That may be so, but the marginal purposes to be accomplished by creating the divisions are not as important as the purpose of having one consistent law for the entire circuit. That is

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one reason why the proposal itself is fundamentally unsound. Since the Commission intends this divisional structure to serve as a model for other circuits, it should be noted that its deficiencies are not peculiar to the Ninth Circuit but would cause similar problems everywhere it was applied.

4. **Authority of Circuit Division.** Under the proposal, the Circuit Division would operate *only* to resolve conflicts between the divisions. This poses several problems.

- (a) It deprives the circuit as a whole of any means of establishing a uniform rule for “question[s] of exceptional importance,” as now provided by F.R.A.P. Rule 35(a)(2). It is impractical to rely on the U.S. Supreme Court to accomplish this function for the circuit, both because of the limited nature of the high court’s certiorari docket and because of the delays attending Supreme Court review.
- (b) For a question to be settled circuit-wide there would have to be at least two separate actions (to establish conflict between divisions). If two divisions agreed there would have to be a third action in the remaining division to establish the law there, because the Circuit Division would have no authority to bind the remaining division absent a conflict. This is wasteful and fosters needless litigation. It also promotes uncertainty in the law, which is the opposite result from that which the Commission intends.
- (c) The proposed authority of the Circuit Division will likely create collateral controversies. For example, under section 3(a) the authority of the Circuit Division may be invoked “only on the ground that there is a conflict on a question of law” between divisional decisions. Parties may therefore be expected to litigate whether the decisions in question truly conflict or may be reconciled, and whether such conflict as there may be is “on a question of law.” (The “question of law” language is not included in the pattern for other circuits – see proposed section 46(d).) Issues will also arise as to the binding effect of questions decided by the Circuit Division other than those presented by the enabling conflict itself.
- (d) Because a request for divisional en banc review would be a prerequisite to the jurisdiction of the Circuit Division, this would add an unnecessary extra tier to the review process, with attendant expense and delay for the parties and uncertainty in the law.

To meet these difficulties, almost all commentators in our circuit agree that the new Circuit Division should at a minimum be given the same jurisdiction and competence now given to the Circuit Court en banc. It should have the right to review cases posing questions of exceptional importance, and to grant review on its own motion (or at the instance of some number of circuit judges). The Circuit Division could be enlarged, a number smaller than a majority of

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active judges could suffice to order en banc review, the panel composition could be regionally weighted according to the origin of the case under review, and (despite general satisfaction within our own circuit) other adjustments could be undertaken if necessary to satisfy critics of the present system. But these experiments should be undertaken at the circuit level, not imposed from outside without any empirical trial whatever.

Again, since the Commission intends this divisional structure to serve as a model for other circuits, it should be noted that its general deficiencies are not peculiar to the Ninth Circuit but would cause similar problems everywhere it was applied.

5. **Special position of California.** The partition of California across division lines will be unworkable if the decisions of the divisions affecting our state do not have precedential effect throughout the state. Take for example an injunction against enforcement of a given state law. The Southern Division may forbid enforcement, but its writ runs only to the Central and Southern Districts. In the Northern and Eastern Districts the matter would remain *unadjudicated*. Should the California Attorney General enforce the law in the northern half of the state only, or forbear statewide even in the absence of any authority governing the northern half? Before the question could be settled statewide there would have to be a separate action in a district in the Northern Division (either by the original parties, or by different parties, or by the Attorney General) *and* (in case of conflict) a request for en banc review, *and* (if the conflict persists) a convening of the Circuit Division. In time-sensitive matters (such as election issues, or affirmative-action hiring or school admissions decisions) the required delay might well frustrate federal authority altogether. Similar problems would affect many other controversies requiring a uniform federal law in California. The new procedure for certifying questions to the California Supreme Court can, of course, only clarify questions of *state* law; moreover it is unavailable at the district court level and its use is discretionary with the state high court.

The problem discussed above is caused by the partition of California *combined* with the restricted authority of the divisional tribunals. Neither would cause this *particular* problem without the other — if the whole state were in one division, or if another division's writ ran throughout the state — but together they make the proposal unworkable for California. However, if both policies are to be forced on an unwilling circuit, special provision should be made for California.

Such an accommodation might provide, at a minimum, that published decisions of one division, arising from actions brought in a California district court and directly affecting California districts in another division, would have precedential effect in the those other California districts. Other formulas could also be devised. For example, there could be precedential effect in all California districts for all published Ninth Circuit decisions *affecting*

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California wherever arising; or it could be provided that *all* published decisions of a division binding in any California district be binding in the other California districts. But the existing proposal is inadequate to meet California's need for a uniform federal law on statewide issues. It also virtually requires forum shopping in cases of California-wide application.

It is worth noting that the Commission bases its justification for dividing California into autonomous divisions on a misunderstanding of California state practice. Under *Auto Equiry Sales, Inc. v. Superior Court*, 57 Cal.2d 450 (1962), decisions of California Courts of Appeal have statewide effect at the trial court level. See Appendix.

6. District Court Appellate Panels. In my submission of June 2, 1998, I suggested these panels as a creative approach to reducing caseload pressures on the circuit courts. But it seems wasteful of circuit-level judge-power to require a circuit judge to sit on each panel. The primary value of the DCAP idea is to divert error-correcting appeals not requiring the authority of the circuit court, which are now decided by a hard-pressed circuit bench in non-precedential unpublished opinions, to panels of district judges whose numbers can be increased (as Thomas E. Baker among others has pointed out, see RATIONING JUSTICE ON APPEAL 259 (1994)) without causing institutional difficulties. Requiring a circuit judge to sit on each of these panels dramatically reduces their efficiency in their main purpose of conserving the time of circuit judges. And it adds nothing useful -- the added prestige of a circuit judge's participation is not needed for a decision which is intended to be unpublished and non-precedential. The three judges on the proposed DCAPS should all be district judges.

In my previous submission I proposed using DCAPS generally for cases requiring only error-correction rather than statement of circuit law. While the Commission appears to contemplate assigning cases to DCAPS by subject instead, its provision in proposed section 145(c) that the circuit judicial council would have authority to specify "the categories or types of cases" to be sent to DCAPS would seem sufficient to permit use of the DCAPS as suggested in my submission. The exact composition of the panels, including whether *all* the judges need come from outside the district, might also appropriately be left to circuit rule.

7. Two-judge courts. I support this as another valuable device for conserving scarce circuit judge-power, provided a way can be found to add a tie-breaking judge without additional cost and delay to litigants. Restricting two-judge courts to cases decided without oral argument might be one way to protect against this. This needs more thought, and it is reassuring that the Commission supports leaving detailed implementation to circuit rule.

8. Federal Circuit. The Commission's suggestion to expand the jurisdiction of the Federal Circuit is a good one and I support it.

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9. Sunset provision. I share the concern of Chief Judge Hug that a sunset date could be taken as a date for division of the circuit if the proposed experiment does not work. It should not be so regarded. In any event seven years is too long a period -- three to four years should be ample to test the Commission's proposal in practice.

I thank the Commission for the opportunity to participate in this process, and hope you find these comments helpful.

Respectfully submitted,


Jerome I. Braun

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APPENDIX

The Commission says in its Tentative Report, at 41:

We recognize that putting parts of California in different divisions will prompt concerns about forum shopping and subjecting Californians to possibly diverging lines of federal authority. However, in the California state appellate court system, where the intermediate appellate system is organized into geographical districts, the decisions of one court of appeal have no binding precedential effect outside the court's jurisdiction. Thus, differences between the Middle and Southern Divisions under the system we propose would not create a system that does not already exist and is apparently well accommodated in state practice.

But California law is actually to the contrary.

Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. *Otherwise, the doctrine of stare decisis makes no sense.* The decisions of [the California Supreme Court] are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. * * * *It would create chaos in our legal system if these courts were not bound by higher court decisions.* * * * Of course, the rule under discussion has no application where there is more than one appellate court decision, and such appellate decisions are in conflict. In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions.

Auto Equity Sales, Inc. v. Superior Court of Santa Clara County, 57 Cal.2d 450, 455-456, 369 P.2d 937, 939-940, 20 Cal.Rptr. 321, 323-324 (Cal. 1962) (emphasis added).