CHICAGO COUNCIL OF LAWYERS

CHICAGO'S PUBLIC INTEREST BAR ASSOCIATION

ONE QUINCY COURT BUILDING • SUITE 800 • 220 SOUTH STATE STREET • CHICAGO, ILLINOIS 60604
TELEPHONE: (312) 427-0710 • FAX (312) 427-0181 • E-MAIL: CCL@INTERACCESS.COM

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VIA FEDERAL EXPRESS

Mr. Daniel J. Meador
Executive Director
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: Comments on October, 1998 Tentative Draft Report, Commission on Structural Alternatives for the Federal Courts of Appeals

Dear Mr. Meadow:

Pursuant to the Commission's Notice dated October 7, 1998, the Chicago Council of Lawyers submits these comments on the Commission's October, 1998 Tentative Draft Report.

As a threshold matter, the Council finds that its review of the Draft Report is hindered by the Commission's failure to publish the results of its surveys (Draft Report at 4) of the district and circuit judges and of 5,800 lawyers. Indeed, the Draft Report does not even include a copy of the questions asked, making it very difficult for the Council to assess recommendations based on survey results. Nonetheless, we will comment in light of the available information.

We write to comment on two proposals in the Draft Report -- two-judge panels and a divisional organization for all circuits with more than seventeen judges.

A. Two-judge panels.

The Council testified before the Commission at its hearing in Chicago on April 3, 1998. At that time, we stressed our concern that in the name of efficiency some disputes and some litigants get less than equal attention. We expressed considerable skepticism whether summary procedures -- denial of oral argument

followed by summary, unpublished opinions -- was really necessary, and pointed to the experience in the Seventh Circuit. There, we noted, the court permits oral argument in almost three-quarters of its represented (i.e. non-pro se) cases. We find (Draft Report at 21) that all but the Third, Fifth, Tenth and Eleventh Circuits also meet this standard, and that the First, Seventh, Eighth and D.C. Circuits render published opinions in most represented cases.

The poor showing of the other Circuits cannot be explained entirely by an overworked judiciary. In part, it is the culture of the circuits. For example, merit terminations per authorized judge can be calculated from the termination on the merits statistics (Table B-1) for the year ending June 30, 1997 in "Statistical Tables for the Federal Judiciary" and viewed against the number of authorized judges in the circuit (Draft Report Table 2-8, at 26). It is apparent that the Third and Tenth Circuits -- which neither had oral argument nor published opinions in fifty percent of their cases -- have relatively light case loads per judge, while the Eighth Circuit with a heavier case load per judge than all but two circuits publishes opinions in more than fifty percent of its cases.

Circuit	Merits Termination	# of Auth Judges	Merits Term Per Auth Judge	50%+ Oral Arg	50%+ Pub Op
11th	3212	12	268	--	--
5th	3601	17	211	--	--
8th	1872	11	170	X	X
9th	4717	28	168	X	--
4th	2520	15	168	X	--
7th	1635	11	149	X	X
3rd	1930	14	138	--	--
2nd	1731	13	133	X	--
6th	2084	16	130	X	--
10th	1484	12	124	--	--
1st	723	6	121	X	X
D.C.	778	12	64	X	X

We are therefore dismayed that in its Tentative Draft, the Commission seems to assume that "second class" treatment must be a fact of life in the federal courts of appeals. Thus, the Draft would institutionalize the two-tier system with its proposal for two-judge appellate panels. This is, simply stated, a bad idea.

To us, the experience cited above in the First, Seventh, Eighth and D.C. Circuits means that the system can work: full appellate considerations can be the norm, not the exception. Rather than a proposal for a radical change to two-judge panels, the Council would have expected the Commission to explore what these Circuits are doing right, and to see what can be exported.

The two-judge panel idea, in contrast, is simply the wrong direction. First, and most important, the Council continues to express its concern about the kind of cases selected for summary disposition. In its April 3rd submission, the Council urged the Commission to study, or ask the Federal Judicial Center to study, which cases are presently selected for less than full consideration out of two concerns: first, is there any systematic, albeit unconscious, bias in the selection process (e.g., civil rights cases, employment discrimination cases), and second, are the cases selected in fact of potentially general interest? Rather than considering these questions, the Commission assumes that the present selection process is appropriate even though no one seems to know which cases are selected, or why.

The "New Jersey Rule," cited in the Draft Report (at 54), is no answer. The Rule, which allows three-judge panels only when there is "a question of public importance, of special difficulty, of precedential value, or for such other special reasons as the presiding judge shall determine," sounds and looks a lot like discretionary review, which the Commission itself rejects elsewhere (at 61-62). And a New Jersey-like rule will surely add to the court's workload. Every appellant will quickly realize that to be relegated to a two-judge panel is tantamount to virtually certain affirmance. It is not hard to anticipate that as a result a certiorari-like motion practice will develop, in which the appellant will argue the importance of his or her case in order to obtain a three-judge panel, the appellee will oppose by denigrating the issues, and a motion panel will have to sort the whole matter out.

There are other practical problems with the proposal. First, there will be little real savings in time. The premise of summary disposition is that the result in cases appropriate for this treatment is obvious. Hence, it is hard to believe that the third judge (or even the first or second) spends any appreciable amount of time on them. In contrast, whenever there is a disagreement, the two-judge procedure will require reargument and reconsideration. Also, there will be substantial and difficult questions as to the precedential effect of these "two-judge" court actions whenever one is published.

Again, the Council would have far preferred that rather than propound radical solutions, the Commission would have looked much harder at whether there are cultural issues in some circuits inhibiting full review and published opinions. The figures quoted above about oral argument and full disposition indicate that some Circuits at least are able to handle the bulk of their work with routine oral argument and with published opinions. The Council regrets that the Commission was not able to allocate some of its resources to studying what these circuits were "doing right" and suggest that other follow their lead.

B. Divisional Organization of the Court of Appeals

To the Council, this is another bad solution to a "not proven" problem.

The Ninth Circuit is unique. It has 28 judges and covers 11 states. (Draft Report at 26). The next largest Circuits in terms of judges are the Fifth with 17 (covering only three states) and the Sixth with 16 (covering four states). The Commission proposes a mandatory divisional arrangement for the Ninth Circuit, even though (Draft Report 36) a "great majority" of judges and lawyers in that Circuit oppose a split and presumably would oppose the divisional arrangement, which in some ways is even more drastic a change. It then would extend this system in every court with 17 or more judges, without explaining why it is the acceptable outer range of judges for a single appellate bench.

The Commission does not base its recommendation of divisional arrangement on excessive case loads in the Ninth Circuit or elsewhere; indeed, as seen in the above table, the Ninth Circuit merits case load per judge is by no means the heaviest. Instead, the Commission's reasons seem to be principally two: that according to unpublished survey results lawyers and district court judges in the Ninth Circuit are somewhat more likely (the amount is not given) to have trouble discerning circuit law, and that the court is too large for "collegiality" to work effectively.

To the Council, this data is far too soft and impressionistic to justify the radical step of divisional organization, either in the Ninth Circuit or perforce in the other Circuits. The Council would be surprised if there were not substantial complaints from attorneys and district court judges even in the small Circuits about difficulty in ascertaining the state of the Circuit's law. In fact, one would expect no less from an evolving body of law as complex as are many areas covered by federal jurisdiction.

Collegiality is a consideration that practitioners like ourselves have trouble assessing. Significantly, however, the judges of the Ninth Circuit -- who should be most knowledgeable about problems of this kind -- are reported (Draft Report at 36) to oppose any split and favor keeping the Circuit as it is presently configured.

Moreover, the divisional proposal will if anything increase uncertainty and hinder collegiality. The Council, as I testified at the April 3rd hearing, is somewhat expert in a court that sits in permanent divisions, as until very recently the Illinois intermediate state appellate court was similarly organized. There are serious practical problems with this arrangement. Simply stated, one division does not follow another, so that within the same court there are multiple positions on the same issue. Unless the decisions of one division under the Commission's scheme are to be given some sort of primacy in the division's jurisdiction, exactly the same problem will develop. This is hardly the blueprint for increasing clarity and predictability.

Second, there is unevenness of output. Our experience with the Illinois First Appellate District has been that a small division can easily be victimized by a very slow judge, who can and will significantly delay the output of the entire division.

Since under the Commission's plan it appears that in-state judges will be (with one exception) permanently assigned to that division, the potential for delay is obvious.

A third problem arises from the multi-state nature of the regional circuits (except for the District of Columbia). The permanent division can only engender substantial parochialism. At present virtually every multi-state Circuit combines states of "liberal" and "conservative," rural and urban characters. For example, paired with Massachusetts is New Hampshire, with Michigan is Tennessee, with Minnesota is Arkansas, and with California is Idaho and Montana. As a result, in every court there is a mix of judges from a variety of backgrounds, with grounding in different kinds of practices and in different social and economic conditions. The permanent division proposal, in contrast, would destroy this mix. The division system then excaberates this split by developing in each division a separate body of case law that can only be reconciled through a cumbersome process.

C. Conclusion

The Council therefore urges the Commission to reconsider and reject its proposals for permanent divisions and two-judge appellate courts. The Council also urges the Commission to publish its survey questions and results as soon as possible.

Yours very truly,

Thomas R. Meites
for the Chicago Council of Lawyers

TRM/oj