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TO: Commission on Structural Alternatives for the Federal Courts of Appeals

TO FAX #: 202-208-5102

FROM: Todd D. True

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COMMENTS: Thank you for the opportunity to comment on the Commission's Tentative Draft Report



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

Re: Tentative Draft Report

Dear Members of the Commission:

Thank you for the opportunity to comment on the "Tentative Draft Report" which you released in October. It is clear from the Draft Report that the Commission has invested considerable time and thought in studying the issues facing the federal courts of appeals and especially the Ninth Circuit Court of Appeals.

After testifying before the Commission at its hearing in Seattle last May, listening to other testimony from lawyers and judges that day, and reviewing testimony from other hearings, I was surprised by the Draft Report's detailed recommendation for an extensive statutory restructuring of the Ninth Circuit that will effectively split the Court's adjudicative function into three very specific geographic divisions. Based on the materials in the Draft Report alone, this sweeping recommendation appears to be a solution in search of a problem.

Indeed, there is much evidence in the Draft Report that actually counsels against such far-reaching changes, very little information in the Report that supports such changes, and no real information that would compel such a fundamental reorganization of the Ninth Circuit. If experimentation with geographic division of the Ninth Circuit's adjudicative function is in order at all, and the Draft Report offers little evidence to indicate it is, a less sweeping and more flexible administrative approach would be preferable.

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A. Much of the Information in the Draft Report Counsels Strongly Against Reorganization of the Ninth Circuit.

First, as the Draft Report expressly recognizes, no division or restructuring of the Ninth Circuit can be justified "because of particular judicial decisions or particular judges." Draft Report at 6. Second, with regard to actually splitting the Ninth Circuit into two or more courts, the Draft Report firmly concludes: "We examined over a dozen proposals for splitting the circuit and found no merit to any of them." Id. at 46. Finally, the Draft Report also expressly finds that

Having a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with other nations on the Pacific Rim, is a strength of the circuit that should be maintained.

Id. at 45.

In addition, the Commission reports that its own survey shows over two-thirds of the Circuit's judges and a similar percentage of district court judges within the Circuit who responded to the Commission do not favor circuit reconfiguration. Draft Report at 36. Similarly, the Commission found that available statistical information about the current Circuit's performance did not "tip decisively in one direction or another," for or against court restructuring. Id. at 37. Nor did the Commission's analysis of more subjective factors lead in only one direction: "District judges in the Ninth Circuit report finding the law insufficiently clear to give them confidence in their decisions on questions of law about as often as their counterparts in other circuits." Id. at 38. Lawyers in the Ninth Circuit, however, "report somewhat more difficulty discerning circuit law and predicting outcomes of appeals than lawyers elsewhere." Id. Interestingly, however, the Report does not identify any state or local bar associations that favor restructuring the Circuit. Indeed, according to the Report, "most state and local bar associations" oppose reconfiguration. Id. at 36.

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In short, the evidence in the Draft Report identifies at least three compelling reasons not to divide geographically the adjudicative work of the Ninth Circuit: (1) the views of the judges of the federal courts in the circuit; (2) the desirability of a uniform federal law in the western states; and, (3) the absence of any workable proposal for dividing the Court's adjudicative function.

B. The Commission's Survey Results May Also Counsel Against Restructuring The Ninth Circuit.

Against these important considerations, the primary evidence the Report cites to support the proposal to statutorily divide the adjudicative function of the Ninth Circuit into three geographic units is

our judgment that the consistent, predictable, coherent development of the law over time is best fostered in a decisional unit that is small enough for . . . close, continual, collaborative decisionmaking

Draft Report at 38. The Report indicates that such decisional units optimally consist of between eleven and seventeen judges. See Draft Report at 27-28. The basis for this conclusion rests largely on the results of the Commission's survey which found that about two-thirds of the federal appellate judges who responded to the survey expressed the view that this size group was optimal for appellate decisionmaking. Id.

Table 2-8 in the Draft Report, at page 26, however, shows that a similar percentage of all federal appellate judges, two-thirds to three-fourths, currently serve on courts with between eleven and seventeen judges. The First and Ninth Circuits are, in fact, the only courts of appeals that fall outside this range. In the absence of any additional information, it seems quite plausible that the survey results about the optimal size of appellate decisionmaking groups, which are at the heart of the Report's recommendations for re-organizing the Ninth Circuit, simply reflect the aggregate individual satisfaction of federal

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appellate judges with the courts they currently serve -- with what is familiar in terms of size and decisionmaking units -- and not a genuine crystallization of opinion concluding that larger or smaller groups of judges are harmful to effective, collegial adjudication. Indeed, since most Ninth Circuit judges oppose circuit reorganization and find their current experience on a large court sufficiently collegial and effective, the view that the Commission's survey results on optimal circuit size simply reflect satisfaction with current circuit size across the country seems quite likely.

C. The Draft Report Does Not Identify Evidence or Reasons that Support a Strong and Immediate Need to Statutorily Restructure the Ninth Circuit.

Apart from the Commission's survey of judges and the views reflected in that survey about the optimal size of an appellate decisionmaking body, there appears to be very little information in the Draft Report to persuasively indicate a need to reorganize the Ninth Circuit into three geographically distinct adjudicative groups. While such information can be imagined - a groundswell of dissatisfaction among lawyers in the circuit, or a court's inability to administer itself and decide cases - no evidence of this nature appears in the Draft Report.

In the absence of much more compelling evidence, the Report's recommendations for an extensive statutory restructuring of the Ninth Circuit's adjudicative functions do not appear to be well grounded.

D. An Alternate Approach to Experimentation.

While the information in the Draft Report does not support a statutorily-mandated division of the adjudicative function of the current Ninth Circuit into three geographic divisions, the Ninth Circuit itself has shown a willingness to experiment in approaches that might benefit both the Court and litigants. To this end, it would be a much simpler matter for the Commission to recommend that the Court experiment for a period of time with adjusting its formula for assigning judges to appeals so that in

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most cases an appellate panel of the Court would consist of at least two judges from within an identified geographic area or administrative unit. These units could follow the boundaries of the Court's current administrative units, or those outlined in the Draft Report, or even some other configuration. If this approach to panel assignments appeared to improve decisionmaking or judicial or litigant satisfaction with the Court over time, it could be retained, if not it could be abandoned. In any event, this approach would avoid the balkanization of federal law in the western states that the Draft Report's statutory geographic divisions that eliminate circuit-wide precedential effect for most decisions easily could create.

Similarly, if the current limited en banc procedures in the Ninth Circuit appear to be unsatisfactory, the Court could adopt a different approach by rule without a statutorily-mandated change. The size of the limited en banc court could be increased or the threshold for obtaining an en banc review could be lowered, or both, to ensure greater oversight through en banc proceedings. Any of these approaches would provide room to improve the Court without adding one or more layers of complex appellate review as proposed in the current Draft Report.

Finally, leaving the impetus for experimentation and innovation with the judges of the Court, rather than imposing new structures and procedures by statute over the objection of the majority of the Court's judges, especially where there is no compelling evidence that the current Court is failing to do its job, would be much more consistent with the history of federal appellate court reorganization and institutional respect for the views and abilities of the judges of the Court. See Draft Report at 17-20 (reviewing this history).

Thank you again for this opportunity to comment on the Commission's Tentative Draft Report.

Sincerely,



Todd D. True