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November 5, 1998

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 the White Commission Draft Report by the
Federal Bar Association, Los Angeles Chapter and its
Appellate Practice Section

Dear Justice White and Members of the Commission:

The Federal Bar Association of Los Angeles, with more than 700 members, is the largest organized group of lawyers within the Ninth Circuit devoted to advancing the practice of law in the federal courts. Our membership includes public and private practitioners who represent governments, counties, municipalities, institutions, entities and individuals in civil and criminal actions throughout the Ninth Circuit, and most particularly in California. We commend the Commission for the time and consideration it has devoted to the organization of the Ninth Circuit. This letter offers several brief comments on the Commission's proposal for the reorganization of the Ninth Circuit.

First, we heartily agree with the Commission's recommendation not to split the Ninth Circuit for administrative purposes or otherwise. We previously endorsed the views of Chief Judge Hug and former Chief Judge Wallace against such a move, which likewise were echoed overwhelmingly in the oral and written commentary the Commission received.

Second, to avoid duplication, we again endorse the views of Chief Judge Hug and the Ninth Circuit Judicial Council in response to the draft proposal. The Circuit's ability to speak with one voice in cases of legal significance, and when resolving inner-Circuit conflicts, is of critical importance to practitioners and their clients. But the ability to speak with one voice depends on a meaningful and effective en banc procedure. In our view, the present proposal substantially impedes that goal for the reasons Chief Judge Hug and others have noted.

Third, the proposed division of California is particularly troubling to our membership. As noted, we represent clients statewide in the public and private sector, and in civil and criminal cases. The proposal for separate judicial districts carries with it the inherent potential for inconsistency in the law from one section of the state to another, with no readily available mechanism for

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reconciliation of the conflicts. The diversity in the law will, in turn, promote unseemingly forum shopping, undermine uniformity of decision on issues that ought to be treated uniformly, and make it difficult to explain the diverse results achieved to clients.

Although the Commission analogizes its proposed divisions to the state system in California, the analogy is flawed for several reasons. To begin with, the Supreme Court of California has the tools at its disposal (through the grant of review or depublication) to promote uniformity of decision on issues of statewide importance or when there is conflict among lower courts. The proposal's contemplated en banc procedure cannot accomplish either objective. Additionally, intermediate appellate court decisions in California have stare decisis effect and thus bind all inferior courts statewide. The proposal's divisional structure lacks that feature as well.

Finally, the proposal's inflexible seven year mandate is equally troubling. The Ninth Circuit has demonstrated its willingness to tackle the efficient and effective administration of its case load -- with great industry and effort. Its use of a dedicated mediation program and an appellate commissioner are but two examples that put the Ninth Circuit at the forefront of creative decisionmaking for courts nationwide.

We believe that reform proposals, if needed, should promote more flexibility, not less. The Circuit should have the capability to retain what works and discard what does not. If some form of administrative division is ultimately recommended, we therefore urge the Commission to give the Circuit the discretion to experiment with the changes proposed to see if they make sense. If they work, the Circuit will embrace them. If they need to be modified, that flexibility should be provided so workable reforms can be achieved.

Respectfully submitted,

Federal Bar Association, Los Angeles Chapter
and its Appellate Practice Section

By


James C. Martin

Member, Appellate Practice Section,
Los Angeles Chapter Federal Bar Association

cc: Chief Judge Procter Hug, Jr.