

November 5, 1998

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

Re: Comments on the White Commission Draft Report
By the Ninth Circuit Judicial Council

Dear Justice White and Members of the Commission:

First let me express my personal thanks for the efforts of the Commission. The Tentative Draft Report was a scholarly presentation of a difficult subject. You are to be congratulated.

I am still concerned, however, as to the need for binding precedent in bankruptcy cases. If the appellate decisions of district courts and bankruptcy appellate panels were binding throughout the Ninth Circuit, absent a contrary circuit decision, this would be very helpful. I believe it would be Constitutional, but even if it failed to pass the Constitutional test, it would be well worth the risk in the interim. I cannot begin to tell you how much judicial time and cost is incurred because of the lack of binding precedent.

I also concur with the comments of the Judicial Council as related in the October 28 letter from Chief Judge Procter Hug, Jr. The BAP should be circuitwide. Bankruptcy is a national system and further Balkanization should be avoided insofar as possible.

This brings me to my earlier proposal. I believe a "bankruptcy" panel composed of circuit judges, whose decisions would bind bankruptcy, district and courts of appeal, absent a contrary decision of the United States Supreme Court, would substantially reduce bankruptcy appeals and result in a substantial cost savings to debtors and creditors. It is very important to have a binding answer to an issue in the bankruptcy system and the sooner the better. There is no great need to have matters percolate for years in order to achieve the "best" judicial solution; Congress constantly tinkers with the bankruptcy statute and it will be quick to act as to any nationally binding decisions it finds offensive.

Yours sincerely,



Gerald K. Smith