

United States District Court  
District of Nevada

Chambers of  
Howard A. McKibben  
Chief Judge

Bruce R. Thompson  
U.S. Courthouse and Federal Building  
400 South Virginia St. Rm. 804  
Reno, Nevada 89501  
702-686-5880

TO: Mr. Justice White and Members of the Commission  
FROM: District of Nevada  
DATE: November 2, 1998

The District of Nevada appreciates the opportunity to respond to the Commission's Tentative Draft Report on the Structural Alternatives for the Federal Courts of Appeals. We wish to express our appreciation to the Commission for the extraordinary amount of time and effort it has expended in its examination of the nationwide system of appellate courts. We also wish to compliment the Commission on the comprehensive and detailed draft report it has prepared in response to the mandate of Congress.

In the foreword and summary of the report the Commission states that its study shows that the "administration of the Ninth Circuit is, at the least, on a par with that of other circuits, and innovative in many respects. We see no good reason to split the circuit solely out of concern for its size or administration."<sup>1</sup> We are pleased that the Commission has reached this conclusion which

---

<sup>1</sup> Commission on Structural Alternatives for the Federal Courts of Appeals: Draft Report for Comment, vii.

is consistent with the position taken by our district throughout this process.

The Commission then states "neither do we see a need to split the Ninth Circuit in order to solve problems having to do with the consistency, predictability and coherence of circuit law."<sup>2</sup> Again, this finding is consistent with the position our district has always taken and we are pleased that the study confirms the validity of this position.

The Commission concludes that the circuit should not be split and indicated it had examined "over a dozen proposals and found each without merit." The Commission states that each plan for a split of the circuit is flawed and it endorses none of them.

Again, our district would urge the Commission to adopt each of these conclusions in its final report to assist the Congress in understanding that any proposed split of the Ninth Circuit is unworkable, unwise and not warranted by the existing evidence and, in fact, would not achieve the objectives urged by the proponents of a split.

Because the Commission has unequivocally concluded that any plan for a split of the Ninth Circuit should be rejected, we do not believe the recommendation to create three regionally based adjudicative divisions with the Ninth Circuit Court of Appeals

---

<sup>2</sup>Commission on Structural Alternatives for the Federal Courts of Appeals: Draft Report for Comment, vii.

should be adopted in the final report. If the Ninth Circuit, as acknowledged by the Commission after an extensive and comprehensive study, is being administered in a manner that is as effective and

efficient as any other circuit, it is difficult to understand why divisions should be created that will necessarily make the administration of the circuit as a whole more complex and difficult to manage. To the extent the Commission believes that in order to ensure the consistency, predictability and coherence of circuit law there should be regionally based adjudicative divisions created within the circuit, it should be left to the Ninth Circuit to study the recommendations and organize itself into adjudicative divisions where appropriate. Any such plan should include a circuit-wide *en banc* process with a substantially increased panel size. Since the Commission's recommendation is that Congress should enact a "statute of general applicability directing that any court of appeals with more than seventeen judgeships organize itself into adjudicative divisions in accordance with a plan to be developed by the circuit court or the circuit judicial council," so too the Ninth Circuit should be given the leeway to design such divisional structures as may be appropriate. However, in the final analysis, because there does not appear to be compelling empirical evidence that the Ninth Circuit is unable to operate effectively as an

adjudicative body, any mandated division of the circuit should be rejected.

With respect to other aspects of the report, our court believes that the proposal to authorize federal appellate courts to use two-judge panels is a sound one and should be included in the final report. The recommendation to enact legislation to authorize judicial councils to create district court appellate panels within the circuit that would have jurisdiction in matters such as diversity of citizenship cases and sentence appeals merits consideration. Any such proposal should be conditioned upon an authorization of additional district judgeships and staffing to permit the district judges to handle the increased caseload. Our district would urge the Commission to recommend the retention of bankruptcy appellate panels. The bankruptcy appellate panel should be circuit-wide, not based on divisions. The Ninth Circuit has had great success with the BAP and it should be continued.

Finally, the Commission should delete the appendix section recommending the judicial council composition. This court is satisfied with the judicial council of the Ninth Circuit as it is currently composed.

Thank you for your consideration of our response to the Commission's Tentative Draft Report. We will be pleased to respond to any questions the Commission may have.



Howard D. McKibben  
Chief Judge