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## Division Proposal Jeopardizes Consistency of Circuit Law

In December 1998, the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by Retired Supreme Court Justice Byron R. White, submitted to the Congress and the President its Final Report (located on the Commission's web site: <http://app.com.uscourts.gov>). In January 1999, Senators Murkowski (Alaska) and Gorton (Wash.) introduced S. 253, The Ninth Circuit Reorganization Act of 1999, to implement the Commission's proposals.

The Commission strongly recommended keeping the Ninth Circuit together as a single administrative unit, stressing the importance of having a single court interpret and apply federal law in the western United States and the Pacific Rim. It further proposed restructuring the court of appeals into three autonomous adjudicative divisions, an action that would have the opposite effect of diminishing the court's ability to provide consistent and stable law across the nine-state region. This article briefly describes the proposed legislation, how it might affect California business lawyers, and the steps the court is taking to respond to the Commission's concerns.



**Hon. Procter Hug, Jr.**

### Findings and Recommendations

The Commission's principal recommendation was that the Ninth Circuit should not be split:

There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit. (page 29)

Although the Commission concluded that no objective data, and no substantial subjective findings, justify a major structural change, it nonetheless proposed the following divisional restructuring:

- The court of appeals would be reorganized into three regionally-based adjudicative divisions to hear and decide all appeals from the district courts in their divisions:

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*Northern Division* — Districts of Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington.

*Middle Division* — Districts of Eastern and Northern California, Guam, Hawaii, Nevada, and the Northern Mariana Islands.

*Southern Division* — Districts of Arizona, Central and Southern California.

- Each active judge would be assigned to a particular regional division; each division would consist of seven judges or more, depending upon the caseload. A majority of the judges in each division would be residents of the division, but each division would include some non-resident judges assigned randomly for three-year terms.

- Each regional division would function as a semi-autonomous decisional unit, sitting in panels and *en banc*. Decisions made in one division would not bind any other division but should be accorded substantial weight by the other two divisions.

- A Circuit Division for conflict resolution would resolve conflicting decisions between two regional divisions. Comprised of 13 judges — the chief and four judges chosen by lot from each division for three-year terms — the Circuit Division's jurisdiction would be discretionary and could be invoked by a party after a divisional *en banc* decision or denial of an *en banc*.

### The System Is Working Well Now

Why should California business trial lawyers be concerned about the Commission's proposal for restructuring the Ninth Circuit? The question essentially becomes whether the structural changes better serve the prime objective of maintaining a consistent body of coherent federal case law throughout the circuit. I believe they do not — nor do the chief judges of eight other federal circuits, the Department of Justice, and more than a dozen other bar organizations and key political leaders who have submitted comments opposing the divisional structure to the Commission.

The Commission's own surveys show that the vast majority of judges and lawyers within the circuit believe that the Ninth Circuit is operating well in its current structure. The court of appeals has a viable mechanism that maintains the consistency of the law throughout the circuit. Every decision of a three-judge panel is binding throughout the entire circuit, not just in one unit or division. The limited *en banc* procedure for reviewing conflicts and cases of exceptional importance provides a mechanism for all judges to participate in the process of selecting a case for review and for making their views known. Once a case is taken *en banc* and resolved, the decision becomes the law of the circuit which all later panels recognize and follow. Nor is there an additional layer of appeal, as there would be with the divisional approach.

### The Divisional Structure Frustrates Consistency

As the Commission itself stated in favor of keeping the circuit together:

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 the other nations on the Pacific Rim, is a strength of the circuit that should be maintained. (page 29)

However, a closer look at the proposed divisional structure shows that it would have the opposite effect on circuit law:

- Neither the panel nor the *en banc* decisions of a division would have a binding precedential effect on the other two divisions. A circuit-wide *en banc* hearing for any purpose other than

resolving direct conflicts would be abolished.

- The proposal would eliminate the participation of all judges circuit-wide in resolving circuit law. Circuit-wide law would be replaced by divisional law which would be developed only by the judges sitting in a single division.

- The likelihood of inconsistent interpretations of federal law would exist throughout the circuit and would not be adequately addressed by the Circuit Division, which would oversee only direct conflicts between two divisions.

- Federal law for California would be established by two different divisions (Middle and Southern), creating the potential for different interpretations and enforcement of the same law in different parts of a single state.

- The Circuit Division is a new level of appeal before finality, resulting in additional expense and delay for litigants.

- The chief judges of the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and D.C. Circuits strongly opposed divisional restructuring, stating that, "[T]he whole concept of intra-circuit divisions, replete with two levels of *en banc* review, has far more drawbacks than benefits."

### Adverse Impact on California

Senator Dianne Feinstein, in her comments to the Commission, wrote:

[I]t would be disastrous if California were split into Northern and Southern [Divisions]...[which] would not be bound precedentially by each other's decisions. Lawyers would engage in "forum shopping" within the same State for favorable rulings. California corporations subject to federal jurisdiction could be subject to varying interpretations of the same federal and state laws. This could compel businesses to build headquarters in other States where there is no conflict within the federal court system. The lack of uniformity and certainty in the law could create chaos in our state. Imagine if two California divisions disagreed on the constitutionality of any state-wide initiative or law. This could do extraordinary damage to Californians' faith in the integrity and fairness of the judicial system. (Letter of December 3, 1998, to Justice White)

Nor would placing California in a single division resolve the flaws in the divisional structure. The situation would remain the same, since no single entity would have the ability to establish the law for the entire circuit.

### Conclusion

While the judiciary is indebted to the Commission for its valuable and independent work, the evidence simply does not support change to a divisional structure for the Ninth Circuit Court of Appeals. The disadvantages of such a structure far outweigh the claimed advantages of increased collegiality and a smaller body of law to master. The Ninth Circuit has never hesitated to evaluate and modify its procedures; there is always room for improvement. But such an untried proposal does not justify scuttling the Ninth Circuit's time-tested mechanisms for maintaining consistency which are operating efficiently and effectively.

Last spring, I appointed a 10-member Evaluation Committee, chaired by Senior Circuit Judge David R. Thompson of San Diego, to review areas of concern raised by the Commission. Consisting of judges, lawyers, and an academic, the committee will make recommendations to the court for correction. This is a far less disruptive and more constructive approach to achieve the goal we are all striving for — a fair and efficient judicial system.

*While these remarks are my own, they reflect the position of two-thirds of the members of the court.*

—Hon. Procter Hug, Jr.