



**WHITE COMMISSION REPORT
ON THE DIVISION OF THE
NINTH CIRCUIT COURT OF APPEALS**

I. ORIGIN AND DEVELOPMENT.

The White Commission was appointed under a federal statute to consider possible reconstruction of the federal court system. Its original report proposed serious consideration of a breaking up of circuits into divisions when the number of judges passes 18 and, since the Ninth Circuit is already over that number, the divisional plan would take effect by a new congressional statute forthwith. The report was circulated for comment and was vigorously opposed throughout the country. Apart from the Ninth Circuit, the proposal was sharply criticized by the chief judges of eight of the remaining circuits (the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and D.C. circuits). The Department of Justice opposed the plan, in summary, because it would "have potentially adverse repercussions" for all the courts of appeal. Judge Winter, Chief Judge of the Second Circuit, in a detailed analysis concluded, "We do not agree with the major premise. Moreover, we believe that the proposal for mandatory divisions will lead either to more incoherence in case law rather than less or to intolerable collateral consequences." The New York City Bar Association found no significant difference between divisions and outright circuit splitting, concluding that the plan is "very nearly the functional equivalent of splitting it into separate circuits." The Chicago Council of Lawyers declared that the plan would "if anything, increase uncertainty and hinder collegiality."

In consequence of the nationwide opposition to the proposal that this be a plan for all of the circuits, the White Commission retreated and in its final report recommended it only for the Ninth Circuit.

II. THE PLAN.

The White Commission said:

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.

...

Any realignment of circuits would deprive the west coast of a mechanism for obtaining a consistent body of federal appellate law, and of the practical advantages of the Ninth Circuit administrative structure.

...

However, for all practical purposes the plan does divide the Circuit. Specifically:

1. The Circuit is divided into three divisions. The southern division would contain Southern California and Arizona. The middle division would contain Northern California, Nevada and Hawaii and the Pacific Islands. The northern division would contain the northwestern states of Oregon, Washington, Idaho, Montana and Alaska.
2. All cases originating within a division would be decided by a divisional panel.
3. Conflicts within a division would be decided by an en banc court within that division.
4. The decisions of one division would not be binding precedent on another division.
5. In case of conflict between any two divisions, a 13-judge court, composed of the chief judge and 12 judges serving three-year terms, would resolve the conflict, but only if it is a direct conflict.
6. In case a very important question should be decided in one division, as for example an interpretation of the Constitution, the only review would be by the Supreme Court on certiorari. There is no en banc procedure for deciding important questions within the Circuit.

III. THE PROPOSED PLAN IS UNSATISFACTORY.

1. There is no showing of any need for the new structure. The Commission concedes that the Ninth Circuit is doing a good job with its caseload and that there is no showing of any particular problem.¹
2. Once essence of a unified circuit is that where a panel decides an issue, that determination will be authoritative on the rest of the court unless nullified by the judgment of the whole court through an en banc proceedings. Under the plan, a

¹ There is a problem of prolonged vacancies, which has created great difficulties for the Circuit, but the divisional plan would not cure that situation.

decision in Seattle is not binding in Los Angeles and vice versa. For regional or national businesses, this is an open invitation to forum shopping.

3. A circuit which cannot decide important questions is no circuit.

4. The plan adds greatly to costs. While it purports to maintain centralized administration, there will need to be regional administration as well, with new courthouses and new staff. This mandates plain waste of the \$100 million recently spent to restore the central operating building of the court in San Francisco after an earthquake. A building built to accommodate 28 judges and a caseload of 9,000 would be used by 7 judges handling a 2,800 caseload.

IV. RESPONSE IN CALIFORNIA.

1. Senator Dianne Feinstein advised the Commission that division of California "would create chaos." She foresaw "forum shopping," anticipated that California businesses would be "subject to varying interpretations of the same federal and state laws," and concluded that the plan "could do extraordinary damage to California's fate in the integrity and fairness of the judicial system," as well as "have enormous costs and enlarge the federal bureaucracy."

2. Governor Pete Wilson, then governor of the State of California, advised that the plan "would be counterproductive and not in the best interest of the people of California."

3. Every federal judicial group in the circuit opposed the proposal.

4. The Federal Bar Association is concerned with the same matters mentioned in this memorandum: "Lack of inter-division *stare decisis* and meaningful en banc review.

5. The Sierra Club Legal Defense Fund described the plan as "a solution in search of a problem."

6. The Los Angeles County Bar Association stated that this plan had all of the difficulties "which would accompany a split of the circuit," and found this particularly regrettable because "there is nothing to fix."

V. RESPONSES OUTSIDE THE NINTH CIRCUIT.

As noted above, the individual chief judges of several circuits specifically criticized the proposal. The chief judges of the First, Second, Third, Fourth, Seventh, Eighth and D.C. Circuits a joint response to the proposal stating that "The whole concept of intra circuit divisions, replete with two levels of en banc review, has far more drawbacks than benefits."

The New York City Bar saw no difference between the divisional approach and an outright split of the circuits – the plan is “very nearly the functional equivalent of splitting it into separate circuits.

VI. OVERALL COMMENT.

The Commission has deluded itself. There is no functional difference between an outright break-up of the Circuit and the arrangement which is proposed. Particularly for California, the splitting of the state is a major misfortune. Every Californian who has spoken for the many years in which proposals of this kind have been afloat has opposed plans for this reason. The current resistance in California is valid.