

**COMMISSION REPORT RESPONSES PERTAINING TO
DIVISION OF CALIFORNIA***

Senator Dianne Feinstein (12/3/98):

"California must not be divided under any plan to restructure the Ninth Circuit."

"The Middle Division . . . and the Southern Division . . . 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."

"Another layer of judicial review within the Ninth Circuit would have enormous costs and enlarge the federal bureaucracy."

Judge William Enright (S.D. Cal.) (as quoted in Senator Feinstein's letter of 12/3/98):

"The thought that large law firms could debate within their own offices whether to file in Los Angeles or San Francisco and achieve a different law of the Circuit I think states the whole difficult problem. Even though the statistics may not justify it, I think California of necessity must remain intact with or without other states."

Judge Judith Keep (S.D. Cal.) (11/2/98):

"The proposal would mean that if the Southern Division rendered a decision, the judges in the Central District and the Northern Division would have no obligation to follow that decision. This would lead to great confusion among businesses that operate state wide. The business would have to draft a contract a certain way to do business in the Southern Division but would be unsure how to draft the contract if its business will take it to the Central Division. Key provisions of new federal law, such as the ADA, might be interpreted one way by a panel of the Central Division, and businesses in the Southern Division would not know whether to follow

*Note: Comments supporting the proposal are included in italics.

that division or not." "[The proposal] will lead to blatant forum shopping."

The U.S. Department of Justice (11/6/98):

"We do not support dividing any state in this manner, because, as much as possible, federal rights and responsibilities should be the same for all citizens within a State."

"Splitting California between two divisions that are not bound by each other's precedent would yield different interpretations of federal and state law, and could result in inconsistent federal court rulings regarding the constitutionality of the same California law."

"Nor would there be any guarantee of quick or certain Supreme Court resolution of those issues."

"The draft report suggests that the creation of smaller adjudicative divisions would promote consistency and predictability, because circuit judges would be in a better position to monitor the law as it develops within their division, and because district judges would know who would be reviewing their decisions. It also suggests that smaller, more stable groups of reviewing judges would lead to more predictable outcomes"

"[However,] to the extent discernible judicial approaches lead to 'predictability' within particular divisions, that development itself is not without disadvantages. It is precisely to discourage litigants from attempting to tailor their arguments for particular judges that many circuits do not publicly announce the judges on the panel until shortly before argument. And under the proposed divisional plan, predictability may encourage forum shopping (especially within California) or tactics to delay decisions on appeal while pending cases raising the same issue might be more favorably resolved in a different division"

Martin Schwartz, Attorney (NY) (11/4/98):

"The proposed plan to subdivide the 9th Circuit is ludicrous. [] Does it make any sense that a seizure of evidence by, for example, FBI special agents in Los Angeles, would be lawful there but under the same set of facts, unlawful in San Francisco? That is the havoc your plan will engender."

Stephen L. Wasby, Professor of Political Science (SUNY at Albany) (10/26/98):

"Although a serious effort is made to deal with the problem of dividing California between two units . . . the 'two Californias' issue is at bottom a political matter—which no one really wants to touch, and I think THAT is the reason that the Hruska Commission proposal failed, and that this part of the Commission's proposal would similarly come to grief."

C.E. Petit, Attorney (IL) (10/14/98):

Should cases challenging the constitutionality of California law "be heard in the Middle Division, since that is where the state government sits?"

Kazuhiko Sano, Attorney (CA) (10/9/98):

Notes Commission's misstatement of the law concerning (1) whether a decision of Court of Appeal is binding on all superior courts. (He points out that it does, and cites to *Auto Equity Sales, Inc., v. Superior Court*, 57 Cal. 2d 450, 455 (1962)); and (2) whether a trial court must follow the precedent of the Court of Appeal district within which it sits in favor of that of another district. (He notes that it does not and cites to *People v. Bullock*, 26 Cal. App. 4th 985, 990 (1994).)

Tulare County Counsel (11/6/98):

"Since a decision in one Division is not binding on another, the distinct probability exists that a decision will be made affecting only one part of the state."

"In an effort to avoid differing interpretations in regard to the discharge of the responsibilities of public entities, multiple lawsuits would have to be filed, one in each affected Division. This does not support judicial economy or the efficient use of public resources."

"Even in the event that multiple lawsuits were filed, unless the decisions were conflicting, the parties would not have recourse to en banc review, but rather would have to resort to the Supreme Court. If the decisions were conflicting, the parties would have another layer of review placed on them which would not be place on litigants in any other state."

"Because lawsuits against public agencies often relate to the manner in which those agencies deliver public services [such as indigent aid], and because the distinct probability exists that an appellate decision in the modified Ninth Circuit regarding the delivery of such services may affect only that part of the State in a single division, or will be different between Divisions, the virtual certainty exists that populations which use such services will migrate between Divisions based on which divisional interpretation is most favorable to such recipients. This artificially directed travel within the State of California would place a severe and unfair burden on local public agencies." (Examples given: Prop. 187 [prohibition against provision of public services to undocumented aliens]; Prop. 209 [prohibition against affirmative action], and Prop. 227 [prohibition against certain types of bilingual education].)

The County Counsel also notes the "tremendous burden on the judiciary and the members of the bar to have differing interpretations of the same legal principles within the same state."

Governor Peter Wilson (CA) (11/6/98) (through Daniel M. Kolkey):

The Governor believes "the proposal to divide the Ninth Circuit Court of Appeals into three divisions—which would split California—would be counterproductive and not in the best interests of the people of California."

"This division would subject California to differing interpretations of the law and result in forum shopping, particularly in connection with constitutional challenges to state statutes and statewide initiatives, as litigants searched for the appellate division that most favored their case."

The Governor notes the erroneous conclusion drawn by the Commission concerning the precedential value of California state court of appeals decisions on the various districts.

"The proposed Circuit Division only resolves conflict among decisions from the three regions, and does not review erroneous or unsound decisions, which deprives California of a coherent, circuit-wide law. To illustrate the point, where one division invalidates a state law, but no similar legal challenge is pending in another division, the Circuit Division's jurisdiction would not be invoked (because there was no conflict) and a state law would quite literally govern one half of the State but not the other"

"Making a decision in one region binding on the other region will resolve this problem, but will exacerbate the risk of forum shopping and will require Ninth Circuit Judges to be familiar with decisions throughout the Ninth Circuit—a need the divisional arrangement sought to mitigate."

Peter W. Davis, Attorney, Crosby, Heafy, Roach & May (11/6/98):

Davis notes the Commission's erroneous conclusion concerning precedential value of California Court of Appeals decisions. He also complains of the proposal that district decisions not be binding, and states that "the problem [would be] most acute, of course, in California where the Commission suggests splitting the state—each part with its own law—a result which California finds repugnant"

Judge David F. Levi (E.D. Cal.) (11/6/98):

"[T]he split of California between two divisions whose decisions are not binding on each other opens the prospect that matters of the first importance to residents of the State will be subject to contrary rulings for considerable periods of time. Such matters will include State-wide government programs and policies that are of intense public interest and that have substantial effect on public and private arrangements. One need only think of some of the initiatives adopted by the electorate in recent years, and that have been subject to litigation in federal court, to realize how destabilizing it could be were there conflicting controlling decisions on such issues for any period of time."

"[U]nder the draft proposal there is no mechanism for identifying cases that raise legal question of State-wide importance and resolving these cases on appeal by a panel that may bind both divisions. Instead, these cases must run the gamut of divisional panels and en banc courts before reaching the Circuit Division. In my view, this process is unwieldy and time consuming, and will lead to public dissatisfaction with the appellate process and the judicial system more broadly."

Ronald L. Olson, Munger, Tolles & Olson (CA) (11/6/98):

"[S]uspending California across two circuit divisions will foster intrastate forum shopping."

"[T]he Commission's justifications for the segmentation of California into two divisions are premised on erroneous legal assumptions about the precedential value of decisions rendered in the California state appellate court system, and unrealistic practical assumptions about the feasibility of certifying questions to the California Supreme Court."

"[S]plitting California into two divisions will make state courts wary of the law of either division. In our federalist structure, of course, circuit decisions do not bind the states with respect to their interpretation of state law. However, much of the interpretations and development of California law takes place when, under their supplemental jurisdiction, the district and circuit courts of the Ninth Circuit flesh out the contours of state and federal causes of action by comparing them to one another. Because Middle Division and Southern Division case law could point the same state in two different directions, the unifying and predictive force of Ninth Circuit decisions will be diminished for California."

"California citizens and industry in a state so divided may be subject to two different bodies of federal law, a legal problem that must affect personal and economic choices. And here, too, the proposal actually will perpetuate confusion among laymen and lawyers alike, a species of the very same legal uncertainty that occasioned the Commission's inquiry in the first place."

Judge Diarmuid F. O'Scannlain, Circuit Judge (11/6/98):

Judge O'Scannlain concurs with Supreme Court Justice White that "the consequences of splitting California between two circuits are seriously exaggerated."

Senator Jon Kyl, Arizona (11/6/98):

Commends commission report. Favors having California be its own circuit. Includes statistics to support this position.

Jerome J. Shestack, Former President of the ABA (11/9/98):

"[D]ividing California appears to be ill advised on a number of counts, including the creation of serious problems of conflicting interpretation of California law, not as easily resolved as some of the advocates of the division have contended.."

Federal Bar Association, Los Angeles Chapter (11/5/98):

"[T]he proposed division of California is particularly troubling to our membership. [] 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 reconciliation of the conflicts. The diversity in the law will, in turn, promote unseem[ly] 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 division 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 this feature as well."

Michael Traynor, Cooley Godward (11/5/98):

"California should neither be divided between circuits nor isolated in one."

Jerome I. Braun, Attorney (CA) (11/5/98):

Mr. Braun speaks generally of problems relating to lack of stare decisis and the inadequacy of having the Circuit Division serve to resolve only conflicts between the divisions.

Concerning California, Mr. Braun explains "[t]he partition of California across division lines will be unworkable if the decisions of the divisions affecting our state do not have precedential effect throughout the state. Take for example an injunction against enforcement of a given state law. The Southern Division may forbid enforcement, but its writ runs only to the Central and Southern Districts. In the Northern and Eastern Districts the matter would remain *unadjudicated*. Should the California Attorney General enforce the law in the northern half of the state only, or forbear statewide even in the absence of any authority governing the northern half? Before the question could be settled statewide there would have to be a separate action in a

district in the Northern Division (either by the original parties, or by different parties, or by the attorney general) *and* (in case conflict) a request for en banc review, *and* (if the conflict persists) a convening of the Circuit Division. In time sensitive matters (such as election issues, or affirmative-action hiring or school admissions decisions) the required delay might well frustrate federal authority altogether. Similar problems would affect many other controversies requiring a uniform federal law in California. The new procedure for certifying questions to the California Supreme Court can, of course, only clarify questions of *state* law; moreover it is unavailable at the district court level and its use is discretionary with the state high court."

"The problem discussed above is caused by the partition of California *combined* with the restricted authority of the divisional tribunals. Neither would cause this *particular* problem without the other—if the whole state were in one division, or if another division's writ ran throughout the state—but together they make the proposal unworkable for California."

Los Angeles County Bar Association (11/3/98):

The Los Angeles Bar Association maintains that "under no circumstances should any state, including California, be divided between circuits or divisions.

"Practitioners in our Association, many of whom advise clients -- both public and private -- about issues of California law, have grave concerns about any proposal that could lead to disparate interpretations of, or uncertainty about, California law. Decisions resolving issues of California law form the bedrock of our practitioners' ability to advise statewide clients on many issues. As emphasized in our May Statement, any changes to the structure of the Ninth Circuit that has such results would be very problematic. The same adverse effect would apply to institutional litigants, such as the California District Attorneys and Attorneys General, and to commercial enterprises that conduct business, regulate employees and workplace issues, and structure transactions on a statewide basis. Thus, it is not surprising that there is virtually no precedent for splitting one state between two federal circuits."

"Although the Draft Report acknowledges the problems associated with assigning California to two different Circuits, it fails to recognize that the proposed divisional arrangement will have the same result in many respects. The contemplated creation of a Circuit en banc court to resolve conflicts among divisions can serve to reconcile obvious different interpretations of California law; more subtle differences may go uncorrected. More importantly, however, the proposed structure will impose delays and add expenses and uncertainty in the resolution of cases involving interpretation of state law. Indeed, cases most in need of speedy resolution, such as litigation over the validity of statewide initiatives or appeals regarding the constitutionality of state law, could linger in the system for years under a process that requires both divisional and Circuit en banc review to resolve conflicting interpretations of state law. Moreover, this proposal will also create the potential for problematic, division-to-division forum-shopping where differences in state law already have appeared or appear likely to occur based on the existing decisions of each division."

"For all these reasons, we urge the Commission to revisit the advisability of splitting California. These same concerns apply with equal force to the proposed splitting of any state. Whether the adjudicative units are Circuits or 'divisions,' we see little real difference."

**Thomas E. Baker, James Madison Chair in Constitutional Law,
Director, Constitutional Resource Center (11/2/98):**

"The proposed divisional arrangement is an attractive alternative in theory but I think it is a mistake to divide California between two divisions for much the same reasons that the Commission was more than reluctant to divide the State between two new circuits. TDR at 50."

"The Commission attempts to distinguish its divisional recommendation from the 1978 experiment in the Ninth Circuit with regional divisions. TDR at 45. There was another experiment with divisions in the experience of the old Fifth Circuit before that circuit was divided into the new Fifth Circuit and the Eleventh Circuit. The Fifth Circuit experiment suggests two cautions: first, the rules of stare decisis behind the concept of the law of the circuit became so complicated that they nearly defied description; second, the hind sighted political reality was that the divisional stage of development, implemented by the judges as an administrative experiment, almost immediately precipitated the permanent statutory division of the circuit by congressional reformers. *See generally* Thomas E. Baker, A Postscript on Precedent in the Divided Fifth Circuit, 36 Sw. L. J. 725 (1982); Thomas E. Baker, A Primer on Precedent in the Eleventh Circuit, 34 Mercer L. Rev. 1175 (1983). So my worries are for increasing the confusion and uncertainty in the law of the Ninth Circuit and for prematurely accelerating the momentum for formal division among judges and members of Congress."

"I simply do not like the departure from the venerable principle of the law of the circuit to propose that decisions made in one division would not bind other divisions. TDR at 41. There is just too much going against the proposal."

"The other related reservation I have about the Commission's proposed divisional arrangement is for the Circuit Division for conflict correction. This proposal would put an end to the limited en banc mechanism that to my mind is so problematic and ineffective and that would be an improvement. But the proposal would create a rather complex and subtle rehearing procedure from panel decisions. Panels in one division would not be bound by prior panel decisions in another division but their decision to create a conflict would be reviewable by the Circuit Division for conflict resolution. Each division would continue to rehear en banc panel decisions it deemed important or mistaken."

Chief Judge Hug (10/29/98):

"A decision of an en banc court of a Division that does not create a conflict with another division does not receive any further review in the circuit. It is reviewable only by *certiorari* in

the United States Supreme Court. This would be a significant obstacle to accomplishing the objective of having the Ninth Circuit 'interpret and apply federal law in the western United States.' It would create particularly troublesome problems in California, and for those persons and entities dependent upon the interpretation of federal law in California."

"There is no circuit-wide en banc process that can be invoked unless there is a conflict between the divisions. Thus, unless there is a conflict with another division, the en banc decision of the division would be reviewed only by certiorari to the United States Supreme Court. This would be a particular problem between the Middle and Southern Divisions, which divide the State of California. An example would be one of the many ballot issues that the State of California passes. If Proposition 200 were declared to be unconstitutional by the Middle Division and if *certiorari* were denied by the United States Supreme Court, that would be the rule for the Northern Division of California. Unless a conflict were to arise in the Southern Division by a separate lawsuit being brought, that ruling of the Middle Division would remain intact for the Middle Division, but not for the Southern Division. If there were a conflict, this would be resolved, not between the two divisions that divide California, but by a seven-judge court with a very limited representation from the full circuit."

Richard W. Nichols, Judicial Advisory Committee for the Eastern District of California (10/26/98):

Mr. Nichols points out a "technical matter within the Tentative Draft Report which should be addressed. At page 41, the Tentative Draft Report states that 'in the California state appellate court system, where the intermediate appellate system is organized into geographical districts, the decisions of one court of appeal have no binding precedential effect outside that court's jurisdiction.'"

"To the extent that this statement refers to the fact that decisions of one California district court of appeal are not binding upon another California district court of appeal, it is correct. Decisions of a district court of appeal in one geographical district are binding, however, upon superior (trial) courts located in another geographical district, at least in the absence of relevant precedent from the court of appeal of the district in which the superior court sits. In *Auto Equity Sales Inc v Superior Court*, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937 (1962), the California Supreme Court states that 'Decisions of every division of the District Courts of Appeal are binding upon all the justice and municipal courts and upon all the superior courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court.'"

"It is tempting to treat as identical the geographically binding precedential force of decisions of federal courts of appeals upon district courts throughout the nation, and of California district courts of appeal upon superior (trial) courts throughout the state. They are not identical, however. A federal court of appeals decision has binding effect only upon district courts within that circuit, whereas California district courts of appeals decisions have binding effect upon all superior courts within the state, regardless of location. The Tentative Draft

Report's misapprehension of California law in this regard does not and should not affect the Commission's recommendations. The force of those recommendations would be weakened, however, by inclusion within the Final Report of a misstatement of California law."

Shirley Hufstедler, Morrison & Forester (CA) (10/23/98):

"With some significant modification, the divisional structure recommended could be effective in responding to the advocates for Circuit splitting. The principal modification is to merge the proposed Middle and Southern Divisions into one Division to avoid divisional severance of California."

"Although the Commission recognizes that cutting California in two will raise concerns about forum shopping and diverging lines of federal authority in the State, the Commission has nevertheless recommended that separation in reliance upon stated assumptions that are seriously flawed."

"The Report states that 'Californians' may thereby be subjected to differing views of federal authority. (Draft Report ["DR"] p.41.) The unarticulated assumption is that only persons who are California citizens will be adversely affected. The assumption is incorrect. It is akin to stating that corporation law as pronounced by State courts of Delaware affects only Delaware residents or that Second Circuit decisions with respect to such issues as securities law and banking impact only New Yorkers. Federal law in California, especially in civil actions, directly affects non-California domiciliaries -- individuals and corporations that are transnational and multinational. The economy of the State of California is far larger than that of most countries in the world, and federal law affects all areas of that economy."

"The Report states that divergence on legal issues of state law between the two proposed divisions in California would not be a serious problem because decisions on state law issues are not binding on state courts, and '[i]n any event, federal judges may certify important questions on which state law is not settled to the California Supreme Court.' (Ibid.)"

"Decisions in the Ninth Circuit of state law issues in diversity cases are a relatively small part of the Ninth Circuit caseload, as compared with the impact of diversity jurisdiction in many other Circuits. However, such issues are very frequently before the Ninth Circuit as pendent claims alleged in federal district courts. The conflict between decisions on state law issues creates difficult problems even though the federal decisions are only persuasive in state courts. The assumption that unsettled important questions of state law can be certified to the California Supreme Court by federal judges is true as a matter of federal law. However, the California Supreme Court has consistently refused to accept such certifications for many years, despite strong efforts by the Lawyers Advisory Committee to the Ninth Circuit to persuade the California Supreme Court to accept such certifications."

"The Report assumes that the separation of California into two geographical divisions interpreting and applying federal law is analogous to the districts of California's

intermediate state appellate courts which, like the proposed Circuit divisions, are not compelled to follow one another's decisions. Therefore, the Commission's proposal 'would not create a situation that does not already exist.' (Ibid.)"

"The dockets of intermediate appellate courts in California and of the Ninth Circuit affecting California are not comparable. To be sure, both federal and state courts in criminal cases apply federal constitutional law because much of criminal procedure has been constitutionalized. However, California and federal law differs significantly in criminal cases in other respects because the applicable statutes are very different. On the civil side, the dockets of the two court systems are not similar. A large part of the dockets for California intermediate appellate courts concerns only the rights of the parties before the court; still other cases involve only issues arising from activities of city and county governments without statewide impact. In the Ninth Circuit, however, federal law issues impact the whole State. The Commission's proposal would create a situation that has never existed in California or in any other federal appellate court."

"The Commission assumes that the California State system is 'well accommodated in state practice.' (Ibid.) The intermediate appellate court system in California has endured, but it is 'not well accommodated.' Conflicts between and among intermediate courts of appeal in California pose very real problems. The way they have been 'resolved' is jurisprudentially unsound and has caused considerable mischief. Real conflicts between and among the Districts and Divisions of California's intermediate appellate courts have far too frequently been buried by unpublished opinions, although the rules of court, as correctly applied, would often require publication. The difficulties are exacerbated because the California Supreme Court regularly 'resolves' conflicts by ordering the later of two conflicting intermediate appellate court decisions, if published, to be 'depublished,' even though the remaining decision has not been approved by the Supreme Court."

"Supreme Court Justices and members of the Bar are aware that depublication is an unjust and unsatisfactory way to resolve conflicts; however, the Justices have rationalized the practice as the only way in which it can manage its caseload."

"On federal law questions, conflicts can quickly be resolved by the Circuit Division and certiorari from 'incorrect' decisions or decisions that conflict with other Circuits can be sought in the United States Supreme Court.' (Ibid.) 'The Circuit Division is only supposed to 'resolve square inter-divisional conflicts.' (Id. at 42.) Head-on collisions are easy to spot unless they are buried in unpublished dispositions. Far more prevalent, however, are very serious sideswipes that are much harder to detect. Especially is this true when the opinion readers have not read the briefs and know little (if anything) about the pertinent parts of the record."

"Neither petitions for hearing nor certiorari petitions are 'swift.' The description of 'swiftness' can usually be applied only after counsel have filed such petitions (entailing both delay and significant expense) when the court to which the petitions are addressed denies them out of hand."

"It is quite true that Circuit-splitting would not ameliorate the existing inconsistent interpretations of federal law in the federal system, but the proposed division of California exacerbates rather than improves the situation."

"'[A] panel decision in one division asserted to conflict with the decision in another division could be reviewed by the Circuit Division only after the panel decision had been reviewed by the Division en banc or a divisional en banc had been sought and denied.... The Circuit Division would replace the circuit-wide en banc process, which would be abolished. This change would not create a new tier in the judiciary, as it would merely substitute the Circuit Division for the existing en banc process.' (Id. at p.42.)"

"It is difficult to understand how a new tier has not been created when the Circuit Division can only deal with a conflict after the panel decision had been reviewed by the Division en banc or divisional en banc has been sought and denied."

"The proposed multiple en bancing procedures are inefficient, expensive and slow. They have been designed to avoid the very problems created by the proposed divisional structure. Most of those problems are created by dividing California that produces the lion's share of the workload for the Circuit."

"For these reasons the Commission's stated reasons for the divisional arrangement, in my view, will not withstand meticulous scrutiny. Most of the criticisms that have been leveled at the present Ninth Circuit have been inspired by subjective concerns or political pressures. The Commission has recognized the former, and it has firmly disavowed restructuring to satisfy the latter."

"Almost all of the legitimate concerns can be satisfied without splitting the Court at all. Dissatisfaction with the infrequency of en banc rehearings in the Ninth Circuit is well founded. However, the basis for that infrequency has not been judicial sloth, but rather the fact that the Ninth Circuit has been grievously shorthanded. Vacancies in federal judgeships in the Circuit have remained unfilled for months and even years. That intolerable problem cannot be resolved by reorganizing the Ninth Circuit because Circuit organization is not a part of its etiology."

"The Report's proposal to create the Middle and Southern Divisions rather than a single Southern Division creates more problems than it solves. The real problems can be addressed by the prompt filling of the judicial vacancies, by pressure within the Ninth Circuit to follow the Court's own rules with respect to publication of opinions and to consider far more seriously requests for en banc consideration of cases that should require the attention of more than three judges of the Court."

Judge Geraldine Mund, Bankruptcy Judge, (C.D. Cal.) (10/19/98):

Although the judge "think[s] that [the commission's] proposals for the creation of

divisions within the Ninth Circuit are politically justified and administratively possible, [] [she] wishe[s] that the state of California would not have to be divided in any way"

Judge Lawrence K. Karlton, Chief Judge (10/19/98):

"Even more objectionable, however, than the lack of evidence on the issue of the effect of size qua size, is the lack of any evidence to support the truly radical suggestion that the law of California be split among two appellate courts which will have no precedential relationship. As best I can tell from the report, this suggestion derives from the huge workload produced by this state's litigation, and the undeniable inability to work a split which is equitable while keeping appeals from district courts sitting in California within a single court of appeals. Since, as noted above, there is no objective justification for the circuit court of appeals split, there is also no objective reason to support this radical departure from our historic practice."

"Even more serious, however, is the Commission's failure to come to grips with the chaotic consequences of its proposed division. While acknowledging that diversions in precedent will occur, followed by forum shopping and resulting in unpredictable law, the Commission sanguinely notes the weakness of the doctrine of stare decisis under California's jurisprudence as a justification. That reliance is utterly misplaced. I have remarked elsewhere on the difficulty the state's lack of appellate uniformity makes for district courts sitting in California, *see Froyd v. Cook*, 681 F. Supp. 669, 672 n.9 (E.D. Cal. 1988); it is appalling to suggest that we import that confusion into federal courts addressing federal law. I have no doubt that despite the Commission's views on the satisfactory nature of the California system, the Commission would not suggest importing California's doctrine which permits panels of the same division to refuse to abide by decisions they regard as erroneous; if not, they should at least favor us with an explanation of the difference."

"Moreover, from my experience as a California lawyer and trial judge, the notion that the endemic instability fostered by California's system is generally regarded as satisfactory is simply wrong. I acknowledge that some members of the California Court of Appeals are quite happy not to be bound by the opinions of their sister courts (or indeed other panels of the same court), and some litigators enjoy the freedom to argue undeterred by precedent. My impression, however, formed as a California practitioner and former California trial judge, is that most trial judges, and many lawyers, not to speak of clients who cannot get reasonably reliable advice, do not share that contentment. In any event, it seems inconsistent to me to argue that the solution to a felt belief in inconsistency is its institutionalization."