



U.S. Department of Justice
Office of Legislative Affairs

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Office of the Assistant Attorney General

Washington, D.C. 20530

May 19, 1999

The Honorable Dianne Feinstein
United States Senate
Washington, D.C. 20510

Dear Senator Feinstein:

Thank you for your letters of March 10, 1999, to Associate Attorney General Raymond C. Fisher requesting the views of the Department of Justice on proposals to divide the Ninth Circuit Court of Appeals into separate adjudicative divisions or to reform the Ninth Circuit's en banc process. As you note, the Commission on Structural Alternatives for the Federal Courts of Appeals (the "White Commission") recommended that the Ninth Circuit be restructured on a divisional basis and legislation to implement that recommendation is now pending in the Senate (S. 253).

In sum, the Justice Department continues to oppose any restructuring of the Ninth Circuit (or other Courts of Appeals) in the manner recommended by the White Commission. We think any divisional structure would diminish the uniformity of federal law and would delay, rather than improve, the administration of justice. These problems make a divisional structure undesirable whether or not the State of California is included in a single division. Splitting California between two divisions raises distinctive problems, but placing California in one division would present other concerns, as set forth below.

Restructuring the Ninth Circuit – our largest Court of Appeals – on an untried divisional basis would be disruptive for litigants and the court and could have serious and far-reaching implications for all federal courts. Such a dramatic change is unwarranted. Structural changes should be used only as a last resort, after all available means of non-structural reform have been attempted and assessed. Because the Department believes that the Ninth Circuit generally operates well, the need to try non-structural alternatives first is even more compelling.

As you may know, the Ninth Circuit itself is in the process of considering non-structural reforms to the court's en banc process. The Ninth Circuit recently created a ten-member evaluation committee that is examining the en banc process and other issues and is expected to complete its study in six months. We at the Justice Department are also now reviewing ways to improve the en banc process, including the particular proposals noted in your letter, with the goal of identifying reforms we would support either as amendments to the Circuit's rules or, where appropriate, as legislation. We welcome the opportunity to work with you and others in assuring that the issues are carefully reviewed and that desirable reforms are implemented..

The remainder of this letter elaborates on these views. A more extensive discussion of the Department's views on a divisional restructuring (as well as the White Commission's recommendations concerning two-judge appellate panels and district court appellate panels, which are also included in S. 253 and which the Department also opposes) appears in the Department's November 6, 1998 comments submitted in response to the White Commission's draft report. A copy of these comments is enclosed for your convenience.

1. Divisional restructuring is generally not desirable for the Courts of Appeals.

The White Commission recommended, and S. 253 would require, that the Ninth Circuit be restructured into three semi-autonomous adjudicative divisions. Under this structure, cases would be appealed to the division in which the district court is located; one division would not be bound by the decisions of another division; and, after a party first seeks en banc review within a division, a 13-judge Circuit Division would have discretion to review cases only where the decisions of two or more divisions pose an outright "conflict" on a particular issue. The Circuit Division -- with no authority to review cases of exceptional import -- would be comprised of the Chief Judge for the Circuit and four judges, selected randomly, from each of the three divisions.

Such a divisional structure would diminish, rather than enhance, the uniformity of federal law across the Ninth Circuit and the ability of the Circuit to effectively and efficiently adjudicate appellate issues. The development of a consistent body of law in the western United States would be hindered because one division's decisions would not be binding precedent across the Circuit and tensions among decisions in different divisions might go unresolved for long periods. Because the Circuit Division's jurisdiction would be discretionary, there is no assurance that even those cases that do present conflicts would be resolved on a Circuit-wide basis. Even were it to exercise its discretion, the Circuit Division (according to the White Commission report) would be limited to resolving "square inter-divisional conflicts." Whether a conflict exists -- and whether there is a "square conflict" -- would often be unclear, which itself would foster uncertainty and litigation concerning the Circuit Division's jurisdiction over particular cases. The divisional structure, in contrast to the existing Ninth Circuit en banc process, would offer no mechanism for resolving on a Circuit-wide basis those issues that are unsettled or important but do not involve a conflict among divisions.

The administration of justice would also likely be delayed by the divisional structure because it adds another layer of review -- after appealing a case to the division, parties will have to seek divisional en banc review before seeking discretionary review by the Circuit Division. This structure might also have the effect of insulating divisional decisions from review by the United States Supreme Court, inasmuch as parties could be expected to argue that certiorari should not be granted for such decisions that have not been reviewed by the Circuit Division and the Supreme Court might itself be disinclined to take cases that have not yet presented at least an inter-division conflict.

Nor would the divisional structure offer significant advantages over the existing structure of the Ninth Circuit. The divisional structure, with its added layer of review, would not speed up the handling of appeals. Regionally-defined divisions also would not likely promote consistency or clarity in the law by allowing judges to stay on top of a smaller body of law specific to their division. Judges will still need to stay abreast of law in other divisions, both because they are to give it substantial weight and because they may be temporarily assigned outside their division. We also do not think that federal law, including individual rights and obligations under such law, should vary within the Ninth Circuit based on any "regional" perspective that might result from a divisional structure. If it is desirable to have diversity cases decided by panels that include judges from the region where such cases arise, that goal could be met by using the existing Ninth Circuit structure to assign such cases to panels whose judges are selected on a regional basis, a concept that we understand the Ninth Circuit's evaluation committee is considering.

The proposed Circuit Division also could be significantly less representative of the Circuit overall than the Ninth Circuit's existing en banc process. Currently, the Ninth Circuit selects members for en banc panels at random from all non-recused active judges, with the proviso that any judge who is not picked for three consecutive en banc hearings is automatically placed on the next. In contrast, the proposed Circuit Division would include four judges from each of the three divisions. Representation of the different divisions in the Circuit Division thus would not be proportional to the number of judges assigned to the divisions. Moreover, judges who are not on the Circuit Division would have no role in deciding if the Circuit Division reviews a particular case or its outcome on the merits. As a result, a seven-judge majority on the Circuit Division could determine that court's docket and decisions, even though those judges did not reflect the view of a majority of the Circuit.

2. A divisional structure with California in one division is equally undesirable.

The problems identified above inhere in the divisional structure and make it undesirable whether or not California is divided. While dividing California creates so many problems as to make it an unacceptable option, keeping California in the same division would have its own unwanted side effects.

The Justice Department firmly opposes splitting California between divisions. Federal law should be the same for individuals, businesses, and governmental entities across any one state. Placing California in two divisions could promote forum shopping by parties. There also would be delays in reconciling conflicting decisions on law within California because the Circuit Division could not review a decision by one division until a conflict arose with another and even then any review would be at the discretion of the Circuit Division.

If California were placed in one division, other problems would arise. Because California accounts for about 60 percent of the cases within the Ninth Circuit, a California division would be significantly larger in terms of the number of judges (some of whom would presumably be

temporarily assigned from other divisions) and cases than the other divisions. Proponents of a divisional structure argue that it would allow smaller adjudicative units. But it is difficult to see how a California division with 6,000 or more cases and 18 or more judges would offer significant advantages in terms of size as compared to the existing Ninth Circuit. A California division would likely be too large for all of its judges to sit together on en banc panels, so some form of limited en banc hearing would be needed for that division. Finally, the Circuit Division, with an equal number of judges from each division, would become even less representative of the circuit overall if California were placed in one division. These concerns simply underscore our earlier observation that a divisional structure is undesirable in general.

3. The Ninth Circuit should consider changes in its en banc process.

While believing that the Ninth Circuit generally functions well, and should not be restructured at this time, the Department also believes that there is a need to consider ways to improve the Circuit's en banc process. In our comments to the White Commission, the Department did not itself advocate specific proposals, but instead suggested that the Commission evaluate whether to recommend that Congress authorize the Ninth Circuit to take cases en banc with the vote of less than a majority of the Circuit's active service judges. We also noted that the Commission might consider requiring the Ninth Circuit to hear, on a regular basis, a calendar of en banc cases filed from the available pool of petitions for en banc review. These suggestions, of course, could offer ways for the Ninth Circuit to use the en banc process more frequently to resolve conflicts and to otherwise clarify the law of the Circuit on important issues. The final report of the White Commission, however, focused on structural changes and did not recommend or otherwise evaluate in depth any possible reforms for the Ninth Circuit's en banc process.

Your March 10 letter identifies several possible en banc reforms. In addition to allowing en banc hearings on less than a majority vote or requiring the Ninth Circuit to set a regular en banc calendar, the letter mentions requiring the judge who calls for an en banc to sit on the en banc panel or requiring that a majority of the active Circuit judges, rather than the current 11, be required to sit on any resulting panel. While we are studying your suggestions carefully, we have two preliminary reactions: (1) Automatically requiring the judge (or judges) who call for an en banc hearing to sit on the panel might raise concerns because the en banc panel should, ideally, reflect the view of the Circuit overall and the representativeness of the panel may be skewed by automatically including those judges who strongly believe en banc review is required for any particular issue. (2) Increasing the size of the en banc panel, however, to a majority of the active judges might help assure that particular panels are more representative of the Circuit overall and have other salutary effects as well, although at some point the size of the panel would likely become unwieldy.

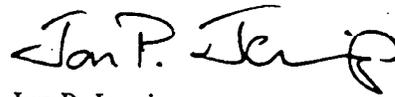
We are now reviewing the suggestions raised in your letter and several other possible reforms for the en banc process. Our goal is to identify specific proposals to suggest to the Ninth Circuit's recently created evaluation committee or, where appropriate, for legislation. Reforms

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of the en banc process should be carefully considered and evaluated before a novel restructuring is imposed on the Ninth Circuit, particularly when the court is generally functioning well in deciding large numbers of cases arising from nine states and two territories. We welcome the opportunity to work with you and others in considering these issues and identifying desirable reforms to improve the administration of justice in the Ninth Circuit.

Please do not hesitate to call if we may be of additional assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon P. Jennings". The signature is fluid and cursive, with a large, stylized "J" at the beginning and a long, sweeping tail that loops back under the name.

Jon P. Jennings
Acting Assistant Attorney General