

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTONIN SCALIA

August 21, 1998

The Honorable Byron R. White
Chairman, Commission on Structural Alternatives
for the Federal Courts of Appeals
Thurgood Marshall Building
One Columbus Circle, N. E.
Washington, D. C. 20544

Dear Byron:

I have refrained from conveying to you my views concerning realignment of the Ninth Circuit, since I think it unlikely that I can contribute any fact or consideration that you and the distinguished members of your commission are not already aware of. However, after reading the thoughtful letter of Justice Kennedy—who does have special expertise on the subject—I find myself so thoroughly in agreement with his analysis that I must send along a seconding statement.

I will add to what he has said only two points: First, the function of en banc hearings—which the current size of the Circuit discourages, and the incomplete and random nature of its en banc panel deprives of predictability—is not only to eliminate intra-circuit conflicts, but also to correct and deter panel opinions that are pretty clearly wrong (which occasionally occur, of course, in any Circuit). The disproportionate segment of this Court's discretionary docket that is consistently devoted to reviewing Ninth Circuit judgments, and to reversing them by lop-sided margins, suggests that this error-reduction function is not being performed effectively. The following figures are compiled from the statistics maintained by the Clerk's Office:

October Term	Total SCt Cases Argued ¹	Argued From CA9	Reversed or Vacated	Unanimous	Two or Fewer Dissents	Unargued Summary Reversals
1997	94	17	14	10	13	0
1996	88	21	20	12	12	6
1995	90	12	10	4	10	2
1994	94	17	12	5	10	1
1993	95	14	12	9	10	0
1992	113	22	15	6	11	1

¹ excludes cases where writ of certiorari was dismissed as improvidently granted

My second point is that, in my judgment, this Court will have no difficulty sustaining whatever additional caseload will be created by the addition of a Circuit, and by the necessity of being especially prompt in resolving conflicts between the two Circuits containing California. (The latter necessity could be reduced by requiring an en banc hearing when either of the two Circuits wishes to depart from a holding of the other.) Indeed, it may well be that the new

Circuits' greater ability to perform what I have called the error-reduction function will result in a net decrease in our business from that part of the country. But if an increase does occur, our docket has been such in recent years that I am confident we can manage it. For all the very good reasons described by Justice Kennedy, the additional effort will be well spent.

I wish you and colleagues success in your difficult task.

Sincerely,

A handwritten signature in dark ink, appearing to be "J. F. Kennedy", written in a cursive style.