Public Comment of Retired Judge Charles E. Horan in Support of Full Implementation of the Recommendations of the Chief Justice's Strategic Evaluation Committee (Item SP12-05)

Dear Justice Miller, Justice Cantil-Sakauye, members of the Judicial Council and the Strategic Evaluation Committee:

My name is Charles E. Horan. I am a former judge of the Los Angeles Superior Court, having served in that capacity for 23 years, and in 2009 was a founding Director of the Alliance of California Judges, the group that served as a catalyst for most of the changes now under consideration. I write on my own behalf and not on behalf of my former court or the ACJ.

First, let me make it clear that I urge the Executive and Planning Committee, the Chief Justice, and the Judicial Council to immediately undertake a swift and sure implementation of every recommendation of the Strategic Evaluation Committee. It is clear to me that regaining our status as an independent, accountable judiciary, possessed of sufficient credibility and resources to serve the citizens of this state effectively, requires nothing less.

I have divided my comment into four parts. First, I set forth my views of why this public comment period is unfairly structured to guarantee a skewed result. Next, I argue that the Council already has the information necessary to move forward, and should do so. Third, I explain my view that the Council must also reform itself if restructuring the AOC is to have any beneficial effect. Finally, I respond to Mr. Clark Kelso and various members of the Council, who argue for an expansive view of both the Council's policymaking powers, and the AOC's role in the affairs of the judiciary, for the adherence to their approach has led to disastrous results.

1. The Public Comment Process is Flawed, Effectively Excludes Comment by AOC Employes Critical of the AOC, and Assures a Skewed Outcome

The process the Council is following makes likely that the SEC report will in time find itself gathering dust on a shelf at the AOC and that at best only few and relatively minor changes in the organization will be made.

On June 21, 2012, acting primarily upon the recommendation of Justice Miller, head of the Council's Executive and Planning Committee, the Council refused to get about the task of implementing the SEC report's recommendations, and instead embarked upon yet another survey, this time described as a 30-day public comment period, which within minutes had morphed into a "rolling public comment period" with no estimated end point. Incredibly, though the SEC members pointed out in great detail that many of their findings were based upon interviews with current AOC employees who agreed to speak only on condition of confidentiality, the current "public comment period" makes absolutely no provision for these honest employees to repeat to you what they told the SEC, for the names of all respondents will be published on the AOC website. Due to

this fact, an incomplete and skewed result is all but assured, and Justice Miller's explicit promise made at the Council meeting of June 21 that he would jealously protect the integrity of the process cannot be kept.

The problems began even before June 21, however. Almost immediately upon the release of the SEC report, the Chief Justice appeared in an AOC produced video, not to assure the pubic and the members of the judiciary that the problems uncovered by the SEC investigation would be dealt with swiftly, but instead to lift the morale of AOC employees and urge them to find errors in the report. The message could not have been more unfortunate, or more clear. Many will now view the public comment period as an invitation primarily to those who have an interest in seeing to it that the SEC's recommendations are never implemented. Already, some have reported that a campaign is underway within the AOC to gin up public comments aimed at just that result.

Finally, there is the problem of simple fatigue and exasperation--many judges at this point have surely thrown up their hands and despaired of the notion that the Council is at all interested in true reform. This belief is understandable--on June 21, only *one* Council member voted to support a motion that the Council must oversee the AOC. Further, the current invitation to comment is just the latest in a long line of recent surveys and requests for comment by members of the judiciary. Many judges--struggling with budget cuts, court closures, and staff layoffs--will rightly ask: "Why should we tell you what we have told you again and again, when you refuse to act on what we say?"

2. The Council Already Has All the Information It Needs to Act, and Must Do So

In the past six years, the Council has received at least *five separate reports and surveys* --not counting the scathing Bureau of State Audits report on CCMS--which while they overlapped in coverage and purpose, all noted substantial institutional difficulties within the AOC. Recurring themes emerged--the AOC is a dysfunctional, control-oriented, bloated and overstaffed agency which habitually oversteps its bounds, and cannot be counted on to deliver trustworthy information to the state's judges, the legislature, or even the Council. The AOC evidences a seeming inability to engage in thoughtful analysis, and it fails to seek branch buy-in or obtain cost-benefit analyses before undertaking massive statewide projects. Also repeatedly noted was the obvious abrogation by the Council of its duty to oversee the AOC.

The first critical report, titled "*Statewide Administrative Infrastructure Initiatives Review Final Report*," was delivered in 2006. It noted many of the difficulties set forth above, primarily the notable lack of meaningful planning and analysis in large scale AOC projects, as well as identifying problems within the problematic Office of General Counsel. As pointed out by the SEC report, the recommendations were ignored, and the report has been all but forgotten.

The next report, in 2008, was written by four members of the Judicial Council--

Judges Carolyn Kuhl, Michael Welch, Jamie Jacobs May, and Charles McCoy--and recommended many of the changes now thoroughly shown to be necessary by the SEC investigation, pointing out that the AOC's orientation had shifted from service to control. That report was received by the Council, and the reaction was swift: The Director of the AOC, William Vickrey, dismissed the report as "insulting" while the Council made not a peep, and the AOC continued to grow larger and more controlling as the state's judges became ever angrier, in time leading to another, more formalized inquiry relating to the AOC.

This occurred in April 2011, when the California Judges Association surveyed over 2000 current and former judges about the AOC, Council, and the CCMS project, and released a summary of their findings, which absolutely dovetail with those of the SEC. The summary was forwarded to the Chief Justice and was widely publicized.

Saying she needed further input, the Chief Justice then undertook her own separate survey. All judges in the state were asked to provide, through the 58 presiding judges, concrete examples of what they believed constituted AOC malfeasance and dysfunction. The Chief Justice has refused to make the results of that survey public, though she did allow the SEC access to it. (The SEC report has confirmed that its findings mirror the Chief's own survey results.)

This apparently still was not enough for our leaders. The Chief Justice next formed the Strategic Evaluation Committee, to which she appointed a number of current and retired judges as well as advisory members outside the California judicial branch, including the president of the National Center for State Courts, an organization to which the AOC pays roughly $1 million per year. The charge of the SEC was to do a thorough, top to bottom review of the agency and to make recommendations for reform where appropriate. The SEC members took their task seriously, undoubtedly to the dismay of some, and embarked upon an exhaustive 55-week review of the AOC. The results of that study are now contained in the almost 300-page SEC report, which includes roughly 150 separate and well documented recommendations for change.

A reasonable person would think that this should resolve the matter, and that the Council should either admit it simply has no intention of ever allowing change to occur, or it should act. Instead, the Council did neither, but embarked upon this latest "comment period."

I ask: How many times does the Council require that the same answer be given? Were we in court, certainly an objection of "asked and answered" would be forthcoming, and it would certainly be sustained.

The time for further discussion, study, surveys, and hand-wringing is long past. We are beyond the time when delay and dithering will be tolerated by the judiciary, or by the Legislature. We are at the point where further inaction or half-measures by the Chief Justice and Council will only more firmly cement the notion that our leaders are incapable of movement and unworthy of our support.

3. In Order for the AOC to be Effectively Reformed, the Council Must Respect the Constitutional Limits on its Power

Judges must always be cognizant and respectful of the limits to their authority. Judges are not omnipotent, and have no charter to simply do as they please, even if their actions have the trappings of legality. Their core function is to provide forums for the resolution of disputes, and to do so fairly, effectively, and efficiently. The Council likewise is bound by the law, and need not search far to accurately discern the limits of its powers, for they are expressly, succinctly and *fully* set forth in the California Constitution's Article VI, section 6(d) as follows:

> *(d) To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute.*

For the past 15 years, this express mandate has been routinely ignored by Council after Council. From this simple grant of power, the Council has embarked on all manner of projects far beyond their authorization, even taking steps to write pubic school civics curriculum on the theory that it would eventually improve the administration of justice by providing us with better-informed jurors and would foster respect for the judiciary. Improving humanity may be a laudable goal, but nowhere can this charge be found, and certainly not in Article VI. Notwithstanding that for years many of us have--politely at first, then a bit more pointedly--reminded the Council of their limited role, the Council continues to describe itself as the "policymaking body for the judiciary." Proclaiming this, and emblazoning it on their website, does not make it so.

This disrespect for limits--and indeed for the courts it claims to serve--has not surprisingly become ingrained in the culture of the supposed servant of the Council and courts, the AOC. Largely this is due to the Council's failure to issue understandable, concrete marching orders, and to insist that the Council--not the AOC, is at the head of the organizational chart. The Council's "strategic plans," formulated at meetings where judges are barred from attending--and have for years been barred from even seeing copies of the *meeting agendas*--consist of collections of vagaries couched as "goals" expressed in incredibly broad terms.

The current Judicial Council Governance Policies, ensconced in the Title Ten Rules of Court and enacted without a public comment period or vote of the Council, allow the AOC to use whatever means it wishes to implement these goals. For example, the Council declares vaguely that it wishes "increased access to justice," pats itself on the back (often handing out awards in the process) and then turns the AOC loose on the world to "implement" that goal as it sees fit, often with little guidance, oversight, or apparent care as to how this occurs, and with no measure of success or failure. When

an agency is given a blank check to access trial court operating funds to implement policy declarations that are (1) beyond the Council's charter and (2) so vague as to allow almost any interpretation and any AOC action, the recipe for disaster has been written. CCMS, which wasted over half a billion dollars of precious funds, was but one example of the failure of this approach. Yet this is exactly the way our branch has operated since roughly 1997.

As the Council's expansive and extralegal view of its own powers caused it to steadily encroach into areas well beyond those allowed by Article VI, the AOC, in the words of an AOC director, "grew and changed like a coral reef--seemingly without a definite or purposeful form." At its height, it had over 1100 employees, or two AOC staffers for every three of the state's judges. It changed culture, as the SEC found, from service to control, and was not above prevarication to protect its expansion. Year after year, the Council enabled this conduct, both by ignoring its *own* limits, and by failing to provide even a modicum of control of the AOC, which carried out its own agenda as often, or more, than it followed the dictates of a part-time and often compliant Council.

4. The Approach Advocated by Mr. Kelso and Some on the Council Would Frustrate Reform and Further Damage the Judiciary

Though it is by now clear that most if not all of this state's judges demand change, some seek to protect what has become their private fiefdom, where unelected Council members and bureaucrats make sweeping policy pronouncements for the rest of us, and fuel the resulting projects with ever-more-scarce trial court funds. Often, these individuals are not members of the judiciary and have little apparent appreciation of the proper role of a judge, or of the fact that ours is not a policymaking branch or a legislature, but foremost a system for dispute resolution.

As an example, Mr. Clark Kelso, a policy advisor long closely associated with the AOC--he draws his pay through that agency, along with state benefits, though he works for the federal courts as a prison receiver--urges the Council to move slowly if at all on the SEC recommendations. He has submitted a lengthy comment (though fortunately for the reader not as lengthy as mine) that requires an answer, as it expresses views I surmise are shared by Ms. Krinsky, Judge Yew, former Judge Friedman, and several others on the Council who favor an unrealistically expansive view of the role of the AOC.

Mr. Kelso insists that a new AOC director be in place before the Council takes any action on the SEC report, and asks that this new director be allowed to decide how to implement change. In the meantime, he states that he trusts Ms. Patel, the latest interim director, to institute whatever reforms she thinks appropriate. In making this argument, he fails to accept the fact that it is the *Council*, and not the future director who must determine how the agency should be reformed--that is solely and clearly the job of the Council. There is no reason to allow a temporary interim director, who has made it clear she has no interest in the permanent post, to set her own agenda for change, or the lack thereof. In suggesting otherwise, Mr. Kelso inexplicably ignores the SEC's

finding that the habitual abrogation of the Council's duty to control the AOC is a large part of the problem.

Frankly, it appears that Mr. Kelso is simply stalling. Undoubtedly, when a new director eventually appears on the scene, Mr. Kelso will complain that it would be unfair to require swift action. Perhaps he will then suggest yet another study, and another, and another. We have all recently gone down a quite similar road, leading us to this point. I believe that Mr. Kelso clearly underestimates the anger and frustration of the state's judges. They will not wait for Mr. Kelso to finally determine that the time is ripe to move forward.

Mr. Kelso should simply come out with it--he disagrees with the SEC's findings, and is quite satisfied with the status quo. He bristles at the commonsense notion shared by most of us that the AOC is a service provider, and shares the agency's view that its role, along with that of the Council, is to oversee the trial courts. He has long labored to ensure that result.

Several years ago, former Chief George apparently came to the quite reasonable--and for him quite unacceptable--realization that Article VI as currently worded truly did not grant the Council the power it needed to legitimately claim the mantle of branch policymaker. Thus, in his 2006 State of the Judiciary Speech he urged the legislature to assist in his efforts to amend Article VI to make that policymaking power explicit. Mr. Kelso, AOC "scholar in residence" Roger Warren, former Senator Joe Dunn, and similar like-minded individuals helped pave the way for this effort and joined the Chief in his mission, Kelso authoring "*Why Article VI Needs Work*" for the Judicial Council's house organ, "*California Courts Review*," and stumping for constitutional change. Unpersuaded, the Legislature and the judiciary wisely balked at giving the Council this power (even though the proposed amendment included a carrot of 10 year judicial terms of office) and the amendment failed.

Shrugging off the defeat, and the now rather obvious lack of Constitutional authority, former Chief George took a *realpolitic* approach, continuing to exercise ever-increasing Council power over the courts. In 2009 Kelso made clear his agreement with this approach in "*Access to Justice, a Broader Perspective*," which he co-wrote with then-AOC director William Vickrey and Joe Dunn. In that article, he treated the idea that the Council is primarily a recommending body as merely a historical artifact rather than a Constitutional mandate. Today, Mr. Kelso persists in the view that the role of the Council is to enact sweeping branch policy and that the role of the AOC is to carry out these policies as it sees fit, and thus that the size and scope of the AOC must be concomitant with, and is simply the natural product of, these roles.

Mr. Kelso puts it this way: "The AOC's role, programs, organization, and staffing depend very directly upon what the Council *believes* [emphasis mine] the relationship should be between trial court and statewide governance, and the mechanisms by which the trial courts will be held accountable for performance in a state funded context. The spotlight

needs to be put on this issue first, not upon ‘fixing’ the AOC when a much more fundamental issue is on the table.”

I respond that the spotlight must not be on what the Council *believes* its proper role to be, but instead upon the *law which already clearly defines that role.* That law exists in Article VI, section 6(d). Thus, the “fundamental issue” that Mr. Kelso insists must be dealt with before we even consider implementation of the SEC recommendations has already been settled, though Mr. Kelso and some others continue to behave as if he and former Chief George had succeeded in their attempt to change the law in 2006, rather than failed.

As to the debate regarding the AOC, that has also taken place, over several quite acrimonious years, and the final scorecard now exists in the form of the SEC report, which the current Chief Justice has publicly described as “the Bible.” It is beyond time for the Council to implement its recommendations. If they fail to do so, they should not be heard to complain if those outside the judiciary step in and do it for them.

Respectfully submitted.

Charles Horan
Retired Judge of the Los Angeles Superior Court