# The Ninth Circuit: Should It Stay or Should It Go?

*Scott Bales*[*]

When it comes to court restructuring, the U.S. Department of Justice (the "Department") holds firmly to the view that "if it ain't broke, don't fix it."[1] Recognizing that the Commission on Structural Alternatives for the Federal Courts of Appeals (the "White Commission") has commendably studied and proposed ideas for organizing the appellate courts, the Department has consistently opposed the White Commission's specific recommendations for structural change. The Department's position can be briefly stated:

> We think any divisional structure would diminish the uniformity of federal law and would delay, rather than improve, the administration of justice.... Restructuring the Ninth Circuit Court of Appeals—our largest Court of Appeals—on an untried divisional basis would be disruptive for litigants and the 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 the Ninth Circuit generally operates well, the need to try

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* Scott Bales is the Arizona Solicitor General. He formerly served as a Deputy Assistant Attorney General in the Justice Department's Office of Policy Development and as an Assistant U.S. Attorney for the District of Arizona. The views expressed are his own and are not a statement of position by the Arizona Attorney General's Office or the Justice Department.

[1] *Cf. Hearing before the Comm'n on Structural Alternatives for the Federal Courts of Appeals*, San Francisco, California (May 29, 1998) (statement of Judge James R. Browning, United States Court for the Ninth Circuit) (noting "[i]f it isn't broken [and it isn't] don't fix it."); *Oversight Hearing Concerning the Final Report of the Comm'n on Structural Alternatives for the Federal Courts of Appeals Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. (1999) [hereinafter *House Oversight Hearing*] (statement of Judge Pamela A. Rymer, Member, Comm. on Structural Alternatives for the Federal Courts of Appeal) (noting "[i]nstead of splitting a circuit that 'ain't broke,' fix the appellate court that is.").

non-structural reforms first is even more compelling.[2]

The following remarks do not attempt to restate or defend the Department's position. Instead, I discuss three issues raised by the White Commission's Report (the "Final Report") and the Department's response to the Final Report. Those issues are: 1) how do we evaluate the performance of the courts of appeals; 2) when should structural changes occur; and 3) which branch of government should decide to make those changes. I conclude by noting two issues that will persist whatever is done with the Ninth Circuit's structure: the California or "big state" problem and the continuing growth in caseloads. These comments are merely my own views, although formed by my having worked at the Justice Department and, more recently, by representing the State of Arizona in Ninth Circuit cases.

## CONSISTENCY IN TALKING ABOUT CONSISTENCY

Both the White Commission and the Department recognize "consistency" as the primary criterion for evaluating the performance of a circuit court of appeals. So how do they reach such different conclusions concerning the desirability of restructuring the Ninth Circuit?

The White Commission and the Department agree on many things. In particular, they agree that a split or other restructuring is not required for reasons other than "consistency." They both recognize that restructuring the Ninth Circuit is not required based on concerns for "efficiency." As the Final Report declares, "[t]here is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively."[3]

Neither the White Commission nor the Department suggests that "regional sensitivity" is a concern that justifies structural change. The Final Report acknowledges that some proponents of realigning the Circuit contend that "judges from other regions, especially California, decide cases involving their way of life with insufficient appreciation of

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[2] Letter dated May 19, 1999, to Senator Dianne Feinstein from Jon Jennings, Acting Assistant Attorney General, Office of Legislative Affairs [hearinafter Jennings Letter] (on file with author).

[3] Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 29 [hereinafter Final Report]. Citations to Final Report can be found at http://app.comm.uscourts.gov (last visited Oct. 25, 2000). Hard copies of all cited Final Report documents are on file with the UC Davis Law Review.

the legal problems that way of life engenders."[4] This concern, however, is not adopted by the White Commission to support its recommendation for divisional restructuring. The Department does not consider "regional sensitivity" to be a legitimate concern at all, at least as far as federal law is concerned.[5]

The Department focuses on "consistency" in evaluating structural change. Testifying before Congress, Assistant Attorney General Eleanor Acheson stated that "[t]he touchstone of any assessment of any proposal to modify the Circuit's procedures should be its ability to enhance the uniformity of the Circuit's interpretation of federal law."[6] Similarly, she observed that "[i]t is of paramount importance that federal law be interpreted consistently regardless of the location of the court or the composition of the judicial panel."[7]

Why then has the Department consistently opposed the White Commission's proposals, which are intended to increase the "consistency and coherence" of the law?[8] The answer may lie in the fact that the White Commission and the Department seem to use the term "consistency" in two different ways. The Department tends to stress consistency in terms of ensuring that, on any particular issue, federal law means the same thing in different places at the same time. For example, for purposes of the sentencing guidelines, the same conduct should yield the same offense level whether the defendant is in California or Washington. Similarly, whether an environmental assessment is sufficient instead of an environmental impact statement should not depend on whether the U.S. Forest Service project is in Idaho instead of Arizona.

The Department thus focuses on "consistency" in a static sense. Given this focus, it is not surprising that the Department resists suggestions to split or restructure the Ninth Circuit into semi-autonomous adjudicative units (which of course threatens to create inconsistencies among such

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[4] *Id.* at 36.

[5] The Department has noted: "We 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." Jennings Letter, *supra* note 2, at 3. The Department did recognize that "[i]f 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 . . . ." *Id.*

[6] *House Oversight Hearing*, *supra* note 1 (statement of Eleanor D. Acheson, Assistant Attorney General, Office of Policy Development).

[7] *Id.*

[8] *See* Final Report, *supra* note 3, at 40.

units) and instead supports the increased use of en banc hearings within the existing structure.

The White Commission, it seems to me, gives more weight to "consistency" in a dynamic sense. The Final Report notes, "[i]n our common law system, consistency and predictability have to do with the coherence of the law declared over time."[9] Consistency in this regard concerns whether, as case law develops, the reasoning within particular substantive areas is coherent and the results are therefore more predictable. Toward this end, the Final Report notes that smaller decisional units may allow the pre-issuance circulation of draft opinions among all members of the court, a greater willingness to take cases en banc, and more accountability among the judges themselves.[10]

The type of consistency noted by the White Commission is something that cannot be measured objectively, but instead turns on the subjective impressions of judges and lawyers. This point in turn raises the issue of what showing should be required to justify structural changes to the courts of appeals.

## WHEN SHOULD YOU CHANGE A CIRCUIT'S STRUCTURE?

The Department of Justice and the White Commission also differ significantly in their openness to structural change for the circuit courts of appeals.

The Department takes a very conservative view towards structural experimentation. In various forums, the Department has stated that, "all available means of non-structural reform should be attempted and assessed before structural changes are imposed on the federal courts."[11] This approach is consistent with the *Long Range Plan for the Federal Courts* adopted by the Judicial Conference in 1995. That plan observed, "[c]ircuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload."[12]

The resistance of the Department to structural change in part reflects its role as a frequent litigant. The Department, through its various components including the U.S. Attorney's Offices, participates in about

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[9] *Id.*

[10] *Id.* at 29-30.

[11] *House Oversight Hearing*, *supra* note 1 (statement of Eleanor D. Acheson).

[12] JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 44 (December 1995).

40 percent of all Ninth Circuit cases. Because it litigates so often, the Department will acutely feel whatever disruption results from structural change. Moreover, the Department itself is comprised of several different components and constituencies that may have strongly differing views on the desirability of structural reforms or other legal changes. When you cannot form a consensus for change, the familiar sometimes become the preferred position by default.

The White Commission takes a more flexible, experimental approach to structural change. After reviewing the "objective data" concerning the performance of federal courts, the Final Report acknowledges, "we cannot say that the statistical criteria tip decisively in one direction or the other."[13] Rather than argue that structural change is required because the Ninth Circuit is demonstrably "broken" by any objective criteria, the Final Report observes that smaller decisional units are necessary to achieve "collegiality" in the sense of close, collaborative decision making.[14]

Collegiality "cannot be quantified or measured," and the White Commission admits that it "make[s] no attempt to do so with respect to the Ninth Circuit Court of Appeals or any other."[15] Instead, the White Commission observes, "[i]t is our judgment that the consistent, predictable, coherent development of the law over time is best fostered in a decisional unit that is small enough for the kind of close, continual, collaborative decision making that 'seeks the objective of as much excellence in a group's decision as its combined talents, experience, and energy permit.'"[16]

By advocating structural change based on "subjective" perceptions, the White Commission rejects the more restrictive views of those, like the Department, who support structural changes only when compelled as a last resort. Whether courts should be more or less open to structural change is an interesting question, and one made more timely as our world generally is being rapidly transformed by technology and demographic changes.

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[13] Final Report, *supra* note 3, at 39.

[14] *Id.* at 40.

[15] *Id.*

[16] *Id.* (footnote omitted).

## WHO SHOULD DECIDE WHEN TO MAKE A STRUCTURAL CHANGE?

One of the more innovative aspects of the Commission's Final Report is its recommendation that Congress statutorily authorize the circuit courts to implement three structural reforms: 1) divisional structures; 2) two-judge appellate panels; and 3) district court appellate panels. This recommendation is meant to provide "a flexible statutory framework to allow, not require, courts to experiment with [the] three innovations."[17] Adoption of any of the innovations would be at the discretion of a particular circuit court of appeals or, for district court appellate panels, the judicial council of the circuit.

The Final Report, however, takes an inconsistent approach in affording the courts of appeals the choice to implement structural reforms. The Final Report recommends that the divisional structure be required for the Ninth Circuit, but that it should be optional for other circuits even as they grow beyond the size that the White Commission believes is too large to effectively function.[18] In the words of Chief Judge Hug, the Ninth Circuit would be "conscripted as the guinea pig" to implement the proposed divisional structure.[19]

This very inconsistency raises other more general issues. One issue is when, if ever, structural change should be imposed on an effectively working court of appeals over the opposition of most of its judges. The views of the Ninth Circuit judges were not given decisive weight by the White Commission, as it acknowledged that most of them opposed realigning the circuit and favored keeping its current configuration.[20] Similarly, most of the district judges in the Ninth Circuit opposed restructuring, as do most of the lawyers and law-related organizations that have commented on the White Commission proposals.[21]

Another issue is whether the judges of a circuit should themselves be allowed to alter its appellate structure. Changes in the federal appellate structure have generally been made by Congress. Whether this is

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[17] *Id.* at 60.

[18] The draft report by the White Commission would have required circuits to adopt a divisional structure once they had seventeen or more active judges. This proposal was opposed by the chief judges of eight circuits other than the Ninth. The final report makes the adoption of the divisional structure optional at the discretion of any Circuit that has fifteen or more active judges.

[19] *House Oversight Hearing, supra* note 1 (statement of Chief Judge Procter Hug, Jr., United States Court for the Ninth Circuit).

[20] Final Report, *supra* note 3, at 37-38.

[21] *See House Oversight Hearing, supra* note 1 (statement of Chief Judge Procter Hug, Jr.) (describing comments by various entities on Commission proposals).

desirable, and whether it would be preferable to delegate the decision to make such changes to the judges of particular circuits, are fairly debatable issues. With regard to the circuits generally, the White Commission seems to presume that the judges themselves are best able to recognize when structural changes are necessary and they should be allowed flexibility in experimenting. This is somewhat at odds with the Final Report's conclusion that Congress should itself require divisional restructuring of the Ninth Circuit because courts larger than seventeen judges cannot function effectively.

## CAN THE CALIFORNIA PROBLEM BE SOLVED?

Any proposal to split or restructure the Ninth Circuit must confront the "California problem." The "big state problem," as Judge Rymer has observed, "is not easily solved."[22] California alone has a population and caseload greater than that of most circuits, and a disproportionate number of cases arise in California as compared to the number of active judges who now reside there. California accounts for nearly two-thirds of the Ninth Circuit's cases, yet fewer than half of the active judges are based in California.[23]

Because a disproportionate number of cases come from California, any effort to split the Ninth Circuit will increase the per judge caseloads for those judges who remain in California's circuit. The White Commission responded to this problem by proposing that California be divided between two divisions. Even with the divisional structure, it would still be necessary to regularly assign judges across divisions to help deal with California cases.[24]

The proposal to divide California between two divisions has evoked strong opposition on several fronts. California itself could be one division or a circuit, but this again would exacerbate the caseload problem. It also would create a court that is too big according to the White Commission's standards. Judge Rymer noted in her congressional testimony "a 'California' division with an adequate number of judges to handle the caseload would immediately be too large to function well."[25]

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[22] *Id.* (statement of Judge Pamela A. Rymer).

[23] Twelve of the currently authorized active judgeships are held by California residents.

[24] New judgeships could also be created to deal with the caseload problem, but that seems an unlikely possibility.

[25] *House Oversight Hearing*, *supra* note 1 (statement of Judge Pamela A. Rymer).

Neither splitting California nor placing it in its own circuit appears to be a desirable alternative. California may indeed be a problem without solution, at least when it comes to circuit structure.

## WHERE ARE WE HEADED GIVEN CASELOADS?

The White Commission notes that structural issues are "profoundly affected by the volume of appeals."[26] "That volume, in turn, is significantly driven by the jurisdiction of the federal district courts."[27] Likely trends in the volume and source of appeals should be considered in evaluating any structural changes.

Legislation to implement the White Commission recommendations was proposed in 1999 as the Ninth Circuit Reorganization Act.[28] Last year, yet another proposal for structural change was introduced as the Ninth Circuit Court of Appeals Reorganization Act of 2000.[29] This bill proposed to split the Ninth Circuit in the manner described as "Option A" in the Final Report. This split would create a new Ninth Circuit comprised of California, Arizona, and Nevada and a new Twelfth Circuit comprised of the other States and territories now in the Ninth Circuit. Neither of these bills was approved, but similar legislation may be proposed in the next Congress.

Existing and anticipated caseloads suggest we should be cautious about any proposal to restructure the Ninth Circuit by combining Arizona and Southern California in the same division or circuit. In recent years, the growth in appellate caseloads has been driven in significant part by increased filings of criminal and criminal-related appeals. Such cases, including direct criminal appeals as well as habeas and other prisoner-related civil cases, now account for about half of the Ninth Circuit's appellate caseload.[30]

What accounts for the growth in criminal appeals? A major source is border-related drug and immigration cases. Drug and immigration cases now account for nearly 47 percent of all criminal case filings in the district courts.[31] In fiscal year 1999, more than 27 percent of all new

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[26] Final Report, *supra* note 3, at 6.

[27] *Id.*

[28] S.253, 106th Cong. (1999).

[29] S.2184, 106th Cong. (2000).

[30] *See* Administrative Office of U.S. Courts, *Judicial Business of the United States Courts: 1999 Annual Report of the Director*, Table B-7 [hereinafter *1999 Annual Report*]; Final Report, *supra* note 3, at 15.

[31] *See* Chief Justice William H. Rehnquist, *1999 Year-End Report on the Federal Judiciary* at n.2 [hereinafter *1999 Year-End Report*]. Previously found at

federal criminal filings originated in just five southwest border districts: the Southern District of California, the District of Arizona, the District of New Mexico, and the Western and Southern Districts of Texas.[32] Chief Justice Rehnquist has observed that "[f]ederal courts in the U.S. border areas face a crisis in workload created by an unmanageable number of immigration and drug-related cases."[33] Such cases already account for more than half of all criminal appeals and nearly 13 percent of all appeals in the Ninth Circuit, and those percentages are headed upward.[34]

Also fueling the growth in appellate caseloads, in both civil and criminal cases, is the rapid population and economic growth that has occurred in the Southwest. In the 1990s, Nevada and Arizona (along with Utah) had the highest rates of job growth nationally. In 1999, Nevada and Arizona had, respectively, the first and second highest rates of population growth.[35] California had the largest total increase in population, growing by more than 450,000 people to an estimated population of 33.1 million by July 1999.[36] By that time, Arizona had a population of nearly 4.8 million, and Nevada more than 1.8 million.[37]

These caseload trends suggest several conclusions. A new Ninth Circuit, as contemplated by the Ninth Circuit Court of Appeals Reorganization Act of 2000, would immediately be too large under the White Commission's criteria. The proposed split would also create a substantial disparity in caseloads between the new Ninth Circuit and the new Twelfth Circuit.[38] The size-associated problems for the new Ninth Circuit would likely be compounded over time as a result of combining California with the two most rapidly growing States in the current Ninth

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http://www.uscourts.gov/chief99.html (on file with UC Davis Law Review). Currently found at http://www.uscourts.gov/ttb/jan00ttb/jan2000.html (last visted Oct. 25, 2000) without the endnotes.

[32] *1999 Annual Report, supra* note 30, Table D-3 at 219-21.

[33] *1999 Year-End Report on the Federal Judiciary, supra* note 31.

[34] *See 1999 Annual Report, supra* note 30, Table B-7 at 123-24.

[35] Population figures are from the U.S. Census Bureau, State Population Estimates, available at www.census.gov/population/estimates/state/st-99-5.txt (last visted Oct. 23, 2000).

[36] *Id.*

[37] *Id.*

[38] The Final Report notes if the existing Ninth Circuit were split under "Option A," the new configuration would immediately result in the judges in the new Ninth Circuit having 119 more weighted filings (331) per judge than the active judges in the new Twelfth Circuit (212). *See* Final Report, *supra* note 3, at 54, n.114. These figures would change somewhat if adjusted for more recent caseload data and new appointments to the Court of Appeals, but the basic point remains: because California accounts for more than two-thirds of the cases but fewer than half the judges, splitting the circuit increases per judge caseloads for the new circuit comprising California.

Circuit, particularly since Arizona's caseload is heavily affected by border-related cases. If it is time to split the Ninth Circuit, perhaps it is also time to revisit the desirability of a one-state circuit and the possibility of realigning other circuits in light of existing and anticipated caseloads.