Implications of the White Commission

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As you are all painfully aware, the debate about the Ninth Circuit has consumed many decades and many decibels. Several years ago a bill passed the Senate that would have split the circuit into a new Ninth Circuit of California and Nevada and a new Twelfth of all the rest. However, the House disagreed and the Ninth Circuit convinced the Congress that the circuit should not be split before an independent study was conducted. So the Commission on Structural Alternatives for the Federal Courts of Appeal, which is known as the White Commission for reasons both of ease and affection, was established to do just that. So the commission conducted an extensive study of circuit configuration and of the structure and alignment of the federal appellate courts "with particular reference to the Ninth Circuit" as it was charged to do.[1]

Our study produced several findings: we found that caseloads in general are continuing and are likely to continue to increase[2]; that the jurisdiction of the Federal Courts is not likely to be decreased enough to make a difference[3]; that there are limits to the number of judges who can sit together effectively as a single decision-making body[4], that innovative procedures are a help but not a cure[5]; and that because we lack a crystal ball, structural flexibility should be built into the system for the future.[6]

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[*] Judge Rymer was appointed United States Circuit Judge for the Ninth Circuit on May 24, 1989. Prior to her appointment to the appellate branch, Judge Rymer served as United States District Court Judge for the Central District of California from 1983 until 1989 and practices privately from 1966 until 1983.

[1] *See* Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 2 (1998) [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.

[2] *See id.* at 14.

[3] *See id.* at 67-74.

[4] See *id.* at 34-35, 47.

[5] See *id.* at 59-68.

[6] See *id.* at 60.

With particular reference to the Ninth Circuit, we concluded that the circuit, which is an administrative entity with no adjudicative responsibility, should not be fixed because it isn't broke. However the court of appeals, which is an adjudicative body, is broken with respect to the Ninth Circuit because it is too big and cannot be fixed without structural change.[7] The commission therefore recommended that the Court of Appeals for the Ninth Circuit be restructured into adjudicative divisions, but that the circuit not be split.[8] A bill was introduced into the Senate to accomplish this. Hearings were held, but nothing happened until a few weeks ago when another bill was introduced to split the circuit. This time into a new Ninth consisting of California, Arizona, and Nevada, and a new Twelfth consisting of all the rest. The response will surely be: This requires further study.

So, returning full circle to the White Commission, it is hard to say that it was a pleasure to be assigned to this task. However, it certainly was an extraordinary privilege to work on it with Justice White, Judge Merritt, Former Chief Judge Bill Browning from the District of Arizona, and Lee Cooper, former president of the American Bar Association. The Commission recognized that while the Ninth Circuit was the impetus for our creation, the mandate for study was larger and included the federal appellate system as a whole, both in its present condition and its future capacity. Of course, we did not start from scratch but from a substantial inheritance of valuable studies, as Thomas Baker mentioned.[9] We also had limited time and resources. However, we thought it was important to get as much information as possible about how the system works now, what assumptions should be made about the future, and how the judges, as well as consumers and commentators envisioned the system as a whole, and the Ninth Circuit in particular, in the years to come.

We consulted with Thomas Baker, John Oakley, Arthur Hellman, and other scholars about their research. We studied the alignment and the governance of circuits historically. We held public hearings in Atlanta, Dallas, Chicago, San Francisco, Seattle, and New York. We received written submissions from many people, including the majority of the United States Supreme Court and we met with representatives of the Department of Justice and the White House Counsel. Also, we surveyed

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[7] See *id.* at 47.

[8] See *id.* at 40.

[9] See Thomas Baker, UC Davis School of Law Symposium, *Managing the Federal Courts: Will the Ninth Circuit be a Model for Change?* (Transcript of Videotape No. 1 at 5) (March 24, 2000.) Hereinafter the transcripts of the symposium videotapes will be referred to as *Symposium Transcript.* All transcripts are on file with UC Davis Law Review.

all federal circuit and district judges. Over 80 percent responded, which, I think, shows either a higher level of interest than one might have imagined, or a lower level of workload than I might have assumed. We also surveyed a random assortment of lawyers who appeared in federal appellate courts in the last three years. Their response rate was not nearly as high and that must show how much more valuable their time per hour is than for judges. And, finally, we gathered volumes of data on case management procedures from the chief judges on all the circuits.

Several things emerged clearly. Caseload has grown and grown substantially but the number of appellate judges has not. Appellate courts, including in particular the Ninth Circuit, have stepped up to the plate by adding staff, treating different cases differently, encouraging mediation, borrowing judges from out of circuit and from district courts, and adapting technology to track issues and coordinate their disposition more effectively and efficiently. But, there is a limit to Article III judges' ability to continue to do so while continuing to render decisions that are and perceived to be fairly and fully considered. Most circuit judges, two-thirds overall, and one-third of my colleagues on the Court of Appeals for the Ninth Circuit, believe that the maximum number of judges for an appellate court to function well lies somewhere between 11 and 17. The reason is that beyond this range there are too many judges to sit together en banc as a full court to develop and maintain a coherent, consistent, and predictable body of law; to read all of the court's output and to keep personally abreast of what court is holding; to hold each other accountable for opinions that speak for the court, and to sit with colleagues on panels regularly enough to understand each other's jurisprudence and how to relate to it. The conundrum is obvious: how to have enough judges to deal with caseload pressures, yet still be few enough to sit and serve together as a true appellate court.

Interestingly, no one from whom the Commission heard had a ready answer. Traditionally, the solution has been to split circuits when the number of circuit judges needed to deal with a circuit's caseload has gone beyond a tolerable size. That's what happened with the old Fifth, and the old Eighth. But to add to the conundrum, it appeared to us from our study that the circuits, including the Ninth Circuit, are administering their courts effectively.[10] To carve up a circuit is costly, both in dollars and disruption. And to create more circuits, each with its own law, has a Balkanizing effect rather than a federalizing effect. Besides this, only two other regional circuits could be split into survivors of at least three states

[10] Final Report, *supra* note 1, at 29.

each, even if they become too big in the future. Few people think that one state circuits are a good idea for a federal court declares federal law can speak beyond the boundaries of a single state. The upshot is that circuits do not suffer from size, but appellate courts do. While I am sure it is self-evident to everyone in this room, it is critical to the White Commission's recommendation that a circuit is a distinct animal from the court of appeals. Because we call federal appellate judges "circuit judges" and federal courts of appeal are frequently referred to as the "circuit court", it is easy to think of them as the same thing - but they are not. A circuit is simply an administrative entity that governs all of the judges in all the courts within the geographic area that it covers, district, bankruptcy, magistrate, as well as appellate. But unlike the appellate court, the circuit has no adjudicative role that is collegial in nature. By collegial, as the commission indicated, we do not mean that the judges get along, enjoy each other's company, and have a good time at dinner together.[11] By collegial, the commission means a body of judges who work together over time, not as individuals, but as a collective body to develop a coherent and predictable body of law for the jurisdiction that they cover.[12]

From the difference between a circuit and a court of appeals, it follows that there is an alternative for achieving a court of optimal size to splitting circuits or to combining them, for that matter, should case trends reverse. That is to restructure the court itself. A court that needs more judges to handle a caseload than can sit together in a true en banc can do its work through adjudicative divisions. There are a zillion different possible permutations of a divisional concept. A few of them are: For the Ninth Circuit, the Commission recommended three semi-autonomous divisions, each consisting of 7-11 judges chosen at random from throughout the circuit, but with a majority who are from the division; with a "circuit division" of 7 to 13 judges to maintain circuit-wide uniformity on issues where consistency is important to the circuit but on which the division have to take squarely conflicting positions.[13]

The exact scenario is not critical for the Ninth Circuit or for any other. The important points are that the work of any court of appeals can be done through any number of divisions between 7 and 17 judges each. The exact number depends on how many judges are needed to handle the caseload comfortably while allowing judges on each division to sit

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[11] *See id.* at 34-35, 40.

[12] *See id.*

[13] *See id.* at 43-47.

regularly every other judge, to read and digest personally all of the court's decisions and to sit together as a full and a true en banc. And circuit-wide uniformity can be maintained as it has been except through a limited en banc procedure. There is no question that this is not a perfect solution, much less a popular one. But it is an alternative that preserves the administrative advantages of a larger circuit and the adjudicative advantages of a smaller court. It is also infinitely flexible up, down, or sideways. And it retains both the regional routes, and the federalizing of our historical circuit system.

In sum, for myself and I believe for all of us who participated in it, the work of the White Commission was interesting, challenging and I hope constructive.

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