

NEWS RELEASE

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CIRCUIT EXECUTIVE

Adopted by the ABA
House of Delegates
August 1999

CIRCUIT RESTRUCTURING

RESOLVED, that the American Bar Association opposes enactment of legislation that mandates restructuring of the Ninth Circuit Court of Appeals into adjudicative divisions, in view of the absence of compelling empirical evidence to demonstrate adjudicative dysfunction.

FURTHER RESOLVED, that the American Bar Association opposes the creation of district court appellate panels within the circuits.

FURTHER RESOLVED, that the American Bar Association opposes the use of two-judge panels by any federal appellate court.

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REPORT

I. BACKGROUND

The federal courts of appeals have been the subject of intense study and debate for almost three decades, primarily because of concerns generated by the dramatic and persistent growth in federal appellate caseload.¹ The Ninth Circuit Court of Appeals -- the largest circuit in terms of geographical size, population served, number of judgeships, and total caseload -- has often been at the vortex of the debate.

In 1973, the Hruska Commission, properly called the Commission on Revision of the Federal Court Appellate System, recommended that Congress split the Fifth and Ninth Circuits. Congress rejected the recommendation of the Hruska Commission and instead permitted circuits with 15 or more judges to adopt innovative measures, such as the use of limited en banc panels and administrative units to deal with rising caseloads.

After considerable study by the respective judicial councils of each circuit, the Ninth Circuit chose to adopt these new procedures and the Fifth Circuit chose to petition Congress for division. Congress complied and in 1980 divided the Fifth Circuit into what are now the Fifth and Eleventh Circuits.

Even though the Ninth Circuit's judicial council concluded that the various techniques adopted in the 1980s were working well, some members of Congress who reside in the Pacific Northwest persisted in offering legislation to split the Ninth Circuit into various configurations. During one of the latest attempts to force Congressional consideration of the issue, proponents tried to attach an amendment to split the circuit to an appropriations bill. Disagreement erupted and, in lieu of such an amendment, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals.² The Commission was directed to study the structure and alignment of the federal appellate system, with particular reference to the Ninth Circuit, and to submit its final recommendations regarding changes in circuit boundaries or structure to the President and to Congress by December 1998. Chief Justice Rehnquist appointed

¹ See THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL 39-45 (1993.) According to Mr. Baker, the American Bar Foundation commissioned the first study to focus on the burgeoning federal appellate caseload. Published in 1968, it was called *Accommodating the Workload of the Federal Courts*. See also Federal Judicial Center, STRUCTURAL ALTERNATIVES FOR THE COURTS OF APPEALS, 1993.

² Pub .L. No. 105-119.

Retired Justice Byron R. White, past ABA president N. Lee Cooper, Judge Gilbert S. Merritt, Judge Pamela Ann Rymer and Judge William D. Browning to the five-member commission. Justice White and Mr. Cooper were elected chair and vice-chair, respectively. The Commission is commonly referred to as the "White Commission."

The White Commission conducted six public hearings and received more than 90 written comments as it prepared its draft report. Once the draft was released on October 7, 1998, public comment was invited, and over 80 organizations and individuals responded. The Final Report was submitted to Congress and the President on December 18, 1998.³

This recommendation and its accompanying report propose an ABA policy response to the legislative recommendations of the White Commission and to S. 253, implementing legislation introduced by Senators Gorton (R-WA) and Murkowski (R-AK) during the opening days of the 106th Congress.

II. CURRENT ABA POLICY REGARDING CIRCUIT RESTRUCTURING

One of the primary goals of the American Bar Association is "to promote improvements in the administration of justice." It is therefore not surprising that the ABA has examined the issue of federal circuit restructuring on several occasions over the past twenty-five years.⁴

Our most recent review was prompted by the creation of the White Commission. A distinguished ABA Working Group on Structural Alternatives for the Federal Courts was appointed to examine whether structural change to the federal appellate court system now is needed in light of changed circumstances and increasing caseloads. Its members included Professor Charles Alan Wright, Lawrence J. Fox, John P. Frank and Jerome J. Shestack. The Working Group's proposed resolution was presented to the Board of Governors in April 1998 to enable the ABA to testify before the Commission.

³ COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS, FINAL REPORT (1998).

⁴ AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 55 (August 1998). *See* accompanying report for detailed explanation.

The policy, adopted by the Board, states:

RESOLVED, That the American Bar Association opposes restructuring the Ninth Circuit Court of Appeals in view of the absence of compelling empirical evidence to demonstrate adjudicative or administrative dysfunction;

FURTHER RESOLVED, That the American Bar Association, based on compelling empirical evidence, does not support any other restructuring of the federal circuits at this time;

FURTHER RESOLVED, That the American Bar Association supports ongoing efforts by the federal circuit courts of appeal to utilize technological and procedural innovations in order to continue to enable them to handle increased caseloads efficiently while maintaining coherent, consistent law in the circuit.

The appropriate standard to be used in making decisions about circuit restructuring, in the Working Group's view, was the standard contained in the *Proposed Long Range Plan for the Federal Courts*, the final version of which was approved by the Judicial Conference of the United States in December 1995. The Association supported the Plan's recommendation regarding circuit restructuring and adopted it as part of its policy response to the *Long Range Plan* in August 1995. It states:

Each court of appeals should comprise a number of judges sufficient to maintain access to and excellence of federal appellate justice. Circuit 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.

This standard clearly embodies the principle that circuit restructuring is a remedy of last resort and should only be used if there is uncontrovertible evidence that justice is being denied to individual litigants and the integrity of law of the circuit is threatened.

The ABA believes that this very stringent standard is appropriate because circuit restructuring brings with it its own set of problems, including substantial start-up expenses for new construction or renovation of existing facilities and for relocation of personnel and tangible property, administrative disruption, and unpredictability of case law in circuits whose boundaries are moved.

III. FINAL RECOMMENDATIONS OF THE WHITE COMMISSION AND PROPOSED ABA POLICY RESPONSE

The White Commission concluded that the Ninth Circuit should not be split. Specifically, the Commission found that:

There is no persuasive evidence that the Ninth Circuit (or any other circuit for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.⁵

This conclusion concurs with the position adopted by the ABA in April 1998, and reflects the opinion of the majority of judges and lawyers in the Ninth Circuit as well.

While it opposed outright splitting, the Commission nonetheless recommended a major structural change for the Ninth Circuit, as well as structural options for the other circuits and courts of appeals in general, which will be discussed seriatim in the next section. These proposals were not advanced until after the ABA Working Group had completed its analysis and the Board of Governors had acted on its recommendations.

A. Mandatory Restructuring of the Ninth Circuit Court of Appeals into Adjudicative Divisions

Having rejected the notion of splitting the Ninth Circuit in order to solve perceived problems with consistency, predictability and coherence of circuit law, or out of concern solely for its size, the White Commission nevertheless recommended that Congress restructure the Ninth Circuit Court of Appeals into three regionally-based adjudicative divisions.⁶ Each regional division, consisting of 7 to 11 judges, would have exclusive jurisdiction over appeals from district courts within its region and would perform en banc functions as if it were a court of appeals. Conflicting decisions by regional divisions would be resolved by a newly created "Circuit Division" of 13 active judges, one of whom would be the chief judge of the circuit.

⁵ FINAL REPORT, *supra* note 2 at 29.

⁶ The three contemplated divisions are the Northern Division (Alaska, Idaho, Montana, Oregon, and Washington); Middle Division (districts of Northern and Eastern California, Hawaii, Nevada, Guam and the Northern Mariana Islands) and the Southern Division (Arizona and the Districts of Central and Southern California).

While it is clear that the Commission rejected the idea of completely splitting the Ninth Circuit because it did not favor restructuring the circuit's administrative function, based on an assessment of its current efficiency and the innovative opportunities afforded by its size, it is not at all clear why the Commission decided that restructuring the Ninth Circuit into adjudicative divisions was necessary. Its decision to recommend such a major structural change does not seem to be supported by its own findings and conclusions.

The Commission received the testimony and written statements of the Court's judges, lawyers, consumers, and other knowledgeable people, including recognized scholars in the field of federal appellate practice. Opinions were expressed on a range of topics, including the ability of the Ninth Circuit Court of Appeals to function effectively and in a timely matter; its ability to produce a coherent body of circuit law; its ability to perform its en banc function effectively; the administrative efficiency of the circuit; the effect of circuit size on collegiality, federalism and regionalism; and the practicality of dividing the circuit.

The Commission summarized the positions expressed in the testimony and written statements:

The position of the Ninth Circuit is that it is working well and that a great majority of judges and lawyers in the circuit are opposed to a split. Of the judges in the Ninth Circuit who expressed an opinion on our survey, 69.7% of the circuit judges and 67.6% of the district judges do not favor realignment of the boundaries of their circuit...Most of the Ninth Circuit judges who testified or submitted statements opposed a split....Most of the other testimony at the public hearing and in formal submissions to us, including comments on the Commission's tentative draft report, favor keeping the circuit as currently configured.⁷

In addition to soliciting the comments of others, the Commission engaged in its own analysis of the vitality of the Ninth Circuit. According to the Report, other "criteria informing the debate" had both objective and subjective components. Objective components included the number of cases a court disposes of relative to the number filed, how many cases are orally argued and how many are decided on the briefs, how many dispositions result in published opinions, unpublished memoranda, summary orders, etc. The Commission summarized its findings with respect to the objective criteria by saying, "We have reviewed all the available objective data routinely used in court administration to measure the performance and efficacy of the federal appellate courts, but we cannot say that the statistical criteria tip decisively in one direction or the

⁷ FINAL REPORT, *supra* note 2 at 37-38.

other.”⁸

As for subjective criteria, the Commission said:

Subjective criteria, such as consistency and predictability of the law, are obviously more difficult to evaluate but are widely regarded as a high priority for the courts of appeals. In the time allotted, we could not possibly have undertaken a statistically meaningful analysis of opinions as well as unpublished dispositions, dissents, and petitions for rehearing en banc to make our own objective determination of how the Ninth Circuit Court of Appeals measures up to others.”⁹

Instead, the Commission did its own survey of lawyers and district judges from the Ninth Circuit and nationwide. Respondents from the Ninth Circuit differed only slightly from their counterparts elsewhere in their dissatisfaction with the predictability and consistency of circuit law. Even these differences were minimized by the Commission, which concluded that “when all is said and done, neither we, nor we believe anyone else, can reduce consistency and predictability to statistical analysis. These concepts are too subtle...to allow evaluation in a freeze-framed moment”¹⁰

Even though it emphasized how important collegial deliberation was to the coherence of law declared over time, the Commission also conceded that it had no way of measuring the degree of collegiality among the judges of the Ninth Circuit or any other circuit.

The Commission’s decision that the Ninth Circuit requires structural reconfiguration into adjudicative divisions, therefore, is not supported by subjective or objective data, *or* by the majority of judges on the circuit and other survey respondents, *or* by the majority of individuals who testified or submitted statements for the record. On what other basis did the Commission make its determination that some form of restructuring was necessary?

The Commission clearly stated a philosophical preference for smaller divisional units.

It is our judgement that consistent, predictable, coherent development of the law over time is best fostered in a decisional unit that is small enough

⁸ *Id.* at 39.

⁹ *Id.* at 39.

¹⁰ *Id.* at 40.

for the kind of close, continual collaborative decision making that “seeks the objective of as much excellence in a group” decision as its combined talents, experience and energy permit.¹¹

By its own admission, therefore, the Commission based its decision to recommend adjudicative division of the Ninth Circuit on its belief that smaller decisional units would minimize perceived and identified problems with the predictability and consistency of the circuit’s case law and its limited en banc procedures.

Our judgement that the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals leads us to recommend a divisional arrangement that we believe will capitalize on the benefits of smaller decisional units while preserving the Ninth Circuit’s administrative efficacy and the economies of scale.¹²

In our view, the Commission’s., findings and stated preferences provide an insufficient basis for dividing the Ninth Circuit into the proposed adjudicative divisions or in any other manner.

The Commission has not produced compelling empirical evidence to demonstrate that justice is being denied to individual litigants and the integrity of the law is being threatened. In short, the Commission failed to demonstrate adjudicative dysfunction within the circuit -- the standard for circuit restructuring first enunciated in the *Long Range Plan for the Federal Courts* and adopted by the ABA in 1995.¹³

We have evaluated the Final Report of the Commission and do not find any new facts or evidence that was not available and evaluated by us during the preparation of our related April 1998 policy opposing restructuring of the Ninth Circuit. We therefore oppose the Commission’s recommendation for mandatory restructuring of the Ninth Circuit into adjudicative divisions by Congress, and in the process affirm our 1998 policy opposing circuit restructuring at this time.

Because we base our opposition to this proposed restructuring on the lack of compelling evidence in support of such a plan, we do not need to, nor do we chose to, comment on the relative merits of creating adjudicative divisions within large circuits.

¹¹ *Id.* at 40.

¹² FINAL REPORT, *supra* note 2 at 47.

¹³ Judicial Conference of the United States, LONG RANGE PLAN FOR THE FEDERAL COURTS 44 (1995).

We therefore take no position on the Commission's additional proposal to authorize, but not require, other circuit courts with 15 or more judges to restructure their adjudicative function by creating two or more adjudicative divisions.

B. District Court Appellate Panels

In addition to recommending the division of the Ninth Circuit, the Commission recommended that Congress authorize, but not require, circuit judicial councils to establish district court appellate panels (DCAP) and to specify by rule the categories of cases over which the DCAPs would have appellate jurisdiction. These appeals would be decided by panels of two district judges and one circuit judge, with any further appellate review only by leave of the court of appeals.¹⁴ The Commission suggested that diversity cases, sentencing appeals and cases requiring the application of well-settled legal rules were good prospects for DCAP jurisdiction.

As the Report points out, the concept of shifting a portion of the reviewing task to the trial court level, as a way to expand appellate capacity without incurring the costs associated with appellate court growth, has been discussed for at least a half a century,¹⁵ but little, if any, experimentation has been attempted. While some scholars see this as a viable, innovative option, judges do not appear to support it. As a matter of fact, the Judicial Conference of the United States voted this past March to oppose this particular recommendation of the Commission. We concur with their decision and supporting analysis.

We oppose creation of DCAPs for many reasons, not the least of which is that they would simply divert the workload for some appeals away from busy appellate judges to busy district court judges, a solution that simply creates another problem. Further, appellate courts already rely on the services of district court judges to help with their workload – by one estimate, about one fifth of the panel decisions in the courts of appeals utilized at least one district judge during the period from 1985 to 1995.¹⁶

¹⁴ FINAL REPORT, *supra* note 2 at 64-66.

¹⁵ For a discussion of the evolution of this concept, see generally Daniel Meador, *Enlarging Federal Appellate Capacity through District Level Review*, 35 HARV. J ON LEGIS 233 (1998).

¹⁶ Richard B. Sapphire and Michael E. Solimine, *Diluting Justice on Appeal? An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. Mich J L Reform, 351, 364 (1995).

Another major problem is that it would establish another tier in the appellate process which would require resources and the creation of a central support staff, similar to that required to support bankruptcy appellate panels. In those cases where additional review in the court of appeals was sought, DCAPs also would slow down the resolution of appeals and increase the cost to litigants

We also question whether the creation of DCAPs would help achieve the goals sought by the Commission, namely, improved predictability and collegiality in larger circuits. It seems more likely that they would produce the opposite effects.

Finally, we join the Department of Justice in questioning “whether the administration of justice would be served by creating a class of appellate courts inferior to circuit courts of appeals and assigning cases deemed to be less significant to them.”¹⁷

C. Two-Judge Appellate Panels

The Commission also recommended that Congress “authorize federal appellate courts to use two-judge panels and that it allow the courts to designate by rule those case types suitable for such disposition.”¹⁸ The Report suggests that two-judge panels should be used primarily to decide cases in which the outcome is clearly controlled by well-settled precedent, and that if the case turns out to be more complicated, or the two judges disagree or are in doubt, they should be permitted to enlist a third judge to participate in the decision, or refer the case to a regular three-judge panel for hearing. The Commission made this recommendation based on an assessment that “two-judge panels may be able to help the courts conserve resources with no loss in fairness....”¹⁹

Courts of appeals function primarily through three-judge panels, pursuant to 28 U.S.C. § 46(b). The three-judge panel evolved from the three-judge appellate courts created by the 1891 Evarts Act and has been the federal tradition and the American norm for an intermediate court. The ABA has long supported the use of three-judge appellate panels;²⁰ we do not believe that sufficient reason exists to depart from this core appellate practice and therefore oppose this recommendation.

¹⁷ Prepared Statement of the Department of Justice, November 6, 1998, at 25.

¹⁸ FINAL REPORT, *supra* note 2 at 62.

¹⁹ *Id.* at 62.

²⁰ See §1.13(b)(ii) of the ABA STANDARDS RELATING TO COURT ORGANIZATION (1990 edition) (“The decision of an appeal should ordinarily be made by a panel of at least three judges.”)

The premise underlying both this recommendation and the previous one is that there are certain categories of cases that do not merit full review by a panel of three appellate judges. We disagree with this premise. As the Association of the Bar of the City of New York pointed out in its written submission to the Commission:

We believe that, in the oft-reported words of Judge Weinfeld, "There is no such thing as an unimportant case." Almost all cases are important to the litigants, and whether they are important to the jurisprudence of the circuit is a matter that should be determined through a careful review of each case by a three-judge panel....²¹

Many other questions have been raised concerning the possible unintended effects of using two-judge panels to decide certain routine cases.²² The loss of the perspective of one judge might diminish the quality of the particular decision. There might be subtle pressure created for the two assigned judges not to disagree. The assumption might be made that the case need not be fully evaluated by judges since it already has been screened and deemed straight-forward and unimportant. Justice might be delayed and additional resources might need to be expended if a third judge has to be brought in. (And there is no way to predict how often this might happen.) Finally, two-judge panels might exacerbate some problems, since they could reduce opportunities for collegial interaction, and the decisions rendered by such panels would be less representative of the whole court.

III. CONCLUSION

The federal appellate courts have been the subject of concern and study for many years. Few people disagree that the manner in which the federal courts carry out the appellate function has changed as a result of dramatic caseload growth. As the volume of appeals has grown persistently without a concurrent growth in the number of judges, traditional practices and procedures of the appellate process have been truncated and new innovations have been employed; for example, oral arguments have been limited, fewer decisions are handed down in published opinions, the size of support staff and their attendant responsibilities have increased, and reliance on senior and visiting judges also has dramatically increased. Some believe that such changes have diminished the quality of the appellate process; others praise the resilience of the federal courts to handle increased caseloads efficiently while maintaining coherent, consistent law in the circuit.

²¹ Prepared Statement of the Association of the Bar of the City of New York, October 26, 1998 at 4.

²² See generally THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL* (1994) at 173.

There is no doubt that scrutiny of the federal appellate courts will intensify over the next decade, and that calls for circuit restructuring again will surface if caseload growth continues unchecked. While we think that Congress should first try to ameliorate any identified problems with the appellate courts by promptly filling judicial vacancies and not expanding federal court jurisdiction unless absolutely necessary, we recognize that there may be a time when circuit restructuring will be indeed appropriate and necessary to guarantee the continued excellence of our federal appellate system. Therefore, we urge the Association and other interested entities to continue to examine the need for structural changes in the federal appellate system and to expand the 1995 policy enunciating a restructuring standard by developing detailed guideline for assessing the potential benefits of any circuit restructuring.

For all of the above reasons, the Standing Committee on Federal Judicial Improvements and the Section of Litigation respectfully request the House of Delegates to adopt this recommendation.

Respectfully submitted,

John P. Driscoll, Jr., Chair

August 1999

Retired Justice Byron R. White, past ABA president N. Lee Cooper, Judge Gilbert S. Merritt, Judge Pamela Ann Rymer and Judge William D. Browning to the five-member commission. Justice White and Mr. Cooper were elected chair and vice-chair, respectively. The Commission is commonly referred to as the "White Commission."

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