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# A Federal Appellate System for the Twenty-First Century

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## A FEDERAL APPELLATE SYSTEM FOR THE TWENTY-FIRST CENTURY

Carl Tobias\*

*Abstract:* In December 1998, the Commission on Structural Alternatives for the Federal Courts of Appeals issued a report and recommendations for Congress and the President. The commission resulted from ongoing controversy over splitting the U.S. Court of Appeals for the Ninth Circuit. The commissioners clearly suggested that the circuit remain intact but proposed three regionally based adjudicative divisions for the appeals court. However, the commission did not adduce persuasive empirical evidence that the Ninth Circuit experiences difficulties that are sufficiently problematic to warrant treatment, particularly with the essentially untested divisional arrangement. Accordingly, the Ninth Circuit should continue to experiment with promising measures.

The Commission on Structural Alternatives for the Federal Courts of Appeals recently issued its report on the intermediate appellate courts and recommendations for their improvement and submitted the report and suggestions to Congress and the President.<sup>1</sup> This commission, which Congress authorized the Chief Justice of the United States to appoint a year ago, had an invaluable opportunity to assess the appeals courts and develop helpful proposals for change and, thus, to influence appellate justice as the twenty-first century opens. The commission resulted from lengthy, continuing controversy over the advisability of dividing the U.S. Court of Appeals for the Ninth Circuit. The commissioners clearly and strongly rejected the idea of splitting the Ninth Circuit and endorsed the alternative of creating adjudicative divisions for the Ninth Circuit now and for the remaining circuits as they increase in size.

The publication of the commission's report and recommendations is significant because the appeals courts are at a critical juncture. The federal appellate system has served Congress, the federal courts, and the nation very well for more than a century. However, the circuits have experienced a striking increase in appeals, which has transformed the courts since the 1970s; this crisis of volume could threaten the system.

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1. Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (Dec. 1998), available in <<http://app.comm.uscourts.gov/final/appstruc.pdf>> [hereinafter Commission Report].

The independent, expert nature of the commission and the time and care that it devoted to evaluating the intermediate appellate courts meant that the commission's report and suggestions would enjoy the respect, or at least receive deference from, many members of the federal judiciary and of Congress. Some senators have scrutinized the commission's report and proposals and introduced bills that would implement the entity's recommendations.<sup>2</sup> Several members of Congress from the West, who agreed to the study as a compromise and perhaps as a condition precedent to dividing the Ninth Circuit, might well offer measures that would split the court now that the commissioners have rejected this possibility. The ultimate impact of the report remains unclear, but it will apparently be substantial.

All of the factors examined above mean that the recently issued report and suggestions of the Commission on Structural Alternatives for the Federal Courts of Appeals warrant analysis. This Article undertakes that effort by assessing the commission's report and finds that several of its proposals deserve implementation but require circuit-specific experimentation and evaluation to insure effective system-wide reform. Part I of the Article explores the origins and development of the commission. Part II then traces the entity's efforts in compiling its report and recommendations. Part III analyzes the commission's report and suggestions. Part IV offers recommendations for the future.

## I. THE COMMISSION'S ORIGINS AND DEVELOPMENT

The history of the Commission on Structural Alternatives for the Federal Courts of Appeals is important because the intense debate and divergent views that led to the commission's establishment may have affected the final report and could shape Congress's response to it.<sup>3</sup> Comprehensive treatment is required because this kind of evaluation should improve understanding of the report and suggestions that the commission recently completed. For instance, it is important to appreciate that a House-Senate Conference Committee approved the

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2. S. 253, 106th Cong. (1999); S. 186, 106th Cong. (1999).

3. Some features of the commission's background have been chronicled elsewhere. *See, e.g.*, Carl Tobias, *An Analysis of Federal Appellate Court Study Commissions*, 74 *Denv. U. L. Rev.* 65 (1996); *see also* Ninth Circuit Court of Appeals Reorganization Act of 1995, S. Rep. No. 104-197 (1995) [hereinafter Senate Report]. *See generally* Thomas E. Baker, *On Redrawing Circuit Boundaries: Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit Is Not Such a Good Idea*, 22 *Ariz. St. L.J.* 917 (1990).

national study as a replacement for an appropriations rider that would have bifurcated the Ninth Circuit.<sup>4</sup> The commission, therefore, resulted from diverse legislative developments and a compromise struck by members of Congress with quite different perspectives. Moreover, the commission's charge was rather unclear and general, leaving many parameters of the analysis to commission discretion.

### A. General Background

Congress instituted the modern appellate system with the 1891 passage of the Circuit Court of Appeals Act, legislation that was popularly known as the Evarts Act.<sup>5</sup> Lawmakers thereafter created two new appellate courts and realigned the boundaries of two regional circuits. In 1948, Congress expressly recognized the U.S. Court of Appeals for the District of Columbia Circuit, which resolves numerous cases challenging federal administrative agency determinations.<sup>6</sup> In 1982, Congress established the Federal Circuit and assigned the court national jurisdiction over appeals that principally involve customs, patents, trademarks, copyrights, and claims against the United States.<sup>7</sup>

The initial circuit realignment occurred relatively early in the history of the system. In 1929, senators and representatives created the Tenth Circuit Court of Appeals by extracting Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming from the Eighth Circuit and leaving Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and

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4. See Commission Report *supra* note 1, at 34; see also Pub. L. No. 105-119, § 305(a), 111 Stat. 2491, 2491-92 (1997); S. 1022, 105th Cong. § 305 (1997).

5. Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891) (codified as amended at 28 U.S.C. §§ 41-49 (1994)). See generally Felix Frankfurter & James Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 103-28 (1928). I rely in Part I.A on Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 Emory L.J. 1357 (1995).

6. Act of June 25, 1948, ch. 646, § 41, 62 Stat. 869, 870 (codified as amended at 28 U.S.C. § 41 (1994)); see also Patricia M. Wald, *Life on the District of Columbia Circuit: Literally and Figuratively Halfway Between the Capitol and the White House*, 72 Minn. L. Rev. 1 (1987); Colloquy, *The Contributions of the D.C. Circuit to Administrative Law*, 40 Admin. L. Rev. 507 (1988).

7. Act of Apr. 2, 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended at 28 U.S.C. § 41 (1994)). See generally Rochelle C. Dreyfuss, Symposium, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. Rev. 1 (1989); *United States Court of Appeals for the Federal Circuit Tenth Anniversary Commemorative Issue*, 41 Am. U. L. Rev. 559 (1992).

South Dakota in that court.<sup>8</sup> Congress authorized the new Tenth Circuit to address increasing caseloads in the Eighth Circuit.<sup>9</sup>

Docket growth did not become a systemic complication until the 1960s when Congress began to enlarge federal court jurisdiction dramatically. Lawmakers prescribed many new civil actions and criminalized much activity, and this legislation promoted a 200% annual increase in appellate filings between 1975 and 1995.<sup>10</sup> Congress approved numerous new appellate court judgeships; however, it did not authorize enough additional judges to address the large number of increasingly complicated civil and criminal cases that litigants appealed.<sup>11</sup> Each circuit has treated mounting dockets by restricting the written decisions and oral arguments it affords and by relying more substantially on support staff.<sup>12</sup> The appeals courts vary significantly, nevertheless. All the circuits have encountered growing caseloads, but the courts have done so during different periods, at diverse rates, and with varying resources and measures to address dockets.<sup>13</sup>

Federal judges' concerns about the rising number of appeals prompted Congress to establish the Commission on Revision of the Federal Court Appellate System (Hruska Commission) in 1972.<sup>14</sup> This commission thoroughly analyzed the circuits and proposed that Congress split the two biggest appeals courts, the Fifth and the Ninth Circuits, rather than proffering a more comprehensive approach, such as reconfiguration of the entire system's boundaries.<sup>15</sup> The commission was reluctant to

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8. Act of Feb. 28, 1929, ch. 363, 45 Stat. 1346, 1347 (codified as amended at 28 U.S.C. § 41 (1994)).

9. See Baker, *supra* note 2, at 923–24. See generally Arthur J. Stanley & Irma S. Russell, *The Political and Administrative History of the United States Court of Appeals for the Tenth Circuit*, 60 Denv. L.J. 119, 124–28 (1983).

10. Commission on Structural Alternatives for the Federal Courts of Appeals, H.R. Rep. No. 105-26, at 1 (1997). [hereinafter House Report].

11. See *id.*

12. See, e.g., 8th Cir. R. 34A; 11th Cir. R. 36; see also Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 Cal. L. Rev. 937, 938–40 (1980); Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 Cornell L. Rev. 1264, 1267–68 (1996).

13. See Carl Tobias, *Some Cautions About Structural Overhaul of the Federal Courts*, 51 U. Miami L. Rev. 389, 395 (1997) (citing multiple sources).

14. Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807; see also Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223 (1973) [hereinafter Hruska Commission].

15. Hruska Commission, *supra* note 14, at 228.

disturb institutions that enjoyed the loyalty and respect of their constituents and to disrupt the sense of community that judges and attorneys had seemingly developed within the appellate courts.<sup>16</sup>

The Hruska Commission grounded its recommendation that Congress divide the Fifth and Ninth Circuits on general criteria respecting alignment.<sup>17</sup> Congress created the Eleventh Circuit by removing Alabama, Florida, and Georgia from the Fifth Circuit and leaving Louisiana, Mississippi, and Texas in that court.<sup>18</sup> Congress divided the Fifth Circuit because of its size in terms of geography, population, caseloads and judgeships and because the court's active judges agreed on bifurcation.<sup>19</sup> The Hruska Commission's suggestion that Congress split California and reassign its district courts to two different circuits was not predicted and was highly controversial; thus, the idea delayed serious legislative consideration of the Ninth Circuit's division during the 1970s.<sup>20</sup>

Multiple evaluations of the federal courts preceded the study undertaken by the Commission on Structural Alternatives for the Federal Courts of Appeals. Some non-governmental entities, including the American Bar Association (ABA), conducted assessments of the appeals courts after the Hruska Commission had concluded its analysis.<sup>21</sup> In 1988, Congress empowered the Federal Courts Study Committee, an independent group consisting of respected members of Congress and the judiciary as well as practicing lawyers, to evaluate the federal courts and develop suggestions for improvement.<sup>22</sup> This entity determined that the circuits had encountered a crisis of volume that had dramatically altered

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16. *Id.*

17. The standards provided that: (1) at least three states would constitute circuits; (2) appeals courts should not be established that would immediately require more than nine judges; (3) circuits ought to include states that have diverse populations, legal business, and socio-economic interests; (4) realignment should not unduly interfere with existing appellate court boundaries; and (5) appeals courts should consist of contiguous states. Hruska Commission, *supra* note 14, at 231–32.

18. Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified as amended at 28 U.S.C. § 41 (1994)). See generally H.R. Rep. No. 96-1390, at 1, reprinted in 1980 U.S.C.C.A.N. 4236; Baker, *supra* note 3, at 925–28.

19. See Baker, *supra* note 3, at 927.

20. Hruska Commission, *supra* note 14, at 234–35; Arthur D. Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. Pa. L. Rev. 1188 (1974).

21. American Bar Assoc. Standing Comm. on Federal Judicial Improvements, *The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth*, reprinted in 125 F.R.D. 523, 542–44 (1989) [hereinafter ABA Report]. See generally Thomas E. Baker, *Rationing Justice on Appeal* 39–40 (1994).

22. See *Report of the Federal Courts Study Committee* (1990) [hereinafter *Courts Study*]; see also Federal Courts Study Act, Pub. L. No. 100-702, §101, 102 Stat. 4642, 4644 (1988).

them during the preceding quarter-century.<sup>23</sup> The Committee found that “more fundamental change” seemed inevitable, unless appellate workloads decreased, a prospect that appeared remote.<sup>24</sup> The Committee canvassed five fundamental structural measures for addressing caseload growth to promote future inquiry and discussion among the federal government’s branches and attorneys, but it endorsed none of the alternatives.<sup>25</sup> The entity also urged Congress to authorize a five-year study of the appellate court dockets and structural options for treating appeals.<sup>26</sup>

Lawmakers failed to approve the Federal Courts Study Committee’s proposed evaluation but did require that the Federal Judicial Center (FJC) conduct an analysis of structural alternatives, which the FJC finished in 1993.<sup>27</sup> The FJC found that the regional circuits were confronting stress that structural changes would not “significantly relieve.”<sup>28</sup> The Long Range Planning Committee of the Judicial Conference of the United States also concluded a rather comprehensive examination of the federal courts and published a final report in March 1995.<sup>29</sup> The Committee essentially disfavored realigning appellate courts, and it assessed the possibilities of according district judges greater appellate responsibilities and reducing the size of appeals court panels.<sup>30</sup> None of these assessments, however, prompted legislative action to modify the federal appellate court system.

### B. Ninth Circuit

Recent congressional developments regarding the possible division of the Ninth Circuit warrant comparatively comprehensive examination here because they eventually resulted in legislative approval of the

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23. *Courts Study*, *supra* note 22, at 109.

24. *See id.*

25. *Id.* at 116–23; *see also* Tobias, *supra* note 5, at 1396–1400.

26. *Courts Study*, *supra* note 22, at 116.

27. Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 302, 104 Stat. 5104; *see also* Judith A. McKenna, *Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States* 1 (Federal Judicial Center 1993). The FJC is the federal courts’ arm for research and continuing education. Its purpose is “to further the development and adoption of improved administration” in federal courts. 28 U.S.C. § 620(a) (1994).

28. *See* McKenna, *supra* note 27, at 155.

29. Committee on Long Range Planning of the Judicial Conference of the United States, *Proposed Long Range Plan for the Federal Courts* (1995) [hereinafter *Long Range Plan*].

30. *Id.* at 42, 123–24.

national study commission.<sup>31</sup> Congress has debated the possibility of restructuring the Ninth Circuit almost since the system's inception, and most recently considered division in the 104th and 105th Congresses.

### 1. *Earlier Proposals to Split the Ninth Circuit and the Circuit's Ameliorative Efforts*

Proposals to split the Ninth Circuit have been made since the 1930s.<sup>32</sup> The Hruska Commission's suggestion that Congress bifurcate the court was predictable; however, the recommendation that California be divided and that its four district courts be reassigned to different circuits was not foreseen.<sup>33</sup> This idea sparked controversy and delayed congressional examination of the court's bifurcation during the 1970s.<sup>34</sup> A circuit-splitting proposal that senators sponsored in 1983 evoked minimal legislative interest.<sup>35</sup>

The Ninth Circuit responded to certain criticisms of the court's performance by attempting to improve its administration. During 1978, Congress empowered appeals courts having more than fifteen active judges to reorganize with administrative units and to implement streamlined mechanisms for conducting en banc proceedings.<sup>36</sup> The Ninth Circuit responded creatively to this congressional authorization by restructuring into three constituents for greater decentralization and more efficient administration.<sup>37</sup> The court concomitantly adopted a local rule prescribing a limited en banc mechanism under which the chief judge

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31. For other sources that chronicle recent congressional activity, see generally *supra* note 1.

32. See Baker, *supra* note 3, at 928; see also Office of the Circuit Executive, United States Courts for the Ninth Circuit, *Position Paper in Opposition to S. 1686 Ninth Circuit Court of Appeals Reorganization Act* (1991) [hereinafter *S. 1686 Position Paper*] (affording additional historical background).

33. See *supra* note 20 and accompanying text.

34. See *supra* note 20 and accompanying text.

35. See S. 1156, 98th Cong. (1983); Baker, *supra* note 3, at 928; *Circuit Breaker—Move on to Split the Ninth*, 70 A.B.A. J. 34, 34 (1984).

36. "Any court of appeals having more than 15 active judges may constitute itself into administrative units . . . and may perform its en banc function by such number of members of its en banc court as may be prescribed by rule of the court of appeals." Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633, *supplemented by* Act of Oct. 15, 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1981).

37. See Baker, *supra* note 3, at 929. See generally Joseph Cecil, *Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project* 13-14 (1985); Office of the Circuit Executive, United States Courts for the Ninth Circuit, *S. 948 Ninth Circuit Court of Appeals Reorganization Act 6-7* (1989) [hereinafter *S. 948 Position Paper*].



and ten active judges who are randomly selected sit en banc to rehear cases on a majority vote of all active judges.<sup>38</sup> These were not the only ameliorative efforts that the Ninth Circuit undertook.

Ninth Circuit judges have increased their productivity, and the court has instituted numerous internal reforms. For example, the circuit employs prebriefing conferences to narrow issues for appeal, limit the size of briefs, and examine the possibility of settlement.<sup>39</sup> The court's staff has enhanced its efficiency, and the circuit has implemented many technological advances.<sup>40</sup> In 1989, the court published a report for Congress claiming that these measures had permitted it to decide the biggest caseload efficaciously, that there were no reasons to divide the circuit, and that the reforms used would enable the court to accommodate greater growth.<sup>41</sup> Despite these assurances, Congress continued considering proposals to split the circuit during the 1980s and 1990s.

## 2. *Activities of the 104th Congress*

### a. *Circuit-Splitting Bills*

During May 1995, senators representing Pacific Northwest states offered proposed legislation that would have divided the Ninth Circuit.<sup>42</sup> This marked the fourth analogous effort to bifurcate the court in the

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38. 9th Cir. R. 35-3 (formerly Rule 25). See generally ABA Report, *supra* note 21, at 542-43; Paul D. Carrington et al., *Justice On Appeal* 161-63, 200-03 (1976); Steven Bennett et al., "Mini" *In Banc Proceedings: A Survey of Circuit Practices*, 34 Clev. St. L. Rev. 531 (1986).

39. See Baker, *supra* note 3, at 932; John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. Rev. 859, 875-80, 907-10; see also S. 948 Position Paper, *supra* note 37, at 6-7; Cecil, *supra* note 37, at 79-95.

40. See Baker, *supra* note 3, at 932; Cathy Catterson, *The Changing Ninth Circuit*, 21 Ariz. St. L.J. 173, 176-78 (1989); Hellman, *supra* note 12, at 943-46; see also Office of the Circuit Executive, U.S. Courts for the Ninth Circuit, *Position Paper in Opposition to S. 956—Ninth Circuit Court of Appeals Reorganization Act of 1995* (June 22, 1995), reprinted in 141 Cong. Rec. S10,436 (daily ed. July 10, 1995) (lauding court's experimentation) [hereinafter *S. 956 Position Paper*].

41. Judicial Council and United States Court of Appeals for the Ninth Circuit, *Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeships Act of 1978 and Other Measures to Improve the Administration of Justice in the Ninth Circuit* (1989). Senate Bill 948, introduced by circuit-splitting proponents during 1989, was the "most credible effort" to divide the Ninth Circuit that advocates had staged prior to 1995. See Baker, *supra* note 3, at 932. However, they apparently failed to persuade Congress of bifurcation's propriety, while the bill's opponents seemed to counter convincingly the proponents' arguments. *Hearing on S. 948 Before the Subcomm. On Courts and Admin. Practice of the Senate Comm. On the Judiciary*, 101st Cong. 361 (1990) [hereinafter *S. 948 Hearing*].

42. S. 956, 104th Cong. (1995); see also S. 853, 104th Cong. (1995) (providing earlier similar bill).

preceding thirteen years.<sup>43</sup> One measure, Senate Bill 956, would have placed Alaska, Idaho, Montana, Oregon, and Washington in a new Twelfth Circuit and would have left Arizona, California, Hawaii, Nevada, Guam, and the Northern Mariana Islands in the Ninth Circuit.<sup>44</sup> The bill authorized nine active judges for the new Twelfth Circuit and nineteen active members for the proposed Ninth Circuit, but it did not create any new judgeships.<sup>45</sup>

In September of that year, the Senate Judiciary Committee conducted a hearing on Senate Bill 956, and the Committee heard much helpful testimony and received additional instructive information from advocates and opponents of circuit-splitting.<sup>46</sup> During a December markup, the Committee approved an amendment that would have placed California, Hawaii, Guam, and the Northern Mariana Islands in the Ninth Circuit with fifteen judges. The amendment would have included the other states of the current Ninth Circuit—Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington—in a new Twelfth Circuit with thirteen judges.<sup>47</sup> Advocates and opponents of the amendment disagreed over every justification articulated in support of circuit division.

Supporters of circuit splitting relied primarily on four main arguments. First, proponents of bifurcation emphasized the difficulties that the circuit's substantial magnitude has allegedly caused. These complications included the court's enormous geographic expanse, its large number of judges (twenty-eight), the circuit's overwhelming docket, and the great cost of operating the court.<sup>48</sup> Advocates of circuit splitting believed that the Ninth Circuit's reforms were insufficient to address these problems.

Critics of circuit division responded in several ways to these contentions. The opponents asserted that the court had implemented measures addressing difficulties attributable to size. For instance, during the 1980s, the circuit created administrative units in Pasadena and Seattle for filing and orally arguing appeals, and that action reduced somewhat

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43. See Baker, *supra* note 3, at 928–45; Tobias, *supra* note 5, at 1363–75.

44. S. 956. See generally Baker, *supra* note 3, at 928–45; Tobias, *supra* note 5, at 1363–75.

45. S. 956.

46. See *Ninth Circuit Split: Hearings on S. 956 Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) [hereinafter *S. 956 Hearings*].

47. See Senate Judiciary Comm. Markup of S. 956 (Dec. 7, 1995); see also Senate Report, *supra* note 3, at 2.

48. See, e.g., 141 Cong. Rec. S7504 (daily ed. May 25, 1995) (statement of Sen. Gorton); *id.* at S7505–06 (statement of Sen. Burns).

the distances that attorneys and parties must travel.<sup>49</sup> Thus, critics claimed that creating a Twelfth Circuit would not decrease travel distances for many lawyers currently practicing in the area that would have been encompassed by the new court. Opponents also contended that the circuit's size provided advantages. For example, it afforded economies of scale while offering diversity in terms of case complexity and novelty and in terms of judges' political perspectives and geographic origins.<sup>50</sup>

A second important argument of Senate Bill 956's champions was that Ninth Circuit case precedent lacked consistency. The statistical possibilities for conflicting decisions on a court with twenty-eight judges appear significant when 3278 different combinations of three-judge panels are possible.<sup>51</sup> The Ninth Circuit Executive Office and experts who have evaluated the court have discovered too little inconsistency to require action as drastic as bifurcation.<sup>52</sup> The circuit has concomitantly implemented procedures that limit inconsistency. For example, the court's staff attorneys thoroughly scrutinize all cases and they code into a computer the issues to be resolved.<sup>53</sup> Using this system, the circuit assigns to a single three-judge panel those appeals that involve analogous issues and that are ready for resolution at the same time.<sup>54</sup>

The third contention of split proponents was that the court's California judges, viewpoints, and cases dominated the Pacific Northwest. This idea partly implicated opposition to Ninth Circuit opinions in areas such as criminal and environmental law.<sup>55</sup> These advocates suggested that a new Twelfth Circuit would better represent the regional views of the northwest states. Critics of the court's bifurcation, however, claimed that a better means of securing changes in the substantive law was to

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49. See *supra* note 36.

50. See, e.g., *S. 956 Position Paper*, *supra* note 40; Steve Albert, *Congress Weighs Plan to Divide Ninth Circuit*, *Legal Times*, Feb. 1, 1993, at 12, 13 (quoting former Chief Judge James Browning's assertion that court's diversity is asset).

51. See *S. 956 Hearings*, *supra* note 46 (statement of Sen. Gorton); Baker, *supra* note 3, at 938.

52. See *S. 956 Position Paper*, *supra* note 40, at 4-5; Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 *U. Chi. L. Rev.* 541 (1989).

53. Hellman, *supra* note 12, at 945; see also U.S. Court of Appeals for the Ninth Circuit General Order 4.1 (1987).

54. Hellman, *supra* note 12, at 945.

55. See, e.g., 171 *Cong. Rec. S7504*, *supra* note 48 (statement of Sen. Gorton); 171 *Cong. Rec. S7505-06*, *supra* note 48 (statement of Sen. Burns).

persuade Congress to modify it.<sup>56</sup> Opponents correspondingly questioned the advocates' underlying premise that judges who were stationed in California were monolithic and idiosyncratic.<sup>57</sup> Analysis of the judges' perspectives and the computerized, random selection of three-judge panels rendered untenable attempts to stereotype these jurists, while a majority of the courts' active judges were not even located in California.<sup>58</sup>

Proponents and critics articulated several other ideas in favor of and against the Ninth Circuit's division. Opponents stated that the new Ninth Circuit would have had a significantly less advantageous ratio of three-judge panels to cases than the proposed Twelfth Circuit and a much less beneficial ratio than the existing Ninth Circuit. Panels of the new Ninth Circuit would have annually addressed 1014 filings and panels of the proposed Twelfth Circuit would have annually treated 645 cases, while panels of the Ninth Circuit decided 868 appeals at the time.<sup>59</sup> Critics also contended that the new Twelfth Circuit would have entailed considerable administrative cost and duplicated functions that the Ninth Circuit then discharged effectively.<sup>60</sup> Opponents concomitantly asserted that many active judges of the court and numerous lawyers who practiced before it opposed division.<sup>61</sup>

Advocates of bifurcation claimed that judges on a smaller circuit, such as the projected Twelfth Circuit that would have had nine judges, would be more collegial, thus increasing efficiency.<sup>62</sup> This idea had some force, but familiarity might have fostered detrimental routinization and could

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56. See, e.g., *S. 948 Hearing*, *supra* note 41, at 284, 286 (statement of Sen. Pete Wilson); Daniel Trigoboff, *Northwest Favors Splitting "California" Circuit*, *Legal Times*, June 12, 1989, at 2 (quoting former Chief Judge Alfred Goodwin).

57. Baker, *supra* note 3, at 941; Tobias, *supra* note 5, at 1373.

58. Baker, *supra* note 3, at 941; Tobias, *supra* note 5, at 1373.

59. See *S. 956 Position Paper*, *supra* note 40, at 6; see also Office of the Circuit Executive, United States Courts for the Ninth Circuit, *Position Paper in Opposition to S. 956—Ninth Circuit Court of Appeals Reorganization Act of 1995 and Companion Bill H.R. 2935*, at 3 (Feb. 3, 1996) (December markup realignment assigning 1065 appeals annually to proposed Ninth Circuit and 765 appeals annually to proposed Twelfth Circuit) [hereinafter *Second S. 956 Position Paper*].

60. See *S. 956 Position Paper*, *supra* note 40, at 2–3.

61. See *Second S. 956 Position Paper*, *supra* note 59, at 5; Senate Report, *supra* note 3, at 20–21; Tobias, *supra* note 5, at 1371.

62. See *S. 956 Position Paper*, *supra* note 40; see also Senate Judiciary Markup of S. 956, *supra* note 47 (approving 13 judges for reconfigured proposed Twelfth Circuit and 15 judges for reconfigured proposed Ninth Circuit).

even have promoted disagreement.<sup>63</sup> The court's magnitude might have forfeited advantages, namely diversity, that a larger court affords.

The debate between split proponents and split critics eventually resulted in a compromise proposal to establish a national study commission. In March 1996, several proponents of Senate Bill 956 encouraged the Senate to pass the circuit division proposal as an amendment of a federal courts appropriations measure. Opponents vigorously challenged this effort on procedural grounds, although senators engaged in considerable substantive debate over splitting the circuit.<sup>64</sup> Advocates and critics ultimately agreed to a study commission measure that garnered much bipartisan support, and the Senate approved a commission on March 21.<sup>65</sup> When the House received the Senate proposal, it assigned the proposal to the Judiciary Subcommittee on Intellectual Property and Judicial Administration, which Representative Carlos Moorhead (R-Cal.) chaired. The House took no further action on the Senate measure during the 104th Congress, but Congress budgeted \$500,000 for the commission's work even though it did not pass authorizing legislation.<sup>66</sup>

#### *b. Commission Proposals*

The Senate study commission proposal was apparently an acceptable compromise, although the time prescribed for completing the commission's work would have been inadequate. The Senate measure mandated that the commission report to the President and the Congress no later than February 28, 1997 and that the Senate Judiciary Committee take action within sixty days of receiving the document.<sup>67</sup> This proposal, allowing less than a year, differed from a prior study commission measure providing two years for the endeavor and calling for no Judiciary Committee action on the report, which Senator Dianne Feinstein (D-Cal.) had tendered as an amendment and which the Committee rejected on a

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63. See Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. Miami L. Rev. 159, 169–70 (1993). See generally Frank M. Coffin, *On Appeal* 213–29 (1994).

64. 142 Cong. Rec. S2219–2303 (daily ed. Mar. 18, 1996).

65. 142 Cong. Rec. S2544, S2545 (daily ed. Mar. 21, 1996). Rejection of division was advisable. It would have been a limited reform and could have precluded more effective solutions, such as creating a third tier of appellate courts or more judgeships.

66. 142 Cong. Rec. H11,164, H11,859 (daily ed. Sept. 28, 1996).

67. 142 Cong. Rec. S2545.

close vote in its December 7, 1995 markup.<sup>68</sup> Moreover, the Federal Courts Study Committee, which undertook the most recent similar effort, required eighteen months to finish its work.<sup>69</sup> The Hruska Commission consumed an identical period to perform a study of the appeals courts.<sup>70</sup> It would have been unwise to create an entity that lacked the requisite time to assemble the best information and to develop the finest recommendations.

Somewhat analogous problems implicating scope may also have attended the proposed entity's charge, which stated that the commission was to:

- (1) study the present division of the United States into the several judicial circuits;
- (2) study the structure and alignment of the Federal Courts of Appeals, with particular reference to the Ninth Circuit; and
- (3) report to the President and the Congress its recommendations for such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeal, consistent with fundamental concepts of fairness and due process.<sup>71</sup>

The mandate might have been too circumscribed because, for instance, the first two components did not expressly mention docket growth, which is the principal problem that the appeals courts now confront.<sup>72</sup> However, those commands could have been read to include mounting caseloads, and the third stricture explicitly prescribed recommendations "for the expeditious and effective disposition" of appeals.<sup>73</sup>

Perhaps most restrictive was the requirement that suggestions pertain to "such changes in circuit boundaries or structure as may be appropriate"

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68. Senate Judiciary Comm. Markup of S. 956, *supra* note 47 (statement of Sen. Feinstein); *see also* Senate Report, *supra* note 3, at 19–20.

69. *See supra* note 23.

70. *See supra* note 14.

71. 142 Cong. Rec. S2545 (daily ed. Mar. 21, 1996). Senator Feinstein's proposal was similar, but it did not include "with particular reference to the Ninth Circuit." *See* Senate Judiciary Comm. Markup of S. 956, *supra* note 47 (statement of Sen. Feinstein). However, any national analysis of the appeals courts might well have emphasized this circuit.

72. *See, e.g., Courts Study, supra* note 22, at 109; Baker, *supra* note 21, at 33.

73. 142 Cong. Rec. S2545.

for prompt and efficacious resolution.<sup>74</sup> Limiting the commission to structural options might have been overly narrow, because courts have numerous structural means of addressing the difficulties ascribed to rising dockets. Illustrative are increases in resources, such as judges and staff, and numerous procedures for expediting appellate disposition, which many courts have applied.<sup>75</sup> Congress could have discouraged consideration of many potentially helpful alternatives by apparently confining the commission to non-structural alterations.

When the Senate was debating the advisability of splitting the Ninth Circuit and approving S. 956, Governor Pete Wilson (R-Cal.) and Ninth Circuit Judge Diarmuid O'Scannlain developed different proposals for establishing a commission to analyze the court. Governor Wilson aired the prospect in a letter to Senator Orrin Hatch (R-Utah), Chair of the Senate Judiciary Committee, as the Committee prepared for the December 1995 Committee markup.<sup>76</sup> Judge O'Scannlain examined the possibility of establishing a commission when testifying in the September 1995 Judiciary Committee hearing.<sup>77</sup> These proposals warrant little analysis here because their Ninth Circuit focus meant that they would have been incomplete by definition; Congress chose to authorize the recently completed national study, which the Wilson and O'Scannlain proposals only minimally inform.<sup>78</sup>

### 3. *Activities of the 105th Congress*

Members of the 105th Congress held varying viewpoints on problems facing the Ninth Circuit. Efforts in the House focused on the need for a national study of the appellate system, while the Senate proposed a more drastic solution, a circuit split. In the end, the 105th Congress adopted a modified version of the House proposal, but it left many aspects of the national study effort unclear.

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74. *Id.*

75. *See, e.g.*, Senate Report, *supra* note 3, at 27–28; Tobias, *supra* note 5, at 1363–64, 1405–07.

76. Letter from Pete Wilson, Governor of California, to Senator Orrin Hatch, Chair, U.S. Senate Judiciary Comm. (Dec. 6, 1995) (on file with author).

77. *S. 956 Hearings*, *supra* note 46, at 69 (statement of Ninth Circuit Judge O'Scannlain), reprinted in pertinent part in Diarmuid O'Scannlain, *A Ninth Circuit Split Is Inevitable, But Not Imminent*, 56 Ohio St. L.J. 947 (1995).

78. Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 Fla. L. Rev. 189, 204–05 (1997).

The continuing debate over whether the Ninth Circuit should be split prompted senators and representatives to introduce several bills authorizing evaluations of the federal appeals courts during the first session of the 105th Congress. In January 1997, Senators Dianne Feinstein (D-Cal.) and Harry Reid (D-Nev.) offered a measure that would have created a national commission to assess the appellate courts.<sup>79</sup> Senator Conrad Burns (R-Mont.) and Representative Rick Hill (R-Mont.) then introduced the same study commission bill that differed in important respects from the one proffered by Senators Feinstein and Reid.<sup>80</sup> During March, Representatives Howard Coble (R-N.C.) and Howard Berman (D-Cal.) proposed a measure that was similar to the Feinstein-Reid bill, which the House later changed somewhat.<sup>81</sup> That month, a number of senators from Pacific Northwest states introduced a bill that would have bifurcated the Ninth Circuit by moving Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington to the projected Twelfth Circuit and leaving California, Hawaii, Guam, and the Northern Mariana Islands in the current Ninth Circuit.<sup>82</sup>

The Coble-Berman measure, H.R. 908, warrants emphasis because it most closely resembles the legislation that passed, while the other proposals have been analyzed elsewhere.<sup>83</sup> H.R. 908 was analogous in several significant ways to the study commission measures that the 104th Congress considered. The proposal instructed the entity to “study the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit.”<sup>84</sup> The second phrase, therefore, changed the concept employed in the 104th Congress by adding the term “system,” thus clarifying and stressing the systemic character of the evaluation prescribed.<sup>85</sup> H.R. 908 also mandated that the commission “report . . . its recommendations for such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective

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79. S. 248, 105th Cong. (1997). The ideas in this paragraph and the remainder of Part I.B.3 are premised on conversations with individuals who are knowledgeable about the developments that occurred.

80. S. 283, 105th Cong. (1997); H.R. 639, 105th Cong. (1997).

81. H.R. 908, 105th Cong. (1997).

82. S. 431, 105th Cong. (1997).

83. Tobias, *supra* note 78, at 205–14.

84. H.R. 908, § 1(b)(2).

85. Compare S. 248, § 1(b)(2), H.R. 908, with S. 956, § 1(b)(2), 104th Cong.



disposition of the caseload of the Federal Courts of Appeal, consistent with fundamental concepts of fairness and due process.”<sup>86</sup>

In early June, the House passed a revised version of the Coble-Berman measure that included a number of compromises.<sup>87</sup> This measure adopted the reporting provision discussed immediately above and accorded the commission eighteen months to complete the assessment. The bill was transmitted to the Senate and remained at the desk awaiting action in the upper chamber.

The legislative history that accompanied H.R. 908 is significant because the House Committee Report on that bill provides the most comprehensive discussion of the national study commission that Congress approved. The bill received no hearings and little floor debate, while the floor statements of the bill’s principal sponsors, Representatives Coble and Henry Hyde (R-Ill.), chair of the Judiciary Committee, were primarily based on the House Report. The House Committee Report concomitantly improves comprehension of the statutory terminology that authorizes the study, particularly the wording that is terse or vague. Moreover, the report was essentially the last, as well as the most thorough, precise, and authoritative pronouncement on the long, complex process behind the commission’s approval.

The House Committee Report offered informative perspectives on the commission and its duties, especially by elaborating and clarifying the responsibilities that Congress envisioned for it. The report observed that the measure originated in response to recurring efforts to split the biggest of the federal circuits, the Ninth, but warned that H.R. 908 “represents a sound approach to a problem of national concern: explosive growth in the caseload of all of the courts of appeals.”<sup>88</sup> The Judiciary Committee stated that the number of cases had risen by more than 200% and that Congress had increased the number of judgeships, although less rapidly, over the last two decades; yet, the appellate system’s structure had effectively remained the same since 1891.<sup>89</sup> The report proclaimed that the “time is ripe for a careful, objective study aimed at determining whether that structure can adequately serve the needs of the 21st

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86. H.R. 908, § 1(b)(3).

87. 143 Cong. Rec. H3225 (daily ed. June 3, 1997).

88. House Report, *supra* note 10, at 1.

89. *Id.*

century” and that the commission would be responsible for conducting the analysis.<sup>90</sup>

The House Committee Report emphasized the prior efforts that led Congress to authorize the commission. The report repeated that the “immediate occasion for the Commission proposal was the debate over dividing the Ninth Circuit, [however] the proposal has its origins in the work of the Federal Courts Study Committee, which Congress created in 1988.”<sup>91</sup> This entity’s 1990 report concluded that the federal appellate courts were already experiencing a “crisis of volume” and expressed the view that “within as few as five years the nation could have to decide whether or not to abandon the present circuit structure in favor of an alternative structure that might better organize the more numerous appellate judges needed to grapple with a swollen caseload.”<sup>92</sup> The Federal Courts Study Committee evaluated, but did not endorse, five alternatives, urging further inquiry and discussion.<sup>93</sup>

The Judiciary Committee said that the commission would “take up where the Federal Courts Study Committee left off [and] would be the first of its kind since the [Hruska Commission] which completed its work in 1975.”<sup>94</sup> The report considered it clear that:

[D]ramatic changes have taken place in the work of the federal courts in those two decades, including the explosive growth noted above [but that] there have been no structural alterations except for the division of the old Fifth Circuit and the creation of the Court of Appeals for the Federal Circuit.<sup>95</sup>

In the June 3, 1997 floor debate on H.R. 908, the study commission’s major champions proffered many observations analogous to those in the report and frequently quoted from it. Illustrative are the statements of Representative Coble, who chaired the Judiciary subcommittee that had primary responsibility for the measure:

H.R. 908 was introduced in response to recurring attempts to divide the largest of the Federal judicial circuits, the ninth. However, if properly implemented, the commission proposal represents a sound approach to a problem of national concern, and that is the explosive

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90. *Id.* at 1–2.

91. *Id.* at 2; *see also supra* notes 22–26 and accompanying text.

92. *Courts Study*, *supra* note 22, at 109; *see also* House Report, *supra* note 10, at 2.

93. *Courts Study*, *supra* note 22, at 116–23; *see also supra* note 25.

94. House Report, *supra* note 10, at 2; *see also supra* notes 14–20, 22–26 and accompanying text.

95. House Report, *supra* note 10, at 2; *see also supra* notes 7, 17–19 and accompanying text.

growth in the caseload of all of the courts of appeals. The time is right, it seems to me, for a careful, objective study aimed at determining whether that structure can adequately serve the needs of the 21st century. The task of the commission would be to carry out that study.<sup>96</sup>

Representative Hyde, the House Judiciary Committee chair, reiterated many sentiments expressed in the House Committee Report and numerous concepts that Representative Coble voiced. For instance, the chair repeated that the “goal of the commission will be to study the entire Federal appellate court system, but, of course, with a particular view toward addressing the problems facing the largest and most diverse circuit we have, the ninth.”<sup>97</sup>

The Judiciary Committee chair repeated and elaborated the notions relating to the commission’s origins and purposes that were expressed in the report and in Representative Coble’s floor statement. Representative Hyde correspondingly confirmed that the commission would “take up where the Federal Courts Study Committee left off” and detailed this entity’s most significant determinations, including the finding that the appellate courts were encountering a “crisis of volume.”<sup>98</sup>

While H.R. 908 awaited Senate action, members of the Senate decided to promote more extensive reforms. In mid-July, Senators Ted Stevens (R-Alaska), Slade Gorton (R-Wash.), and Conrad Burns (R-Mont.), who all served on the Appropriations Committee, convinced their colleagues to adopt an appropriations rider that would have split the Ninth Circuit, and on July 29, the entire Senate approved this rider. The measure would have left California and Nevada in that court.<sup>99</sup> The rider would have established a new Twelfth Circuit that included Alaska, Arizona, Hawaii, Idaho, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands.<sup>100</sup> The measure prescribed fifteen judges for the Ninth Circuit and thirteen judges for the Twelfth Circuit and provided the Twelfth

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96. 143 Cong. Rec. H3223 (daily ed. June 3, 1997). He next remarked on the Hruska Commission and recent “dramatic changes” in the appeals courts’ work in terms that were quite similar. *See supra* notes 94–95 and accompanying text.

97. 143 Cong. Rec. H3224.

98. *Id.* He stated that the study was timely, using data which showed that “in fiscal 1996, the number of appeals filed in the 12 regional courts of appeals rose four percent to 51,991 [which was] an all-time high in filings, with eight circuits reporting increases.” *Id.*

99. I rely in the remainder of this and the next three paragraphs on S. 1022, 105th Cong. § 305 (1997) and 143 Cong. Rec. S8041 (daily ed. July 24, 1997).

100. 143 Cong. Rec. S8044.

Circuit two co-equal headquarters and two co-equal court clerks in Phoenix and Seattle.

Republican senators, primarily from the West, expressed numerous ideas that had previously been voiced during the floor debate in favor of Senate action that would divide the Ninth Circuit. For instance, Senate members reiterated the idea that the Ninth Circuit's magnitude in terms of population, geography, dockets, and judges fosters difficulties, such as travel costs and inconsistent case law.<sup>101</sup> Several senators claimed that the Supreme Court reversal rate demonstrates that the Ninth Circuit requires division.<sup>102</sup> They asserted that projections for population increases in the West will multiply these complications.<sup>103</sup>

Senate critics of the court's bifurcation contended that there was too much uncertainty about the exact character of the complications confronting the Ninth Circuit and the other appeals courts, and the best remedies for those problems, to institute drastic measures like bifurcating the Ninth Circuit.<sup>104</sup> For example, division advocates have claimed that the Ninth Circuit's size precludes prompt appellate disposition,<sup>105</sup> however, minimal data correlate magnitude with time to resolution. Moreover, opponents argued that the split would have improperly distributed the court's docket. For instance, judges of the proposed Twelfth Circuit would have had to decide 239 appeals annually, while judges of the new Ninth Circuit would have had to resolve 363 cases annually, which would have been fifty percent more.<sup>106</sup> Despite the critics' contentions, the Senate rejected 55-45 along political party lines an amendment that would have approved a study analogous to that which the House had authorized.<sup>107</sup> Thus, the Senate approved a split as the solution to the Ninth Circuit's problems.

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101. *See, e.g.*, 143 Cong. Rec. S8044 (statement of Sen. Gorton); 143 Cong. Rec. S8046-47 (statement of Sen. Hatch).

102. *See, e.g.*, 143 Cong. Rec. S8047 (statement of Sen. Hatch); 143 Cong. Rec. S8047-48 (statement of Sen. Burns).

103. *See, e.g.*, 143 Cong. Rec. S8044 (statement of Sen. Gorton); 143 Cong. Rec. S8048 (statement of Sen. Burns).

104. *See, e.g.*, 143 Cong. Rec. S8041-44 (statement of Sen. Feinstein); 143 Cong. Rec. S8045 (statement of Sen. Leahy).

105. *See, e.g.*, 143 Cong. Rec. S8050-51 (statement of Sen. Craig); 143 Cong. Rec. S8052-53 (statement of Sen. Kempthorne).

106. *See, e.g.*, 143 Cong. Rec. S8042 (statement of Sen. Feinstein); 143 Cong. Rec. S8060 (reprinting letter from Procter Hug, Jr., Chief Judge, U.S. Courts for the Ninth Circuit, to Senator Feinstein).

107. *See* 143 Cong. Rec. S8087.

The appropriations rider prompted sharp criticism from Representatives Hyde and Coble, and the California delegation.<sup>108</sup> These lawmakers articulated a number of arguments against circuit splitting. For example, the opponents argued that the division contemplated would inappropriately allocate the caseload between the two new courts and that action as drastic as bifurcation required clearer understanding of the precise problems affecting the court and the appellate system, the impacts of those difficulties, and the most efficacious ways of treating them.

In mid-November, the House-Senate Conference Committee on Commerce-Justice-State Appropriations refused to adopt the appropriations rider that would have split the Ninth Circuit.<sup>109</sup> The committee replaced the measure with a national study that included many features of the measures both Houses had considered and effectively incorporated most aspects of H.R. 908.<sup>110</sup> The compromise prescribed five commissioners, all of whom the Chief Justice of the United States was to name within thirty days; afforded the commission ten months to study and two months to write a report and recommendations; and incorporated verbatim H.R. 908's mandate. On December 19, Chief Justice Rehnquist appointed retired Supreme Court Justice Byron White, U.S. Court of Appeals Judges Gilbert Merritt of the Sixth Circuit, and Pamela Rymer of the Ninth Circuit, U.S. District Judge William Browning of Arizona, and N. Lee Cooper, the immediate past president of the American Bar Association.<sup>111</sup>

In sum, the November 1997 measure that authorized a national commission to analyze the federal appeals courts left unclear certain significant dimensions of the assessment and provided the entity comparatively little time to conclude its work. The second section of this essay, therefore, examines the efforts that the commissioners instituted in discharging the important responsibilities that Congress assigned them.

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108. See, e.g., Letter from Henry J. Hyde, Chair, House Judiciary Comm., to Robert Livingston, Chair, House Comm. on Appropriations (Sept. 5, 1997) (on file with author); Letter from Jerry Lewis et al., Members of Congress from California, to Harold Rogers, Chair, Appropriations Subcomm. on Commerce, Justice, State and the Judiciary (Oct. 17, 1997) (on file with author). I also rely in this paragraph on conversations with individuals who are knowledgeable about the development that occurred.

109. Pub. L. No. 105-119, § 305, 111 Stat. 2491, 2491-92 (1997); Bill Kisliuk, *White, Rymer to Consider Circuit Split*, Recorder, Dec. 22, 1997, at 1.

110. See 111 Stat. at 2491-92; Kisliuk, *supra* note 109, at 1.

111. Commission Report, *supra* note 1, at 1; see also 111 Stat. at 2491-92; Kisliuk, *supra* note 109, at 1.

## II. THE COMMISSION'S EFFORTS

Because numerous aspects of the work the Commission on Structural Alternatives for the Federal Courts of Appeals undertook were not open to the public, it is difficult to detail accurately all of the activities that the Commission undertook in the course of the rather brief period that it had to study and report on the federal appellate courts.<sup>112</sup> For instance, meetings among the commissioners were generally private and communications between them and the staff were not public. In fairness, the important, controversial, and delicate nature of the commission's work and the desirability of fostering candid exchange may have necessitated secrecy, while the commissioners instituted numerous efforts, such as the establishment of a website, in an attempt to keep the public well informed.<sup>113</sup> Notwithstanding these difficulties, it is possible to identify many important initiatives of the entity partly by relying upon the information included in the commission report.

Early in 1998, the commission instituted several efforts to organize its work, as well as to collect, analyze and synthesize relevant information on the federal appellate courts. At the commission's first formal meeting during January 1998, it appointed Professor Daniel Meador, James Monroe Professor of Law Emeritus at the University of Virginia, as the Executive Director.<sup>114</sup> One of the entity's initial actions was to enlist the assistance of the Federal Judicial Center (FJC) and the Administrative Office of the United States Courts (AO), the principal research arms of the federal courts.<sup>115</sup> In the first phases of the commission's endeavors, it requested that the FJC compile comprehensive lists of the problems that the appellate courts were purportedly encountering and of potential solutions for these difficulties.<sup>116</sup> The FJC thoroughly surveyed much of the prior research on the regional circuits and compiled extensive

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112. I rely in this section on the Commission's Report, see *supra* note 1, and on conversations with numerous individuals who are familiar with the commission's work.

113. *Commission on Structural Alternatives for the Federal Courts of Appeals* (visited Apr. 4, 1999) <<http://app.comm.uscourts.gov>>.

114. Commission Report, *supra* note 1, at 2; see also § 305(a)(4)(A), 111 Stat. at 2492.

115. Commission Report, *supra* note 1, at 2. Congress had authorized the commission to invoke the aid of these two entities, and the commissioners worked closely with the FJC and the AO during much of the project. § 305(a)(4)(D), 111 Stat. at 2492.

116. Commission Report, *supra* note 1, at 2.

enumerations of the complications the courts apparently experienced and possible remedies for them.<sup>117</sup>

From the earliest stages, the commission also attempted to solicit much public input on numerous issues that were relevant to its mandate.<sup>118</sup> The commissioners held public hearings during March in Atlanta and Dallas, partially because those cities are located in the two appeals courts created from the former Fifth Circuit. The commission conducted public hearings during April in Chicago and New York, two of the nation's largest metropolitan areas and the location of the headquarters for the Seventh and Second Circuits. The commissioners held public hearings during May in Seattle and San Francisco, partly to seek the views of those in the West on whether the Ninth Circuit was encountering difficulties that were sufficiently problematic to warrant treatment, particularly with measures as dramatic as circuit division. The commission requested that witnesses address the problems it perceived "in the federal appellate system's structure, organization, alignment, processes, and personnel" which might interfere with "its ability to render decisions that "are reasonably timely, are consistent among the litigants appearing before it, are nationally uniform in their interpretations of federal law, and are reached through processes that afford appeals adequate, deliberative attention of judges."<sup>119</sup> The commissioners also sought potential remedies for the perceived complications and their benefits and disadvantages while asking which aspects of the courts were working well. Individuals and entities that did not, or could not, testify at the hearings were invited to tender written submissions for commission consideration.

Many witnesses who testified at the hearings were federal appellate court judges.<sup>120</sup> The witnesses provided considerable helpful information about the problems that increasing dockets and limited resources have been presenting for the regional circuits and a plethora of possible solutions for these complications. The commission heard a broad spectrum of viewpoints related to the difficulties and the potential remedies.

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117. *Id.* at 3.

118. *Id.*

119. See News Release, Commission on Structural Alternatives for the Federal Courts of Appeals, *Appellate Commission Schedules Public Hearings* (Feb. 26, 1998), available in <<http://app.comm.uscourts.gov/News-index.htm>>.

120. The assertions in this and the next paragraph are premised on review of the hearing transcripts.

Perhaps most interesting about the testimony was the striking lack of entirely new ideas. Practically all of the witnesses proffered testimony that essentially repeated concepts that they or others had expressed elsewhere. For example, Eleventh Circuit Chief Judge Joseph Hatchett and Gerald Bard Tjoflat, the court's former Chief Judge, continued their debate over whether the appeals court needs additional active judgeships to resolve its large, mounting caseload.<sup>121</sup> Chief Judge Hatchett testified that the court "should expand in a limited fashion from twelve to fifteen judges," while Judge Tjoflat opposed more judgeships.<sup>122</sup> However, each judge had earlier made similar public pronouncements.<sup>123</sup> Relatively few witnesses stated that the circuits confront difficulties that are troubling enough to deserve remediation, especially with approaches as drastic as splitting appeals courts.

To assist in the inquiry, the Federal Judicial Center helped the commission draft several survey instruments for soliciting applicable material.<sup>124</sup> The commissioners then circulated questionnaires to appellate and district judges as well as attorneys who had filed appeals to solicit information about their experiences. The commission also sought the views of the Supreme Court Justices.<sup>125</sup> Justice Anthony Kennedy, who is a former member of the Ninth Circuit, Justice Sandra Day O'Connor, who is the Justice with responsibility for the circuit, Justice John Paul Stevens, Justice Antonin Scalia, and Justice Stephen Breyer submitted responses.<sup>126</sup> The first four Justices claimed that the court was

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121. See Testimony Before the Commission on Structural Alternatives for the Federal Courts of Appeals, of Joseph Hatchett, Chief Judge, U.S. Courts for the Eleventh Circuit, and Gerald Bard Tjoflat, Circuit Judge, U.S. Court of Appeals for the Eleventh Circuit (Mar. 23, 1998) (on file with author).

122. *Id.*

123. See *Considering the Appropriate Allocation of Judgeships in the U.S. Courts of Appeals for the Fourth, Fifth and Eleventh Circuits: Hearings Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary* (Feb. 7, 1997 & June 9, 1997) (testimony of Chief Judge Hatchett (on file with author); Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70, 70).

124. Commission Report, *supra* note 1, at 4.

125. *Id.* at 3.

126. Letter from Stephen G. Breyer, Justice, U.S. Supreme Court, to Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals (Sept. 11, 1998) (on file with author); Letter from Anthony Kennedy, Justice, U.S. Supreme Court, to Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals (Aug. 17, 1998) (on file with author); Letter from Sandra Day O'Connor, Justice, U.S. Supreme Court, to Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals (June 23, 1998) (on file with author); Letter from Antonin Scalia, Justice, U.S. Supreme Court to Byron R. White, Chair,



too large and suggested that it be divided. They also proposed that three regional circuits be created out of the existing Ninth Circuit. One court would include the five states of the Pacific Northwest. A second would encompass the Eastern and Northern Districts of California and Hawaii. The third would include the Central and Southern Districts of California, Arizona, Nevada, and the territories. Chief Justice Rehnquist, in commenting on the commission's Tentative Draft Report, described the divisional idea as "better than merely a compromise between those who have advocated a split of the circuit and those who argue for the status quo [which appeared] to address head-on most of the significant concerns raised about the court" with minimal administrative disruption.<sup>127</sup> Justice Breyer acknowledged that congestion was the major difficulty confronting the appellate courts, but he rejected circuit-splitting at this juncture and urged the commission to consult the ideas included in the Long Range Plan compiled by the Judicial Conference.<sup>128</sup>

The commission then analyzed and synthesized all of the information that it had solicited and received. For example, it compiled the results of the surveys that were circulated to judges and attorneys and reviewed the hearing testimony and written submissions tendered to the commission. Based on this input, the commissioners wrote a tentative draft report and recommendations which they issued for public comment on October 7, 1998.<sup>129</sup> The commission afforded interested members of the public thirty days to submit their views on the draft report and suggestions. The commissioners reviewed the public input received, modified certain features of the draft report and proposals in light of the public comment and finalized their report and suggestions for Congress and the President in December.

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Commission on Structural Alternatives for the Federal Courts of Appeals (Aug. 21, 1998) (on file with author); Letter from John Paul Stevens, Justice, U.S. Supreme Court, to Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals (Aug. 24, 1998) (on file with author).

127. Commission Report, *supra* note 1, at 39. & n.91 (quoting Letter from Chief Justice Rehnquist to Byron White).

128. Letter from Stephen G. Breyer, *supra* note 126; *see also Long Range Plan*, *supra* note 29.

129. Commission Report, *supra* note 1, at 4.

## III. ANALYSIS OF THE REPORT AND RECOMMENDATIONS

A. *Descriptive Analysis*

The commission compiled a comprehensive report that showed that it had studied the “present division of the United States into the several judicial circuits [and] the structure and alignment of the Federal Court of Appeals system” as well as approaches for facilitating the fair, “expeditious and effective disposition” of caseloads.<sup>130</sup> The commission report considered the problems that the Ninth Circuit and the appellate system have encountered and may face in the future and explored potential solutions for these difficulties.

The most pressing complications that the commission identified were mounting dockets and insufficient resources to address those appeals.<sup>131</sup> The report also suggested that the difficulties could prevent courts from resolving cases as promptly, efficaciously, and equitably as was desirable. The commission detected several other potential problems, principally in its evaluation of the Ninth Circuit, which it characterized as less significant. For example, the report evinced concerns about the ability of the Ninth Circuit to function in an effective and timely manner, to produce a coherent body of circuit law, and to perform its en banc functions effectively.<sup>132</sup> The report also expressed concerns about how the size of the court’s geographic jurisdiction affected federalism, regionalism, and efficacious court operations.<sup>133</sup>

The commission reviewed numerous possible solutions for the complications discovered. The report examined several structural remedies, including divisional organization of the circuits and the prospects of two-judge panels and district court appellate panels (DCAP).<sup>134</sup> The commission correspondingly considered certain non-structural approaches, principally under the rubric of appellate jurisdiction, which involved the resolution of bankruptcy appeals, general discretionary review, and the Federal Circuit.<sup>135</sup>

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130. See *supra* note 84 and accompanying text.

131. Commission Report, *supra* note 1, at ix, xi, 13–25.

132. *Id.*

133. *Id.*

134. *Id.* at 59–66.

135. *Id.* at 67–76.

The report specifically comprised six sections. The first described the commission's creation, mission, and activities.<sup>136</sup> The second section discussed the past and present circumstances of the federal appellate system, emphasizing the transformation of the courts of appeals and their work since the mid-1960s and the emergence of the circuit as an entity of federal judicial administration.<sup>137</sup> Most of the commission's analysis appears in the third through sixth sections of the report.

The third part, which constituted one-third of the report, considered the Ninth Circuit and its court of appeals.<sup>138</sup> The section first described the circuit and the court of appeals, summarized the arguments propounded in the debate over splitting them and posited several criteria that inform this debate.<sup>139</sup> The commissioners found Ninth Circuit administration "at the least, on a par with that of other circuits, and innovative in many respects" and added that there was "no good reason to split the circuit solely out of concern for its size or administration [or] to solve problems [of] . . . consistency, predictability and coherence of circuit law."<sup>140</sup> The commission stated that dividing the court would eliminate the administrative benefits that the current configuration offers and would deprive the Pacific seaboard and the West of a means to maintain consistent federal law in this region.<sup>141</sup> The commissioners rejected circuit-splitting, unless there were no other way of treating perceived difficulties in the court of appeals, and proffered adjudicative divisions as an efficacious alternative for the Ninth Circuit, which should be available to all of the appellate courts as they increase in size.<sup>142</sup> The commission specifically suggested that the Ninth Circuit remain intact but that it operate with three regionally based adjudicative divisions. The commission proposed that each division with a majority of its judges resident in its region have exclusive jurisdiction over appeals arising from district courts in those areas.<sup>143</sup> The plan included a Circuit Division to resolve conflicts that develop between regional divisions.<sup>144</sup> The

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136. *Id.* at 1–6.

137. *Id.* at 7–28.

138. *Id.* at 29–57.

139. *Id.* at 29–40.

140. *Id.* at ix.

141. *Id.* at ix–x.

142. *Id.* at x.

143. *Id.* at 43.

144. *Id.* at 43–46.

commissioners asserted that their “plan would increase the consistency and coherence of the law, maximize the likelihood of genuine collegiality, establish an effective procedure for maintaining uniform decisional law within the circuit, and relate the appellate forum more closely to the region it serves.”<sup>145</sup>

Realizing that Congress might reject the recommendation for adjudicative divisions and restructure the Ninth Circuit, the commission stated that the “challenges to finding a workable solution are daunting.”<sup>146</sup> The commissioners evaluated more than a dozen possible alternatives and “found no merit in any of them.”<sup>147</sup> Nonetheless, the commission described three plans that it considered arguable.<sup>148</sup> The first plan would leave Arizona, California, and Nevada in the Ninth Circuit and place the remaining states and territories in the new Twelfth Circuit.<sup>149</sup> The second plan would leave California, Nevada, Hawaii, and the territories in the Ninth Circuit, move Arizona to the Tenth Circuit, and place the Pacific Northwest states in a new Twelfth Circuit.<sup>150</sup> The third plan would leave Arizona, the Central and Southern Districts of California, Hawaii, Nevada, and the territories in the Ninth Circuit, and place the Pacific Northwest states and the Eastern and Northern Districts of California in a new Twelfth Circuit.<sup>151</sup> In the end, however, the commission characterized each of these possibilities as flawed and endorsed none.

The fourth section of the report examined structural options for all the courts of appeals and urged Congress to accord the courts greater flexibility.<sup>152</sup> The commissioners first remarked that they had developed the idea of divisional organization both for the immediate Ninth Circuit situation and as an alternative to circuit-splitting for the remaining appeals courts as they grow.<sup>153</sup> The commission, therefore, suggested legislation that would afford individual courts considerable flexibility in designing a divisional plan, emphasizing that the Ninth Circuit proposal

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145. *Id.* at x; *see also id.* at 42–45.

146. *Id.* at 53.

147. *Id.*

148. *Id.* at 54–57.

149. *Id.* at 54.

150. *Id.* at 55–56.

151. *Id.*

152. *Id.* at 59–66.

153. *Id.* at 59.

was only one model.<sup>154</sup> Recognizing that these courts vary in terms of their size, dockets, judicial resources, and growth rates, the commission urged that Congress “equip those courts to cope with future, unforeseen conditions by according them a flexibility they do not now have.”<sup>155</sup> The commissioners specifically recommended that Congress authorize each court to decide with panels of two, rather than three, judges appeals that do not involve questions of public importance, pose special difficulty, or have precedential value.<sup>156</sup> The commission also suggested that Congress authorize circuits to create district court appellate panels consisting of two district judges and one circuit judge to review designated categories of cases, with discretionary review available in the court of appeals.<sup>157</sup> The commissioners contended that these measures collectively “should equip the courts of appeals with an ability, structurally and procedurally, to accommodate continued caseload growth into the indefinite future, while maintaining the quality of the appellate process and delivering consistent decisions—assuming, of course, that the system has the necessary number of judges and other resources.”<sup>158</sup>

The fifth section evaluated the structural ramifications of several specific features of appellate jurisdiction, although a majority of the commission considered overall federal jurisdiction beyond the scope of its mandate.<sup>159</sup> The commissioners suggested that Congress “not authorize direct court of appeals review of bankruptcy decisions, pending further study by the Judicial Conference.”<sup>160</sup> The commission believed that legislative approval of direct review would exacerbate problems in the appeals courts and “destroy the arguably successful innovation of bankruptcy appellate panels” (BAP).<sup>161</sup> In the final analysis, the commission concluded that Congress needed more information to make the best decision and urged “Congress to refrain from changing the bankruptcy appellate system until the Judicial Conference has an adequate opportunity to study it and propose any necessary improvements.”<sup>162</sup>

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154. *Id.* at 60.

155. *Id.* at xi.

156. *Id.* at 62–64.

157. *Id.* at xi.

158. *Id.*; see also *id.* at 57–65.

159. *Id.* at xi; see also *infra* notes 170–73 and accompanying text.

160. Commission Report, *supra* note 1, at xi.

161. *Id.* at 67; see also *infra* note 178 and accompanying text.

162. Commission Report, *supra* note 1, at 70.

The commission also analyzed the proposal that appellate court jurisdiction be made discretionary for all appeals but proffered no particular recommendation because it was not convinced that the change was a good idea.<sup>163</sup> The commissioners, without providing any specific suggestions, further evaluated the place of the Federal Circuit in the appellate system and explored tax and social security appeals as illustrative of certain categories of cases that have frequently been suggested as candidates for the court's jurisdiction.<sup>164</sup>

The sixth section included a recapitulation and concluding observations. The commissioners asserted that their suggestions were "constructive, forward-looking innovations [that] do not work radical change . . . [but rather] build on the existing circuit structure and alignment [and] . . . are evolutionary, not revolutionary."<sup>165</sup> They contended that the recommendation for divisional organization of the Ninth Circuit, if successful, would preserve this court and the entire structure of the appellate system for the foreseeable future.<sup>166</sup> The commission, thus, urged that Congress authorize two-judge panels, DCAPs, and divisions, which would permit the Ninth Circuit to continue operating as a "laboratory for innovation."<sup>167</sup> The commission also urged Congress to consider ideas regarding bankruptcy appeals, discretionary appellate jurisdiction, and other possible uses of the Federal Circuit.<sup>168</sup>

The report included additional views. Judge Merritt, whom retired Justice White joined, offered a different perspective on the issue of federal jurisdiction.<sup>169</sup> They asserted that docket growth is the foremost difficulty that the appeals courts face and that caseload increases and jurisdiction directly implicate circuit structure.<sup>170</sup> Judge Merritt, therefore, claimed that the majority's narrow interpretation of the commission mandate to preclude jurisdiction would deprive Congress and the President of suggestions that could treat the symptoms of, and even cure, the docket problem.<sup>171</sup> Accordingly, the dissent urged Congress to reform

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163. *Id.* at 70–72.

164. *Id.* at 72–74.

165. *Id.* at 75.

166. *Id.* at 76.

167. *Id.*

168. *Id.* at 75–76.

169. *Id.* at 77–84.

170. *Id.*

171. *Id.*

diversity jurisdiction by prescribing a system that would permit the removal to federal court only those cases that involve local prejudice or complex multistate subject matter.<sup>172</sup>

In short, the commission compiled a thorough report that determined that numerous circuits now experience, or could encounter, docket expansion that might limit prompt, effective, or fair appellate disposition. The commissioners also comprehensively surveyed potential responses to mounting appeals. Nonetheless, the commission proffered few proposals to alter circuit structure, apparently because it found the complications insufficiently troubling to warrant structural remedies or because it viewed structural changes as less effective than other solutions.

## B. *Critical Analysis*

This subsection critically assesses the commission's most notable recommendations for improvement. Because the statutory charge and the commissioners emphasized that the Ninth Circuit and adjudicative divisions were central to the commission's suggestions, I concentrate on these issues. This subsection then analyzes the commissioners' proposal that Congress authorize appeals courts to resolve some categories of cases with two appellate judges or with panels comprised of one circuit and two district judges. I next briefly evaluate the commission's treatment of certain structural consequences entailed in authorizing direct appellate review of bankruptcy decisions and tax and social security cases as those ideas have been examined elsewhere and the commissioners only posited recommendations regarding bankruptcy appeals.

### 1. *The Ninth Circuit and Adjudicative Divisions*

The commission's core proposal was the call for Congress to establish three adjudicative divisions of the existing Ninth Circuit, which would remain intact for administrative purposes.<sup>173</sup> The divisions would be premised on geography, while a majority of the appellate court judges stationed in specific locales would have responsibility for reviewing

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172. *Id.*

173. *Id.* at 41-45; see also *supra* text accompanying notes 144-46.

appeals that arise from districts within their jurisdiction and a Circuit Division would resolve conflicts.<sup>174</sup>

The divisional concept would afford some general benefit. The system would permit the circuit, which has been very successful and whose administration the commission described as “innovative” in many ways,<sup>175</sup> to continue operating with minimal disruption. For example, divisions would respect the character of the West as a distinct region by having one court construe and apply federal law there.<sup>176</sup> The divisional arrangement would fragment federal practice in the western states less than circuit-splitting because this scheme would preserve a single circuit judicial conference and one set of local appellate rules.<sup>177</sup> Moreover, divisions would enable the Ninth Circuit, which has demonstrated that bigger appeals courts can efficiently resolve substantial dockets and realize certain economies, to continue serving as a model for larger circuits.<sup>178</sup> Illustrative are the court’s creative testing and refinement of measures that foster prompt, efficacious, and fair disposition.<sup>179</sup> These include procedures for tracking issues and cases, alternative dispute resolution programs, and bankruptcy appellate panels, which Congress apparently found so successful that it required the remaining appeals courts to consider instituting them.<sup>180</sup> The circuit has also been able to coordinate effectively its active judges by, for example, assigning them to districts that experience overwhelming caseloads, judicial shortages, or other difficulties.<sup>181</sup>

Divisions could offer specific advantages as well.<sup>182</sup> First, they would reduce travel expenses for circuit members, attorneys, and litigants.<sup>183</sup> Second, the divisional structure might promote collegiality, an elusive concept that Tenth Circuit Judge Deanell Tacha has defined as “lively, tolerant, thoughtful debate; it is the open and frank exchange of opinions;

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174. Commission Report, *supra* note 1, at 41–45; *see also supra* text accompanying notes 144–46.

175. Commission Report, *supra* note 1, at ix; *see also supra* text accompanying note 141.

176. Commission Report, *supra* note 1, at 45; *see also supra* text accompanying note 142.

177. Commission Report, *supra* note 1, at 46.

178. *Id.* at 32–37; *S. 956 Position Paper*, *supra* note 40; *supra* notes 141–43 and accompanying text.

179. *Id.* at 32–37; *S. 956 Position Paper*, *supra* note 40; *supra* notes 141–43 and accompanying text.

180. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104, 108 Stat. 4106, 4109–10 ; *see also Long Range Plan*, *supra* note 29, at 47.

181. Commission Report, *supra* note 1, at 32–37; *S. 956 Position Paper*, *supra* note 40; *supra* notes 141–43 and accompanying text.

182. Commission Report, *supra* note 1, at 29–30, 47–50.

183. *Id.*



it is comfortable controversy; it is mutual respect earned through vigorous exchange."<sup>184</sup> Appellate judges in the three divisions would sit together on panels more frequently and, thus, secure increased familiarity with their colleagues' views on substantive and procedural questions, interpretive techniques, political issues, and decisional styles.<sup>185</sup> This could reinforce the importance of listening and keeping an open mind while enhancing the judges' ability to hold themselves and each other accountable and be accountable as a court.<sup>186</sup> These judges and the fewer district judges whose determinations they would review would know one another better professionally and personally.<sup>187</sup> Appellate court judges who are appointed from, and have responsibility for, a smaller geographic expanse would correspondingly possess or acquire greater appreciation for the local legal and broader cultures from which appeals emanate.<sup>188</sup> The Circuit Division should also help preserve consistent precedent. The commission cogently summarized these ideas when it claimed that the divisional plan would enhance consistent and coherent circuit law, maximize the possibility of genuine collegiality, create an efficacious procedure for maintaining consistent decisional law in the circuit, and relate the appellate forum more directly to the area it serves.<sup>189</sup> Finally, if divisions prove efficacious in the Ninth Circuit, the concept should be readily transferable to other courts as they grow, thereby vitiating the need to consider circuit-splitting elsewhere.<sup>190</sup>

The divisional proposal might impose some disadvantages, or be relatively ineffective, however. Divisions may not necessarily promote collegiality and could even lead to disagreement, detrimental routinization, or bureaucratic rigidity.<sup>191</sup> It remains unclear whether greater familiarity with the district judges whose dispositions are being appealed or the locales from which cases arise will lead to faster, more effective, or fairer appellate decisionmaking. Instead, the divisional arrangement might

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184. Deanell Reece Tacha, *The "C" Word: On Collegiality*, 56 Ohio St. L.J. 585, 587 (1995); see also *Long Range Plan*, *supra* note 29, at 44–45; William M. Richman & William L. Reynolds, *Elitism, Expediency and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 323–25 (1996).

185. Commission Report, *supra* note 1, at 29–30, 47–50.

186. *Id.* at 29–30; Tacha, *supra* note 185, at 587–91.

187. Commission Report, *supra* note 1, at 47–48.

188. *Id.*

189. *Id.* at x.

190. *Id.* at 29–30, 47–50.

191. See *supra* note 63 and accompanying text.

erode the circuits' discharge of their important federalizing function—that is, the responsibility for reconciling the U.S. Constitution and national policies with state and local concerns.<sup>192</sup> Moreover, divisions will not limit the quantity of Ninth Circuit law that the court's judges must master, assuming for the purposes of argument that greater mastery of precedent would foster consistency and coherence.<sup>193</sup> For example, appellate judges would have to track the identical quantity of precedent that they now monitor to minimize intracircuit inconsistency and identify potential conflicts requiring Circuit Division resolution. Thus, the probable effects of the divisional plan are unclear.

How the Circuit Division would operate in practice is also uncertain, partly because federal courts have never actually applied the measure. For instance, the notion of inconsistency that triggers the mechanism's application is imprecise and may even resist definition,<sup>194</sup> while the Circuit Division's power to articulate circuit law is also not clearly delineated. Moreover, the device could significantly delay the disposition of cases in which it is invoked and might increase friction among judges in the circuit. These phenomena and others, such as the Circuit Division's composition, mean that the technique may be vulnerable to criticism for the same reasons that opponents use to attack the limited en banc procedure.<sup>195</sup> Furthermore, the assignment of California's districts to different divisions could have detrimental effects, such as fostering

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192. See, e.g., Charles A. Wright, *The Law of Federal Courts* 10–13 (5th ed. 1994); John Minor Wisdom, *Requiem for a Great Court*, 26 *Loy. L. Rev.* 787, 788 (1980). But see Commission Report, *supra* note 1, at 44–45.

193. Commission Report, *supra* note 1, at 29, 34–35. Mastery, in the sense of reading all opinions issued, may not enhance consistency and coherence as much as modern computerized research. No empirical data correlate pre-publication circulation of opinions to the courts' judges with increased consistency or coherence. Moreover, no empirical data correlate circuit size with increased consistency or coherence.

194. See, e.g., Hellman, *supra* note 52, at 541; see also McKenna, *supra* note 27, at 93–98; Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 *U. Pitt. L. Rev.* 693 (1995).

195. The limited en banc procedure consists of the chief judge and 10 other circuit judges chosen essentially by lot who rehear appeals to secure or maintain uniformity and to resolve issues of exceptional importance. Fed. R. App. P. 35(a); see also 9th Cir. R. 35; Pub. L. No. 95-486, 92 Stat. 1633 (1978); Commission Report, *supra* note 1, at 32. Circuit-splitting proponents argue that “a panel only slightly larger than a third of the court's full judgeship complement contravenes the very concept of an ‘en banc’ court.” See Commission Report, *supra* note 1, at 35. But see *id.* at 45–49 (justifying Circuit Division measure).

inconsistent interpretations of California substantive law and forum shopping, which the Circuit Division may not fully ameliorate.<sup>196</sup>

It is important to remember that the Ninth Circuit experimented with and rejected an approach analogous to divisions twenty years ago. Former Chief Judge James Browning testified before the commission that the court's judges unanimously decided to discontinue testing five months after its institution because they "thought there were discrepancies developing among the decisions" in the three geographic areas and "there was a real loss of collegiality."<sup>197</sup> Application of the divisional system could correspondingly limit large circuits' beneficial aspects, such as diversity, in terms of caseload novelty and complexity as well as viewpoints, geography, race, and gender, that twenty-eight active judges can offer.<sup>198</sup>

The commissioners perceptively recognized that Congress might reject adjudicative divisions and decide to restructure the Ninth Circuit.<sup>199</sup> Searching for feasible approaches to reconfiguration and characterizing the task as daunting, the commission analyzed more than a dozen models and found them all meritless. The commissioners, however, examined the three plans that they considered worthy of argument, but ultimately concluded that each was flawed and prescribed none. Commission treatment of this issue, through the good faith exploration of viable options, and its determinations are justifiable. Others have conducted similar assessments and reached analogous conclusions that the court defies practicable realignment.<sup>200</sup>

## 2. *Structural Options for All the Courts of Appeals*

The structural alternatives that the commission proffered for all of the appeals courts require comparatively limited examination here.<sup>201</sup> First,

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196. Commission Report, *supra* note 1, at 1; *see also supra* notes 20, 33–34 and accompanying text.

197. Testimony Before the Commission on Structural Alternatives for the Federal Courts of Appeals of James Browning, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit (May 29, 1998) (on file with author). *But see* Commission Report, *supra* note 1, at 50 (suggesting how new "proposal differs fundamentally" from experiment described).

198. *See supra* notes 176–82 and accompanying text. Similar considerations would apply to the use of adjudicative divisions in appeals courts other than the Ninth Circuit.

199. Commission Report, *supra* note 1, at 54–57.

200. *Id.*; *see also, e.g.*, Baker, *supra* note 3, at 945–49; Tobias, *supra* note 78, at 242–45; *see also* Hruska Commission, *supra* note 14, at 234–42 (analyzing various approaches).

201. Commission Report, *supra* note 1, at 60–62.

the concept of divisions as applied to the Ninth Circuit received rather extensive evaluation above, and the same analysis should apply to the other circuits. Second, quite a few institutions and federal courts observers have scrutinized the benefits and disadvantages of two-judge and district court appellate panels.<sup>202</sup> Nonetheless, some exploration of these ideas is warranted here because it will inform understanding of the concepts.

The commission's development of adjudicative divisions and its proposal that Congress empower regional circuits to employ two-judge panels and DCAPs in certain cases astutely recognize variations among the courts and that lawmakers must afford them much flexibility to address future situations. More specifically, the commissioners' suggestion that individual circuits fashion divisional plans tailored to their circumstances and that the Ninth Circuit recommendation serve as a single model properly acknowledge and provide for the realities that these courts may have diverse needs and might want to respond differently.<sup>203</sup>

The prescription of two-judge and district court appellate panels also acknowledges that circuits require flexibility, particularly in conserving scarce judicial resources. Both forms of panels would save the time that appellate judges devote to those appeals designated for special treatment, and DCAPs would capitalize on the greater capacity that now exists at the district court level.<sup>204</sup> However, many current trial court judges who would serve on district court appellate panels were appointed principally for their trial court expertise and might not "review rigorously, and find erroneous, rulings" of peers who may be close professional or personal colleagues.<sup>205</sup> Moreover, reliance on DCAPs could necessitate the prompt confirmation of numerous new district judges.<sup>206</sup> Each kind of panel might also affect the justice dispensed by, for example, permitting

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202. See, e.g., *Long Range Plan*, *supra* note 29, at 131–32; McKenna, *supra* note 27, at 133–39; Martha Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 Wis. L. Rev. 11, 58–62; Louis Pollak, *Amici Curiae*, 56 U. Chi. L. Rev. 811, 825–26 (1989).

203. Commission Report, *supra* note 1, at x–xi.

204. See Dragich, *supra* note 203, at 59; Tobias, *supra* note 12, at 1278–79; see also Jon O. Newman, *1000 Judges—The Limit for an Effective Federal Judiciary*, 76 *Judicature* 187 (1993).

205. Tobias, *supra* note 13, at 403–04. I realize that most district judges have or secure appellate court expertise and many could now ably discharge the error-correction function envisioned.

206. See McKenna, *supra* note 27, at 138; Baker, *supra* note 3, at 952. Securing confirmation of district court nominees is easier. See Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. Times, Apr. 10, 1990, at A1; see also Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 23 *Hastings Const. L.Q.* 741, 752 (1997).

increased error in the categories of cases delineated. However, the commission proposals provide for instances in which the decisionmakers on two-judge panels disagree and for discretionary appeals court review of DCAP determinations.<sup>207</sup>

Subject to the above caveats, the commissioners may have predicted accurately that these approaches together will permit the circuits to address continued docket growth and to maintain the appellate process's quality and decisional consistency, assuming the courts have the requisite resources.<sup>208</sup> If the Ninth Circuit were to experiment with adjudicative divisions relatively soon, the concept's efficacy could be evaluated and indicated refinements instituted in time for the other courts to profit from this testing. The commission's assumption that Congress will appropriate sufficient funds for the circuits to operate effectively is a critical, yet troubling, one<sup>209</sup> because it may not reflect the political reality of future legislative budgeting processes.<sup>210</sup>

### 3. *Structural Consequences Involving Appellate Jurisdiction*<sup>211</sup>

The commissioners' recommendation that Congress await the results of the Judicial Conference study before considering direct appellate court review of bankruptcy determinations is reasonable.<sup>212</sup> The commission demonstrated that permitting direct review might additionally burden the regional circuits without improving the quality of decisionmaking. The commissioners' intimation that discretionary appellate jurisdiction would not be appropriate today appears convincing. Few persuasive reasons support this reform, which would alter the time-honored notion that

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207. Commission Report, *supra* note 1, at 62–66; *see also supra* note 203.

208. Commission Report, *supra* note 1, at xi.

209. *See id.*

210. *See* William H. Rehnquist, *1997 Year-End Report on the Federal Judiciary* (1997); *see also* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 *Minn. L. Rev.* 375, 379–82, 399–400 (1992); William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 *Wis. L. Rev.* 1; Tobias, *supra* note 207, at 753.

211. I explore only tersely here the structural ramifications that implicate appellate jurisdiction. The issues raised by direct appeal of bankruptcy decisions, by making general appellate jurisdiction discretionary, and by enlarging the Federal Circuit's jurisdiction have been ventilated elsewhere rather thoroughly, while the commission proffered no affirmative suggestions respecting the latter two propositions. Commission Report, *supra* note 1, at 67–68 (noting that National Bankruptcy Review Commission studied bankruptcy system for several years); Baker, *supra* note 21, at 234–38 (discussing discretionary jurisdiction); *supra* note 7 (analyzing Federal Circuit).

212. Commission Report, *supra* note 1, at 57–61.

parties deserve at least one appeal in the federal system.<sup>213</sup> The commission's assessment of expanding the Federal Circuit's duties to include appellate resolution of tax and social security cases without tendering particular suggestions seems defensible.<sup>214</sup> These two prospects have already received analysis, and Congress would probably be responsive to the concerns of specialized practitioners and litigants in the fields involved.

### C. *Summary by Way of Critique*

The commission carefully studied the federal appellate courts and compiled a report and recommendations that complied with its statutory mandate; however, it did not complete the extensive evaluation of the system that is warranted at this important juncture. For example, the commission gathered very little empirical data on the Ninth Circuit and the other appeals courts. The commissioners employed only a skeletal staff and enlisted the assistance of few personnel in the Federal Judicial Center and the Administrative Office. They also did not spend very much of the generous \$900,000 budget appropriated for the commission's work, or capitalize on readily available resources, such as law professors, who might have collected and analyzed instructive empirical information.<sup>215</sup>

The commissioners proposed that Congress prescribe adjudicative divisions without clearly ascertaining that fundamental reform was actually necessary or that the solution recommended would in fact work by systematically assembling, assessing, and synthesizing the maximum quantity of relevant empirical material to support this proposal. The commission failed to establish conclusively that the Ninth Circuit was slowly or ineffectively deciding appeals, producing insufficiently consistent or coherent circuit law, or inefficaciously performing its en banc function. The commissioners also did not demonstrate definitively that the implications of the size of the court's geographic jurisdiction for

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213. See 28 U.S.C. § 1291 (1994); Baker, *supra* note 21, at 234–38; see also Commission Report, *supra* note 1, at 57–61; Robert M. Parker, Jr. & Ron Chapman, Jr., *Accepting Reality: The Time for Adopting Discretionary Review in the Courts of Appeals Has Arrived*, 50 SMU L. Rev. 573 (1997).

214. Commission Report, *supra* note 1, at 72–74.

215. See Pub. L. No. 105-119, § 305(b), 111 Stat. 2491, 2492 (1997); see also Commission Report, *supra* note 1, at 72–74; Paul Elias, *Final 9th Circuit Study Calls for Three Divisions*, Recorder, Dec. 31, 1998, at 3 (reporting that commission spent \$500,000). I only mean to suggest that the commission might have productively used more of the budget than it did, not that the commission failed to spend profitably the money that it did use or should have been profligate.

regionalism, federalism, and effective court operations or its magnitude for collegiality are troubling, much less problematic enough to require major change. Instead, the commission relied substantially on the ideas that smaller decisionmaking units would foster uniformity, predictability, and collegiality, that more efficacious en banc procedures and the Circuit Division would guarantee greater consistency and coherence in circuit law and that the recommended divisional structure would rationalize appellate courts' regionalizing and federalizing responsibilities to support the divisions suggested. That proposal would divide the court of appeals, if not the circuit. In the end, it remains unclear that this divisional organization would afford the expected benefits because the federal courts have never implemented the system.<sup>216</sup>

In fairness, the commission probably achieved as much as could reasonably be expected during the exceedingly short time frame Congress provided. For example, the commissioners did accumulate and analyze some empirical information and showed that expanding caseloads are now and may be sufficiently troubling to deserve remediation. The commission correspondingly submitted recommendations, namely for divisions and two-judge and district court appellate panels, that would ameliorate difficulties, such as delayed resolution, attributable to docket growth. The commissioners also recognized that a few suggestions, primarily the divisional arrangement, could have detrimental side effects and, thus, called for the concepts' testing and evaluation over a specific period. The commission provided for considerable flexibility by proposing sequential experimentation with divisions and urging that Congress authorize, rather than require, circuits to effectuate most measures, including special panels. Insofar as the commissioners' efforts are vulnerable to criticism, a more appropriate target would be Congress which, for instance, only accorded the commission a year to complete an enormous task with a relatively ambiguous charge.

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216. See Commission Report, *supra* note 1, at 72-74. Similar ideas apply to the proposals regarding two-judge panels and DCAPs. For instance, the commission did not clearly show that the circuits face difficulties that require remediation. However, docket growth adversely affects resolution in numerous circuits and, thus, the panels would be responsive by saving appellate judges' resources.

## IV. SUGGESTIONS FOR THE FUTURE

Congress and the federal appellate courts should carefully consider the report and recommendations issued by the Commission on Structural Alternatives for the Federal Courts of Appeals and effectuate those suggestions that will enable the appellate system and individual circuits to resolve cases expeditiously, efficaciously, and equitably. Lawmakers and courts might defer somewhat to the expert, independent entity that Congress authorized because the commissioners spent a year scrutinizing the appeals courts and developing a report and proposals for their improvement. Legislators and judges should consult the broadest spectrum of potential remedies for the difficulties that the courts currently face and will confront, while simultaneously tailoring solutions to the specific problems of each circuit. Members of Congress and the judiciary should proceed cautiously, as the courts' futures are at stake. For example, to the extent that lawmakers or judges entertain doubts regarding the complications that circuits do or will experience, the precise impacts of commission recommendations or the effectiveness of particular approaches, they should defer action, consider additional study, or institute experimentation before implementing irrevocable remedies such as a circuit split.<sup>217</sup>

*A. Congress*

Because the evidence on which the commissioners relied did not conclusively demonstrate that caseload growth is sufficiently troubling to deserve remediation, or that the divisional or panel arrangements would be improvements, Congress should seriously consider several possible courses of action. The House and the Senate, through their respective judiciary committees, may want to scrutinize the commission's report and suggestions or solicit greater public input, especially from appeals

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217. I principally address Congress because it must implement most of the commissioners' suggestions and the courts can effectuate only a few. However, the Judicial Conference of the United States, the policymaking arm of the federal courts, and the Judicial Councils, the governing entities in the circuits, as well as individual appellate and district judges should review and comment on the commission's proposals. These institutions and jurists are peculiarly well-equipped to predict how the measures will work in practice, while the courts' cooperation will be crucial to successful application of any reforms that Congress adopts. The Conference, however, has limited authority to bind the circuits with respect to most of the commission recommendations, but the Conference over which the Chief Justice presides and whose members include each circuit's Chief Judge could speak persuasively to many proposals. The Councils might implement a few suggestions. *See* 28 U.S.C. §§ 331–32 (1994).



court judges and users, on this work. The committees could also independently examine the matters that the commissioners analyzed. Moreover, members of Congress might employ the recently introduced bills that embody the commission's recommendations, and the measures could serve as vehicles for evaluating the relevant issues, reassessing the commissioners' findings, and refining their suggestions.<sup>218</sup> Absent further study, efforts to ascertain whether the commission properly determined that docket growth in the Ninth Circuit and other courts is problematic enough to merit treatment will prove inconclusive. Without additional study, attempts to determine whether the solutions that the commission proffered would be efficacious will similarly be inconclusive.<sup>219</sup>

These propositions mean that Congress may want to authorize experimentation with techniques that could address increasing caseloads and the difficulties that led to the commission's recommendations. This testing should continue for sufficient time in enough contexts to ascertain the efficacy of those concepts. The preferable approach might be to approve Ninth Circuit testing of a divisional structure modeled on the commission proposal, as appropriately refined, and to encourage experimentation in some appeals courts with other mechanisms, such as two-judge and district court appellate panels. Testing of additional measures, including bankruptcy appellate panels and expanded Federal Circuit jurisdiction, should also be considered. More specifically, the divisional concept could be implemented for seven years, as the commissioners recommended, in the Ninth Circuit. Two-judge panels or DCAPs might correspondingly be instituted for a similar period in circuits, namely the Fifth and Eleventh, that are encountering significant docket growth. Congress could empower the Federal Circuit for an analogous time to experiment with tax or social security appeals, while some appellate courts that have not employed BAPs may want to implement them voluntarily.<sup>220</sup> An expert, independent entity, such as the

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218. Congress, which commissioned the year-long study, will be reluctant to appear as if it is second-guessing the commission or may prefer deferring to the expert, independent entity, although senators who disagree with commission findings or suggestions are unlikely to accede.

219. Illustrative of the type of studies needed is Professor Hellman's meticulous analysis of consistency and related issues for more than a decade. *See, e.g.*, Hellman, *supra* note 52; Hellman, *By Precedent, supra* note 195.

220. BAPs may be the only measures that courts can adopt without congressional authority. *See supra* note 181 and accompanying text. Ninth Circuit divisions could arguably be vouched through the 1978 statute prescribing measures for large circuits. *See supra* note 41 and accompanying text. However, the controversial nature of the authority question and the significant character of the change suggest that clear congressional authorization is preferable.

RAND Corporation, must rigorously analyze this testing by systematically collecting, assessing, and synthesizing the maximum amount of dependable empirical information.<sup>221</sup> Once that experimentation has occurred and received careful evaluation, it should be possible to delineate more precisely those problems that the appeals courts are experiencing that deserve long-term treatment and to identify the most efficacious solutions for the complications designated. Congress then can pass legislation, if warranted, to implement any permanent changes that are indicated.

Lawmakers may wish to examine the institution of additional actions. Because most circuits have faced rising caseloads but have possessed inadequate resources to address them, and many of the courts will probably confront similar circumstances in the future, Congress could invoke several responses. First, it might analyze ways to reduce the number of appeals by, for instance, limiting federal civil or criminal jurisdiction, an approach that retired Justice White and Judge Merritt proposed.<sup>222</sup> However, legislators probably will not restrict federal jurisdiction,<sup>223</sup> therefore, they must evaluate means of responding directly to docket expansion. For example, Congress could augment resources in the form of more judgeships or increased staff.<sup>224</sup> It might also explore a broad spectrum of structural and non-structural measures for treating caseload growth.<sup>225</sup>

Finally, if lawmakers remain uncertain about the commission's findings or suggestions, they may want to authorize additional study of the system or specific courts. The commission admirably discharged its substantial responsibilities in a brief period; however, the lack of time and other restraints might have prevented the entity from completing the type of thorough analysis that may be needed. Congress, accordingly,

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221. Illustrative are studies of federal civil justice reform. *See, e.g.*, James S. Kakalik et al., *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (1996); James S. Kakalik et al., *Implementation of the Civil Justice Reform Act in Pilot and Comparison Districts* (1996); *see also* Commission Report, *supra* note 1, at 40 (proposing FJC study).

222. *See supra* notes 170–73 and accompanying text; *see also Long Range Plan*, *supra* note 29, at 134; McKenna, *supra* note 27, at 141–53.

223. *See, e.g.*, Stephen Breyer, *Administering Justice in the First Circuit*, 24 *Suffolk U. L. Rev.* 29, 34–37 (1990); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 *Hastings L.J.* 1135 (1995); Dragich, *supra* note 203, at 16–17.

224. *See Baker*, *supra* note 21, at 202; *see also* Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 *Emory L.J.* 527 (1988); Tobias, *supra* note 78, at 235.

225. For comprehensive treatment of these measures, *see Baker*, *supra* note 21, and McKenna, *supra* note 27.

might consider extending the commission's life or authorizing another assessment, which would build on its work in the near term.

*B. The Courts*

The Judicial Conference should carefully review and respond to the commission's report and recommendations. The Conference might accord some deference to the commissioners and should solicit the views of particular appellate and district judges who will be familiar with the courts' circumstances and how to treat them. More specifically, the Conference ought to decide whether implementation of, or experimentation with, divisions and two-judge or district court appellate panels is advisable systemwide or in individual circuits. If the entity concludes that effectuation or testing of divisional or panel arrangements is indicated, it should identify courts based on diversity of case complexity, docket size, and judicial resources to apply the measures most productively.

The Conference might also formulate positions on the three issues related to appellate jurisdiction that implicate structure. For example, the entity could ascertain whether the commission's opposition to direct bankruptcy appeals is appropriate.<sup>226</sup> The Conference may wish to consult the work of the National Bankruptcy Review Commission because this group called for congressional approval of direct appeals.<sup>227</sup> However, it appears preferable for the Conference to await the results of the study that it recently commissioned. The Judicial Conference could also consider the propriety of making appellate review discretionary.<sup>228</sup> However, that prospect has received thorough discussion within and outside Congress for several decades, and modifying appeal of right would contravene a venerated tradition in American jurisprudence. The Conference, as well, might develop positions on the advisability of enlarging the Federal Circuit's jurisdiction to encompass tax or social security cases or experimenting with appeals in either of those areas.<sup>229</sup>

The Judicial Conference must seriously evaluate the recommendation of Judge Merritt and retired Justice White on diversity jurisdiction

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226. See Commission Report, *supra* note 1, at xi, 57-74; see also *supra* text accompanying notes 160-65.

227. See Commission Report, *supra* note 1, at 72-74.

228. See *id.* at 70-72.

229. See *supra* note 165 and accompanying text. The Conference ought to seek the views of the court's judges and attorneys and parties who pursue these cases.

because jurisdiction was arguably within the statutory mandate, and application of the commissioners' idea could alleviate the pressures that appellate courts are experiencing.<sup>230</sup> The Conference might formulate a position on this issue, although Congress has rejected similar proposals that would limit diversity jurisdiction since 1945.<sup>231</sup>

The Judicial Councils in the circuits ought to consider many of the commission's suggestions that involve particular appeals courts. For example, the Ninth Circuit should closely examine the commissioners' divisional proposal and may want to fashion a position on whether immediate implementation or experimentation is preferable, although the commission's recent recommendation would essentially facilitate testing. In response to issues that the Commission raised, Chief Judge Hug appointed an Evaluation Committee to analyze the Ninth Circuit and report suggestions for improvement.<sup>232</sup> The council might specifically suggest that divisions receive experimentation and rigorous assessment for some period after which Congress could decide on the concept's broader application. Restricted testing and expert analysis should indicate whether the divisional approach warrants permanent adoption in this court and extension to other circuits. The remaining councils may wish to determine whether divisions or two-judge or district court appellate panels deserve effectuation or experimentation in their circuits. The councils could also develop positions on the propriety of direct bankruptcy appeals and of making appellate jurisdiction discretionary, while the judges of the Federal Circuit could evaluate the wisdom of enlarging the court's jurisdiction.

The commission carefully assessed the circuits and made constructive suggestions in the brief time available. However, the Judicial Conference and individual courts should undertake more examination. For example, greater scrutiny might reveal felicitous means of expediting appeals that have applicability systemwide or to specific circuits. In the foreseeable future, it also appears that docket growth will continue but that the courts will have few additional resources for treating cases. The Conference and

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230. Commission Report, *supra* note 1, at 78–79; see also *supra* text accompanying notes 170–73.

231. See Commission Report, *supra* note 1, at 78–79.

232. Media Release, *Chief Judge Hug Appoints Evaluation Committee and Releases Analysis of White Commission's Proposal to Divide the Court of Appeals into Three Divisions* (Mar. 10, 1999), available in <<http://www.ce9.uscourts.gov/web/OCELibra.nsf/504ca249c786e20f85256284006da7ab/a56e24f2c74c4f2588256730005b6dab?OpenDocument>>.

the circuits, therefore, should continue evaluating the courts' situations and experimenting with promising measures.

## V. CONCLUSION

The Commission on Structural Alternatives for the Federal Courts of Appeals recently completed a study of the appellate system and issued a report and recommendations that could influence the courts' destiny in the twenty-first century. The commissioners admirably discharged their serious responsibility in the short period that Congress provided. Members of Congress and the federal judiciary must closely analyze the commission's work and implement those ideas which will improve the system. To achieve effective reforms in the appellate courts, the Congress and the judiciary should experiment with the commission's proposed reforms before they institute permanent structural changes. The diverse characteristics of each circuit require flexible approaches that are tailored to the specific court's circumstances. Moreover, the lack of compelling empirical evidence warranting change may well suggest the need for additional study.