

Jerry-Building the Road to the Future: An Evaluation of the White Commission Report on Structural Alternatives for the Federal Courts of Appeals

JOSEPH N. AKROTIRIANAKIS*
PAUL GARO ARSHAGOUNI**
ZAREH A. JALOTORSSIAN***

TABLE OF CONTENTS

I.	INTRODUCTION	356
II.	BACKGROUND	358
	A. <i>The Ninth Circuit and the Federal Courts of Appeals</i>	358
	B. <i>Circuit Divisions in the Twentieth Century</i>	359
III.	THE WHITE COMMISSION REPORT	361
	A. <i>Creation of the Commission on Structural Alternatives for the Federal Courts of Appeals</i>	361
	B. <i>The Commission's Proposal: Internally Divide the Ninth Circuit, But Do Not Split It into Two Separate Circuits</i>	362
	C. <i>Alternative Solutions Considered and Rejected by the Commission</i>	364
	D. <i>Rationalizing the Commission's Recommendation</i>	368
IV.	EVALUATION OF THE COMMISSION'S PROPOSAL.....	369
	A. <i>Enhancing Consistency and Coherency of Ninth Circuit Law</i>	370
	B. <i>Improving the Ninth Circuit's En Banc Process</i>	373
	C. <i>Increasing Regional Connections</i>	376
	1. <i>Debunking the Myth of "California Judging"</i>	377
	2. <i>Promoting Judicial Regionalism: A Misconception of the Role of Our Federal Courts</i>	378

	D. Other Disadvantages of the Proposed Reorganization.....	379
V.	COMMON CRITICISMS OF THE NINTH CIRCUIT NOT ADDRESSED BY THE COMMISSION	381
	A. The Sheer Expanse of the Ninth Circuit's Boundaries Is Reason to Divide It Only if Size Results in Other Problems.....	382
	1. The Ninth Circuit's Size Has Not Resulted in a Lack of Expediency in Resolving Appeals	382
	2. The Ninth Circuit's Size Has Not Caused a Loss of Collegiality Among Its Judges.....	384
	B. The Supreme Court's Reversal Rate of the Ninth Circuit.....	385
VI.	REFOCUSING THE DEBATE: THE REAL PROBLEM FACED BY THE UNITED STATES COURTS OF APPEALS.....	387
	A. The Workload Crisis: A Threat to Appellate Justice	387
	B. Non-Circuit Dividing Alternatives.....	390
	C. The Modern Ninth Circuit: A Triumph of Innovative Case Management.....	392
VII.	CONCLUSION	395

I. INTRODUCTION

For years, critics have argued that the United States Court of Appeals for the Ninth Circuit should be divided because it has grown too large to manage its caseload effectively.¹ They blame the Ninth Circuit's size for alleged increases in intra-circuit conflicts, inefficiency, delay, and a lack of collegiality among its judges.² In recent years, conservative congressmen in the Pacific Northwest have criticized the San Francisco-based circuit for its "liberal" rulings on everything from the environment to the death penalty.³

On November 26, 1997, Congress created the Commission on

* Law Clerk to the Honorable Harry Pregerson, United States Court of Appeals for the Ninth Circuit; J.D., *magna cum laude*, 1998, Loyola Law School; B.A., *cum laude*, 1995, Whittier College.

** Former extern to Judge Pregerson; J.D. 1999, U.C.L.A. Law School; M.P.H., *summa cum laude*, 1994, U.C.L.A.; M.D. 1988, U.C. Irvine; B.A., *magna cum laude*, 1984, U.C.L.A.

*** Former extern to Judge Pregerson; J.D. 1999, U.C.L.A.; B.A., *summa cum laude*, 1996, U.C.L.A.

The authors would like to thank the following for their assistance in the preparation of this article: Judge Harry Pregerson, Cathy Catterson, Clerk, U.S. Court of Appeals for the Ninth Circuit, Shelley Levine, Serge Avakian, Peder Batalden, and the staff and editors of the *San Diego Law Review*.

1. See David G. Savage, *Panel Urges Realignment of Appeals Court*, L.A. TIMES, Oct. 8, 1998, at A3.

2. See Conrad Burns, *Dividing the Ninth Circuit Court of Appeals: A Proposition Long Overdue*, 57 MONT. L. REV. 245, 250-51 (1996).

3. See *9th Circuit Split It in 3, Panel Says*, ARIZ. DAILY STAR, Oct. 8, 1998, at 9A; Savage, *supra* note 1, at A3.

Structural Alternatives for the Federal Courts of Appeals.⁴ The Commission was headed by the Honorable Byron R. White, retired Associate Justice of the United States Supreme Court. It was charged with studying the structure of the federal courts of appeals, focusing on whether the Ninth Circuit should be divided.⁵

On December 18, 1998, the Commission issued its report and recommended an unprecedented reorganization of the Ninth Circuit.⁶ The Commission recommended that Congress reorganize the Ninth Circuit into Northern, Middle and Southern divisions. Under the proposed plan, a majority of each division's judges would reside within the division's borders,⁷ and each division would have exclusive jurisdiction to hear appeals from lower courts and administrative agencies within its bounds. The Commission considered and rejected proposals to divide the Ninth Circuit into two separate circuits and thereby create a new Twelfth Circuit.⁸

On January 19, 1999, Senators Frank H. Murkowski and Slade Gorton introduced the Federal Ninth Circuit Reorganization Act of 1999.⁹ The bill is verbatim the model act proposed by the White Commission.

This Article critically analyzes the Commission's recommendation.¹⁰ Part II reviews the history and background of the debate whether the Ninth Circuit should be divided. Part III examines the Commission's findings. Part IV evaluates the Commission's proposal and the reasons the Commission offers in support of its recommendation. Part V discusses criticisms of the Ninth Circuit that the Commission did not address and analyzes whether those criticisms justify the Ninth Circuit's division. Part VI examines the ways in which the Ninth Circuit has innovated to deal with increasing workloads and suggests that these

4. See COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, PUB L. NO. 105-119, FINAL REPORT 1 (1998) [hereinafter REPORT].

5. See *id.*

6. See *id.* at iii.

7. See COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, TENTATIVE DRAFT REPORT 41 (1998) [hereinafter DRAFT REPORT]. A minority of each division's judges would also reside outside the division's borders. See *id.*

8. See *id.* at 39.

9. Federal Ninth Circuit Reorganization Act of 1999, S. 253, 106th Cong. The asserted purpose of Senate Bill 253 is "[t]o provide for the reorganization of the Ninth Circuit Court of Appeals, and for other purposes." *Id.* Murkowski is a Republican Senator from Alaska and Gorton is a Republican Senator from Washington. Both Senators have previously endorsed bills to split the Ninth Circuit.

10. This Article addresses the recommendations of the Final Report.

innovations are solutions to problems that will soon become common to all federal courts of appeals.

II. BACKGROUND

A. *The Ninth Circuit and the Federal Courts of Appeals*

The present arrangement of the federal courts of appeals can be traced to the Judiciary Act of 1789.¹¹ The 1789 Act created a federal judicial district and a one-judge district court in each of the then-eleven states.¹² The Act divided the eleven districts into three “circuit courts” and thereby created an intermediate tier of federal courts with limited appellate duties.¹³

These original circuit courts were the principal federal trial courts. They heard major federal criminal cases, diversity actions, and civil cases in which the United States was a party.¹⁴ The circuit courts had no judges of their own. Rather, they were presided over by three-judge panels composed of one district judge and two Supreme Court Justices who “rode circuit.”¹⁵ The original circuit courts had some appellate jurisdiction to review “specified categories of district court decisions.”¹⁶ The United States Supreme Court, however, functioned as the primary appellate court.¹⁷ Congress eventually created circuit judgeships which assumed the role previously played by Supreme Court Justices, whose circuit riding was reduced to a symbolic minimum.¹⁸

By 1866, Congress had realigned the circuit courts’ boundaries

11. Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73; 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, 919 (1990). The Judiciary Act was passed pursuant to Congress’ power to vest “[t]he judicial power of the United States” in lower federal courts that Congress may “from time to time ordain and establish.” U.S. CONST. art. III, § 1.

12. The federal district courts were trial courts of limited jurisdiction. Their docket was largely comprised of cases in admiralty, forfeitures and penalties, and minor federal crimes and smaller “United States as plaintiff” cases. See REPORT, *supra* note 4, at 7.

13. See *id.*

14. See *id.*

15. See *id.* “This approach saved the money a separate corps of judges would require, exposed the justices to the state laws and legal practices that affected the Supreme Court docket, and promoted familiarity with the government in the country’s far reaches.” *Id.*

16. Baker, *supra* note 11, at 919. The original circuit courts had a limited appellate function for larger civil and admiralty cases heard in the district courts. See REPORT, *supra* note 4, at 7.

17. See Baker, *supra* note 11, at 919.

18. See *id.* at 920.

thirteen times.¹⁹ The primary purpose of these initial reorganizations was to adjust the trial assignments of the Supreme Court Justices.²⁰ In 1866, Congress again reorganized the circuits, creating an arrangement that vaguely represents the present layout. The then-nine circuits stretched across the territories that today make up the forty-eight contiguous United States. The Ninth Circuit originally encompassed California, Nevada, and Oregon. Idaho, Montana, and Washington were added soon thereafter.²¹

The next important development in the creation of the present system of federal circuit courts of appeals came in 1891 with the passage of the Circuit Court of Appeals Act.²² This statute was enacted in response to the federal courts' exploding dockets. The 1891 Act created a circuit court of appeals for each of the nine circuits.²³ The original circuit courts were transformed into exclusively trial courts, and their appellate jurisdiction was transferred to the new circuit courts of appeals.²⁴ The 1891 Act also shifted much of the Supreme Court's appellate caseload to the new circuit courts.²⁵ The present makeup of the Ninth Circuit emerged in the 1910s with the addition of Alaska, Arizona, Hawaii and Guam.²⁶

B. *Circuit Divisions in the Twentieth Century*

In the twentieth century, Congress has twice divided existing circuits. In 1929, Congress divided the Eighth Circuit and created the Tenth Circuit. In addition, Congress divided the Fifth Circuit in 1981 and created the Eleventh Circuit.²⁷ The sole purpose for dividing the Eighth Circuit was to relieve that court's workload.²⁸ The rationale underlying the Fifth Circuit split is more relevant to the question whether a Ninth

19. See REPORT, *supra* note 4, at 8.

20. See *id.*

21. See Baker, *supra* note 11, at 920.

22. See *id.* at 921.

23. See REPORT, *supra* note 4, at 11.

24. See Baker, *supra* note 11, at 921. In 1911, the circuit courts were finally abolished and their functions transferred to the federal district courts. See *id.*

25. See REPORT, *supra* note 4, at 11. "The Act's effect on the Supreme Court was immediate—filings dropped from 623 in 1890 to 275 in 1892." *Id.*

26. See Baker, *supra* note 11, at 921.

27. See *id.* at 923.

28. See *id.* The statute that divided the Eighth Circuit also created two new judgeships. See *id.*

Circuit split is now appropriate.²⁹

In 1973, Congress created the Commission on Revision of the Federal Court Appellate System.³⁰ The so-called Hruska Commission³¹ performed research and conducted hearings to decide whether Congress should divide the Fifth and Ninth Circuits.³² Congress' internal disagreements over the Hruska Commission's proposals and the subsequent failure to reach an acceptable compromise proposal postponed resolution of the matter until 1978.³³ In that year, Congress increased the Fifth Circuit's judgeships to twenty-six and authorized any court of appeals with more than fifteen active judges to divide itself into administrative units and to perform its en banc function with fewer than all its members.³⁴ Rather than internally divide itself, the Fifth Circuit Judicial Council unanimously petitioned Congress to split the circuit. Congress obliged and created the Eleventh Circuit.³⁵

The suggestion that Congress also divide the Ninth Circuit is not a new one. Since before World War II, Congress has considered various schemes to divide the Ninth Circuit.³⁶ But each drive to divide the Ninth Circuit has failed for at least one of a variety of reasons. For example, much of Congress' internal dissension over the Hruska Commission report resulted from the Commission's recommendation that Congress divide the Ninth Circuit, divide the State of California, and place one-half of California into each of the two resulting circuits.³⁷ In addition to its inability to agree over the Hruska Commission's recommendations, Congress also failed to pass bills to split the Ninth Circuit in 1983 and 1990.³⁸

In 1995, conservative senators from the Northwest resounded the

29. See *id.* at 925 (noting that the Fifth Circuit split "is the most significant legislative precedent for the current debate over dividing the Ninth Circuit" because it is "[n]earer in time and more similar in complexity").

30. See Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807.1.C.

31. The Commission was headed by Roman Hruska, a senator from Nebraska. See Baker, *supra* note 11, at 925.

32. See *id.* But see Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 MONT. L. REV. 261, 269 (1996) (stating that the criteria the Hruska Commission used to determine whether a circuit should be divided is not satisfied by the present Ninth Circuit and concluding that the Hruska Commission's recommendations are largely irrelevant today and should therefore be given little weight).

33. See Baker, *supra* note 11, at 926.

34. See Act of Oct. 20, 1978, Pub. L. No. 95-486, §§ 3(b), 6, 92 Stat. 1629, 1632-33 (codified as amended at 28 U.S.C. § 46(c) (1994)).

35. See Baker, *supra* note 11, at 927.

36. See Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189, 196 (1997).

37. See *id.*

38. See *id.* at 197.

rallying cry and introduced yet another proposal to split the Ninth Circuit and create a new Twelfth Circuit.³⁹ Once again unable to reach a compromise, the Senate instead approved the creation of a study commission.⁴⁰ The Senate's proposal was sent to the House, which took no additional action on the proposal during the 104th Congress.⁴¹ In 1997, the 105th Congress resumed the debate and resolved to create a commission to study the problem and make a report to Congress.⁴²

III. THE WHITE COMMISSION REPORT

A. *Creation of the Commission on Structural Alternatives for the Federal Courts of Appeals*

President Clinton signed Public Law Number 105-119 into law on November 26, 1997, and created the Commission on Structural Alternatives for the Federal Courts of Appeals.⁴³ The Commission notes that it was created "in the wake of disagreement . . . over the desirability of splitting the Ninth Circuit into two or more separate circuits, and if it were to be split, how best to do so."⁴⁴ The Commission's task was to "study the structure and [present] alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit."⁴⁵ The Commission was instructed to "report to the President and the Congress its recommendations for such changes in circuit boundaries or structure

39. The bill was sponsored by Senators Slade Gorton (R-Wash.), Conrad R. Burns (R-Mont.), Frank H. Murkowski (R-Alaska), Ted Stevens (R-Alaska), Dirk Kempthorne (R-Idaho), Larry E. Craig (R-Idaho), Bob Packwood (R-Or.), and Mark O. Hatfield (R-Or.). See SENATE JUDICIARY COMM., NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995, S. REP. NO. 104-197 (1995) [hereinafter SENATE REPORT]. The "measure's introduction constituted the fourth effort to divide the appeals court in the last thirteen years." Tobias, *supra* note 36, at 198. Under Senate Bill 956 (approved by the Senate Judiciary Committee and substituted with the Ninth Circuit Court of Appeals Reorganization Act of 1995), the new Twelfth Circuit would have included Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington; the new Ninth Circuit would have contained California, Hawaii, Guam, and the Northern Mariana Islands. See Hellman, *supra* note 32, at 261. For a thorough analysis of Senate Bill 956, see Carl Tobias, *Why Congress Should Not Split the Ninth Circuit*, 50 SMU L. REV. 583 (1997).

40. See Tobias, *supra* note 36, at 201.

41. See *id.* at 201-02.

42. See H.R. 2267, 105th Cong. § 305 (1997).

43. See REPORT, *supra* note 4, at 1.

44. *Id.*

45. Act of Nov. 26, 1997, Pub. L. No. 105-119, § 305(a)(1)(B)(ii), 111 Stat. 2491.

as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process.³⁴⁶

On December 19, 1997, Chief Justice Rehnquist appointed the Commission's five members.⁴⁷ The Chief Justice appointed Justice Byron R. White,⁴⁸ Judge Gilbert S. Merritt,⁴⁹ Judge Pamela Ann Rymer,⁵⁰ Judge William D. Browning,⁵¹ and N. Lee Cooper.⁵² The White Commission reviewed previous studies of the appellate system, conducted public hearings, and invited and received written statements.⁵³ As part of its research, the White Commission also conducted surveys of circuit and district judges. On October 7, 1998, the Commission made its draft report available on its website.⁵⁴ On December 18, 1998, the Commission issued its Final Report.

B. The Commission's Proposal: Internally Divide the Ninth Circuit, But Do Not Split It into Two Separate Circuits

The White Commission recommends the creation of three regionally-based adjudicative divisions within the Ninth Circuit Court of Appeals. The Northern Division would include the districts of Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington. The Middle Division would include the districts of Northern and Eastern California, Hawaii, Nevada, Guam and the Northern Mariana Islands. The Southern Division would include the districts of Arizona and Central and Southern California.⁵⁵ According to the Commission's recommendation, each division would have exclusive appellate jurisdiction over matters heard by its lower courts.⁵⁶ Additionally, each division's decisions would not bind the other two divisions.⁵⁷

46. § 305(a)(1)(B)(iii), 111 Stat. at 2491.

47. See REPORT, *supra* note 4, at 1.

48. Justice White was appointed to the United States Supreme Court in 1962 by President Kennedy.

49. Judge Merritt was appointed to the U.S. Court of Appeals for the Sixth Circuit in 1977 by President Carter.

50. Judge Rymer was appointed to the U.S. Court of Appeals for the Ninth Circuit in 1989 by President Bush.

51. Judge Browning was appointed to the U.S. District Court for the District of Arizona in 1984 by President Reagan.

52. Mr. Cooper is a member of the Alabama State Bar Association and formerly served as president of the American Bar Association. See *id.* at 1.

53. See *id.* at 2-3.

54. The Commission's Internet address is <<http://app.comm.uscourts.gov>>.

55. See REPORT, *supra* note 4, at 41.

56. See *id.* Each division would also have exclusive jurisdiction over appeals from administrative agencies and original proceedings commenced within the division.

57. See *id.* at 43. But the report does recommend that the decisions of each

Under the Commission's plan, "[a] majority of judges serving on each division would be residents of the districts over which that division has jurisdiction."⁵⁸ Each division would also include judges that are not residents of districts within the division's jurisdiction.⁵⁹ Each division would have a presiding judge. The chief judge of the entire circuit, however, "could not simultaneously serve as the presiding judge of a division."⁶⁰

To resolve possible conflicts among the divisions, the Commission recommended the creation of a "Circuit Division for conflict correction, whose sole mission would be to resolve conflicting decisions between the regional divisions."⁶¹ As such, the Circuit Division would not have jurisdiction to review a decision of a regional division on the ground that it is incorrect or unsound.⁶² The task of reviewing decisions believed to be incorrect and unsound would be reserved for the regional division sitting en banc.⁶³ The circuit-wide limited en banc process that presently exists in the Ninth Circuit would be abolished under the new regime.⁶⁴

The Circuit Division would be composed of thirteen judges including

division be "accorded substantial weight as the judges of the circuit endeavor to keep circuit law consistent." *Id.*

58. *Id.* Circuit Judges Diarmuid F. O'Scannlain, Stephen Trott, Thomas G. Nelson, Andrew J. Kleinfeld, Sidney R. Thomas, Susan P. Graber, and M. Margaret McKeown, and Senior Circuit Judges Eugene A. Wright, Otto R. Skopil, Betty Binns Fletcher, Jerome Farris, Robert R. Beezer, and Edward Leavy would reside in the Northern Division. Chief Judge Procter Hug, Jr. and Circuit Judges James R. Browning, Melvin Brunetti, and William A. Fletcher, and Senior Circuit Judges Herbert Y.C. Choy, Joseph T. Sneed, Charles E. Wiggins, and John T. Noonan, Jr. would reside in the Middle Division. Circuit Judges Mary M. Schroeder, Harry Pregerson, Stephen Reinhardt, Alex Kozinski, Ferdinand F. Fernandez, Pamela Ann Rymer, Michael Daly Hawkins, A. Wallace Tashima, Barry G. Silverman, and Kim McLane Wardlaw, and Senior Circuit Judges Alfred T. Goodwin, J. Clifford Wallace, Arthur L. Alarcon, Warren J. Ferguson, Dorothy W. Nelson, William C. Canby, Jr., Robert Boochever, Cynthia Holcomb Hall, and David R. Thompson would reside in the Southern Division.

59. *See id.* These judges would be "assigned randomly or by lot for specified terms of at least three years." *Id.*

60. *Id.* The presiding judge of each division will be selected in the same manner in which the circuit's chief judge is presently selected. *See id.* Judge O'Scannlain would preside over the Northern Division, Judge Brunetti would preside over the Middle Division, and Judge Schroeder would preside over the Southern Division. Judge Kozinski would likely preside over the Southern Division after Judge Schroeder becomes Chief Judge of the Ninth Circuit.

61. REPORT, *supra* note 4, at 45.

62. *See id.*

63. *See id.*

64. *See id.*

the chief judge and twelve active circuit judges.⁶⁵ The judges would be “selected by lot in equal numbers from each of the regional divisions” and would serve terms of three years.⁶⁶ The Circuit Division’s jurisdiction would be discretionary and a party—but not a judge—could invoke it following the decision of a regional division.⁶⁷ The Circuit Division, however, would only review a regional division’s decision after the regional en banc had reviewed the allegedly conflicting three-judge panel decision or after the regional division had denied en banc recommendation.⁶⁸

C. *Alternative Solutions Considered and Rejected by the Commission*

The Commission examined over a dozen proposals for splitting the Ninth Circuit, but it gave serious consideration to only three other alternatives for restructuring the court.⁶⁹ According to the Commission, only three alternative proposals had “any geographical integrity, serve[d] to any extent both the federalizing and regionalizing functions of federal courts, and [were] consistent with the principle of state contiguity in the ‘lower 48’ states.”⁷⁰ The Commission rejected two of these options because they would lead to an inequitable distribution of caseloads between the proposed new circuits.⁷¹ The Commission rejected the third alternative proposal because it would result in the division of California

65. *See id.* As originally proposed in the Draft Report, the Circuit Division was to be composed of the Chief Judge of the Ninth Circuit, the presiding judge of each regional division, and one circuit judge from each division. *See* DRAFT REPORT, *supra* note 7, at 42. The “at large” judges were to be selected under rules promulgated by the court of appeals as a whole. *See id.*

As originally conceived, the proposed Circuit Division posed major problems because every case in the Circuit Division would be heard by a panel of which four of the seven judges were chosen based on seniority. This very design is inconsistent with any argument that the present limited en banc system, described in notes 134-136, *infra* and accompanying text, does not adequately represent the entire court. The idea of a seven-member panel with four fixed members, as the Commission originally proposed, is far less representative than the limited en banc system’s design of an eleven-member panel with only one fixed member. The Commission itself seems to acknowledge this very problem in its Final Report. *See* REPORT, *supra* note 4, at 45 n.102.

66. *Id.*

67. *See* REPORT, *supra* note 4, at 45.

68. For a discussion of the procedure by which the Circuit Division would carry out its function, see *id.* at 46. The report also recommends that the Circuit Division operate under rules promulgated by the Ninth Circuit. The regional divisions would operate under the Federal Rules of Appellate Procedure.

69. For a discussion of other proposals to split the Ninth Circuit, see Diarmuid F. O’Scannlain, *A Ninth Circuit Split Study Commission: Now What?*, 57 MONT. L. REV. 313 (1996).

70. REPORT, *supra* note 4, at 53.

71. *See id.* at 54-56.

into two separate circuits.⁷²

To begin with, the Commission rejected the plan it refers to as a “[v]ariation on the ‘classical split.’”⁷³ Under this plan, the new Ninth Circuit would consist of Arizona, California, and Nevada.⁷⁴ The new Twelfth Circuit would include Alaska, Guam, Hawaii, Idaho, Montana, the Northern Mariana Islands, Oregon, and Washington.⁷⁵ The Commission rejected this option because of the resulting workload disparity.⁷⁶ Under the “variation on the classical split” option, weighted filings⁷⁷ would increase from 226 to 257 per judgeship for the new Ninth Circuit, and would decrease to 169 per judgeship for the new Twelfth Circuit.⁷⁸

The Commission also rejected an option combining the classical split with a realignment of the present Tenth Circuit aimed at reducing the size of the new Ninth Circuit.⁷⁹ Under this plan, Arizona would join the Tenth Circuit,⁸⁰ and the Ninth Circuit would include California, Nevada, Hawaii, Guam and the Northern Mariana Islands. The proposed Twelfth Circuit would include only Alaska, Idaho, Montana, Oregon and Washington. The Commission also rejected this plan because of a

72. *See id.* at 56-57.

73. *Id.* at 54. The “classical split” is between the Pacific Northwest and Southwest regions. Under the classical split, the Ninth Circuit would consist of Arizona, California, Guam, Hawaii, Nevada, and the Northern Mariana Islands. The Twelfth Circuit would consist of Alaska, Idaho, Montana, Oregon, and Washington. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*

77. After the parties to an appeal file their briefs, “a Ninth Circuit staff attorney in San Francisco . . . assigns the case a weight based on complexity. The cases containing the simplest issues are assigned a weight of one. The cases containing many complex issues, termed ‘blockbusters,’ are rated ten. In-between case weights are three, five, or seven.” Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 431-32 (1986).

78. *See* REPORT, *supra* note 4, at 54. One must wonder why unequal workloads between two circuits poses such a problem. The workloads of the new Ninth and Twelfth Circuits would be far greater than many other circuits even if the present Ninth Circuit could be divided in a way that would keep California intact and still yield even workloads between the two courts. If Congress resolves to divide the Ninth Circuit—either internally or outright—we believe that the “variation” option is the most appropriate path to take.

79. *See* REPORT, *supra* note 4, at 55-56.

80. Arizona is the second largest state in the Ninth Circuit in terms of generating appeals. *See id.* at 55. Under this plan, the new Tenth Circuit would be composed of Arizona, Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. *See id.*

resulting disparity in workload.⁸¹ Under this “variation and shift” plan, the new Ninth Circuit’s filings would rise by approximately fifty weighted filings per judgeship,⁸² but weighted filings would fall by more than sixty per judgeship in the proposed Twelfth Circuit.⁸³

Finally, the Commission rejected a plan that involved the division of California into two separate circuits. Under this plan, the new Ninth Circuit would consist of the districts of Arizona, Southern and Central California, Hawaii, Nevada, Guam, and the Northern Mariana Islands.⁸⁴ The proposed Twelfth Circuit would include the districts of Alaska, Eastern and Northern California, Idaho, Montana, Oregon, and Eastern and Western Washington.⁸⁵ This is the same plan as was proposed by the Hruska Commission and rejected by Congress. The White Commission rejected this plan because it would result in the unprecedented division of a state between two federal circuits, even though it would yield roughly equal caseloads between the two new circuits.⁸⁶

Also of interest, the Commission rejected Chief Judge Hug’s suggested modifications to the recommendation contained in the Commission’s Draft Report.⁸⁷ Chief Judge Hug suggested that the Commission retain the proposed three-division plan, but he asked the Commission to give the decisions of each division’s panels stare decisis effect throughout the entire circuit. Chief Judge Hug considered the adoption of this recommendation “essential to the maintenance and

81. *See id.* at 56. This plan may also involve more complexity in terms of governing law than did the 1980 split of the Fifth Circuit. After its creation, the new Eleventh Circuit was simply bound by Fifth Circuit precedent that predated October 1, 1981. Moving Arizona into the Tenth Circuit, however, would be far more difficult. To the extent a Fifth Circuit split model could be followed, Arizona district courts would be bound by Ninth Circuit decisions prior to the split and Tenth Circuit decisions after the split. All other districts within the Tenth Circuit would, of course, be bound by Tenth Circuit law only, as they are presently. In the alternative, Ninth Circuit law could be wiped out of Arizona completely, with the state being wholly transplanted into the Tenth Circuit. Arizona would follow Tenth Circuit law to the extent that it conflicts with Ninth Circuit law. In either case, shifting Arizona into the Tenth Circuit would create a real headache for Arizona litigants and their attorneys.

82. *See id.* Projected filings would rise from 226 to an estimated 270 appeals per judgeship. *See id.*

83. *See id.* Projected filings would fall from 226 to 162 weighted filings per judgeship. *See id.*

84. *See id.*

85. *See id.*

86. *See id.* at 57.

87. *See id.* at 51. Chief Judge Hug, writing for a majority of the Ninth Circuit’s judges, submitted a commentary on the Draft Report in the form of a five page letter dated October 29, 1988, to which he attached a twelve-page “Analysis of the Commission Report.” Both can be found on the Commission’s website (<http://app.com/uscourts/gov>).

development of the law of a circuit.”⁸⁸ In order to accommodate the Commission’s concerns that circuit judges be more closely tied to the regions in which they sit, Chief Judge Hug proposed that each division be constituted of two judges resident to the region and one non-resident judge.⁸⁹ This would ensure that judges from a given region render a “great majority of the decisions that affect that area.”⁹⁰ Chief Judge Hug also urged the retention of the Ninth Circuit’s limited en banc process, but suggested increasing the number of judges from eleven to thirteen or fifteen, with an equal number of judges from each division.⁹¹

The Commission rejected Judge Hug’s suggestion that the regional divisions’ decisions be given *stare decisis* effect because the suggestion runs counter to the Commission’s conception of the regional division as a “regionally based, *adjudicative* unit that is small enough, stable enough, and autonomous enough to function effectively as an appellate decisional body responsible for the law applicable in the region.”⁹² Under Judge Hug’s proposal, the regional divisions would function merely to “channel the calendaring process,” not to adjudicate independently of other divisions.⁹³

The Commission also rejected Judge Hug’s suggestion regarding panel composition within each divisional unit as giving “both too much and too little weight to the value of regional connection.”⁹⁴ It gave too much weight to regional concerns by “requiring that every panel in the circuit have a majority of judges from the region that generates the appeal, implying that only judges from the region can get the law right.”⁹⁵ According to the Commission, Chief Judge Hug’s proposal also gave too little weight to the value of regional connections by subjecting a regional panel’s decisions to circuit-wide en banc rehearing.⁹⁶ The Commission felt that Chief Judge Hug’s suggestion did not enhance the “regionalizing or federalizing functions that” they sought to “reconcile.”⁹⁷

88. Hug, *supra* note 87, at 4.

89. *See id.* at 3.

90. *Id.*

91. *See id.*

92. REPORT, *supra* note 4, at 51.

93. *Id.*

94. *Id.* at 52.

95. *Id.*

96. *See id.* at 52.

97. *Id.*

D. Rationalizing the Commission's Recommendation

At the very outset of its report, the Commission set out its findings that “the administration of the Ninth Circuit is, at the least, on a par with that of other circuits” and that the circuit is “innovative in many respects.”⁹⁸ The Commission went on to state that it saw “no good reason to split the circuit solely out of concern for its size or administration.”⁹⁹ Ironically, the Commission later justified its recommendation that Congress internally divide the Ninth Circuit, in part, for these same reasons. The Commission advanced three primary justifications for its proposal: decreasing the Ninth Circuit's rate of intra-circuit conflict, enhancing the effectiveness of its en banc processes, and promoting regional connections between judges and the geographic areas in which they sit.¹⁰⁰

The Commission justified its recommendation on the ground that smaller decisional units within the circuit would promote consistency and predictability in the law, despite the Commission's claim that the Ninth Circuit's size was not a basis for its recommendation.¹⁰¹ The Commission stated that the large number of opinions presently issued by the Ninth Circuit makes it difficult for judges to familiarize themselves with the circuit's law.¹⁰² This fact, “along with *perceptions* of greater inconsistency in the Ninth Circuit than in most other circuits, confirms [the Commission's] *own judgement*, based on experience, that large appellate units have difficulty developing and maintaining consistent and coherent law.”¹⁰³

The Commission also stated that the new divisional regime would improve the Ninth Circuit's en banc procedures.¹⁰⁴ The Commission noted that the Ninth Circuit judges surveyed by the Commission reported dissatisfaction with the frequency of en banc hearings at a higher rate than judges in most other circuits.¹⁰⁵ But the Commission admits that the divisional arrangement it proposes would increase the frequency of en banc hearings because each division's smaller size would enable it to convene its own en banc hearings.¹⁰⁶ The Commission contemplated that the conflict correcting Circuit Division would act as another kind of en banc mechanism and “would act

98. *Id.* at ix.

99. *Id.*

100. *See id.* at 47-49.

101. *See id.* at 47.

102. *See id.*

103. *Id.* (emphasis added).

104. *See id.* at 48.

105. *See id.*

106. *See id.* at 48-49.

effectively to choose between articulated conflicting points of view and quickly settle the law of the circuit.”¹⁰⁷

Finally, the Commission justified its recommendation on the ground that divisions composed of both resident and nonresident judges will better accommodate “the regional character deemed a desirable feature of the federal intermediate appellate system, without losing the benefits of diversity inherent in a court drawn from a larger area.”¹⁰⁸ The Commission aimed to restore “a sense of connection between the court and the regions within the circuit by assuring that a *majority* of the judges in each division come from the geographic area each division serves.”¹⁰⁹ The proposed structure at the same time purports to avoid requiring the President to appoint judges to a particular division because judges would not be strictly assigned to a particular division.¹¹⁰ The President could instead continue to appoint judges to the Ninth Circuit in general.¹¹¹ According to the Commission, maintaining a single circuit ensures that a single court will “interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with the other nations on the Pacific Rim.”¹¹²

IV. EVALUATION OF THE COMMISSION’S PROPOSAL

Above all, the Commission’s justifications for its recommendation largely lack empirical support. To the extent the Commission provides support for its recommendation, the reasons it offers do not warrant the radical restructuring of the Ninth Circuit that the Commission proposes.

To begin with, no empirical evidence indicates that the Ninth Circuit suffers a higher rate of intra-circuit inconsistency than that suffered by smaller circuits. This is true despite any “perceptions” of intra-circuit inconsistency or the Commission’s “own judgment, based on experience, that large appellate units have difficulty developing and maintaining consistent and coherent law.”¹¹³ Moreover, the Commission’s assertion that the proposed reorganization will improve the Ninth Circuit’s en banc process is dubious at best. Finally, the

107. *Id.* at 49.

108. *Id.*

109. *Id.* (emphasis added).

110. *See id.*

111. *See id.*

112. *Id.* at 49-50.

113. *Id.* at 47.

Commission's goal of enhancing connections between federal judges and the regions in which they sit is not a legitimate reason for dividing a circuit.

A. *Enhancing Consistency and Coherency of Ninth Circuit Law*

The Commission states that the proposed divisional arrangement will decrease the likelihood of conflicting decisions within the Ninth Circuit.¹¹⁴ The Ninth Circuit is by far the largest of the federal circuits, and the number of judges in the Ninth Circuit gives rise to numerous possible combinations for randomly drawn panels of three. Critics charge that this high number of potential combinations makes it increasingly difficult for a panel to track cases before other panels and thereby increases the likelihood that two or more panels considering the same issue will reach inconsistent results.¹¹⁵

Common sense tells us that larger circuits will tend to have a greater raw number of intra-circuit conflicts than smaller circuits.¹¹⁶ This is due to the volume of decisions a larger circuit will inevitably publish. But no objective evidence supports the conclusion that this intuition is correct, at least with regard to the Ninth Circuit.¹¹⁷ Quite to the contrary, one significant empirical study suggests that this assumption is completely wrong.¹¹⁸

114. *See id.*

115. *See* Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357, 1369 (1995).

116. *See* Burns, *supra* note 2, at 251 (noting that the large number of panel combinations "creates intracircuit conflicts and increases the likelihood of inconsistent decisions among panels within the circuit").

117. According to Conrad Burns, United States Senator from Montana, "Anecdotal evidence indicates that the Ninth Circuit is marked by an increased incidence of intracircuit conflicts." *Id.* at 252. But Senator Burns fails to set forth any empirical study suggesting that this "anecdotal evidence" is of any real significance. Indeed, the Commission all but concedes this very point, complaining that "[i]n the time allotted, [it] could not possibly have undertaken a statistically meaningful analysis of opinions as well as unpublished dispositions, dissents, and petitions for rehearing en banc to make [its] own, objective determination of how the Ninth Circuit Court of Appeals measures up to others" in terms of intra-circuit consistency. REPORT, *supra* note 4, at 39. Despite this absence of empirical evidence, the Commission feels perfectly comfortable leaping to the conclusion that the Ninth Circuit suffers from a problem of intra-circuit inconsistency based solely on the perceptions of district judges and lawyers in the Ninth Circuit. *See id.* at 40. The Commission never questions whether the perceptions ("views and experiences") of the judges and lawyers reflect reality. *See id.*

118. *See* Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in RESTRUCTURING JUSTICE 55, 83-86 (Arthur D. Hellman ed., 1990); *see also* David C. Frederick, *An Old Argument*, THE RECORDER, August 20, 1997, at 5, 7 ("There is, in fact, no concrete evidence for that assertion [that the Ninth Circuit suffers from a higher rate of inconsistency than other circuits]. Scholars who have studied the Ninth Circuit have consistently reported that the problem of intra-circuit conflicts is not greater

During the years 1986 and 1989, Professor Arthur D. Hellman conducted a series of empirical studies of Ninth Circuit case law. Hellman studied between one-fourth and one-fifth of the Ninth Circuit's published opinions for the years 1983 and 1986 to determine whether they conflicted with other Ninth Circuit decisions.¹¹⁹ For each case he studied, Hellman searched for other published cases that reached a different conclusion.¹²⁰ Hellman next determined whether the attorney for the losing party relied on an "alternate precedent" in making arguments in support of a result that was ultimately rejected by the panel.¹²¹ To determine whether the losing attorney relied on the alternate precedent, Hellman examined whether the district court, a dissenting judge on appeal, or another circuit accepted the losing party's argument.¹²² Hellman also considered whether the panel majority itself expressed a belief in the validity of the argument.¹²³ If these criteria suggested that the precedent the losing party relied upon may have given rise to a conflict, Hellman looked to the clarity and cogency of the panel majority's opinion to determine whether it provided a sound and credible rationale for distinguishing the earlier case or otherwise declining to follow it.¹²⁴ Professor Hellman ultimately found very few cases that gave rise to intra-circuit conflict.¹²⁵

The Hellman study is no doubt dated. But the present relevance of Professor Hellman's work is that it suggests that, at least in the mid-1980s, inconsistency among Ninth Circuit decisions was not a problem of magnitude many perceived it to be. The same may be true today. Professor Hellman's study at least demonstrates that larger circuits do not *necessarily* suffer higher rates of intra-circuit conflict, as the White Commission has assumed.

Professor Hellman's study is the *only* comparative study of intra-circuit inconsistency. The White Commission performed no comparative study of intra-circuit conflict in the federal courts of appeals. To reach its conclusion, the Commission instead relied on "perceptions" of inconsistency in the Ninth Circuit and the "experience"

in the Ninth than in other circuits.").

119. See Hellman, *supra* note 118, at 83-86.

120. See *id.*

121. See *id.*

122. See *id.*

123. See *id.*

124. See *id.*

125. See *id.* at 86.

of its members.¹²⁶ It would be imprudent for Congress to make fundamental changes to the Ninth Circuit's structure until the White Commission presents it with at least *some* objective measure of the level of inconsistency in Ninth Circuit law. Congress may otherwise be fixing a problem that does not exist.

In addition, the White Commission appears to have given little weight to the Ninth Circuit's existing rigorous internal procedures intended to prevent intra-circuit conflicts. Once appellate briefs are filed, Ninth Circuit staff attorneys use a detailed issue identification system¹²⁷ to classify the cases.¹²⁸ The system alerts three-judge panels if a different panel is considering the same legal issue.¹²⁹ In addition, the court's central staff "disseminate daily reports designed to alert judges to soon-to-be published opinions and the impact those opinions may have on pending cases."¹³⁰ Finally, whenever possible, appeals concerning similar issues are calendared before the same panel.¹³¹

Once a panel has ordered an opinion to be filed, a copy in "slip" form is circulated to the entire circuit.¹³² A majority of active circuit judges "may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc."¹³³ In addition, the court's central staff also reviews all published opinions for potential conflicts, and notifies the issuing panel if they perceive a consistency problem.

The Ninth Circuit's internal regulation procedures ensure that no serious problem of intra-circuit consistency develops. Without empirical data, neither the White Commission nor Congress can determine whether these measures are in fact successful. And indeed, the only

126. See *supra* note 103 and accompanying text.

127. This identification information accompanies the briefs and record of every case on appeal.

128. See Hellman, *supra* note 118, at 57-62; Pregerson, *supra* note 77, at 431-32.

After the briefs are filed, a Ninth Circuit staff attorney in San Francisco reviews both the appellant's and the appellee's briefs and prepares a case inventory. The inventory includes a short summary of the nature of the case and the issues raised on appeal. To enable the court to monitor cases dealing with similar issues, a staff attorney assigns an appropriate computer code to each issue listed in the inventory.

Id.

129. See Hellman, *supra* note 118, at 58.

130. United States Court of Appeals for the Ninth Circuit, Long Range Plan, Court Operations, 1994-1998 Accomplishments [hereinafter Ninth Circuit Long Range Plan] (on file with author).

131. See *id.*; Michael Daly Hawkins, *Your Worst Nightmare: Things that Can Go Bump on Appeal*, LITIG., Spring 1996, at 5, 6.

132. See Hellman, *supra* note 118, at 59.

133. FED. R. APP. P. 35(a). "Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." *Id.*

available evidence suggests that they are.

B. Improving the Ninth Circuit's En Banc Process

Parties may seek full court or en banc review of the decision of any circuit.¹³⁴ When a circuit sits en banc, it generally does so because a majority of the circuit's judges feel that there might be reason to overrule a decision of a three-judge panel or to reconsider a prior case with which the present case is arguably inconsistent.¹³⁵ Pursuant to 28 U.S.C. § 46, any circuit with more than fifteen judges may opt to conduct its en banc hearings with fewer than all of its members.¹³⁶

The White Commission acknowledged that the Ninth Circuit's limited en banc system has worked well in the past, but stated that the system can be improved through the Commission's proposed restructuring.¹³⁷ The Commission believes that the proposed restructuring would improve the limited en banc process in two ways: "It would [1] relieve each judge of having to cope with the decisional output of the entire Ninth Circuit Court of Appeals[,] and [2] reduce the burden of en banc calls to a more manageable level."¹³⁸ Both claims are problematic.

A three-way division of the Ninth Circuit will not reduce the circuit judges' burden of having to read the opinions of the whole circuit. Rather, each regional division's judges would have to keep abreast of the opinions issued by other divisional units if the three divisions are going to strive in earnest to maintain inter-division, and therefore, intra-circuit consistency. As such, it is unlikely that the problem of "having to cope with the decisional output of the entire Ninth Circuit" will be alleviated

134. Under the Federal Rules of Appellate Procedure, "[a] party may petition for a hearing or rehearing en banc." FED. R. APP. P. 35(b).

135. See FED. R. APP. P. 35(a)(1).

136. See 28 U.S.C. § 46(c) (1994) ("A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486."). Section 6 of Public Law 95-486 provides:

Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts 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.

137. See REPORT, *supra* note 4, at 48.

138. *Id.* at 48-49.

at all.¹³⁹ If the judges of each division do not remain aware of the other regions' decisions, the number of inconsistencies generated by the three divisions could overwhelm the conflict-correcting Circuit Division.

Similarly, there is no reason why the proposed restructuring would reduce en banc calls to a "manageable" level.¹⁴⁰ The Ninth Circuit's present limited en banc process functions quite well. The process operates in the following way: if a party suggests that a matter be reheard en banc, the panel who decided the appeal will notify the other members of the court of its decision to deny rehearing and whether it recommends rehearing en banc.¹⁴¹

Upon receipt of the panel's recommendation, any judge has fourteen days to call for en banc consideration, whereupon a vote will be taken. If no judge requests or gives notice of an intention to request en banc consideration within twenty-one days of the receipt of the en banc suggestion, the panel will enter an order denying rehearing and rejecting the suggestion for rehearing en banc.¹⁴²

If a bare majority of nonrecused active judges vote in favor of en banc, the chief judge issues an order stating that the case is to be reheard en banc.¹⁴³ The members of the en banc panel are selected by a modified random lot. The chief judge is always a member of the panel and presides over it.¹⁴⁴ The remaining ten members are selected at random, with one exception: if any judge has not been selected for the preceding three en banc panels, that judge is automatically selected.¹⁴⁵ This selection process ensures that, despite the whims of fortune, all judges will participate in the circuit's en banc procedures.

The Ninth Circuit's limited en banc process has been viewed by many critics as an indication of the problems that come with any circuit having

139. *Id.* at 48.

140. Moreover, the Commission does not explain or support its implicit assumption that the number of calls for en banc is presently at a level that can be fairly characterized as "unmanageable." *See* REPORT, *supra* note 4, at 40-49.

141. *See* 9TH CIR. R. 35 advisory committee's note.

142. *See id.* The advisory committee's note also provides that

[a]ny active judge who is not recused or disqualified and who entered upon active service before the call for a vote is eligible to vote. A judge who takes senior status after a call for a vote may not vote or be drawn to serve on en banc court. This rule is subject to two exceptions: (1) a judge who takes senior status during the pendency of an en banc case for which the judge has already been chosen as a member of the en banc court . . . ; and (2) a senior judge may elect to be eligible . . . to be selected as a member of the en banc court when it reviews a decision of a panel of which the judge was a member.

Id.

143. *See id.*

144. *See* 9TH CIR. R. 35-3. "In the absence of the Chief Judge, an 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside." *Id.*

145. *See id.*

a large number of judges. They argue that a limited en banc panel does not adequately represent the full circuit bench.¹⁴⁶ It is true that the Ninth Circuit's limited en banc procedure does not exactly represent the collective view of the entire circuit. To the extent that it does not, the possibility of a full court rehearing protects both the parties and the state of the circuit's law.¹⁴⁷ Putting aside the possibility of this "super en banc" review, whether or not the Ninth Circuit's limited en banc perfectly represents the collective views of the entire circuit is not entirely relevant. The question is not, and should not be, whether the limited en banc process precisely reflects the opinions of a majority of the Ninth Circuit judges. Rather, the issue is whether the Ninth Circuit's limited en banc process is capable of properly resolving the same problems that true en banc review is intended to resolve.¹⁴⁸

En banc review is generally employed in order to resolve questions of inter- or intra-circuit conflict as well as issues of exceptional importance.¹⁴⁹ There is no inherent reason that limited en banc panels cannot adequately resolve both types of questions. Those who insist, as some have, that all of a circuit's active judges must sit on every en banc panel¹⁵⁰ create a trilemma: (1) holding en banc hearings with panels of twenty-one or more judges; (2) perpetually re-dividing circuits to keep the total number of a circuit's judges within a set limit; or (3) simply enduring the pressures of growing caseloads with the present number of circuits and judges. None of these options is particularly palatable. The third option is untenable because additional circuit judgeships must be created as population growth and the number of pending appeals increase over time. The second option might work as a temporary

146. See Burns, *supra* note 2, at 252 (suggesting that "[t]rue en banc review in the Ninth Circuit is effectively nonexistent, and intracircuit inconsistencies are much more likely to go unreviewed").

147. See 9TH CIR. R. 35-3 ("In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc."). This procedure has never been employed by the Ninth Circuit, but it nonetheless exists.

148. En banc review is appropriately suggested by the parties "[w]hen the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity." *Id.*

149. See FED. R. APP. P. 35(a) (En banc review "is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.").

150. See Eric J. Gribbin, *California Split: A Plan to Divide the Ninth Circuit*, 47 DUKE L.J. 351, 378 (1997).

solution, but circuit re-division consistent with population growth will inevitably lead to more than triple the number of circuits over the next twenty years.¹⁵¹ The first option is impractical because it requires the regular convening of en banc panels of an unwieldy size. Only the limited en banc procedure presently employed by the Ninth Circuit provides a workable long-term solution.¹⁵²

By all indications, the Ninth Circuit's limited en banc has been a success. To begin with, no objective evidence suggests that the Ninth Circuit's rate of intra-circuit conflict is measurably higher than that of other circuits.¹⁵³ Thus, if maintaining intra-circuit consistency is the purpose of en banc rehearings, it is reasonable to conclude that the Ninth Circuit's limited en banc has succeeded, or at least that it has not failed.¹⁵⁴ Moreover, as Chief Judge Hug notes, judges and attorneys—those most directly affected by the Ninth Circuit's system of limited en banc—generally express satisfaction with the process.¹⁵⁵ There is no reason to believe that the Ninth Circuit's en banc system is not functioning well or that the Commission's proposal will necessarily improve it.

C. Increasing Regional Connections

According to the Commission, restructuring the Ninth Circuit would enhance the connections between judges and the geographic regions in which they sit.¹⁵⁶ This statement echoes the criticisms of those who have long advocated an outright split of the Ninth Circuit. Long-time critics of the "political makeup" of the Ninth Circuit argue that the Ninth Circuit is dominated by California judges who do not appreciate the peculiar character of the Pacific Northwest, and who, as a consequence, do not adequately consider that region's interests.¹⁵⁷

If this criticism is rooted in frustration with the judicial appointments of Presidents long since past, it is an illegitimate reason to restructure a federal court of appeals. And if this criticism is not simply political, it is

151. It is estimated that if circuits were limited to 12-15 judges, we would have nearly 40 circuits by the year 2020. See Lloyd D. George, *The Split of the Ninth Circuit: Is It Really Our Best Option?*, NEV. LAW., June 6, 1998, at 5, 5.

152. See generally Frederick, *supra* note 118, at 4 ("The trends suggest that virtually every other circuit will have to copy that idea or come up with some efficient alternative.").

153. See *supra* notes 1157-25 and accompanying text.

154. See Proctor Hug, Jr., *The Ninth Circuit Should Not Be Split*, 57 MONT. L. REV. 291, 298 (1996) ("Since 1980, the Ninth Circuit's use of a limited en banc court to resolve intracircuit conflicts has proven highly effective.").

155. See *id.* at 298-99.

156. See REPORT, *supra* note 4, at 49.

157. See Tobias, *supra* note 115, at 1371-77; Hellman, *supra* note 32, at 282.

open to attack on several fronts, not the least of which is that it is based on a fundamental misconception about the role of our federal courts.

1. *Debunking the Myth of "California Judging"*

California is the most populous state in the Ninth Circuit and most Ninth Circuit appeals emanate from lower courts in California. But there is no reason to believe that any "California judging" phenomenon exists, much less California domination.¹⁵⁸ Moreover, the Ninth Circuit's composition and existing panel selection procedures make even the possibility of domination by any one region highly unlikely. To begin with, some circuit judges presently residing in California actually hail from less populous states within the Ninth Circuit, just as some of the judges in the less populous states originally resided in California.¹⁵⁹ Moreover, the myth that California judges dominate the Ninth Circuit is debunked when one considers the percentage of Ninth Circuit judges who reside in states other than California. In 1997, only eight of the twenty-one active Ninth Circuit judges resided in California, despite the fact that 5,306 of the 8,651 Ninth Circuit filings originated in California.¹⁶⁰ Therefore, California had only 38% of the judges, but generated 61% of the caseload.¹⁶¹ As such, a great many more cases affecting Californians were decided by "non-California" judges than were non-California cases decided by "California" judges. At least for 1997, Californians have the stronger claim of inadequate representation on the circuit's bench. The fact is that California only dominates the Ninth Circuit in that the greatest number of appeals originate there. And this fact is irrelevant to the argument that California judges do not adequately consider the interests of the citizens of California's neighboring states.

158. See Baker, *supra* note 11, at 942 ("To date, no one has tried to correlate decisions with the geographic origins of the judges in order to test the validity of the California stereotype. . . . The complaint that California judges dominate [the Ninth Circuit] has never been proven.").

159. For example, Judge James R. Browning sits in San Francisco, California, but was born and educated in Montana. Judge Alfred T. Goodwin served on the Oregon Supreme Court and Judge Robert Boochever served on the Alaska Supreme Court; both currently sit in Pasadena, California. Judge Stephen S. Trott sits in Boise, Idaho, but spent most of his career as a prosecutor in Los Angeles, California. See Hellman, *supra* note 32, at 283.

160. See George, *supra* note 151, at 5, 23.

161. See *id.*

Moreover, the Ninth Circuit's panel selection procedures make California domination highly unlikely. The computerized random panel selection process employed by the Ninth Circuit is designed to assign each circuit judge to sit with each other circuit judge an equal number of times.¹⁶² This system ensures that three judges from the same state rarely sit together on a panel.¹⁶³ One must also keep in mind that the area covered by the vast expanse of California's boundaries is hardly monolithic. The Golden State is rich with a diversity of differing local cultures and regional attitudes. Therefore, one could ask: Which California supposedly dominates?

2. *Promoting Judicial Regionalism: A Misconception of the Role of Our Federal Courts*

The Commission's argument that the Ninth Circuit should be divided based on regional lines "rest[s] on fundamental misconceptions about the role of the federal courts of appeals in our legal system."¹⁶⁴ A central "reason for the existence of" the federal courts' federal question and maritime jurisdictions is to foster uniform interpretation of federal law across the nation. It is the responsibility of the United States Courts of Appeals to ensure that federal law is so interpreted.¹⁶⁵ To create circuit divisions according to the character of each region of the country would inevitably result in very different and particularized interpretations of federal law between circuits and even within each circuit, thereby undermining the court's mission to uniformly interpret the law.¹⁶⁶

Moreover, the Commission's assertion that federal judges should have a close connection with their local regions conflicts with the concept of diversity jurisdiction—a door to the federal courts which Congress has time and again refused to close.¹⁶⁷ The diversity jurisdiction of the federal courts exists out of concern that state courts, closely connected to local interests, would be unfairly biased against the interests of out-of-staters, even if unintentionally so. Federal judges are expected to balance the interests of local and out-of-state interests and to dispense justice with an even hand. To divide a circuit or to create internal divisions within a circuit is to increase the probability that the federal courts will fall into precisely the situation that the creation of their

162. See 9TH CIR. R. at xviii.

163. See Baker, *supra* note 11, at 941-42.

164. Hellman, *supra* note 32, at 283.

165. See *id.*

166. See *id.* at 283-84.

167. See Frederick, *supra* note 118, at 4 ("The notion that courts of appeals should be closer to the people also runs counter to the purpose behind the creation of the circuit court system 100 years ago.").

diversity jurisdiction was intended to prevent.

The Commission's manifest intention to promote a kind of judicial regionalism by creating internal divisions of the Ninth Circuit is exactly the wrong reason for restructuring a court of appeals. Moreover, because there is no evidence that the State of California or "California judging" in fact dominates the Ninth Circuit, a restructuring of the court over regionalism concerns is seriously misguided. Other than a dislike for the *personal*—as opposed to regional—ideas of some circuit judges who presently reside in California, there is simply no reason to believe that the existing structure of the Ninth Circuit is undesirable from the perspective of citizens of the Pacific Northwest. On the other hand, there is every reason to believe that restructuring the court with the specific intention of accommodating regional concerns will undercut the function and purpose of our federal appellate courts.

D. Other Disadvantages of the Proposed Reorganization

The Commission is to be commended as much for what it did not do as for what it did. Namely, the Commission does not advocate the outright division of the Ninth Circuit into two circuits. But the Commission does propose to divide the circuit internally. And under this plan, intra-circuit consistency is more likely to suffer than to be cured. To the extent that regions within the Ninth Circuit are already politically polarized,¹⁶⁸ "political differences" will have greater

168. Judges in the Southern region of the present Ninth Circuit have often been accused of having liberal tendencies. To the extent that the party affiliations of the Presidents who appointed each of these judges is relevant, judges of the proposed Southern Division who were appointed by Democrats outnumber those appointed by Republicans nearly two to one. Southern Division active judges appointed by Democrats outnumber those appointed by Republicans seven to three. Circuit Judges Schroeder (Carter), Pregerson (Carter), Reinhardt (Carter), Kozinski (Reagan), Fernandez (Reagan), Rymer (Bush), Hawkins (Clinton), Tashima (Clinton), Silverman (Clinton), and Wardlaw (Clinton), and Senior Circuit Judges Goodwin (Nixon), Wallace (Nixon), Alarcon (Carter), Ferguson (Carter), D. Nelson (Carter), Canby (Carter), Boochever (Carter), Hall (Reagan), and Thompson (Reagan) reside in the proposed Southern Division.

The remainder of the circuit is relatively balanced based on the party of the appointing President. In the proposed Middle Division, Republican appointments outnumber Democrat appointments five to three. Among active judges, Democrat appointments outnumber Republican appointments three to one. Chief Judge Hug (Carter) and Circuit Judges Browning (Kennedy), Brunetti (Reagan), and W. Fletcher (Clinton), and Senior Circuit Judges Choy (Nixon), Sneed (Nixon), Wiggins (Reagan), and Noonan (Reagan) reside in the proposed Middle Division.

significance among the proposed circuit divisions.

According to the Commission's proposal, the internal divisions are to have exclusive jurisdiction over appeals originating within their bounds.¹⁶⁹ Moreover, a division's decisions will not bind the other two divisions.¹⁷⁰ This arrangement encourages judges to decide cases based on inclinations other than circuit precedent because they will no longer be bound by the case law of the entire circuit. As such, the proposed regime will either generate a considerable volume of work for the proposed conflict-correcting Circuit Division or create three de facto circuits, or both.

The Commission's proposed arrangement for resident and nonresident judges within each division is also problematic. Under the proposed regime, a majority of a division's judges will reside within the division in which they sit.¹⁷¹ A minority will reside outside the division. The proposal thus creates two classes of judges within each division—regional insiders and regional outsiders. If the Commission's assumptions about the importance of regional connections are accurate, regional outsiders will more often find themselves in the dissent than will the regional insiders. Outsider judges will also be put to more inconvenience in terms of the need to travel to panel sittings in distant locations. As such, an outsider judge is likely to be an outsider not only in the regional but also in the metaphorical sense. Collegiality between judges of different divisions will undoubtedly suffer.

The Commission's proposed en banc structure also press daunting problems when considered together with the exclusive nature of each division's jurisdiction over appeals from lower tribunals within its bounds. Under the Commission's plan, the only circuit-wide en banc review available would be by the Circuit Division. And the Circuit Division would only have jurisdiction to review decisions in cases of inter-divisional conflicts, and not where the division of a three-judge panel or a division sitting en banc is incorrect or unsound. The proposed regime potentially leaves the Ninth Circuit—if one is still justified in calling it that—with no effective mechanism to uniformly settle issues of significance to the entire circuit. According to Chief Judge Hug, "[t]his

In the proposed Northern Division, Democrat appointments outnumber Republican appointments seven to six. Among active judges, Republican appointments outnumber Democrat appointments four to three. Circuit Judges O'Scannlain (Reagan), Trott (Reagan), T. Nelson (Bush), Kleinfeld (Bush), Thomas (Clinton), Graber (Clinton), and McKeown (Clinton), and Senior Circuit Judges Wright (Johnson), Skopil (Carter), B. Fletcher (Carter), Farris (Carter), Beezer (Reagan), and Leavy (Reagan) reside in the proposed Northern Division.

169. See REPORT, *supra* note 4, at 41.

170. See *id.* at 43.

171. See *id.*

would be a particular problem between the Middle and Southern Divisions, which divide the State of California.”¹⁷² Chief Judge Hug illustrates the potentially troublesome consequences of this with a hypothetical:

If proposition 200 were declared to be unconstitutional by the Middle Division, and if *certiorari* were denied by the United States Supreme Court, that would be the rule for the Northern District of California. Unless a conflict were to arise in the Southern Division by a separate lawsuit being brought, that ruling of the Middle Division would remain intact for the Middle Division, but not for the Southern Division.

The Commission’s proposal risks the “balkanization” of the Ninth Circuit.

The Commission has, through its proposal, sacrificed the interests of thirty million Californians in favor of maintaining an even workload among its three new de facto circuits. Proponents of the Commission’s recommendation will surely be quick to point out that under the Commission’s plan all of California is still within one circuit. But the Commission’s refusal to give divisional decisions stare decisis effect throughout the circuit will effectively place California in two separate circuits. Given the new plan’s significant potential for divergent interpretations of federal law among the Ninth Circuit’s divisions,¹⁷⁴ the citizens of California will be subject to the law of two divisions with potentially inconsistent decisions.

V. COMMON CRITICISMS OF THE NINTH CIRCUIT NOT ADDRESSED BY THE COMMISSION

Proponents of Ninth Circuit division also justify their cause with criticisms beyond those addressed by the White Commission. These criticisms can be grouped into two broad categories—administrative and political.¹⁷⁵ Those who propose restructuring for administrative reasons argue that the Ninth Circuit is simply too large to handle its caseload effectively.¹⁷⁶ Those who criticize the Ninth Circuit on political grounds argue that the court is dominated by liberal California judges who force their collective judicial will upon the less populous, more conservative

172. Hug, *supra* note 87, at 4.

173. *Id.*

174. *See supra* notes 168-73 and accompanying text.

175. *See Savage, supra* note 1, at A3.

176. *See Burns, supra* note 2, at 250-51.

states within the circuit.¹⁷⁷ These critics generally cite the Ninth Circuit's high rate of reversal by the Supreme Court as evidence that the Ninth Circuit is out of touch with mainstream American judicial philosophy. A careful analysis of each of these two criticisms reveals that both are groundless and lack empirical foundation.

A. *The Sheer Expanse of the Ninth Circuit's Boundaries Is Reason to Divide It Only if Size Results in Other Problems*

The Ninth Circuit spans nine states inhabited by more than fifty-one million people.¹⁷⁸ The court presently has twenty-eight authorized judgeships,¹⁷⁹ eleven more than the next largest circuit¹⁸⁰ and sixteen more than the average of the other circuits.¹⁸¹ The Ninth Circuit is presently staffed by twenty-one active circuit judges and nineteen senior circuit judges. Between April 1, 1994, and March 31, 1995, the Ninth Circuit decided 7,955 matters. In the same period ending in 1997, the Ninth Circuit decided 8,701 matters.¹⁸² This upward trend will likely continue as the population continues to grow. Approximately 50,000 appeals were filed in the federal courts in 1995. By 2020, that number is expected to reach 350,000.¹⁸³

In addition to an alleged increase in intra-circuit conflicts, critics charge that the Ninth Circuit's size gives rise to both a slowness in resolving appeals and a lack of collegiality among judges. But the available evidence suggests that the Ninth Circuit suffers from neither problem. Moreover, the Ninth Circuit has instituted procedures to deal with these problems to the extent that either problem threatens the court's work.

1. *The Ninth Circuit's Size Has Not Resulted in a Lack of Expediency in Resolving Appeals*

The Ninth Circuit has been criticized as the slowest circuit in the country, requiring a median time of fourteen and one-half months to process an appeal.¹⁸⁴ The circuit's size has been blamed as the cause of

177. See Rex Bossert, *The Call for Dividing the 9th Circuit Grows*, NAT'L L.J., May 5, 1997, at A1; Savage, *supra* note 1, at A3.

178. See Savage, *supra* note 1, at A3.

179. See 28 U.S.C. § 44 (1994).

180. The Fifth Circuit Court of Appeals is authorized 17 judgeships. See *id.*

181. See Tobias, *supra* note 115, at 1367.

182. See Jerome Farris, *The Ninth Circuit—Most Maligned Circuit in the Country—Fact or Fiction?*, 58 OHIO ST. L.J. 1465, 1465 (1997).

183. See "Long Range Plan for the Federal Courts" of the Judicial Conference of the United States, 1995, at 161.

184. See Baker, *supra* note 11, at 936; see also SENATE REPORT, *supra* note 39, at 9

these delays.¹⁸⁵ But these statistics are misleading because each appeal spends only a fraction of the time required to process it in a judges' chambers.¹⁸⁶ The Ninth Circuit's median time of 1.8 months from submission of a case to its disposition equals that of the three fastest federal circuits and is .4 months faster than the average of all circuits.¹⁸⁷ The remainder of the time required to process an appeal is generally spent by attorneys and court reporters preparing briefs and case records.¹⁸⁸

Unfilled judgeships, rather than circuit size, is more likely the reason why the Ninth Circuit lags behind the national average in the time elapsed from an appeal's filing to its final disposition.¹⁸⁹ The Ninth Circuit presently has twenty-eight authorized judgeships, but only twenty-one active judges.¹⁹⁰ This understaffing results in the court's inability to assemble panels to hear cases which are ready for and awaiting hearing and decision.¹⁹¹

In addition, the Bay Area earthquake of 1991—which seriously damaged the court's San Francisco headquarters and thereby created a

("it takes about four months longer to complete an appeal in our court as compared to the national median time") (quoting written testimony of then-Chief Judge J. Clifford Wallace).

185. See Burns, *supra* note 2, at 251 ("Many have cited the court's enormous size as a factor in the court's inability to process the large number of cases filed in the circuit each year.").

186. See Baker, *supra* note 11, at 936.

187. See Hug, *supra* note 154, at 297.

188. See *id.* (noting that the Ninth Circuit has high levels of effectiveness and productivity as measured by one of the highest rates of reasoned, written decisions).

189. See *id.* at 292; see also Frederick, *supra* note 118 (noting that a shortage of judges being nominated and confirmed, not a large circuit, is the reason why cases are not being handled quickly enough).

190. In addition to these 21 active judges, President Clinton has nominated U.S. District Judge Richard Paez and attorneys Marsha Berzon, Ronald Gould, Barry P. Goode and Chief Justice Barbara Durham to fill vacant seats on the Ninth Circuit. None have yet been confirmed. See *Clinton Nominates Conservative Judge for Appeals Court*, ASSOCIATED PRESS POLITICAL SERVICE, Jan. 26, 1999, available in 1999 WL 3112140. Judge Paez, a former Legal Aid Foundation attorney, serves in the Central District of California. Marsha Berzon is a partner in the San Francisco union-side labor firm of Altshuler, Berzon, Nussbaum, Berzon & Rubin. Ronald Gould is former president of the Washington Bar Association and is a partner in the Seattle office of Perkins Coie. Barry P. Goode is a former special assistant to Senator Adlai E. Stevenson and is a partner in the San Francisco law firm McCutchen, Doyle, Brown & Enersen. Chief Justice Durham serves on the Supreme Court of Washington. President Clinton nominated Chief Justice Durham, considered a conservative, as he promised in "return for the Senate's long-delayed confirmation . . . of [Judge] William Fletcher." *Id.*

191. See Hug, *supra* note 154, at 292.

case backlog—has significantly contributed to the length of time needed to process an appeal.¹⁹² Disposition time has improved as the court has worked to reduce this backlog, notwithstanding the shortage of judges.¹⁹³

To the extent that a circuit's size causes significant delays in the time required to dispose of an appeal, one could reasonably expect delays in disposing of appeals among the larger circuits and relative speed among the smaller ones. But the Commission cites no empirical data that demonstrates correlation between circuit size and speed in processing appeals. Furthermore, if circuit size is determinative, no manner of dividing a circuit would solve the problem because it simply divides the work.¹⁹⁴ The better solution to timeliness issues in the Ninth Circuit is to add more active judges, not to divide the circuit and its workload.¹⁹⁵

2. *The Ninth Circuit's Size Has Not Caused a Loss of Collegiality Among Its Judges*

Critics also argue that the Ninth Circuit's size has resulted in a loss of collegiality among its judges.¹⁹⁶ As the number of circuit judges increases, it becomes increasingly difficult for judges to get to know one another and develop relationships, or so the argument goes.¹⁹⁷ A lack of collegiality supposedly decreases the likelihood that judges will compromise on non-essential aspects of a case, thereby increasing the likelihood of conflicts between judges.¹⁹⁸ In time, the lack of collegiality detrimentally affects the smooth functioning of the court.¹⁹⁹

Collegiality will inevitably suffer on some level as any group grows in size. But improvements in telecommunications technologies diminishes the magnitude of that loss in the Ninth Circuit and other courts of appeals.²⁰⁰ Video- and tele-conferencing allow multiple individuals to

192. *See id.* at 297.

193. *See id.*

194. *See generally* George, *supra* note 151, at 23 (noting that larger circuits have many advantages over smaller circuits with regard to case management and stating that "in the context of federal circuit management and growth, bigger may be better").

195. *See generally id.* (stating that no true assessment of the Ninth Circuit's performance can take place with seven of 28 seats vacant, and noting that the Judicial Conference of the United States in 1997 recommended that Congress approve 10 additional judgeships for the Ninth Circuit).

196. *See* Diarmuid O'Scannlain, *A Ninth Circuit Split Is Inevitable, But Not Imminent*, 56 OHIO ST. L.J. 947, 948 (1995).

197. *See id.*

198. *See id.*

199. *See id.*

200. *See* Robert C. Mueller, *Finding a System of Courts that Work*, FED. LAW., July 1998, at 2, 6, 26 ("Any impediments to collegiality and the ability to confer will be obviated by advances in videoconference technology, along with electronic mail. These tools will provide the judiciary with the ability to instantly communicate drafts, discuss

have conversations from anywhere within the circuit and even beyond.²⁰¹ This is admittedly not the same as face-to-face communication,²⁰² but dividing the circuit is also not necessarily the answer. If the circuit were split or internally divided tomorrow, Judge Sidney Thomas, who sits in Billings, Montana, would likely not often have an in-person conversation with Judge Andrew Kleinfeld, who sits in Fairbanks, Alaska.

Moreover, the judges of the Ninth Circuit—those closest to this collegiality issue—generally do not agree that the circuit's collegiality has suffered as the circuit has grown in number of judges. According to Judge Michael Daly Hawkins, who joined the Ninth Circuit in 1994, “[c]ollegiality is alive and well in the Ninth Circuit. With the possible exception of former U.S. Marines, I have never encountered a group of people who, regardless of background or point of view, treat one another with such civility and decency.”²⁰³ Chief Judge Procter Hug, Jr., who joined the court in 1977, echoes the same feelings.²⁰⁴

Distance itself is not the real threat to collegiality. Rather, the challenge lies in the potential for less frequent contact among judges. Judges who sit together less often will inevitably interact less. And such less-frequent interaction will result under the White Commission's proposal to internally divide the Ninth Circuit.

B. *The Supreme Court's Reversal Rate of the Ninth Circuit*

Some have argued that circuit division will reduce the Supreme Court's reversal rate of the Ninth Circuit.²⁰⁵ They cite the court's

differences, and interact with one's fellow judges on a real-time basis.”).

201. See Baker, *supra* note 11, at 953 (stating that “[m]odern communications link chambers in San Francisco and Honolulu almost as instantaneously and just as reliably as two chambers on different floors of the same courthouse.”). The Ninth Circuit courthouses in San Francisco and Pasadena are presently capable of video-conferencing. Many United States courthouses in cities where Ninth Circuit judges reside are similarly capable. For example, video-conferencing facilities are presently operational in Phoenix, Arizona; Los Angeles, Santa Ana, and Riverside, California; Boise, Idaho; Billings, Montana; Las Vegas and Reno, Nevada; and Portland, Oregon.

202. But see J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 485 (1993) (“Although technology will permit appellate judges to be geographically dispersed, a careful and refined transition will insure use of telepresence is achieved over time without abandoning the face-to-face collegiality.”).

203. Hug, *supra* note 154, at 299-300.

204. See *id.* at 299.

205. See Baker, *supra* note 11, at 943.

relatively high reversal rate as an indication that the circuit has grown too large.²⁰⁶

Even assuming that the Supreme Court's reversal rate of the Ninth Circuit is of significance,²⁰⁷ it does not follow that internally dividing or otherwise reorganizing the court would reduce its reversal rate. If Congress voted to divide the circuit outright, thereby forming a new Twelfth Circuit encompassing the allegedly more "conservative" states of the Pacific Northwest, the reversal rate of a relatively more "liberal" Ninth Circuit would remain as high or might even rise. This is because the allegedly "liberal" tendencies of the new Ninth Circuit would no longer be tempered by more "conservative" judges who many see as mitigating the present reversal rate "problem."²⁰⁸

In addition, the idea of dividing or restructuring a circuit to improve its reversal rate is unwise because a circuit's composition, as well as that of the Supreme Court, is temporary and far from immutable. Changes in the composition of any appellate court would have the potential to dramatically decrease or increase a "liberal" or "conservative" court's reversal rate.²⁰⁹ A circuit's reversal rate is simply too transient a variable on which to base a proposal to divide or fundamentally reorganize a circuit.²¹⁰

A circuit's reversal rate has more to do with the judicial and political philosophies of the individual judges of a circuit than it does with the circuit's overall structural form.²¹¹ Furthermore, all of the participants in the debate over whether the Ninth Circuit should be reorganized agree—at least publicly—that it is fundamentally wrong to restructure the court in an attempt to "fix" perceived differences of political philosophies of

206. See Farris, *supra* note 182, at 1465 (noting that in 1997, the Supreme Court accepted 29 Ninth Circuit decisions for review and reversed 28; in 1996, the Court reviewed 12 decisions and reversed 10; and in 1995, the Court reviewed 14 decisions and reversed 10).

207. See *id.* (questioning the significance of the Ninth Circuit's reversal rate in light of the large number of cases decided by the court).

208. See generally Baker, *supra* note 11, at 943-44 (noting that "[d]ividing the Fifth Circuit did not appreciably affect the number of cases claiming Supreme Court review from the regions of the new Fifth and Eleventh Circuits").

209. See *id.* at 942.

210. See *id.* at 944 (stating that the argument that the Ninth Circuit's reversal rate warrants its division "may prove ultimately only that labelling any bench as large as the Ninth Circuit must be a gross generalization and at best only temporarily accurate").

211. See *id.* ("At least in part, these arguments appear to be efforts to justify an underlying political goal to shift the direction of law in the Ninth Circuit, notwithstanding protests to the contrary."); see, e.g., Frederick, *supra* note 118, at 7 ("Timber interests from the Pacific Northwest have been lobbying to divide the Ninth Circuit for years, ever since Congress enacted the Endangered Species Act and the circuit started handling the most important cases arising under that law and other environmental laws.").

the judges who currently sit on the circuit's bench.²¹² Moreover, to restructure a court based on the existence of political differences flies in the face of our federal government's separation of powers arrangement. The federal judiciary was quite deliberately designed to be insulated from politics.²¹³ Political pressures certainly do bear upon the court system, but to manipulate the judiciary in order to quell political frustrations violates the foundational principles of our government's third branch.

VI. REFOCUSING THE DEBATE: THE REAL PROBLEM FACED BY THE UNITED STATES COURTS OF APPEALS

A. *The Workload Crisis: A Threat to Appellate Justice*

The increase in the Ninth Circuit's workload in recent years, and the projected continued increase, is the court's most serious problem.²¹⁴ This problem, however, is not unique to the Ninth Circuit. Other circuits have experienced and will continue to experience substantial increases in caseload.²¹⁵ A study of the workload problem that focuses exclusively or primarily on the Ninth Circuit is therefore misguided. The Ninth Circuit's innovative and highly successful efforts to combat this problem, on the other hand, can serve as a model to other circuits by instructing them how to alleviate and overcome their workload crises. The approach of Congress and of the White Commission to restructure the federal courts of appeals is fundamentally misguided, as both have focused on the Ninth Circuit as emblematic of the United States Courts

212. See REPORT, *supra* note 4, at 6 ("Views about the merits or correctness of specific judicial decisions or about individual judges presently serving on a court are transient matters and are inappropriate bases for constructing long-range institutional arrangements.").

213. See THE FEDERALIST NO. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The complete independence of the courts of justice is peculiarly essential in a limited constitution.").

214. See Baker, *supra* note 11, at 938 ("Workload, not size, is the problem of the Ninth Circuit."). "There is a fundamental problem facing the federal court system. The number of cases filed in federal courts has increased dramatically in the last twenty years. This is due to the increase in population and also to the increased number of issues that now fall within federal jurisdiction." Hug, *supra* note 154, at 291.

215. See Thomas E. Baker, *U.S. Courts of Appeals: Problems and Solutions*, FED. LAW., Aug. 1998, at 30, 31 (stating that "federal appellate dockets continue to grow and future projections are for greater and greater numbers of appeals for the foreseeable future").

of Appeals' problems. Rather, the Ninth Circuit should be recognized as illuminating the path to future solutions for all courts of appeals.²¹⁶

The federal appellate docket has grown tremendously in the last forty years.²¹⁷ "[P]rojections for the future are Malthusian."²¹⁸ From 1960 to 1990, the number of appeals in the circuit courts of appeals increased from approximately 4,000 to approximately 40,000.²¹⁹ From 1989 to 1995, the number of appeals filed increased by 26%, while the number of judges remained the same—167.²²⁰ The causes of this explosion in federal appellate dockets can be difficult to identify,²²¹ but there is no evidence that this upward trend will abate in the future.²²²

The increase in the number of cases per judge represents a serious and real threat to appellate justice.²²³ Logically, the more cases a judge must process and decide, the less time he or she can devote to each case. This, of course, creates the potential danger that judges will, for sheer lack of time, be unable to thoroughly consider all the issues presented by an appeal.²²⁴ There is also the risk that judges will give undue deference

216. See Baker, *supra* note 11, at 953 ("The Ninth Circuit . . . may be better viewed as a harbinger than an aberration. . . . Rather than divide the Ninth Circuit to make two new courts that soon will resemble the beleaguered other circuits, Congress ought to hold the mirror the other way.").

217. See Christopher F. Carlton, *The Grinding Wheel of Justice Leaves Some Grease: Designing the Federal Courts of the Twenty-First Century*, 6 KAN. J.L. & PUB. POL'Y 1, 1 (1997) ("Although the dockets have increased at all levels of the judicial system, the most acute concerns have centered on the federal appellate courts."); see also Hug, *supra* note 154, at 292 ("A study by the Federal Judicial Center in 1989 pointed out that the caseload per circuit judge increased 347% from 1960 to 1989, whereas the caseload per district judge increased 35.6%.").

218. Baker, *supra* note 215, at 31.

219. See *id.*

220. Appellate filings increased from 37,734 to 50,072. See Hug, *supra* note 154. The number of appeals filed declined from 50,224 in 1993 to 48,322 in 1994, but since 1994 it has rebounded to 52,319. See *id.*

221. See Carlton, *supra* note 217, at 2 (stating that caseload has continued to increase in the 1980s and 1990s "even as the Burger and Rehnquist courts have eroded some of [the] . . . liberal precedents" of the Warren Court and noting that "Congress has been assigned some of the blame for the increased caseload because it has created a multitude of new federal judicial rights which have had the concomitant impact of augmenting the federal caseload"); see also Hug, *supra* note 154, at 291 (speculating that the increase in caseload is "due to the increase in population and also to the increased number of issues that now fall within federal jurisdiction").

222. See Carlton, *supra* note 217, at 2.

223. See *id.*

224. See *id.*; see also Baker, *supra* note 215, at 32 (stating that one of the perceived problems of growth in the appellate dockets is that "the procedural shortcuts implemented by the various courts of appeals[] have unreasonably degraded the quality of federal appellate justice[;]" specifically, "[w]e have gotten too far away from the procedures of the Learned Hand era, when every appeal was fully briefed, orally argued, and decided collegially by a three-judge panel with a published opinion written by a judge").

to the primary decision maker from whom the appeal is taken²²⁵—thereby undermining the purpose of appellate review. A large volume of cases can also give rise to delays for the litigants,²²⁶ resulting in increased hardship to them and a longer wait for finality and repose.²²⁷ Professor Baker, among others, has suggested that there is also a danger that, with so many cases, judges may be tempted to delegate more and more authority to staff, namely law clerks and central staff attorneys, resulting in a kind of “law clerk justice.”²²⁸

Dividing or restructuring the Ninth Circuit will not remedy its intensifying caseload problem. Dividing a circuit, and thereby simply dividing its caseload, does not reduce the number of cases the two circuits or two or more divisions must process. The two new circuits will each still have the same number of combined cases that the old circuit previously handled alone. Division also does nothing to deal with the projected increase in caseload that each new circuit or division will face in the future. Dividing a circuit merely forces the two new circuits to manage their respective caseload crises individually, resulting in the unnecessary duplication of administrative effort.²²⁹ The Fifth Circuit’s 1980 division, for example, failed to address that circuit’s workload problem.²³⁰ Within five years of its division, the Fifth Circuit’s caseload “reached the pre-division crisis level of filings.”²³¹ It is clear that circuit division will not solve the caseload problem. As such, other alternatives must be explored.

225. See Carlton, *supra* note 217, at 2.

226. See *id.*

227. See Baker, *supra* note 215, at 32.

228. See *id.*

229. See Baker, *supra* note 11, at 946 (stating that “circuit-splitting does not solve the problems of one circuit and merely postpones solution of the problems of two”); see also Tobias, *supra* note 115, at 1416 (“Bifurcation will not remedy most complications that the Ninth Circuit in particular, and the appellate system in general, will confront in the twenty-first century. . . . [But it] would eliminate the best appellate court for experimenting with solutions to the problems faced by large circuits.”).

230. See Baker, *supra* note 11, at 927-28 (“Redrawing the circuit boundaries . . . did absolutely nothing to relieve the press of the caseload.”); see also Tobias, *supra* note 115, at 1362 (“Creating two circuits [from the old Fifth Circuit] . . . failed to relieve docket pressures. In less than half a decade, the new Fifth Circuit had encountered the same crisis level of appeals that it had experienced before division.”).

231. Baker, *supra* note 11, at 928 (noting that in March, 1990, the Eleventh Circuit Judicial Council “reached the point of passing a formal and unanimous resolution . . . asking Congress not to add any more circuit judgeships, despite statistical-caseload justifications, because that court of appeals simply would grow too large”).

B. Non-Circuit Dividing Alternatives

Scholars studying the structure of our federal courts of appeals have suggested several alternatives to circuit division. But their proposals are designed to remedy the present crisis in the federal circuits. But these proposed courses of action seem somewhat drastic, even given the considerable problems faced by federal appellate courts today. We nevertheless briefly consider these alternative proposals here.

Some commentators have suggested that if the benefits of having a large circuit are so significant, Congress should consider simply consolidating all the federal courts of appeals.²³² This proposal would, by definition, eliminate inter-circuit conflicts. Rather, existing inter-circuit conflicts would be converted to intra-circuit conflicts.²³³ The administrative mechanisms the Ninth Circuit has instituted have maintained a low rate of intra-circuit conflicts, but even the Ninth Circuit's procedures may not work in a circuit suddenly quintupled in size. At the very least, there would be a significant period of transition. The current structure of geographic circuit organization has worked well. Therefore, the idea of a single court of appeals is not a realistic solution to today's problems, whether or not it has theoretical merit.²³⁴ The primary problem facing the appellate courts is the exponential growth in caseload, and no structural reorganization will remedy that problem.

Other suggestions have included allowing the appellate courts discretionary review of appeals, or creating district court appellate divisions for error correction.²³⁵ Under the former option, courts of appeals would have discretionary review of appeals.²³⁶ This option

232. See, e.g., Tobias, *supra* note 115, at 1398 (stating that consolidation "would eliminate [inter-circuit] conflicts among appellate courts," but would result in "enhanced intra-circuit inconsistency"); see also Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913, 959-60 (1994) (stating that "a single, unified national court of appeals [would] eliminate . . . intercircuit conflict[,]") but "would require some appropriate mechanism to deal with the . . . inevitability of more numerous intracircuit conflicts").

233. See Baker, *supra* note 11, at 960. Baker believes that in a single appellate mega-circuit there "[l]ogically . . . could be no such thing as an intercircuit conflict," but he envisions the "equally logical inevitability of more numerous intracircuit conflicts among three judge-panels" and the accompanying need in such a regime to create a mechanism to resolve such conflicts. *Id.*

234. The Commission also does not recommend the consolidation of the intermediate appellate tier. "We have concluded . . . that the system of geographical circuits has not outlived its usefulness and that a decentralized administrative structure for the federal judiciary continues to be an effective means of administering this vast nationwide system of courts." REPORT, *supra* note 4, at 59. The report goes on to state that the circuit boundaries are "firmly established in the American legal order, and changing them would impose substantial disruptive costs." *Id.*

235. See Baker, *supra* note 215, at 34.

236. See *id.*

would entail allowing the federal courts of appeals to select certain cases for plenary review based on the briefs.²³⁷ Under such a regime, “[m]ost appeals would be ‘affirmed’ without opinion” and courts of appeals would be transformed into “primarily law-declaring courts” and not error-correcting courts.²³⁸

Professor Baker would assign the error-correcting function to appellate divisions in the district court.²³⁹ His proposed district court appellate divisions would sit in three-judge panels and review district court decisions.²⁴⁰ This would reduce the number of appeals and the number of issues brought in the courts of appeals.²⁴¹ The White Commission also suggests the creation of district court appellate divisions, or that Congress alternatively authorize federal appellate courts to sit in two-judge panels.²⁴² According to the Commission, the use of two-judge panels will save time and result in increased productivity at the court of appeals level.²⁴³ The very notion of discretionary appellate review and district court appellate panels “may seem to upset the assumptions behind the present structure of the federal intermediate courts.”²⁴⁴ But Professor Baker thinks that such concerns can be allayed.²⁴⁵

Regardless of how these reforms are to operate in practice, however, discretionary appellate review represents an abandonment of the traditional concept of one appeal as of right. Indeed, the “basic argument” motivating discretionary appellate review “is to recognize that the appeal-as-of-right is gone forever, the victim of procedural shortcuts implemented over the years to cope with the deluge of

237. *See id.*

238. *Id.* at 35.

239. *See id.* at 34-35.

240. *See id.* at 35.

241. *See id.* Baker favors that these two proposals be implemented in tandem and does not favor instituting discretionary review at the appellate level without the corresponding district court appellate review. *See id.* at 34-35. The Commission similarly recommends that “Congress authorize the courts to experiment with shifting a portion of the reviewing task to the trial court level.” REPORT, *supra* note 4, at 64.

242. *See* REPORT, *supra* note 4, at 62. The report anticipates that the two-judge panels will decide those cases “in which the outcome is clearly controlled by well-settled precedent.” *Id.* at 63. But the report also recommends that the Federal Judicial Center monitor the use of two-judge panels and the types of cases it reviews. *See id.*

243. *See id.* at 62.

244. Baker, *supra* note 215, at 35.

245. *See id.* (assigning the task of allaying such fears to a future law review article).

appeals.”²⁴⁶ Indeed, Professor Baker recognizes that, under the regime he favors, some cases will be summarily affirmed and not reviewed by either the appellate court or a district court appellate panel. He thinks, however, that because the notion of appeal as of right is defunct anyway, we should simply recognize that reality.

Professor Baker’s assumption in this regard is subject to serious question. Under the present system, every appeal in the federal courts of appeals gets some degree of attention from a three-judge panel. Some appeals no doubt get less attention than others because of their less complex nature; but litigants can rest assured that their appeal will at least be considered by three judges. The preservation of the present system is important because some “simple” appeals—those that discretionary appellate review would no doubt consign to summary affirmation—occasionally involve important issues which, under the present system, are caught by reviewing judges. As such, rumors that appeals as of right are already dead are highly exaggerated.

Professor Baker’s system also presents an additional problem—determining what is “error-correction” and therefore an appropriate function for district court appellate review and what is “an issue of law” to be reviewed by an appellate panel. The distinctions between the two are less than perfectly straightforward. “Error-correction” cases often involve issues of law and an appellate court’s correction of an error can result in an opinion that advances the law or creates new law. The concepts are inherently interwoven and may be impossible, or at least are not easy to separate in practice.

This discussion is not intended to demonstrate that the measures Professor Baker and others suggest are wholly unreasonable or unworkable. We do not suggest that these proposals should never be considered at any time in the future. But each of the ideas comes with either substantial cost or risk, or both. Given the degree of risk that they pose, it would be wiser to first try less extreme alternatives.

C. The Modern Ninth Circuit: A Triumph of Innovative Case Management

The Ninth Circuit has undertaken great efforts to deal with its burgeoning docket. The court’s innovations demonstrate that administrative reform within a circuit is a more desirable alternative for overcoming a caseload crisis than is the internal or outright division of a circuit, the curtailing of the appellate courts’ jurisdiction, or collapsing the system of intermediate appellate courts.

246. *Id.* at 34.

Over the years, the Ninth Circuit has surveyed its judges, the attorneys of its bar, and bar organizations within the circuit to assess problems that have arisen from the court's size and to deal with those problems in an innovative fashion. To date, the Ninth Circuit has instituted a number of programs intended to meet the concerns of the professional community the court serves.²⁴⁷ The Ninth Circuit's implementation of new administrative and technological methods has improved the court's efficiency in managing its growing workload and has allowed the court to be more responsive to the needs of its consumers—litigants and the attorneys who represent them. As a result, the overwhelming majority of federal judges, attorneys, and official bar organizations agree that the Ninth Circuit should not be split.²⁴⁸

The Ninth Circuit's assimilation of technological advances in e-mail, computerized case management, and additional innovations have made its handling of cases more speedy and efficient.²⁴⁹ In addition to taking advantage of technological advancements, the Ninth Circuit has created the position of Appellate Commissioner, developed an alternative dispute resolution system and a submission-without-oral argument track for less complex appeals, adopted internal administrative units, and created the Bankruptcy Appellate Panel.

The creation of the Appellate Commissioner position conserves "judge time" in a number of ways. To begin with, the Commissioner may rule on non-dispositive motions formerly presented to two judges.²⁵⁰ In addition, the Commissioner also reviews all Criminal Justice Act voucher requests, thereby relieving all but the administrative judges of responsibility for voucher processing.²⁵¹ Finally, upon referral from judges, the Commissioner will hold evidentiary hearings in attorney disciplinary matters and in cases where a criminal defendant seeks leave to proceed pro se on appeal and may issue attorney fee awards in civil appeals.²⁵²

Additionally, in order to reduce the number of appeals disposed of by written disposition, the Ninth Circuit has "[d]eveloped an alternative

247. See, e.g., Tobias, *supra* note 36, at 240 (noting that the Ninth Circuit "has been [the acknowledged] leader in developing and [applying] creative measures to treat the [complications that many regional circuits do and will confront]").

248. See Hug, *supra* note 154, at 306.

249. See Baker, *supra* note 11, at 932.

250. See Ninth Circuit Long Range Plan, *supra* note 130.

251. See *id.*

252. See *id.*

dispute resolution proposal in which court mediators may invite parties in civil appeals to stipulate to having their appeal referred for a binding award by the appellate commissioner.”²⁵³

The court has also carried out a number of additional reforms aimed at the more speedy resolution of appeals. A “submission-without-oral-argument track” has been instituted for cases that are less complex or are easily disposed of by established precedent.²⁵⁴ The court has begun to funnel appropriate three-judge appeals into this program, where a three-judge screening panel has been able to resolve 83% of such cases to date.²⁵⁵ In addition, staff attorneys “now present[] all pro se appeals to screening panels regardless of weight,” and “pro se appeals continue to be routinely screened for inclusion in the court’s pro bono counsel program.”²⁵⁶

Two of the Ninth Circuit’s more bold changes are the adoption of administrative units within the court and the creation of the Bankruptcy Appellate Panel. In an effort to decentralize, the Ninth Circuit established internal administrative units. In 1980, the circuit established three geographic units based in San Francisco, Pasadena,²⁵⁷ and Seattle. While all major adjudicative²⁵⁸ functions of the court are still carried out at the central clerk’s office in San Francisco, many nonadjudicative duties have been decentralized. For example, the “satellite” clerk’s office in Pasadena has assumed responsibilities of the space and storage needs of the southern unit, and presently handles building maintenance and the procurement of equipment and supplies.²⁵⁹

In addition, the Ninth Circuit has established an administrative chief judge for each of the three units. The importance and prominence of the role of administrative chief judge may fluctuate depending on the judge holding the office, but the position does come with substantive duties.²⁶⁰

253. *Id.*

254. *Id.*

255. *See* Ninth Circuit Long Range Plan, *supra* note 130.

256. *Id.*

257. The Southern California base of operations was temporarily set up in Los Angeles and Pasadena. It was moved entirely to Pasadena following the 1986 completion of the Richard H. Chambers Courthouse. *See* Thomas W. Church, Jr., *Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals*, in *RESTRUCTURING JUSTICE* 226, 233 & n.15 (Arthur D. Hellman ed., 1990).

258. The clerk’s office’s adjudicative roles include “accepting and keeping track of the vast flow of case-related filings, monitoring presubmission progress of appeals, assignment and scheduling of three-judge panels, and distribution of briefs and other submissions to the judges prior to oral argument.” *Id.* at 237.

259. *See id.* at 238. Church argues that “those aspects of an appellate court’s administrative structure which support its *adjudicative* functions are best organized to encourage the maintenance of the unifying, centralizing function of the court,” even in a circuit as big as the Ninth Circuit. *Id.* at 240.

260. *See id.*

The administrative chief judge of each unit within the Ninth Circuit is charged with

overseeing the clerk's office in the unit and reviewing support services (including space needs and improvement of facilities). Moreover, the administrative chief judge serves as a liaison between the court of appeals and the district courts and bar associations in the unit and 'maintain[s] contact with Court of Appeals judges within the unit and report[s] on their needs.'²⁶¹

Other duties of the administrative chief judge include reviewing "reports of cases under submission with the judges in the unit," serving on the Ninth Circuit's executive Committee, and rotating through one position on the circuit judicial council.²⁶²

Finally, the Bankruptcy Appellate Panel, or "BAP," offers a specialized appellate panel specifically devoted to providing intermediate appellate review of single-judge bankruptcy decisions. If questions still remain, the BAP's decisions may then be appealed to the Ninth Circuit. This system has been a success in the Ninth Circuit²⁶³ and has been implemented in several other circuits.

VII. CONCLUSION

The current structure of the Ninth Circuit presents no unique problems that justify its internal division or other reorganization. Rather, Congress should refocus the debate and consider implementing the Ninth Circuit's case management program and other innovations in all federal circuits which now face or which will in the near future face case management crises.

The available evidence indicates that the Ninth Circuit's efforts to manage its caseload have been successful. Intra-circuit conflicts are under control. Case disposition time is improving and will continue to improve with the confirmation of already appointed judges and the future appointment of judges to vacant seats. Furthermore, lawyers and judges within the Ninth Circuit seem reasonably happy with the court's performance.

Based on all of the foregoing, it is unwise to resort to drastic measures such as ridding ourselves of the entire federal appellate system as we know it or splitting or internally dividing circuits to deal with exploding

261. *Id.*

262. *Id.*

263. *See* REPORT, *supra* note 4, at 68.

dockets. That problem is common not only to all federal courts of appeals, but to all courts in the nation. Moreover, it will not fade with the disappearance of appellate circuits or their present structure. Congress should resist the temptation to build the road to the future hastily and without sufficiently understanding the exact problem it is trying to solve.