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DIVIDING THE NINTH CIRCUIT: AN IDEA WHOSE TIME HAS NOT YET COME

Arthur D. Hellman*

I. INTRODUCTION

Once again, Congress has been considering legislation to divide the largest of the federal judicial circuits, the Ninth. In December 1995, the Senate Judiciary Committee approved a bill that would have created a new Twelfth Circuit consisting of the states of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington.¹ A shrunken Ninth Circuit would have been left with only two states—California and Hawaii—and the Pacific territories. Similar legislation was introduced in the House.²

The Senate never voted on the bill that was reported out of the Judiciary Committee. Instead, it approved a substitute amendment to establish a “Commission on Structural Alternatives for the Federal Courts of Appeals.”³ The task of the commission is to study all aspects of “the structure and alignment of the Federal courts of appeals” and to report to Congress and the President on its recommendations for change.

The Senate’s approach is the preferable course of action. There was a time, more than 20 years ago, when the idea of splitting the Ninth Circuit made sense. On the evidence available today, it does not. The proponents of the legislation have not pointed to any problems in the administration of justice that would be cured or mitigated by this particular realignment. Moreover, creating a new circuit could interfere with Congress’s ability to pursue more promising reforms in the future.

Many of the arguments underlying the circuit-splitting legislation have been analyzed elsewhere, notably in an article by Professor Carl Tobias published in the *Emory Law Review*.⁴

* Professor of Law, University of Pittsburgh School of Law. Portions of this article are based on the author’s testimony in *Ninth Circuit Court of Appeals Reorganization Act of 1995: Hearings on S. 956 Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) (prepared statement of Arthur D. Hellman). The author has benefited greatly from the counsel of Jamie Grodsky, Judith McKenna, Mark Mendenhall, Carl Tobias, and Joe Wolfe. However, the views expressed are the author’s alone.

1. See SENATE JUDICIARY COMM., NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995, S. REP. NO. 197, 104th Cong., 1st Sess. (1995) [hereinafter SENATE REPORT].

2. H.R. 2935, 104th Cong., 2d Sess. (1996); see also 142 CONG. REC. E166 (daily ed. Feb. 1, 1996).

3. See 142 CONG. REC. S2544, S2545 (daily ed. Mar. 20, 1996).

4. Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357

Here I shall concentrate on five points. Because there is no longer a Senate bill that would divide the Ninth Circuit,⁵ I shall refer to the House bill, H.R. 2935, as the measure embodying the current circuit division proposal.

First, the proponents of the legislation bear the burden of demonstrating that their proposed realignment will improve the administration of justice in the western states. They must show that serious problems exist in the Ninth Circuit today and that splitting the circuit can be expected to cure or mitigate those problems.

Second, little weight should be given to the 1973 report of the Commission on Revision of the Federal Court Appellate System (Hruska Commission), which recommended that the Ninth Circuit be divided into two new circuits. That recommendation has been outdistanced by events, and it cannot persuasively be invoked in support of the current legislation.

Third, empirical studies do not support assertions that the Ninth Circuit Court of Appeals has been unable to maintain consistency in its decisions. Nor is there any justification for impugning the legitimacy or effectiveness of the "limited en banc."

Fourth, arguments that circuit law in the northwestern states should reflect a northwestern perspective rest on fundamental misconceptions about the role of the federal courts of appeals in our legal system. Such arguments should be given no weight in the debate over circuit realignment.

Finally, dividing the Ninth Circuit today could interfere with Congress's ability to pursue more comprehensive appellate reform in the future.

In this article, I shall address these points on the basis of the evidence that exists today. If a Commission on Structural Alternatives is established in accordance with the legislation adopted by the Senate, one of its main tasks will be to compile

(1995).

5. Three distinct versions of S. 956 have been considered by the Senate. The bill as initially introduced would have created a Twelfth Circuit consisting of five northwestern states, leaving four states—California, Hawaii, Nevada, and Arizona—in the Ninth Circuit. See 141 CONG. REC. S7498-01 (daily ed. May 25, 1995) (statement of Sen. Gorton) (discussing S. 853, a predecessor of S. 956) [hereinafter 1995 Gorton Statement]. The Senate Judiciary Committee endorsed a substitute bill that would have enacted a seven-two split. See SENATE REPORT, *supra* note 1. The Senate itself adopted a different substitute that abandoned efforts to divide the Ninth Circuit and instead established a Commission on Structural Alternatives for the Federal Courts of Appeals. See 142 CONG. REC. S2544, S2545 (daily ed. Mar. 20, 1996).

and analyze data that will shed more light on the issues raised by the current proposals. Those data may well call for reconsideration of the conclusions offered here.

II. THE BURDEN OF PERSUASION

We have all heard the advice, "If it ain't broke, don't fix it." This principle applies with particular force to proposed changes in the judicial system. Judicial institutions operate and interrelate in subtle ways, and improvident reforms may have consequences that cannot be predicted even by the most knowledgeable. For that reason, Congress should insist that anyone proposing to alter the structural arrangements in the federal courts demonstrate—

- that serious problems exist that warrant change;
- that the proposed changes will cure or substantially mitigate the problems; and
- that the proposed changes are unlikely to have undesirable consequences worse than the problems being remedied.

Further, the realignment proposed in H.R. 2935 must be evaluated from a national perspective. The Ninth Circuit Court of Appeals is part of a national system of courts. Its primary function is to interpret and apply the Constitution and laws of the United States. The question, therefore, is whether the court's performance of that function has been impeded by conditions that would be ameliorated by dividing the Ninth Circuit in the manner proposed by H.R. 2935. If the answer is "No," there is no need to go further.

In this light, it is not sufficient for proponents of H.R. 2935 simply to point to deficiencies in the court's performance. They must provide evidence that links those deficiencies to the size of the circuit.

To illustrate: even if the Ninth Circuit were the slowest of the regional circuits in hearing and deciding appeals,⁶ that

6. Recent data indicate that the Ninth Circuit's record is poor by some measures, good by others. Compare SENATE REPORT, *supra* note 1, at 9 (citing data showing "delay in case processing") with *id.* at 28 (Separate Views of Sens. Feinstein & Kennedy) (citing other data showing that "the Circuit is fast in getting out its

would not prove that dividing the circuit would speed up the process. At the least, we would want to see some correlation between circuit size and the extent of delay. Does the second-largest circuit also have problems of delay? Is the smallest circuit the fastest? If these questions cannot be answered in the affirmative, there is little reason to believe that dividing the Ninth Circuit would cure problems of delay. If the correlation does exist, further investigation would be required to determine whether and to what extent the size of the circuit contributed causally to the delays.

We should also be cautious in assuming that "delays" signify deficiencies. Speed of disposition is an important value, but it is not the only one. For example, Ninth Circuit panels provide some kind of explanation in the overwhelming majority of the appeals decided on the merits.⁷ In some other circuits, a high proportion of cases are disposed of by judgment orders that contain no explanation whatever.⁸ Explaining to the losing litigant why he or she lost takes time, but it is time well spent, even if the effect is to lengthen the interval between filing and disposition.

III. THE HRUSKA COMMISSION'S RECOMMENDATION

In the debate over the current proposals to divide the Ninth Circuit, both sides have frequently alluded to the work of the Commission on Revision of the Federal Court Appellate System (Hruska Commission).⁹ I served as Deputy Executive Director of the Commission, and in that capacity I drafted the 1973 report that recommended that the Ninth Circuit be divided into two new circuits.¹⁰ Supporters of the current proposal repeatedly

work"). Comparative data on all circuits can be found in ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. B-4 (1994) [hereinafter 1994 A.O. REPORT].

7. See 1994 A.O. REPORT, *supra* note 6, at tbl. S-3.

8. For example, in the Third Circuit, nearly 60% of the dispositions on the merits in fiscal year 1994 were "without comment." *Id.* (1,262 out of 2,152). In the Ninth Circuit, only 5% of the terminations fell within that category (218 out of 4,654). *Id.*

9. See, e.g., SENATE REPORT, *supra* note 1, at 3-4; 142 CONG. REC. E166 (daily ed. Feb. 1, 1996) (statement of Rep. Bunn); 142 CONG. REC. S2225 (daily ed. Mar. 18, 1996) (statement of Sen. Reid).

10. See Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223, 236 (1973) [hereinafter Hruska Commission, *Geographical Boundaries*]. Two years after issuing its report on circuit realignment, the Commission issued a final report that addressed a broad spectrum of issues relating to the

invoke that recommendation.¹¹ However, the Hruska Commission report provides little support for H.R. 2935. On the contrary, adherence to the principles underlying the Hruska Commission plan leads to rejection of the House bill.

To begin with, the Hruska Commission proposal was quite different from either the original version of S. 956 or the substitute bill approved by the Senate Judiciary Committee and embodied in H.R. 2935. Under the Hruska Commission plan, two of the four judicial districts of California would have been included in the northern circuit (along with the five northwestern states, Hawaii, and Guam) and two in the southern.¹² In contrast, H.R. 2935 would create a "stringbean" circuit encompassing all of the present Ninth Circuit except California, Hawaii, and the Pacific territories.

It is a moot point whether the realignment proposed by the Hruska Commission would have achieved the desired ends if the legislation had been enacted in the mid-1970s. Circumstances have changed considerably over the past twenty years, and today the Hruska Commission's recommendation should be given little weight. Several considerations underlie this conclusion.

A. *The Hruska Commission's Criteria and the Current Proposal*

In making its recommendations for circuit realignment, the Hruska Commission was guided by "several important criteria."¹³ One was that "no circuit should be created which would immediately require more than nine active judges."¹⁴ Another was that "where practicable, circuits should be composed of at least three states; in any event, no one-state circuits should be created."¹⁵

structure and internal procedures of the federal courts of appeals. See Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195 (1975) [hereinafter Hruska Commission, *Structure and Internal Procedures*].

11. See, e.g., 142 CONG. REC. S2221 (daily ed. Mar. 18, 1996) (statement of Sen. Burns); 142 CONG. REC. E166 (daily ed. Feb. 1, 1996) (statement of Rep. Bunn).

12. See Hruska Commission, *Geographical Boundaries*, *supra* note 10, at 236. One member of the Ninth Circuit Court of Appeals has recently endorsed the Hruska Commission proposal. See Diarmuid O'Scannlain, *A Ninth Circuit Split Study Commission: Now What?*, 57 MONT. L. REV. 313 (1996).

13. Hruska Commission, *Geographical Boundaries*, *supra* note 10, at 231-32.

14. *Id.* at 232.

15. *Id.* at 231-32. A decade later, an American Bar Association committee referred to "the widely shared assumption[] . . . that each circuit must consist of at least three adjoining states." REPORT OF THE AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON FEDERAL JUDICIAL IMPROVEMENTS, THE UNITED STATES COURTS OF

It is impossible to divide the Ninth Circuit today without violating at least one of these criteria. H.R. 2935 (like the substitute bill approved by the Senate Judiciary Committee) violates both.

Under H.R. 2935, the Twelfth Circuit would be a circuit of 13 active judges; the new Ninth Circuit would have 15. That violates the first of the quoted principles.

Also, under the proposed legislation, the new Ninth Circuit would include only two states (along with the Pacific Territories). This would violate the second-quoted criterion. Moreover, the particular two-state circuit—California and Hawaii—would run afoul of the policies that underlie the Commission's emphatic rejection of a one-state circuit. The Commission wrote:

Although the judges in a single state may differ widely in any number of respects, the "pool" from which nominees are likely to be chosen, as well as the processes which lead to an appointment, would inevitably be narrower in a single state than in several. On a less tangible but perhaps ultimately more important level, there is the risk that a single-state circuit would no longer be perceived as a national court in quite the same way and to the same degree as a court which draws its judges from several states.¹⁶

These concerns are only slightly ameliorated in a two-state circuit, especially when the circuit consists of one very large state and one small one. California contributes 94% of the case-load of the proposed new Ninth Circuit.¹⁷ In all likelihood, California would contribute all but one of the judges. Indeed, at the present time, every one of the active judges in the proposed new Ninth Circuit is from California. Thus, like creation of a one-state circuit, H.R. 2935 (in the words of the Hruska Commission) "invites the loss of important elements of our federalism."¹⁸

This does not necessarily mean that the Ninth Circuit should not be divided. Rather, it means that the principles espoused by the Hruska Commission must be reconsidered in light

APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH 7 (1989) [hereinafter ABA STANDING COMMITTEE, REEXAMINING STRUCTURE].

16. Hruska Commission, *Structure and Internal Procedures*, *supra* note 10, at 267.

17. See SENATE REPORT, *supra* note 1, at 29-30 (separate views of Sens. Feinstein & Kennedy). Administrative Office data, which do not apportion administrative agency appeals, yield a figure of 93%. See 1994 A.O. REPORT, *supra* note 6, at tbl. B-3A (3,743 cases out of 4,019).

18. Hruska Commission, *supra* note 10, at 267.

of the many changes that have occurred in the appellate system in the last 20 years. That is why Congress should create a new commission to study the federal appellate courts before acting on any proposal to divide the Ninth Circuit.

B. Disclaimers in More Recent Studies

There has not been a study commission on the federal appellate courts since the Hruska Commission finished its work in 1975. However, two eminent study groups have analyzed the problems of the federal judicial system as a whole. Neither of these recommended that the Ninth Circuit be divided, either in accordance with the Hruska Commission's recommendation or in the configuration contemplated by the Senate Judiciary Committee. On the contrary, both panels expressed skepticism about circuit realignment as a means of coping with increased case-loads.

In 1990, the Federal Courts Study Committee, which included among its members two Senators and two Congressmen,¹⁹ issued a report that had one chapter on the "crisis of volume" in the federal appellate courts.²⁰ The Study Committee presented various models of appellate structure, but it did not endorse any of them. Nor did it take any position "on whether the Ninth Circuit should be split."²¹ However, in the course of its analysis, the Study Committee observed, "The Court of Appeals for the Ninth Circuit—a 'jumbo' circuit today—apparently manages effectively . . . Perhaps the Ninth Circuit represents a workable alternative to the traditional model."²²

In March 1995, the Committee on Long-Range Planning of the Judicial Conference of the United States issued another broad-ranging report.²³ That report, which has now been approved by the Judicial Conference, contrasts even more sharply with the approach taken by the Hruska Commission. In particular:

19. The Senators were Charles E. Grassley of Iowa and Howell T. Heflin of Alabama. The Congressmen were Robert W. Kastenmeier of Wisconsin and Carlos J. Moorhead of California.

20. FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109-31 (1990) [hereinafter STUDY COMMITTEE REPORT].

21. *Id.* at 123.

22. *Id.* at 122.

23. COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter PROPOSED LONG RANGE PLAN].

- The report explicitly disclaims “a fixed numerical limit to circuit size.”²⁴
- It emphasizes that proposed changes in circuit boundaries “must be considered in the light of the disruption of precedent and judicial administration that such changes generally entail.”²⁵
- It concludes: “Circuit restructuring should occur only if *compelling empirical evidence* demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing caseload.”²⁶

There have been other studies as well over the past 20 years.²⁷ None has endorsed the Hruska Commission recommendation for a division of the Ninth Circuit.²⁸ This is further evidence that the recommendation has been outdistanced by events and is no longer a sound basis for legislation.

C. The Division of the Fifth Circuit: A False Parallel

Supporters of H.R. 2935 and its Senate predecessor have noted that the Hruska Commission recommended division not only of the Ninth Circuit, but also of the Fifth Circuit as it existed in 1973.²⁹ The division of the old Fifth Circuit took place in 1980, and that fact has been given as a reason for dividing the

24. PROPOSED LONG RANGE PLAN, *supra* note 23, at 42.

25. *Id.* at 43.

26. *Id.* at 42 (emphasis added).

27. For example, in 1989 a committee of the American Bar Association reconsidered many of the issues addressed by the Hruska Commission. See ABA STANDING COMMITTEE, REEXAMINING STRUCTURE, *supra* note 15.

28. The 1989 American Bar Association committee report recommended four “specific steps.” *Id.* at 41. None involved circuit realignment. Further, the committee referred to “the widely shared assumption[] that each state must fall entirely within one circuit.” *Id.* at 7. Acceptance of that assumption would require rejection of the Hruska Commission’s proposal for dividing the Ninth Circuit. See *supra* text accompanying note 15.

29. See, e.g., 141 CONG. REC. S7506 (daily ed. May 25, 1995) (statement of Sen. Burns) (“[A] commission which studied the revision of the Federal appellate court system recommended in 1973 that both the Fifth Circuit and the Ninth Circuit courts be split.”); 142 CONG. REC. E166 (daily ed. Feb. 5, 1996) (statement of Rep. Bunn) (“The Hruska Commission recommended in 1973 that both the Fifth and the Ninth Circuits be divided due to overwhelming size and caseload.”).

Ninth Circuit today.³⁰ However, the argument is a non-sequitur. The situations are quite different. If anything, the history of the Fifth Circuit counsels against division of the Ninth.

It is a historical fact that Congress divided the former Fifth Circuit in 1980, and that it followed the alignment recommended by the Hruska Commission in 1973. But the more significant fact is that Congress acted only when the judges and the lawyers of the region, speaking with a voice that was nearly unanimous, agreed that the split was necessary.³¹

A bill to divide the Fifth Circuit was introduced in Congress only two months after the Hruska Commission issued its realignment report.³² But the legislation was not enacted at that time, or for several years thereafter. Why? One of the main reasons is that the proposed division was strongly opposed by some members of the court, as well as by some lawyers' groups.³³ By 1980, however, professional opinion had turned around. As Barrow and Walker report, "The Circuit Council [of the old Fifth Circuit] unanimously signed a petition to Congress requesting that legislation be passed to divide the Fifth into two completely autonomous circuits."³⁴ In addition, "statements urging division were registered by the bar associations of each of the six states, the magistrates of the Fifth Circuit, the district judges of the Fifth Circuit, the bankruptcy judges of the Fifth Circuit, the Federal Bar Association, and the Justice Department."³⁵

This unanimity of professional opinion also characterized the one previous division of a circuit. That was in 1929, when Congress carved out the Tenth Circuit from the old Eighth. By the time hearings were held on the circuit division proposal, all of the judges of the existing Eighth Circuit and bar associations of

30. See, e.g., 142 CONG. REC. E166 (daily ed. Feb. 5, 1996) (remarks of Rep. Bunn) (citing division of the Fifth Circuit as "recent precedent for the successful split of a Circuit Court of Appeals"); SENATE REPORT, *supra* note 1, at 10 ("The split of the fifth circuit has . . . been universally considered a success.").

31. For a detailed account of the events leading up to the division of the Fifth Circuit, see DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* (1988) [hereinafter BARROW & WALKER]; see also Arthur D. Hellman, *Deciding Who Decides: Understanding the Realities of Judicial Reform*, 15 LAW & SOC. INQUIRY 343 (1990).

32. BARROW & WALKER, *supra* note 31, at 171.

33. For example, at hearings in the House in 1977, three judges testified against dividing the circuit. Opposition was also voiced by the Alabama Black Lawyers Association and other civil rights groups. See *id.* at 200-06.

34. *Id.* at 236. At that time the circuit council was composed of all active judges of the court of appeals. See 28 U.S.C. § 332(a) (1970).

35. BARROW & WALKER, *supra* note 31, at 240-41.

eight states had expressed their approval.³⁶

In virtually every respect, the contrast with H.R. 2935 and its Senate predecessor could not be more acute.³⁷ At the 1995 hearing on S. 956, Chief Judge J. Clifford Wallace argued strongly against splitting the circuit.³⁸ The new Chief Judge, Proctor Hug, Jr., shares his view.³⁹ Nor is this simply a personal perspective. "The Judicial Council of the Ninth Circuit and the Judicial Conference of the Ninth Circuit—the two entities that Congress has designated for circuit governance—oppose the division of the circuit."⁴⁰ Five of the nine state bar associations in the circuit have spoken out against the split; no more than one has supported it.⁴¹

In dividing the Fifth Circuit in 1980, Congress acted in accordance with the overwhelming weight of professional opinion within the circuit. Today, respect for professional opinion in the nine states of the west leads to the conclusion that the time has not yet come to divide the Ninth Circuit.

This is not to say that the views of the judges and lawyers in a circuit should invariably be given controlling weight in determining whether realignment is appropriate. There may be situations in which professional opinion is counterbalanced by

36. Arthur J. Stanley & Irma S. Russell, *The Political and Administrative History of the United States Court of Appeals for the Tenth Circuit*, 60 DENVER L.J. 119, 127 (1983).

37. What makes the contrast especially striking is that as early as 1977, a majority of the judges of the Fifth Circuit supported the split. See BARROW & WALKER, *supra* note 31, at 191 (circuit council voted 10-3 in favor of division). Congress did not act until the court spoke with a single voice.

38. *Ninth Circuit Court of Appeals Reorganization Act of 1995: Hearings on S. 956 Before The Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) (statement of Hon. J. Clifford Wallace, Chief Judge, U.S. Court of Appeals for the Ninth Circuit).

39. See Proctor Hug, Jr., *The Ninth Circuit Should Not Be Split*, 57 MONT. L. REV. 291 (1996).

40. OFFICE OF THE CIRCUIT EXECUTIVE OF THE U.S. COURTS FOR THE NINTH CIRCUIT, POSITION PAPER IN OPPOSITION TO S. 956—NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995 (June 22, 1995), *reprinted in* 141 Cong. Rec. S10436 (daily ed. July 20, 1995).

41. See 142 CONG. REC. S2219-03, S2221-23 (daily ed. Mar. 18, 1996) (statement of Sen. Reid) (resolutions by bar associations in Arizona, Nevada, Montana, California, and Hawaii). Reference was made at the Senate hearing to support by the Washington state bar association for a division of the circuit, but the discussion is at best ambiguous. See *Ninth Circuit Court of Appeals Reorganization Act of 1995: Hearings on S. 956 Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995) (statement of John McKay). Significantly, the Senate Report on S. 956 did not claim support from any state bar association. See SENATE REPORT, *supra* note 1, at 8 (stating that "numerous State attorney generals and practitioners in the ninth circuit have indicated support for the circuit's division.").

other evidence that points to a different conclusion. But that is not the case here.

One final point warrants attention. Some supporters of the current circuit division proposal have suggested, at least implicitly, that bar associations do not adequately represent the views of lawyers in a particular state.⁴² That may be so, but it would be unsound to make that judgment on the basis of casual conversations or anecdotal reports. What is needed is a systematic study aimed at ascertaining whether the experiences of lawyers in the Ninth Circuit—and elsewhere—lend support to the concerns that underlie H.R. 2935. If a Commission on Structural Alternatives is established in accordance with the Senate vote, one of the most useful things it could do would be to carry out that inquiry.⁴³

D. The Commission's Premises and the Circuit's Innovations

The Hruska Commission explicitly predicated its recommendation for division of the Ninth Circuit on the premise that “[s]erious problems of administration and of internal operation inevitably result with” an appellate court of fifteen or more active judges.⁴⁴ However, the Ninth Circuit’s experience over the past decade and a half demonstrates that innovative approaches to adjudication and administration can go far towards mitigating the problems of operating a large court—even one much larger than fifteen judges. For example:

- Computerized issue tracking systems, far more sophisticated than anything available in 1973, assist the court in assuring that panels are aware of what others are doing and conform to existing precedents.
- The “limited en banc” authoritatively establishes the

42. See, e.g., 142 CONG. REC. S2231 (daily ed. Mar. 18, 1996) (statement of Sen. Kyl) (acknowledging opposition by the “so-called organized bar, the political organization” to division of the circuit, but stating that “there is very definitely a split” among Arizona lawyers); SENATE REPORT, *supra* note 1, at 8.

43. I emphasize that it would not be adequate to confine the study to lawyers who practice in the Ninth Circuit. The object of the inquiry is not to evaluate conditions in that one circuit, but to ascertain whether there are any aspects of the Ninth Circuit’s operations, *attributable to size*, that bear on the question whether the circuit should be divided. The only hope of getting such information is to compare conditions in the Ninth Circuit with conditions in other, smaller circuits. (Of course, even then, the task of identifying causal relationships would be formidable.)

44. Hruska Commission, *Geographical Boundaries*, *supra* note 10, at 227.

law of the circuit without the need for participation by all active judges in every case.⁴⁵

- An executive committee of the court of appeals allows the court to concentrate the responsibilities of administration and governance in a small rotating group of judges rather than burdening all.⁴⁶
- The restructuring of the circuit council frees most of the court of appeals judges from having to spend time on matters relating to the governance of the trial courts within the circuit.⁴⁷

Technological advances also underlie the recommendation of the Long Range Plan for the Federal Courts that circuit realignment continue to be "an infrequent event."⁴⁸ As stated in the Planning Committee's report, "Technological solutions, such as circuit-wide electronic networks and chambers access to court dockets, can keep a court in close communication, helping to maintain a level of collegiality that otherwise would be unattainable."⁴⁹

E. *The Court and the Circuit*

The mandate of the Hruska Commission was to examine the structure and internal procedures of the federal court *appellate* system. The Commission had no occasion to consider, and did not consider, the operation of the *circuit* as distinguished from the court of appeals. But one of the important points to emerge from the study of Ninth Circuit innovations published in 1990 is the role of the circuit as an institution for promoting regional decentralization in the federal judicial system.⁵⁰ This consideration

45. For further discussion of the limited en banc, see *infra* Part IV.

46. For detailed analysis, see Thomas W. Church, Jr., *Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals*, in RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 226 (Arthur D. Hellman ed., 1990) [hereinafter RESTRUCTURING JUSTICE].

47. For a comprehensive discussion of the circuit council, see Doris M. Provine, *Governing the Ungovernable: The Theory and Practice of Governance of the Ninth Circuit*, in RESTRUCTURING JUSTICE, *supra* note 46, at 247.

48. PROPOSED LONG RANGE PLAN, *supra* note 23, at 43.

49. *Id.* at 42.

50. The role of the circuit and the operation of circuit-wide institutions are examined in Michael A. Berch, *The Bankruptcy Appellate Panel and Its Implications*

casts further doubt on the relevance of the Hruska Commission recommendation to the present proposals.

Half a century ago, Congress created the circuit councils and made them "the cornerstone of the federal judiciary's administrative institution."⁵¹ The architects of that system viewed the circuit as "an intermediate structure that makes it possible to carry out the tasks of adjudication and governance from a perspective that transcends the borders of a single district or state, yet without concentrating power in a centralized set of institutions."⁵² Over the last few decades, Congress has moved further in that direction by adding to the responsibilities of the circuit councils.⁵³

The large circuit may well have some advantages in carrying out these tasks. On the administrative side, economies of scale can be realized. Staff specialization, especially in matters involving technology, is more feasible. And in matters of governance, the larger and more diversified the polity, the easier it is to bring a variety of viewpoints to bear on the work of the courts within the districts. During the last decade and a half, the Ninth Circuit has pioneered in the development of circuit-wide institutions that strengthen the system of regional decentralization established by Congress in 1939.

From this perspective, there is a certain poignancy in the fact that H.R. 2935, like its Senate predecessor, is called the "Ninth Circuit Court of Appeals Reorganization Act." Of course, the legislation would also reorganize the circuit council, the circuit conference, the Bankruptcy Appellate Panel, and other institutions that in some ways have made a distinct virtue of size.

F. Trade-Offs and the Future

When the Hruska Commission issued its report on circuit realignment, innovative approaches to appellate adjudication were in their infancy. Today we have much more experience. But in the 20-plus years since the Hruska Commission completed its

for Adoption of Specialist Panels in the Courts of Appeals, in RESTRUCTURING JUSTICE, *supra* note 46, at 165; Doris M. Provine, *Governing the Ungovernable: The Theory and Practice of Governance in the Ninth Circuit*, *id.* at 247; Stephen L. Wasby, *The Bar's Role in Circuit Governance*, *id.* at 281; Judith Resnik, *Independent and Interdependent: The Ninth Circuit and the Federal Judiciary*, *id.* at 321.

51. PETER G. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 165 (1973).

52. RESTRUCTURING JUSTICE, *supra* note 46, at 15.

53. *See generally* Provine, *supra* note 47.

work, there has not been another study commission on the federal appellate courts.⁵⁴ Such a study should be conducted before proceeding with ad hoc structural alteration.

One reason a study is needed is that any "solution" carries tradeoffs. The quest is not for the perfect solution (there is none), but for innovations in structure or process that will bring improvement with a minimum of damage to other values. Only a thorough analysis, taking very little as a "given," can provide a sound foundation for choosing among the various possibilities. For example, over the years there have been several suggestions for establishing rotating subject-matter panels within large courts of appeals.⁵⁵ Judges have not responded favorably to this idea, but if it proved to be the most workable alternative to balkanization of the appellate system, it might look considerably more attractive.

G. Conclusion

Twenty-one years after the Hruska Commission issued its final report, I continue to take pride in the research and analysis that the Commission produced.⁵⁶ But for the reasons given, the Hruska Commission's recommendation of 1973 should not be viewed as supporting the desirability of enacting H.R. 2935 or similar legislation today.

IV. CONSISTENCY AND PREDICTABILITY IN THE LAW OF THE CIRCUIT

One of the principal arguments made by proponents of the current legislation is that, because of its size, the Ninth Circuit has been unable to maintain consistency in the decisions of its court of appeals. For example, Senator Gorton stated, "The large number of judges scattered over a large area inevitably results in difficulty in reaching consistent circuit decisions."⁵⁷ More gener-

54. There have been study groups with broader missions, but none that have investigated, in detail and depth, the structures of appellate adjudication in the federal system.

55. See, e.g., Daniel J. Meador, *Struggling Against the Tower of Babel*, in RESTRUCTURING JUSTICE, *supra* note 46, at 195.

56. For example, I continue to believe that "the Federal Rules of Appellate Procedure [should] require that in every case there be some record, however brief, and in whatever the form, of the reasoning which impelled the decision." Hruska Commission, *Structure and Internal Procedures*, *supra* note 10, at 258. As noted above, this would require substantial change in the practice of some circuits. See *supra* note 8 and accompanying text.

57. 1995 Gorton Statement, *supra* note 5, at S7504; see also 142 CONG. REC.

ally, Chief Judge Gerald Bard Tjoflat of the Eleventh Circuit has contended that “[b]y their very nature, jumbo courts experience increasing difficulty in creating and sustaining a clear and stable legal regime.”⁵⁸

Critics of the Ninth Circuit recognize that the mechanism of en banc rehearing is available to resolve intracircuit conflicts.⁵⁹ They argue, however, that the “limited en banc” pioneered by the Ninth Circuit is not an adequate substitute for “the traditional en banc procedure” followed in other circuits.⁶⁰

These criticisms echo concerns that were articulated by the Hruska Commission more than 20 years ago.⁶¹ If valid today, they would support the view that the Ninth Circuit should be divided because it is too large to function effectively. But on the record as it stands in 1996, the criticisms are not valid. The assertions about inconsistency are contradicted by empirical research. The concerns about the limited en banc are unfounded.

A. *The Findings on Intracircuit Conflict*

In the absence of evidence, it would certainly be plausible to speculate that the large number of judges in the Ninth Circuit and the hundreds of different three-judge combinations would lead to conflicts among panel decisions. But speculation is no substitute for evidence,⁶² and in this instance we do have evidence.

The evidence is found in a series of empirical studies that I conducted for the specific purpose of determining the extent of intracircuit conflict in the Ninth Circuit. The Federal Judicial Center, in its comprehensive report on the structure of the federal courts of appeals, described this work as “the only systematic study of the operation of precedent in a large circuit.”⁶³ This research does not support the argument that the Ninth Circuit Court of Appeals has been unable to maintain consistency in its

E166 (daily ed. Feb. 1, 1996) (statement of Rep. Bunn) (“The number of judges alone prevents consistency in the ninth circuit.”).

58. Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70-71. Judge Tjoflat testified at the Senate hearing on S. 956 and submitted this article as part of his written statement.

59. See FED. R. APP. P. 35.

60. SENATE REPORT, *supra* note 1, at 10.

61. Hruska Commission, *Geographical Boundaries*, *supra* note 10, at 235.

62. See generally Arthur D. Hellman, *Conference on Empirical Research in Judicial Administration*, 21 ARIZ. ST. L.J. 33, 34 (1989).

63. JUDITH A. MCKENNA, *STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS* 94 (Federal Judicial Center 1993).

decisions.

In the first of these studies, I formulated a comprehensive definition of intracircuit conflict and applied it to 175 cases randomly selected from the published panel decisions handed down by the Ninth Circuit in 1983.⁶⁴ The sample encompassed 22 percent of the court's published work in that year.

The study concluded that intracircuit conflict is not as much of a problem as it is sometimes thought to be, and that the perception of conflict in the Ninth Circuit has been skewed by the admitted disarray in a few high-visibility areas of the law characterized by a large volume of cases and fact-specific legal rules. The results are set forth in detail in an article published in the *University of Chicago Law Review* in 1989.⁶⁵

In the second study, a follow-up to the first, I analyzed 212 panel decisions handed down by the Ninth Circuit in 1986. This was nearly one-quarter of the published work of the court's three-judge panels in that year. I applied the same criteria as I had to the 1983 sample. Once again, the evidence indicated that the Ninth Circuit has generally succeeded in avoiding conflicts between panel decisions. A full account will be found in an article published in the *Arizona State Law Review*.⁶⁶

B. The Findings on Predictability

As Judge Tjoflat's article makes clear, resistance to "jumbo" courts is not grounded solely on concerns about inconsistency. Skeptics argue that quite apart from actual conflicts, enlarging the number of judges in a circuit makes the law less predictable.⁶⁷ In the Arizona State study, I attempted to determine empirically whether unpredictability on appeal correlates with circumstances that would be more prevalent in a large circuit than a small one. I did this by using dissent within court of

64. Although some aspects of the definition are controversial, the points of controversy would have affected only a handful of cases in the sample. See Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915, 923, 926, 930 (1991) [hereinafter Hellman, *Breaking the Banc*]; MCKENNA, *supra* note 63, at 94.

65. See Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989) [hereinafter Hellman, *Jumboism*].

66. Hellman, *Breaking the Banc*, *supra* note 64. Again, the controversial aspects of the definition of intracircuit conflict played only a minor role in the empirical findings.

67. See, e.g., Tjoflat, *supra* note 58, at 71 (discussing "uncertainty of outcomes," "unpredictability," and "lack of clarity" in the decisions of "jumbo courts").

appeals panels as a proxy for unpredictability.

As explained in the article, "A dissenting opinion provides concrete evidence that the outcome on appeal was not foreclosed. We can readily suppose that but for the luck of the draw, one of the judges in the majority might have been replaced by a judge who shared the views of the dissenter; if so, the outcome would have been different. . . . [B]y studying the grounds for disagreement within panels, we . . . [can] identify the circumstances that make appellate outcomes unpredictable."⁶⁸ In pursuit of this inquiry, I analyzed all 120 dissenting opinions in published panel decisions of the Ninth Circuit handed down in calendar year 1986.

The findings of the study provide little support for the thesis that predictability of appellate outcomes suffers in the large circuit. In particular, I concluded that "what makes for an unpredictable outcome generally is not an oversupply of circuit decisions, but the absence of a circuit precedent that is closely on point or, less commonly, a fact-specific rule of law that by its nature requires case-by-case evaluation. These conditions are no more likely to obtain in the large circuit than the small; if anything, they will occur less often in the large circuit because the larger number of decisions increases the odds that there will be a precedent on point."⁶⁹

C. Further Evidence on Inconsistency

Although the study of dissents focused on identifying sources of unpredictability in appellate decisions, the results also shed light on the debate over inconsistency in the large circuit. To borrow (and adapt) a favorite literary allusion of Chief Justice Rehnquist, the research directs our attention to a large and

68. See Hellman, *Breaking the Banc*, *supra* note 64, at 981-82.

69. *Id.* at 984. A lawyer from Washington State made a similar point in commenting on the 1989 bill to divide the Ninth Circuit. He said, "As a practitioner [in the Ninth Circuit] I can far more readily determine the state of the law on a particular question and advise my clients accurately about it than I could in a small circuit. A Circuit Court of limited size often will not have an opportunity to address a specific question. . . . [L]ike a motorist in an unfamiliar city[,] I am thankful for many signposts along the way and much prefer that to searching for an uncharted way." *Ninth Circuit Court of Appeals Reorganization Act of 1989: Hearings on S. 948 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 507 (1990) (letter from Irwin H. Schwartz, Federal Bar Association, Western District of Washington, to Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary (Apr. 19, 1990)) [hereinafter 1990 Hearings].

excitable dog that did not bark in the nighttime.

We know that dissenting judges do not shrink from accusing colleagues of flouting circuit precedent when they believe that the judges in the majority have done so.⁷⁰ Thus, if there were any grounds for arguing that the majority's decision in a new case was inconsistent with an earlier decision of the court, we would expect the dissenter to say so.

It is significant, therefore, that this kind of argument is made so seldom by dissenting judges in the Ninth Circuit. As reported in the Arizona State article, "In 65 of the 120 cases with dissents, circuit precedents contrary to the majority's result were cited by the majority, by the dissent, or by both. Yet in no more than twelve of the cases did the dissenting judge argue—or even imply—that there were no relevant distinctions between the earlier decision and the case at hand. In the vast majority of cases, the dissenting judge might have found support in the contrary precedent, but did not argue that it was compelling."⁷¹ In the remaining 55 cases—nearly half of the total—no contrary Ninth Circuit precedents were cited in either opinion.

If the "astounding" array of panel combinations in the Ninth Circuit⁷² were truly creating "a cacophony of differing opinions,"⁷³ dissenting judges in new cases should have little difficulty in finding circuit precedents to invoke in opposition to a majority decision. The fact that they so seldom pursue that line of argument suggests that such precedents generally do not exist.

Negative evidence is not conclusive. But when added to the findings based on the random samples from 1983 and 1986, these results strongly contradict the assertion that conflict be-

70. See, e.g., *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189, 1196 (3d Cir. 1993) (Seitz, J., dissenting) (asserting that circuit precedent distinguished by majority "is not distinguishable"); *United States v. McGregor*, 11 F.3d 1133, 1139 (2d Cir. 1993) (Mahoney, J., dissenting) (stating that "this case cannot be meaningfully distinguished from" a circuit precedent). See generally RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 232-34 (1985) (discussing the "abusive dissent"); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1194-95 (1992) (criticizing intemperate language in dissents).

71. Hellman, *Breaking the Banc*, *supra* note 64, at 931-32.

72. Tjoflat, *supra* note 58, at 72.

73. *Id.* at 71 (quoting Judge Irving Kaufman).

tween panel decisions is a common phenomenon in the Ninth Circuit.

D. Possible Challenges

I can anticipate two possible challenges to conclusions based on the studies I have described.⁷⁴ First, the studies took as their subject the work of the Ninth Circuit Court of Appeals in the early and mid 1980s. Since that time, the court's caseload has grown substantially. Are the conclusions still valid today? There is every reason to think that they are. Notwithstanding the increased number of dispositions, the number of published opinions remains about the same as it was during the period of my studies.⁷⁵ And it is only published opinions that can give rise to conflicts. As explained in one of the studies, "Under court rules, unpublished opinions have no precedential value and cannot be cited to or by courts within the circuit. A case that has no precedential value cannot give rise to an intracircuit conflict, or more accurately cannot create a conflict that will generate uncertainty or inconsistency in the law of the circuit."⁷⁶ In this light, I do not think that the passage of time casts doubt on the continuing validity of conclusions based on the published studies.

The second possible ground of challenge relies on the limitation just described—the fact that I did not include unpublished opinions in either of the two random samples. This point was, in fact, made at hearings held in 1990 on a predecessor to S. 956.⁷⁷

Upon reflection, and drawing upon the studies of precedent

74. One actual challenge deserves brief mention. At the hearings on S. 956, Chief Judge Gerald Bard Tjoflat of the Eleventh Circuit suggested that no reliable empirical study of intracircuit conflict could ever be conducted because "[t]here are so many ways in which precedent can be disregarded in cases." See SENATE REPORT, *supra* note 1, at 10 n.19 (quoting Judge Tjoflat). The implications of this remark are extremely troubling. Was Judge Tjoflat acknowledging that he has, himself, "disregarded" binding precedent of his own circuit? Was he accusing his colleagues on the Eleventh Circuit of doing so? Or was he saying that although judges of his own court treat precedent with appropriate respect, judges of other courts do not? I find it hard to believe that Judge Tjoflat would, upon reflection, adhere to the suggestion that judges routinely flout precedent in a way that cannot be identified through objective study. Without that premise, his criticism loses its force.

75. From 1983 through 1988, the number of published opinions ranged from 717 to 946. See Hellman, *Jumboism*, *supra* note 65, at 554-55 n.44. In more recent years, the figure has remained under 900. See, e.g., 1994 A.O. REPORT, *supra* note 6, at 32 tbl. S-3 (893 published opinions in statistical year 1994).

76. Hellman, *Jumboism*, *supra* note 65, at 554.

77. 1990 Hearings, *supra* note 69, at 678, 686 (statement of former Sen.

that I have been pursuing over the last few years, I do not think that this limitation should be given great weight in evaluating conclusions based on my research. For one thing, although I did not look for conflicts *created* by unpublished opinions, I did (in the later study) examine unpublished opinions for evidence of confusion or inconsistency created by conflicts between published opinions.⁷⁸

More important is the kind of case typically decided by unpublished opinion. Generally, unpublished opinions apply established rules to fact-specific grounds of appeal. Was the evidence sufficient to support a conviction? Did the defendant knowingly consent to a search? Did prosecutorial misconduct deprive the defendant of a fair trial? Did the prejudicial effect of evidence outweigh its probative value? Did the evidence support a claim of disability under the Social Security Act?

In these cases, there is generally no dispute over the law. Rather, the outcome depends on the judges' reading of the record and their evaluation of the facts. Almost by definition, it is impossible to have a conflict between two such cases. The facts are unique, and the question is whether the case falls on one side of the line or the other.

Moreover, many unpublished opinions involve rulings by trial courts or administrative agencies that are reviewed deferentially, either for abuse of discretion or for clear error. When the governing law allows "a zone of choice within which the trial courts may go either way" without being reversed,⁷⁹ it is almost impossible that appellate decisions will come into conflict with one another. Indeed, different appellate panels might well affirm contrary trial court rulings in similar cases. That would not create an intracircuit conflict.

E. The Limited En Banc

In 1973, when the Hruska Commission recommended a division of the Ninth Circuit, there was no such thing as a limited en banc court. Two years later, in its final report on structure and internal procedures, the Commission endorsed the idea as the best way of managing a large circuit.⁸⁰ The idea was very much in its infancy, and the Commission struggled both with the

78. See Hellman, *Breaking the Banc*, *supra* note 64, at 941 n.153.

79. *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970-71 (8th Cir. 1984).

80. Hruska Commission, *Structure and Internal Procedures*, *supra* note 10, at

basic concept and with the details of implementation.⁸¹

Three years after the Hruska Commission's final report, in the Omnibus Judgeship Act of 1978, Congress authorized any court of appeals with more than 15 active judges to "perform its en banc function by such number of [judges] as may be prescribed by rule of the court of appeals."⁸² The Ninth Circuit Court of Appeals accepted this invitation, and the limited en banc has been in operation since 1980.⁸³

Some supporters of circuit division have attacked the Ninth Circuit's use of the limited en banc court.⁸⁴ They express particular concern that the outcome of en banc decisions can be controlled by a small minority of the full court.⁸⁵ These attacks are misguided.

En banc decisions, in the Ninth Circuit as elsewhere, constitute a tiny minority of precedential decisions. In 1994, there were only about 100 en banc decisions in all circuits.⁸⁶ Overwhelmingly, the law of the circuit is established by the decisions of three-judge panels, with two judges sufficient for a majority. Often the two judges include a district judge or a visiting judge from another circuit.⁸⁷ Decisions of this kind are fully authoritative, no less than those that are actually endorsed by a majority of the court's active judges. The reason is simple: everyone recognizes that in a system that has grown to the size of the federal appellate courts today, three-judge panel decisions must be the rule rather than the exception.⁸⁸

81. The members of the Commission never reached a consensus as to the best method of selecting the members of the limited en banc court. *See id.*

82. Act of Oct. 20, 1987, Pub. L. No. 95-486, § 6, 92 Stat. 1633.

83. For a detailed account of the deliberations leading to the establishment of the present system, see Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in RESTRUCTURING JUSTICE, *supra* note 46, at 55 [hereinafter Hellman, *Maintaining Consistency*].

84. *See, e.g.*, SENATE REPORT, *supra* note 1, at 10 (stating that "[t]rue en banc review in the ninth circuit is effectively nonexistent"); 1995 Gorton Statement, *supra* note 5, at S7504 (stating that limited en banc panels "further contribute to the inherent unpredictability of a jurisdiction as large as the ninth circuit").

85. *See, e.g.*, 142 CONG. REC. S2220 (daily ed. Mar. 18, 1996) (statement of Sen. Burns) (describing the limited en banc procedure as one that "permit[s] as few as six of the sitting judges to dictate the outcome of a case contrary to the judgment of 22 others, solely depending on the luck of the draw"); SENATE REPORT, *supra* note 1, at 10.

86. 1994 A.O. REPORT, *supra* note 6, at tbl. S-1. The total number of cases terminated on the merits was more than 27,000. *Id.*

87. In three circuits, visiting judges accounted for more than 10% of the total case participation in cases terminated on the merits in statistical year 1994. The Ninth Circuit's figure was 6.1%. *See* 1994 A.O. REPORT, *supra* note 6, at 29 tbl. S-2.

The limited en banc was authorized by Congress as one response to growing appellate caseloads. The available evidence indicates that the limited en banc in the Ninth Circuit is no less effective than other devices for establishing a law of the circuit that is regarded as legitimate and binding. For example, the court's rules allow rehearing by the full court of limited en banc decisions,⁸⁹ but this has never happened.⁹⁰ Thus, on the record today, the only conclusion to be reached is that the limited en banc is an innovation that works.⁹¹

Curiously, the Senate Report on S. 956 views the absence of full-court rehearings as evidence that the limited en banc does *not* serve its purpose.⁹² That puts the matter backwards. The most plausible explanation for the court's failure to grant full-court rehearing is that the judges accept the rulings of the limited en banc panels as definitive expositions of the law of the circuit.

Admittedly, there may be better solutions (contrary to the view of the Hruska Commission). But the limited en banc is a matter that should be investigated as part of a systematic study of the federal courts of appeals, not belittled on the basis of speculation.

V. REGIONALISM AND DOMINATION BY "CALIFORNIA JUDGES"

Another major argument made by some supporters of circuit division is that creating a separate circuit for the five northwestern states will bring a much-needed regional perspective to federal appellate adjudication. For example, a resolution adopted by the Montana Senate argues that "an essential element of a federal appellate system must include guaranteeing regionalized and decentralized review when regional concerns are strongest."⁹³ In

89. 9TH CIR. R. 35-3.

90. See Hellman, *Maintaining Consistency*, *supra* note 83, at 70 & n.35; Carol M. Ostrom, *9th Circuit Court Asks for New Briefs in Case*, SEATTLE TIMES, Mar. 28, 1996, at B3.

91. The limited en banc may actually have some advantages over the traditional practice. For instance, in other circuits, an equal division among the judges may result in a per curiam affirmance that provides no precedential guidance whatever. See, e.g., *United States v. Torres*, 77 F.3d 91 (4th Cir. 1996) (per curiam) (stating that the "judgment of the district court is affirmed by an evenly-divided vote of the en banc court."); *Elliott v. United States*, 37 F.3d 617 (11th Cir. 1994) (per curiam) (stating that "judges of the en banc court are equally divided on the proper judgment of this case. Therefore, the judgment of the district court is affirmed by operation of law.").

92. SENATE REPORT, *supra* note 1, at 10-11.

93. See H.R. CON. REP. 47599 (113th Cong. ed. May 25, 1995) (statement of Sen.

a similar vein, an Idaho newspaper editorialized that “the judiciary serves best when it is closest to the people.”⁹⁴

Senator Gorton has stated the point even more strongly. In his view, the Ninth Circuit is “dominated by California judges and California judicial philosophy.” This is undesirable because “the interests of the Northwest cannot be fully appreciated or addressed from a California perspective.”⁹⁵

These arguments are both unpersuasive and misguided.⁹⁶ To begin with, who is a “California judge”? Judge James R. Browning now lives in California, but he was born and educated in Montana. Is he a “California judge”? Judge Alfred T. Goodwin served with distinction on the Oregon Supreme Court; Judge Robert Boochever did so on the Alaska Supreme Court. Both now have their chambers in Pasadena. Are they “California judges”? Judge Stephen S. Trott now lives in Idaho, but for most of his career he was a prosecutor in Los Angeles. Is he a “California judge”?

I shall make no attempt to answer these questions, for the answers are irrelevant. Arguments about “California judges” and “regionalized . . . review” rest on fundamental misconceptions about the role of the federal courts of appeals in our legal system.

As noted earlier, the Ninth Circuit Court of Appeals is part of a national court system. As an appellate court, its responsibility is to articulate and expound rules of law. For the most part, its decisions interpret the law of the United States—the Constitution and the statutes enacted by Congress.

Surely the interpretation of federal law should be, to the greatest extent possible, uniform throughout the country. In the early years of the 19th century, Justice Story lamented “[t]he public mischiefs” that would result if “the laws, the treaties, and the constitution of the United States . . . [did not] have precisely the same construction, obligation or efficiency in any two states.”⁹⁷ These concerns have no less force today.⁹⁸ It would be perverse to create a new circuit to promote interpretations of fed-

Burns).

94. *New Circuit Court Reasonable*, The Idaho Statesman, Aug. 2, 1995, at 8A.

95. 1995 Gorton Statement, *supra* note 5, at S7504.

96. The theme of regionalism has been de-emphasized in the latter phases of the debate over dividing the Ninth Circuit, but it has not entirely disappeared. Thus it is worthwhile to address the point.

97. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816).

98. See generally Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 698-99 (1995).

eral law that would differ from those in force elsewhere in the country.

Perhaps this is not what is meant by the reference to "a California perspective." Perhaps the argument is only that judges should understand the regional milieu out of which cases arise.⁹⁹ If so, the answer is simple. To the extent that the "regional milieu" is relevant to the legal issues, we can expect that it will be developed in the record. Development of a record—the facts upon which decision is to be based—is the responsibility of the lawyers and the trial court. Trial judges, of course, are appointed from the bar of the state in which the court sits. They will be fully familiar with the regional milieu. And if the materials of record do not suffice to clarify the regional background, we can expect the advocates on both sides to do so, just as they would with issues of science, technology, or business practices that may not be familiar to appellate judges.

In short, to the extent that cases turn on an understanding of local conditions, the regional perspective will be reflected in the work of the district judge; to the extent that cases turn on the law, the goal is to minimize the variations from one jurisdiction to another. "Regionalized . . . review" by the court of appeals is thus a poor argument for creating a new circuit.

Fortunately, the theme of regionalism appears to have been largely cast onto the sidelines in the more recent discussions of circuit division.¹⁰⁰ The Senate report in support of the Judiciary Committee substitute explicitly disclaims the idea of "altering circuit boundaries in order . . . to benefit any regional interest."¹⁰¹ Neither of the sponsors of the House bill made any reference to regionalized review.¹⁰² Thus, the debate over circuit division can concentrate, as it always should have done, on the question: will creation of a new circuit improve the administra-

99. This theme was sounded by two of the sponsors of S. 956 in an article supporting an earlier proposal to divide the Ninth Circuit. See Mark O. Hatfield & Slade Gorton, *Time for a New Federal Circuit in the West: Why the Ninth Circuit Should Be Divided*, DAILY J. REP., Sept. 29, 1989.

100. It has not disappeared entirely, however. On January 9, 1996, a resolution was introduced in the Alaska Legislature in support of the original version of S. 956. The resolution argues that creation of a Twelfth Circuit "would benefit [the five northwestern states] by providing speedier and more consistent rulings by jurists who have a greater familiarity with the social, geographical, political, and economic life of the region." Alaska H.J.R. Res., 19th Legis., 2d Sess. (1996).

101. SENATE REPORT, *supra* note 1, at 8.

102. See 142 CONG. REC. E166-01 (daily ed. Feb. 5, 1996) (statement of Rep. Bunn).

tion of justice in the West?

VI. THE LONG-TERM PERSPECTIVE

The thrust of the argument thus far has been that the proponents of dividing the Ninth Circuit have not met their burden of proof. That being so, there is no need to consider the possible negative consequences of enacting the legislation. Nevertheless, one of those consequences does warrant discussion: the danger that splitting the Ninth Circuit today will interfere with Congress's ability to pursue more comprehensive appellate reform in the future.

To recognize this danger is not to say that Congress should do nothing. Obscured by the debate over circuit realignment in the West are legitimate concerns about caseload growth and its effects on the speed, quality, and uniformity of dispositions in the federal appellate courts throughout the Nation. These concerns should be addressed on a national basis, and the way to do it is by establishing a study commission to make recommendations that will serve the country over the long term.

A. *The Dangers of Piecemeal Realignment*

At the hearings on S. 956 and again in the Judiciary Committee markup sessions, Senators debated the fine points of the Ninth Circuit's caseload management statistics and what they tell us about the court's effectiveness. It was easy to lose sight of a fundamental fact: the Ninth Circuit's problems are problems that are shared, in varying degrees and in differing manifestations, by all of the circuits. Caseloads have grown throughout the country. Each circuit has responded in its own way to the pressures of burgeoning dockets. Some of the techniques are more visible than others, but all involve departures from the traditional model of the appellate process.¹⁰³

In 1990, the Federal Courts Study Committee concluded that the federal appellate courts were already in a "crisis of volume."¹⁰⁴ It anticipated that "within as few as five years the nation could have to decide whether or not to abandon the present circuit structure in favor of an alternative structure that might better organize the more numerous appellate judges need-

103. For a thoughtful and comprehensive discussion of caseload growth and the devices used to cope with it, see MCKENNA, *supra* note 63.

104. STUDY COMMITTEE REPORT, *supra* note 20, at 109.

ed to grapple with a swollen caseload.”¹⁰⁵ The Committee’s report presented several “structural alternatives,” but it did not endorse any of them; instead, it called for “further inquiry and discussion.”¹⁰⁶

Dividing the Ninth Circuit today would significantly interfere with Congress’s ability to pursue the reconsideration that the Study Committee urged. This is so for three reasons.

First, if a Twelfth Circuit is established—whatever its configuration—the effect will be to create new structural arrangements and institutionalize new modes of doing business. These will soon take on a life of their own, reinforcing the status quo and making comprehensive reform more difficult.

Senator Harry Reid of Nevada made this point vividly in the course of the Senate debate on S. 956. To split the Ninth Circuit now, he said,

is the wrong way to do it. [If we do, we] have already, in effect, let the cow out of the barn, because it makes it almost impossible to go back and pull out some of the resources, the assets of the twelfth and ninth circuits, to help realign part of the other circuits if, in fact, that [proves] necessary.¹⁰⁷

Second, dividing the Ninth Circuit would set Congress on a course that prefers circuit splitting to other, perhaps more fruitful, measures for meeting the “crisis” of appellate overload. Indeed, even today, the division of the Fifth Circuit is being cited as a precedent for dividing the Ninth, notwithstanding the many and significant differences between the two situations.¹⁰⁸

Finally, to divide the Ninth Circuit now would be to lose the full benefit of a vital experiment in judicial administration. As noted above, the Federal Courts Study Committee presented several models of appellate reorganization, but it did not endorse any of them. That is quite understandable. None of the models is very attractive; all have serious drawbacks.

Over the last decade, the Ninth Circuit has undertaken a remarkable range of innovations in an effort to determine whether a large circuit can be made to work effectively. Nothing could be more useful to Congress as it considers systemic reform than to have the concrete empirical information that the Ninth Circuit’s experimentation will provide.

105. *Id.*

106. *Id.* at 116-24.

107. 142 CONG. REC. S2219-03, S2227 (daily ed. Mar. 18, 1996).

108. See *supra* note 30.

Of course, it would be wrong to conduct an experiment if the “subjects”—here, the judges, lawyers, and citizens of the Ninth Circuit—were being hurt by it. But the evidence is overwhelming that they are not. For example, bar associations in five Ninth Circuit states have spoken out on the division proposed by the original version of S. 956. All have expressed opposition to the split.¹⁰⁹ So has the Federal Bar Association.¹¹⁰ If there are contrary perceptions, they have not thus far surfaced.

B. The Proposed New Study Commission

More than five years have passed since the Federal Courts Study Committee issued the strong warning quoted in the preceding section.¹¹¹ Rather than divide one circuit ad hoc, Congress should proceed systematically by creating a new, focused commission to examine the problems of the entire appellate system and make recommendations that will serve the country for the long run.

As already noted, a proposal along these lines has been adopted by the Senate. The Senate bill—derived from an amendment offered initially by Senator Dianne Feinstein of California¹¹²—would create an eleven-member Commission on Structural Alternatives for the Federal Courts of Appeals. In essence, the commission would take up where the Federal Courts Study Committee left off.

The proposed commission would be the first of its kind since the Hruska Commission, which completed its work in 1975, more than 20 years ago. Needless to say, dramatic changes have taken place in the work of the federal courts in those two decades, including explosive growth. But there have been no structural alterations except for the division of the old Fifth Circuit and the creation of the Court of Appeals for the Federal Circuit.

Nor has there been a study commission that could bring to bear a variety of perspectives on the work of the federal appellate courts. To be sure, recommendations on federal appellate structure were made by the Committee on Long-Range Planning

109. See 142 CONG. REC. S2221-23 (daily ed. Mar. 18, 1996) (statement of Sen. Reid) (resolutions by bar associations in Arizona, Nevada, Montana, California, and Hawaii).

110. *Id.* at S2223.

111. See *supra* text accompanying note 105.

112. Senator Feinstein’s proposed amendment was drafted initially by the present

of the Judicial Conference of the United States in its 1995 report.¹¹³ But those recommendations represented the views of only one of the constituent groups, the judges. Of course, the views of the judges—especially those articulated after careful study, as was the case here—should be given heavy weight in any process of structural reform. But those views should be integrated with those of other knowledgeable participants, including lawyers and legislators.

The name of the proposed commission is taken from section 302 of the Judicial Improvements Act of 1990. That statute requested that the Federal Judicial Center study “the full range of structural alternatives for the Federal Courts of Appeals.”¹¹⁴ The Center completed the study and sent it to Congress in 1993.¹¹⁵ The study is a comprehensive and thoughtful analysis of the problems of the courts of appeals, and it can well serve as a starting-point for future inquiries. However, the Center was not asked to make recommendations, and it did not do so. Thus it would be a logical follow-up to have a full-scale commission, composed of judges, legislators, and other knowledgeable citizens, to examine the policy issues and make recommendations to Congress and the President. That is the object of the Senate bill.

The proposed statute first directs the commission to study “the present division of the United States into the several judicial circuits.”¹¹⁶ Next, the statute calls for a study of “the structure and alignment of the Federal courts of appeals with particular reference to the ninth circuit.”¹¹⁷ Finally, the statute requires a report that makes recommendations “for such changes in circuit boundaries *or* structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process.”¹¹⁸

The statute does not further specify the areas or issues that the commission would be expected to consider. However, drawing upon the legislative history (including the hearing on S. 956, the markup sessions of the Senate Judiciary Committee, the Committee Report on the bill, and the floor debate in the Senate on March 18, 1996), I have identified some of the more specific

113. PROPOSED LONG RANGE PLAN, *supra* note 23, at 39-52.

114. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

115. MCKENNA, *supra* note 63.

116. S. 956, 104th Cong., 1st Sess. § (1)(b)(1) (1995).

117. *Id.* § (1)(b)(2).

issues that the Commission might address.¹¹⁹ These fall into two broad groups. The first encompasses circuit realignment; the second embraces other possible approaches to structural reform.

1. *Circuit Realignment: Options and Consequences*

Should Congress take action in the immediate future to divide the Ninth Circuit? If so, what is the preferable realignment? If the time has not yet come to divide the circuit, can we identify criteria or benchmarks that will identify the point at which division becomes desirable?

More generally, is there a point at which a court of appeals is too large to operate effectively? If so, how can that point be identified? Does circuit size affect the speed at which cases are handled? Does it affect the ability of the court of appeals to provide a knowable, coherent body of circuit law?

Do large or small circuits better serve the functions performed by the federal courts of appeals, or can both serve them effectively? If small, medium, and large courts can adequately serve the citizens of their circuits, are there overriding national reasons to make the circuits approximately the same size?

In considering possible realignment of the circuits, what weight should be given to tradition and the likelihood of disruption if states were shifted from one circuit to another? If additional circuits were created, would it be necessary to create a new level of courts to resolve a larger number of intercircuit conflicts?¹²⁰

2. *Alternative Approaches to Structural Reform*

What are the alternatives to circuit realignment as a means of assuring the effective performance of the appellate function, now and in the future? What are the tradeoffs of the various models of structural reform, such as those sketched in the report of the Federal Courts Study Committee? If structural reform is

119. The bill approved by the Senate would require the commission to make its recommendations no later than February 28, 1997. This deadline is hopelessly unrealistic. In outlining the issues and areas that the commission might consider, I am assuming that Congress, if it creates the commission, will give it adequate time (and funding) with which to carry out the work.

120. At the hearing on the original version of S. 956 several Senators expressed concern that creating a new circuit would add to the number of conflicts between circuits that the Supreme Court would be required to resolve. See *Ninth Circuit Court of Appeals Reorganization Act of 1995: Hearings on S. 956 Before the Senate*

necessary, is it preferable to build new structures within existing circuits or to establish new tiers or channels of review outside the existing system?

How many judges are needed to handle the appellate caseload appropriately? Should the number of judgeships in the courts of appeals be substantially increased, as some have proposed? Or (as has been suggested in recent hearings) do some circuits have more judges than they really need?¹²¹ Are there additional nonstructural changes that circuit judges could make to allow their courts to handle more cases while still giving each appeal the attention it deserves? What is the relationship between opinion writing and publication practices and the structure of the federal appellate system?

If appellate caseloads continue to grow, could they be accommodated simply through adding judges to existing circuits? If so, would new structural arrangements be required? What would the consequences be for coherence and consistency in federal decisional law?

VII. CONCLUSION

Dividing the Ninth Circuit is an old idea whose time has not yet come—if indeed it ever will. The arguments made by the proponents of the original version of S. 956 and the Senate Judiciary Committee substitute do not withstand analysis. The Senate was therefore wise not to adopt the bill in that form. For the same reasons, the House should concur in the version of S. 956 approved by the Senate and create the Commission on Structural Alternatives for the Federal Courts of Appeals. The new commission can look carefully at the structure of the federal appellate courts and make recommendations that can provide a sound foundation for Congressional action in the future.

121. See Richard J. Carelli, *Need for D.C. Judges Questioned*, THE DAILY RECORD, Oct. 30, 1995, at 30. <http://www.legis.mt.edu/mlr/vol57/iss2/3>