

**REVIEW OF THE REPORT BY THE COMMISSION
ON STRUCTURAL ALTERNATIVES FOR THE FED-
ERAL COURTS OF APPEALS REGARDING THE
NINTH CIRCUIT AND THE NINTH CIRCUIT RE-
ORGANIZATION ACT**

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

S. 253

A BILL TO PROVIDE FOR THE REORGANIZATION OF THE NINTH
CIRCUIT COURT OF APPEALS, AND FOR OTHER PURPOSES

—————
JULY 16, 1999
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REVIEW OF THE REPORT BY THE COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS REGARDING THE NINTH CIRCUIT AND THE NINTH CIRCUIT REORGANIZATION ACT

FRIDAY, JULY 16, 1999

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:31 a.m., in room SD-628, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Also present: Senators Sessions, Torricelli, and Feinstein.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I want to take this opportunity at the start of this meeting to welcome everybody to this meeting and take care of a few housekeeping matters to expedite everybody so that they can use their time allotment very expeditiously. All written statements will be entered into the record, so I would urge witnesses to summarize, especially since we have so many on this issue who want to speak.

Normally, we would limit our witnesses to 5 minutes each, but I have expanded it to 10 minutes for our Senators and our judges. This is with an acknowledgment that more time would be necessary to discuss the White Commission Report and the year that it took to put together this report.

Witnesses should also expect to receive written follow-up questions because I doubt if all the members of the committee are going to be able to be here, especially since we have a vote scheduled at 10:30 a.m. And I would expect responses to the written questions to be received by the committee 2 weeks after receipt by the panelists.

In addition, the judges' panel was scheduled to be our second panel. However, because Ronald Olson from the fourth panel must attend a funeral of a close friend, we will hear from him after the panel of Senators is finished.

I want to say that I am very happy to hold this hearing today to receive the final report of the Commission on Structural Alternatives for the Federal Courts of Appeals and the Federal Ninth

Circuit Reorganization Act of 1999. The report, which was released by the Commission last December, proposes organizing the Ninth Circuit Court of Appeals into three regional divisions, while keeping the administration of the circuit intact.

At the beginning of this Congress, Senators Murkowski and Gorton introduced S. 253, the Federal Ninth Circuit Reorganization Act of 1999, which is based upon the recommendations of the Commission's report. In addition to the reorganization of the Ninth Circuit, S. 253 also follows the Commission's proposals that would allow other circuits to adopt measures to deal with the growing caseloads.

Circuits would have the option of reorganizing themselves into adjudicative regions in a similar manner, using two-judge panels instead of the current three-judge panels in deciding appeals, and establishing a district court appellate panel for hearing certain categories of appeals.

I am not going to finish my statement at this point because it is very statistical and very factual, and so I am going to just put most of my statement in the record.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF SENATOR CHARLES E. GRASSLEY

Good Morning and welcome to our hearing today on the final report of the Commission On Structural Alternatives for the Federal Courts of Appeals and the Federal Ninth Circuit Reorganization Act of 1999. The report, which was released by the Commission last December, proposes organizing the Ninth Circuit Court of Appeals into three regional divisions while keeping the administration of the circuit intact. At the beginning of this Congress, Senators Murkowski and Gorton introduced S. 253, "The Federal Ninth Circuit Reorganization Act of 1999," which is based upon the recommendations of the Commission report. In addition to reorganizing the Ninth Circuit, S. 253 also follows the Commission's proposals that would allow other circuits to adopt measures to deal with growing case loads.

Circuits would have the option of reorganizing themselves into adjudicative regions in a similar manner, using two judge panels instead of the current three judge panels in deciding appeals, and establishing a district court appellate panel for hearing certain categories of appeals.

Although the Commission looked at all of the circuits, the heart of both the Commission's report and S. 253 deals with the Ninth Circuit. Of the thirteen circuits in the federal judicial system, the Ninth Circuit is currently the largest in terms of geographic size, number of judgeships and caseload. The Ninth Circuit currently covers nine states and over 50 million people. In contrast, the east coast of the United States is divided up into five circuits. The Ninth Circuit is allocated 28 judgeships, nine more judgeships than the Fifth Circuit, the next largest. Finally, the Ninth Circuit has a case load of over 8,500 appeals, almost double the average number of appeals for all other circuits.

Due to the Ninth Circuit's large size, bills advocating splitting the circuit have been introduced as early as the 1940s. In 1973, the *Commission on Revision of the Federal Court Appellate System*, known as the Hruska Commission, recommended that Congress split both the Fifth and Ninth Circuits. Though the Commission's proposals were not enacted, Congress did split the Fifth Circuit in 1981. However, it left the Ninth Circuit intact. But the issue has remained very much alive. Proposals to split the Ninth Circuit have been frequent throughout the late 1980s and early 1990s. At the same time, two reports, the *1990 Report of the Federal Courts Study Committee* and the *1995 Long Range Plan for the Federal Courts*, have recommended against splitting the Ninth Circuit.

In 1995 legislation was once again introduced to split the Ninth Circuit, and was taken up again in the 105th Congress. As part of a compromise that many of us here were involved with, Congress authorized a commission to study "the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit." In December 1998, the Commission released its final report recommending dividing the Ninth Circuit into regional divisions as an alternative to a circuit split.

Deciding how to deal with the Ninth Circuit and the structure of the United States appellate system in general is a very difficult and delicate issue. Many people, including apparently a majority of the judges on the Ninth Circuit, feel that the circuit is doing an adequate job of adapting itself to the problems presented by its size and increasing case load. Others feel that the circuit is too large and unwieldy to function properly. They argue that the number of judges on the circuit prevents the court from deciding appeals in a timely manner, hinders judges from working together in a "collegial" manner, and prevents the court from performing its en banc function effectively. The 1996 Subcommittee Report on the Judicial Questionnaire I sent to the federal judges confirmed this split in opinion on whether or not the Ninth Circuit should be restructured.

The Commission report and the legislation which we will discuss today offers a compromise in the debate over whether or not to split the Ninth Circuit. Instead of splitting the circuit, the suggestion is to divide it into smaller adjudicative divisions that would enable judges to function more effectively as a unit. This solution aims to keep the law of a significant part of the western region of United States both consistent and in one administrative unit, while solving the problems that size and caseload have presented.

Senator GRASSLEY. I will conclude by saying that I look forward to what our witnesses today have to say about the Commission's proposals. However, I am also interested in learning more about the proposed regional divisions and whether there are other alternatives to the current plan of dividing the State of California between two different regions.

Before I turn to our witnesses today, I want to mention that although he is not here to testify, retired Supreme Court Justice White, who chaired the Commission, submitted written comments in support of this legislation. Those comments will be available for the record.

[The prepared statement of Justice White follows:]

PREPARED STATEMENT OF JUSTICE BYRON WHITE

My name is Byron White, safely until September in my home state of Colorado. I hope the Congressional representatives will welcome my written views about the subject matter that will be heard.

Pamela Rymer, a very experienced Ninth Circuit Judge, is a member of the Commission, and will represent in person the Commission in a very competent way. Judge William Browning, also a Commission member and a district judge of the Ninth Circuit, will accompany Judge Rymer. Professor Daniel Meador, the Executive Director of the Commission, will present a written statement.

In late 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals. The statute specified that the Chief Justice should appoint its five members, and he promptly did so.¹ The Commission began its work in early 1998, and it presented its recommendations in a final report to the Congress and the President, pursuant to its statutory mandate, on December 18, 1998.

Although the creation of the Commission was prompted by Congressional difficulty in deciding how to resolve the long-standing debate over what, if anything, should be done about the Ninth Circuit, the Commission was also directed to study and make recommendations concerning the entire federal appellate system. In carrying out its charge, the Commission held public hearings in six cities, heard from dozens of witnesses, received dozens of written statements from others, and spent ten months of intensive study of the nationwide structure of our appellate courts, "with particular reference," as the statute required, to the Ninth Circuit.

This study led the Commission to two insights concerning the structure and functioning of the federal appellate courts, and those insights form the premises for the Commission's key recommendations. First, there is a significant distinction between a circuit and its court of appeals. Second, the magnitude and nature of future

¹ Commission members were Byron R. White, Chair; N. Lee Cooper, Vice-Chair; Gilbert S. Merritt; Pamela Ann Rymer; William D. Browning. The Commission was authorized to appoint an Executive Director. The Commission chose Professor Daniel J. Meador, a very competent selection. The statute also authorized the Federal Judicial Center and the Administrative Office of the United States Courts to serve the Commission, help that was essential.

growth and changes in appellate business cannot be reliably predicted and will vary among circuits; therefore, the appellate courts should have a flexible authority to deal with such unforeseeable changes.

The distinction between a circuit and a court of appeals is that a circuit is an administrative entity, whereas a court of appeals is an adjudicative body. Acting through its Judicial Council, each of the twelve regional circuits discharges a variety of administrative responsibilities concerning the federal courts and judges within its territory. A court of appeals, on the other hand, is concerned solely with deciding appeals from district courts within its circuit and from administrative agencies. In other words, problems of circuit administration are separable from problems of court of appeals' adjudication.

Proceeding from that premise, the Commission found no administrative malfunctions in the Ninth Circuit sufficient to call for a division or realignment of the circuit. Thus, it recommended that the circuit be left intact as an administrative unit.

But, the court of appeals in the Ninth Circuit presents a different picture. The court has 28 authorized judgeships and has requested more; it will undoubtedly need still more judges in the years ahead. From its study, the Commission concluded that an appellate court of that size, attempting to function as a single decisional entity, encounters special difficulties that will worsen with continued growth. These can be avoided by organizing the court into smaller decisional units (and without dividing the circuit). Thus the Commission recommended that the court be organized into three regionally based adjudicative divisions and that a court called the "circuit division" be established to resolve conflicting decisions among those divisions.

The Ninth Circuit has been the subject of debate and intense controversy for many years. For that debate to continue year after year into the future is dysfunctional and damaging to the status of the federal judiciary in the public mind. If Congress does not accept the Commission's recommendations, it is left with two choices: do nothing or split the circuit. Under the circumstances, doing nothing would seem irresponsible. Splitting the circuit would have distinct disadvantages and is not necessary. The Commission's recommendations address the problems that many perceive in the court of appeals, while preserving the administrative advantages of leaving the circuit undivided.

The Commission's other insight, leading to its second premise, is that the appellate system needs flexibility to deal effectively with future, unpredictable changes in the size and composition of the dockets. To this end, the Commission made three recommendations:

- (1) That Congress authorize each court of appeals with more than 15 judgeships to organize itself into adjudicative divisions, with a "circuit division" to resolve inter-divisional conflicts;
- (2) That Congress authorize each court of appeals to decide appeals through two-judge panels in selected categories of cases;
- (3) That Congress authorize the Judicial Council of each circuit to establish district court appellate panels, each panel to consist of two district judges and one circuit judge, to decide appeals in designated categories of cases, with discretionary review thereafter in the court of appeals.

If the courts exercise their discretionary authority to adopt any of these measures, the Federal Judicial Center would be required to evaluate the experience over a period of time and report to the Judicial Conference of the United States. Those arrangements that worked well could be models for other circuits; those that did not work could be discontinued. The ability of courts to experiment in this manner will be increasingly important in the future as dockets grow and circumstances change.

History teaches that any recommendations for change in the courts are likely to encounter opposition from some members of the bench and bar. Some of that can be discounted as nothing more than instinctive reluctance to embrace change. No proposals for dealing with the judiciary's problems will achieve perfection, and there are advantages and disadvantages to any proposal. In arriving at its conclusions, the Commission weighed benefits and costs carefully, after receiving a wide assortment of ideas from judges, lawyers, law professors, and public officials. The Commission has carried out the most thorough study of the federal appellate courts since the Hruska Commission a quarter century ago.² Therefore, it is to be hoped

²Report of Commission on Revision of the Federal Court Appellate System (1973). That Commission's recommendation that the 5th Circuit be split was enacted by Congress. Its recommendation that the 9th Circuit likewise be split has never been acted on.

that Congress will give serious attention to the enactment of these recommendations and that they will have the support of a substantial segment of the bench and bar.

Senator GRASSLEY. I would like to thank our panels for being here and look forward to hearing their thoughts and suggestions about the report and this legislation.

Even though you aren't the ranking minority member, if you would like to speak for the other side, I would be happy to receive that at this particular time.

**STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR
FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Yes, I would like to speak for the other side. I would also like to thank you for holding this hearing.

We are here today, in my opinion, largely because the Supreme Court reversed the ninth circuit in 26 out of 27 cases in its 1996–1997 term. Since this inauspicious session, the ninth circuit has faced incessant, unending charges that it lies outside the mainstream of appellate jurisprudence.

As we move forward with this discussion of the ninth circuit's future, it is critical and crucial that we get the most up-to-date facts.

The American Lawyer recently reported on the reversal rates of the ninth circuit in its 1998–1999 term. It reported that the Supreme Court reversed the ninth circuit in 14 out of 18 cases where it issued definitive decisions, a reversal rate of 78 percent. The ninth circuit's own calculation shows an even more favorable result: 11 out of 18 cases reversed.

No matter how you keep score, the ninth circuit had a lower reversal rate last year than the fifth, 80 percent; the seventh, 80 percent; and the eleventh, 88 percent. In 1997, both the fifth and the eleventh circuits also had higher reversal rates than the ninth circuit. A study of ninth circuit reversal rates also reveals that if a problem exists on the circuit, Clinton judges are not causing it. Currently, 20 percent of the judges in the ninth circuit are appointments of President Clinton, yet on only eight occasions in the past 3 years has a Clinton appointee joined or authored a panel opinion that was later reversed. In comparison, judges appointed by President Reagan have been reversed on 30 occasions.

The fact is Clinton judges are fully in step with mainstream jurisprudence. I think these statistics show that the ninth circuit is operating more effectively than many would have us believe. However, the ninth circuit can and should be improved. Reversal rates should be lower, and the public needs to have confidence in the job the ninth circuit is doing.

In testimony submitted to the White Commission, the Justice Department noted,

We begin with the observation that all available means of nonstructural reforms should be attempted and assessed before structural changes are imposed on the Federal courts.

I couldn't agree more.

The Justice Department is the largest consumer and participator in ninth circuit decisions, and as such, I strongly recommend that

everyone read the comments on the U.S. Department of Justice on the tentative draft report of the Commission on Structural Alternatives for the Federal Courts of Appeals. I have read it, and I agree with much of what the Justice Department has to say.

I hope to introduce on Monday legislation that will enact targeted, nonstructural reforms to the ninth circuit. Entitled "The Ninth Circuit Court of Appeals En Banc Procedures Act of 1999," this legislation would institute three major changes to the ninth circuit procedures.

First, it reduces the number of judges required to grant an en banc hearing.

Second, it increases the size of en banc panels from 11 judges to a majority of the circuit.

And, third, it imposes a system of regional calendaring in which at least one judge from the geographic region where the case arises would be assigned to that case.

Let me state categorically, as a Californian, as a member of this committee, I will forcefully do everything I can to prevent the division of the State of California. Nothing I can think of could have more strong and adverse impacts not only on the administration of justice but on the treatment of Californians on vital legislation before the ninth circuit.

The criminal caseload of this circuit is a heavy one. The immigration caseload of this circuit is 50 percent of all of the cases in the Nation. To have people with the likelihood of being treated differently in one part of the State than in another is, frankly, something I could not stand by and watch happen.

So I am anxious to hear the comments of my colleagues. I have a reasonably open mind, will introduce this legislation on Monday, hope it will have cosponsors from other Senators in this circuit, and look forward to hearing from my colleagues.

Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you.

Normally, I wouldn't have other Senators give opening statements, but Senator Sessions, who is reasonable, asked for 60 seconds. So I will give Senator Sessions 60 seconds.

Senator SESSIONS. Well, I am pleased to have this great panel here. I know you are concerned about this issue. I have been a critic of the ninth circuit. I have numbers that demonstrate that from 1987 through 1992, every year the ninth circuit's reversal rate was substantially higher than the overall reversal rate for the rest of the country. In 1996, they were reversed 95 percent of the time; whereas, the nationwide reversal rate, excluding the ninth circuit, was 62 percent. There are 10, 20, and 30 percent differences almost every year.

So I do think there is a legitimate concern that the ninth circuit is not in the mainstream of American law.

Senator GRASSLEY. Thank you, Senator Sessions.

Now I will go to the panel. Normally, I go left to right, but if my panelist colleagues don't object, I think it would be more appropriate for me to start with Senator Murkowski, then Senator Gorton, then go to Senators Kyl, Bryan, and Reid, if he shows up. Is that OK?

**STATEMENT OF HON. FRANK MURKOWSKI, A U.S. SENATOR
FROM THE STATE OF ALASKA**

Senator MURKOWSKI. I very much appreciate that, Mr. Chairman. I am conducting a hearing on Chinese espionage as chairman of the Energy Committee.

Thanks for the opportunity to testify on this Senate bill 253 to reorganize the Ninth Circuit Court of Appeals. As you know, Congress has attempted to reorganize the ninth circuit since World War II. The time for action, in my opinion, is long overdue, and I think justice bears the price for Congress' inaction.

In 1997, Congress mandated the White Commission to once and for all—which is seldom done around here, but it was the intent, at least, to resolve the severe problems of the ninth circuit court.

Many of the members of the Senate strongly fought for such a conscientious and thorough study. Senator Boxer indicated that she was certainly very, very open to splitting the court. The problem is how we go about it, we ought to have a study. And Senator Feinstein, who is with us today, was quoted as stating, "A study is the only practical approach to dealing with an issue as important as the structure of the U.S. court."

Now, this idea of dividing the State of California, I can understand the sensitivity. But please understand, you know, in my State of Alaska, we are not part of California. Yet the court is in California. So we are somewhat, you know, indifferent in that regard because we don't have the same affinity that you do as the court obviously makes a significant contribution to California as well.

But putting that aside, I think what we have now is the results of the study. For the good of the people of the ninth circuit, I would hope we can act in a bipartisan manner to support what we all agreed we needed was a study. I don't think we need another study on another study. That is the traditional way of doing nothing around here.

Mr. Chairman, the restructuring of the ninth circuit, as in Senate bill 253, as evidenced by chart 1, is warranted, if you will look at that chart, for three important reasons: one, its size and population; second, its caseload; and, third, its astounding reversal rate, which has been discussed this morning.

The ninth circuit is gigantic by any means of the imagination, by far the largest of the 13 circuits, encompasses 9 States stretching from the Arctic Circle—think about that—the Arctic Circle to the border of Mexico. You are looking at some 5,000 miles on the west coast.

The population: Over 50 million people are served by the ninth circuit, almost 60 percent more than the next largest circuit—60 percent more. By the year 2010, the ninth circuit's population will be more than 63 million. That is a 43 percent increase in just 11 years. That is chart 3 which you can see over there.

The caseload: The ninth circuit's docket is daunting, last year over 9,000 new filings, over 1,000 more than the next largest circuit. The result: Cases are decided more slowly, prompting many to forego the entire appellate process. In brief, the ninth circuit is a circuit where justice perhaps is not always as swift and not always served.

And the reversal rate: The gigantic caseload means it is nearly impossible for judges to keep up with the legal developments, inevitably resulting in, one, inconsistent decisions and, two, a high reversal rate, which we have acknowledged.

Now, chart 4, this tracks the ninth's reversal rate. Look at 1997 where the Supreme Court reversed an astounding 19 of 20 ninth circuit court cases. That is a 95 percent reversal rate.

And chart 5—we are keeping the chart lady busy here. Chart 5, between 1997 and 1999, the ninth circuit was responsible for 33 percent of all cases reversed by the Supreme Court—33 percent.

I don't mean any disrespect to the distinguished chief judge of the ninth circuit by citing these figures. I believe that he and the circuit are simply overworked and in need of some relief, and this is what the study proposed.

Now, why is the reversal rate so high? Well, the circuit is simply too big. Ninth circuit judges are unable to keep up with the daunting 9,000 cases. As the report reflects, only about half of the ninth circuit judges are able to read all or most of the published opinions. And in reading the testimony of some of the witnesses today, that is the severest critic. They simply don't have time to read other judges' opinions. They don't really get a feel for the court.

Of the four Supreme Court Justices who wrote to the Commission on the ninth circuit, all were of the opinion that the ninth circuit must be changed. And I submit their statements for the record.

[The statements referred to are located in the appendix.]

Senator MURKOWSKI. Additionally, Chief Justice Rehnquist strongly endorsed the Commission's report:

I share many of the concerns expressed by my colleagues. The proposal to create three divisions of the ninth circuit appears to me to address head-on most of the significant concerns raised about that court and would so with minimal to no disruption in the circuit administration's structure.

On July 8, the Chief Justice wrote to me stating: "One, I continue to support the recommendations of the Commission. I wish you well in your legislative effort."

But what about the critics, Mr. Chairman? More judges will resolve the problem, they say. Well, more is not better. In the words of my former colleague and our revered friend, former Alabama Supreme Court Justice Howell Heflin, "The addition of judges decreases the effectiveness of the court and potentially diminishes the quality of justice."

Others say some judges will oppose the split. Well, one-third of the ninth circuit judges strongly favor Senate bill 253, and with due respect to the judicial bench who oppose the division, the judges of the fifth circuit were not originally in favor of Congress dividing that court, either. They weren't in favor of it. But it was the right thing to do, as we have seen. Now, we in this timeframe have that opportunity to do the right thing.

Finally, Mr. Chairman, remember that it is Congress' constitutional duty to restructure jurisdictions to ensure that justice is not

hindered. We cannot forget that we have that duty and obligation. Indeed, there is nothing unconstitutional, antijudicial, or anti-ninth circuit about fixing the problems of the ninth circuit.

Final points. Our bill is cost-effective by retaining one administrative office. No new courthouses are needed, and our bill is a blueprint for circuits to handle future caseload growth. Moreover, it goes far in strengthening consistency and predictability in law, and that, Mr. Chairman, is what the people of the ninth circuit deserve.

Last, I want to personally thank the members of the Commission. Their sense of duty, diligence, and wisdom is reflected in their report. Here is the report, Mr. Chairman, and I only ask that Congress has the prudence to follow its thoughtful recommendations. That is our obligation.

Thank you for the opportunity.

Senator GRASSLEY. Thank you, Senator Murkowski.
Senator Gorton.

**STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM
THE STATE OF WASHINGTON**

Senator GORTON. Mr. Chairman, long before this Commission was created, long before the action by the Senate, in which I played a major part in creating new circuits out of the ninth circuit, I have dealt with this very distinct problem. Senator Feinstein to the contrary, it didn't come up in 1997 with a higher reversal rate.

I began to feel seriously about the division of the circuit when I was Attorney General of the State of Washington in the early 1970's. My office was convinced that if we could get the Supreme Court to take certiorari of a ninth circuit case, we are going to win. And most of the time, you know, we did just that.

We were convinced then that there was a lack of collegiality or consistency in ninth circuit decisions due to its size. So this isn't a new problem.

In fact, in a Harvard Law Review published in 1969—now, Mr. Chairman, that is 30 years ago—a professor at the University of Michigan Law School commented:

As the court has enlarged to meet the burgeoning caseload, however, there is a serious threat that the enterprise of maintaining the law of the circuit will gradually collapse because of the inherent weakness of its operation. Indeed, as the size of the court has increased, the likelihood of differences among judges has increased, and a wider variety of idiosyncrasies is likely to appear in their decisions. While there is a limit to the number of different viewpoints possible in a given case, nevertheless, the larger number of panel variations possible, the more likely it is that an aberrational view can command an occasional majority. The finding of the committee of the Judicial Conference that a court of more than nine judgeships is likely to be more unstable than a healthy legal system should tolerate seems reasonable.

Now, that is 30 years ago, Mr. Chairman. The present 28-judge court and the lottery system of assigning three-judge panels, you

can be appointed a judge of that court at the age of 40 and never serve with the same panel twice in an entire career. It is impossible to come up with the kind of collegiality that a good court of appeals ought to attain under circumstances like that.

Four years after that Law Review article, the congressionally appointed Hruska Commission concluded that the ninth circuit was too big and contained too many judges to be effective. It recommended a split. Congress didn't act. Since then, the authorized number of judges has increased to 28, and, finally, 22 years after the Hruska Commission recommendation, the Senate voted to divide the circuit.

Those who opposed the split, however, argued successfully in the House of Representatives that the Hruska Commission recommendations were stale and that there needed to be a more contemporary study. We agreed and we created the White Commission.

Now, they were appointed by the Chief Justice of the United States, Mr. Chairman. They came up with the unanimous recommendation. It seems to me at this point it is simply time to accept the recommendations of that Commission.

I may say not at all incidentally that I regard the Commission report as better than the creation of the new circuits, which the Senate passed in 1995. That did raise the question of how many circuits we might eventually have, but the generalized statement of the White Commission that when any court of appeals reaches a certain size it should have the opportunity to divide into divisions is, I think, extremely sound. And the recommendation means that we can stabilize the number of circuits and still create a degree of collegiality that is lacking at the present time.

I am delighted that Senator Feinstein's proposal will at least guarantee that one judge in a three-judge panel comes from the general area from which the appeal arises. The White Commission simply requires that two do so, a majority. We may not be that far apart, at least as far as the way in which justice is to be administered is concerned.

Nevertheless, Mr. Chairman, this kind of division, this kind of cure, it seems to me is absolutely necessary, and if the Congress can also come up with a way in which we don't have to deal with this in the future because these divisions can take place internally, we will have rendered, I think, a terrific service.

Now, each of us is, of course, parochial. I am as well. Senator Kyl and I worked very hard on the previous iterations of this system. He is not completely—he is not satisfied with the particular division that is recommended by the White Commission. Senator Feinstein is not either. I don't have a dog in that fight. The division that is created here in the ninth circuit for the Pacific Northwest is perfectly satisfactory to me and to Senator Murkowski.

I may say incidentally that when we passed the bill, the Senators from Hawaii determined through their bar that Hawaii would prefer to be in the new Northern Division than staying with California. I suppose it is perfectly possible to create a three-division structure with California as its own division in this connection if that is the preference of the people who represent those various

States. But the problem exists and the problem isn't going to go away with more band-aids.

The thoughtful criticism of the recommendation by the Commission on Structural Alternatives from Procter Hug, the chief judge of the ninth circuit, questions why we should opt for an untried proposal over, "the time-tested procedures now in place." Well, I would turn the question around. Why not adopt the Commission recommendations from a former distinguished Justice of the Supreme Court of the United States? The procedures of the ninth circuit may, as Judge Hug asserts, be time-tested but they got an F on that test. It just simply doesn't work.

The Commission, chaired by Justice White, has done an extraordinary job and has made a compelling case for an approach that differs from the status quo, differs from the status quo plus that the Senator from California talks about, and differs from the one that we came up with here several years ago, probably because they spent more time studying it than any of the rest of it does.

I think the answer lies more in human nature than in the nature of the Federal court system. People are inherently conservative about their own institutions, not always in their political philosophy but at least with respect to their willingness to change. We generally don't like change. The status quo may be highly imperfect or seriously flawed, but it is familiar, comfortable, and so we cling to it.

I ask you, Mr. Chairman, and the members of this subcommittee to keep this in mind as you listen to the testimony today and try to separate the substantive criticisms of the Commission's recommendations from those criticisms that are, in fact, based on a natural inclination to resist change. But change, Mr. Chairman, in this case is desperately needed. It has been needed for 30 years. We are never going to have a better opportunity to do it than right now.

Senator GRASSLEY. Thank you, Senator Gorton.

Senator Kyl. Then, Senator Reid, you came in. I was going to do it in the order of the sponsors, Senator Kyl, Senator Bryan, Senator Reid. Is that OK?

Senator REID. Fine with me.

Senator GRASSLEY. Senator Kyl.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman and members of the committee. First of all, I would like unanimous consent to put a written statement and a letter dated November 6, 1998, to Justice White from me into the record as part of my testimony.

Senator GRASSLEY. They will be received and included.

Senator KYL. Thank you, Mr. Chairman.

As a member of this committee, a Senator from Arizona, the State generates more appeals in the ninth circuit than any other State except California, a member of the bar who practiced law in the ninth circuit for about 20 years, wrote a lot of briefs and argued several cases before the ninth circuit, and even took some on up to the U.S. Supreme Court from there—reversing ninth circuit

decisions I had lost—I have a keen interest in how the ninth circuit is configured.

I think it is clear that the ninth circuit has problems. I don't think that can any longer be disputed. And I agree with Justice White and the Commission that changes are warranted. In that regard, let me just cite two things, one of which is not in my statement.

Justice O'Connor wrote a letter to the Commission. She came from the ninth circuit as a circuit judge in Arizona, which is part of the ninth circuit, as you know and she said that, "The circuit is simply too large," that some division or restructuring of the ninth circuit seems appropriate and desirable.

Justice Kennedy also, who was a ninth circuit judge before going to the U.S. Supreme Court, in a letter to the Commission said,

A court which seeks to retain its authority to bind nearly one-fifth of the people of the United States by decisions of three-judge panels, many of which include visiting circuit or district judges, must meet a heavy burden of persuasion.

And I believe that that is correct, and in that regard, I think the comments just made by Senator Gorton are very apropos.

There are a lot of reasons relating to reversal rates, delays in deciding cases and so on why these comments are correct. I am going to move on—assuming that there is some degree of consensus that a change is warranted—to the recommendations of the Commission.

I believe the Commission came up with the right concept that allowing the ninth circuit to maintain its administration as a circuit is appropriate while dividing the adjudicatory function of the court into divisions is the best way to solve the problems that almost everyone agrees exist. My principal concern is with the specific recommendation the Commission made with respect to those divisions.

It all depends on what degree of priority you assign to different factors as to how you come out in the creation of divisions. How important do you think it is to assign roughly equal caseloads or have roughly equal division of population, to have contiguity, to keep California intact, to have geographic affinity, to have no more than three divisions, let's say? All of those are important considerations, and depending upon how much weight you give to any one of them, you come out differently.

If, for example, you assign a very high priority to keeping California intact, then you need to come out with a division which has California as a separate division and then perhaps a couple of other divisions within the circuit. That leaves you, though, with about 60 percent of the caseload in the California division, and that is why the pressure to divide California.

If, on the other hand, you assign a higher priority to caseload distribution, then there are ways to achieve that roughly equally if you divide the circuit into four divisions, for example. You could have roughly equal divisions if you did that, but that would require dividing California.

Under the Commission's recommendation, there are three divisions, one of which is the Southern Division. The problem from day

one with the recommendations of the Commission is the Southern Division already needs to be divided again. It would have almost 50 percent of the population and caseload all by itself. Now, that is of particular interest to me because it has the southern part of California and Arizona, and that group has 47 percent of the circuit's caseload, 46 percent of its population, and those are all of the fastest growing district court divisions and cities in the country.

Los Angeles, San Diego, and Phoenix are the circuit's three most populous cities. They are respectively the 2d, 6th, and 7th most populous cities in the country and among the very fastest growing. So under the Commission's recommendations, by the time you put this into place, you would already need, under its own criteria, to divide the circuits once again—or divide the divisions once again so that you could have a more equal distribution of caseload.

As a matter of fact, I think it is instructive that the Commission itself said: "The concentration of appeals in the southern part of the circuit makes it impossible to divide the court's workload equally among the three divisions." So they acknowledge under their recommendation that they failed to meet one of the most important tests, which is a roughly equal division of caseload.

The only way to achieve that roughly equal division is, instead of having three divisions within the circuit, to have four. And one of the recommendations that I make in a letter that I have now made a part of the record is to consider dividing the circuit into four rather than three divisions, which would result in caseload distributions of 22, 23.9, 23.7, and 30.4 percent respectively, the 30.4 being the southern California division, but that would require a division of the rest of California.

Mr. Chairman and members of the committee, the bottom line is this: There is a problem, there needs to be some division, but we are going to have a hard time agreeing on what that division is because of all of the different parochial interests we have. I urge the committee to continue this conversation, to have more hearings, to have a lot of informal meetings among all of those of us who are most interested, and try to come to some resolution as to how we can do this in a way that meets all of the needs that we have and meets the problems that have been identified by the Commission. Unless we are willing to engage in that kind of a conversation, frankly, nothing will happen because each one of us has the ability to stop any one particular plan from moving forward.

So I commend the committee, and, Mr. Chairman, I commend you for holding this hearing. It is a very, very important subject matter for us, and I urge the committee to continue these conversations to try to come to some resolution that will be satisfactory to all of us.

[The letter follows:]

U.S. SENATE,
Washington, DC, November 6, 1998.

The Hon. BYRON WHITE,
Chairman Commission on Structural Alternatives for the Federal Courts of Appeals,
Thurgood Marshall Federal Judiciary Building, Washington, DC.

DEAR JUSTICE WHITE: As a Senator from Arizona (the state which generates more appeals than any other Ninth Circuit state except California),¹ a member of the Senate Judiciary Committee and the Courts Subcommittee, and as someone who practiced law in the Ninth Circuit for nearly 20 years, I have a keen interest in matters affecting the Ninth Circuit. I would like to accept the invitation of the Commission on Structural Alternatives to offer comments on the draft report.

Overall, I believe the draft report is responsive to Congress' request and will be helpful in our deliberation. I compliment the Commission for its thoughtful, constructive recommendations.

My principal concern is that, while the Commission's proposal of organizing the Ninth Circuit Court of Appeals into regional adjudicative divisions is good in concept, the Commission should evaluate other options for the proposed configurations. It would be most helpful to Congress if the Commission examined in detail a variety of alternatives and provided a thorough analysis of the reasons for and against the alternatives. From the Commission's draft report, it is unclear why the Commission configured the divisions the way it did; the report contains no explanation.

Ultimately, the question of reconfiguration depends on what factors are assigned the highest value—caseload, population, contiguity, consistency of maritime law, keeping California intact, geographic affinity, having no more than three divisions, adhering to a “three-state” rule, etc. The Circuit could be divided or split many ways depending on which factors are the driving considerations. In short, the report would be much more helpful to Congress if it discussed which factors should be given priority. I would like to illustrate the point of emphasizing different criteria by evaluating three plausible options.

POSSIBLE OPTIONS

Keeping California intact: Separate division or circuit for California

If it is important to keep California intact, then perhaps it would be best for California to constitute a separate division or a separate circuit. The Commission states that it would be “undesirable” to split California between circuits.² But why not make California its own circuit? With 61.3 percent of the Circuit's caseload,³ a California circuit would still be one of the nation's largest circuits in terms of caseload and population—and the remainder of the circuit would be a reasonable size.⁴

Moreover, if it is undesirable to split California between *circuits*, then perhaps California should not be split into *divisions*. Why not make California its own division? The caseload split would be approximately 60–40, which many people would consider reasonable.

I know that the Commission wants to maintain the court of appeals as presently aligned to respect the character of the West as a distinct region,⁵ but California is different enough from the other states that creating a California circuit or division would arguably not harm the West as a region.

Finally, I am aware of the oft-expressed view that a circuit should be comprised of at least three states to maintain a federalizing and regionalizing function. But it could be more prudent to have a state such as California its own circuit or division than to divide it into divisions containing other states. Indeed, if California were its own circuit or division, it would have a larger caseload than seven of the

¹Commission on Structural Alternatives for the Federal Court of Appeals (Draft Report) (Oct. 1998) (hereinafter “Draft Report”) at 48.

²Draft Report at 46.

³Office of the Circuit Executive, United States Court of Appeals for the Ninth Circuit (based on filings for year ending December 31, 1997) (updated November 1998).

⁴The Commission's desire to keep California as part of the Ninth Circuit in order to ensure that maritime laws remain consistent on the Pacific Rim could be seen as puzzling. Specifically, under the Commission's proposal, there would be three different divisions on the Pacific Rim (and California would be cut in half) and decisions made in one division would not bind any other division. But by making California its own circuit, the Pacific Rim would have two circuits—a manageable amount considering that the eastern seaboard and Gulf Coast have six circuits.

⁵Draft Report at 45.

remaining eleven circuits.⁶ Perhaps concerns about bifurcation should outweigh fealty to a “three-state” rule. Having one state comprise a circuit or a division seems reasonable considering that in many circuits one state dominates. For example, five circuits (the Second, Third, Fifth, Seventh, and Eleventh) have just three states. In each of these circuits, one state dominates: New York has 64 percent of the Second Circuit’s caseload; Pennsylvania has 66.5 percent of the Third Circuit’s caseload; Texas has 73.6 percent of the Fifth Circuit’s caseload; Illinois has 57.8 of the Seventh Circuit’s caseload; Florida has 57.3 percent of the Eleventh Circuit’s caseload.⁷ It is unclear why some take the view that having three states in a circuit or a division (even though two of the states have only a small portion of the caseload) is so important that it precludes creating a separate circuit or division for a large state.

It would be helpful to Congress if the Commission discussed the idea of creating a separate division or circuit for California.

Caseload: Four-way division

If dividing California is not a problem—and if caseload distribution is a priority—then it makes sense to consider a four-way division. Under such a division, caseload (and population) is most equitably distributed. In fact, each division would contain a higher percentage of cases than the 21 percent comprising the Commission’s proposed Northern Division; yet the highest percentage of cases (30.4 percent) would not come close to the 47 percent in the Commission’s proposed Southern Division.

The Commission notes that “pressure continues, and there is little likelihood that caseloads and work burdens on the judges will lessen in the years ahead.”⁸ This is particularly true in Arizona and Southern California. Southern California is the Circuit’s fastest growing region in terms of caseload. From 1987 to 1997, the appeals from the Southern District of California increased 143.8 percent and from the Central District of California increased 74.5 percent.⁹ Based on these increases, the caseloads in the Southern and Central Districts of California are apt to be, respectively, the third and first largest in the Circuit in 2007¹⁰—comprising more than 43 percent of the Circuit’s caseload.¹¹ Further, as I mentioned above, the Commission states that “[n]ext to California, Arizona generates more appeals than any other state in the present Ninth Circuit”;¹² and Southern California (i.e., the Southern and Central Districts of California) produces the largest number of appeals in the Circuit—38 percent of the Circuit’s appeals.¹³

Additionally, Los Angeles, San Diego, and Phoenix are the Circuit’s three most populous cities and are, respectively, the second, sixth, and seventh most populous cities in the nation, according to recent figures of the U.S. Bureau of the Census provided by the Library of Congress.¹⁴ Also, Arizona and Nevada contain seven of the nation’s 22 fastest growing cities: Chandler (2), Scottsdale (7), Glendale (14), Mesa (17), and Phoenix (22), Arizona; Henderson (1) and Las Vegas (6), Nevada.¹⁵

In short, putting Arizona and Southern California—two of the most rapidly growing regions—in the same division may provide, at best, a temporary solution, and prove unworkable in the near future. Very soon, these components of the proposed Southern Division may have to be divided into two roughly equal parts. That seems impossible without a reconfiguration of all of the divisions.

The Commission states that “[t]he concentration of appeals in the southern part of the circuit makes it impossible to divide the court’s workload equally among the three divisions * * *”¹⁶ Given this difficulty, and the problem of having to re-divide the Southern Division, it might be preferable to have four divisions, structured as follows:

⁶ California would have a greater caseload than the First, Third, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits. Judicial Business of the United States Courts, Annual Report of the Director (1997), Table B-3A (twelve-month period ended September 30, 1997).

⁷ Judicial Business of the United States Courts, Annual Report of the Director (1997), Table B-3A (twelve-month period ended September 30, 1997).

⁸ Draft Report at vii.

⁹ Ninth Circuit Appeals Filed by Fiscal Year of Filing and District of Origin (provided by Commission).

¹⁰ Ninth Circuit Appeals Filed by Fiscal Year of Filing and District of Origin (provided by Commission).

¹¹ Ninth Circuit Appeals Filed by Fiscal Year of Filing and District of Origin (provided by Commission).

¹² Draft Report at 48.

¹³ Office of the Circuit Executive, United States Court of Appeals for the Ninth Circuit (based on filings for year ending December 31, 1997) (updated November 1998).

¹⁴ Population Division, U.S. Bureau of the Census, SU-96-10.

¹⁵ Population Division, U.S. Bureau of the Census, SU-96-14.

¹⁶ Draft Report at 39 n.90 (emphasis added).

4-Way Proposal	Caseload ¹ (percent)	Population ² (percent)
<i>Western Division:</i> Arizona, Nevada, and Southern California	22.0	17.5
<i>Northern Division:</i> Northwest, Hawaii, Guam, NMI	23.9	25.1
<i>Middle Division:</i> Northern and Eastern California	23.7	25.6
<i>Southern Division:</i> Central California	30.4	31.8

¹Office of the Circuit Executive, United States Court of Appeals for the Ninth Circuit (based on filings for year ending December 31, 1997) (updated November 1998).

²Population Estimates Program, July 1996, U.S. Bureau of the Census.

Under this scenario, the caseload (and population) distribution would be much less lopsided than under the Commission's tripartite division. Under the Commission's proposal (see chart below), the Northern Division would contain 21 percent of the Circuit's caseload, thereby apparently making 21 percent an acceptable threshold for caseload. Under the four-way proposal suggested above, every division would meet this threshold and no division would come close to the 47 percent caseload in the Commission's proposed Southern Division. Thus, if caseload distribution is of paramount importance, then for a more enduring partition, it might be reasonable to place Arizona, Nevada, and the Southern District of California in one division, the Northern and Eastern Districts of California in another division, the Central District of California in another division, and the Northwest and the Pacific Islands in the Northern Division.

Commission's proposal

From the Commission's proposal, it is unclear which criteria were given priority—perhaps geographic affinity dominated. Although the divisions may have geographic affinity, the caseload and populations are unevenly distributed:

Commission Proposal	Caseload ¹ (percent)	Population ² (percent)
<i>Northern Division:</i> Northwest	21.0	22.4
<i>Middle Division:</i> Northern and Eastern California, Hawaii, Guam, NMI, and Nevada	32.0	31.5
<i>Southern Division:</i> Central and Southern California and Arizona	47.0	46.1

¹Office of the Circuit Executive, United States Court of Appeals for the Ninth Circuit (based on filings for year ending Dec. 31, 1997) (updated November 1998).

²Population Estimates Program, July 1996, U.S. Bureau of the Census.

Perhaps a factor other than geographic affinity was given priority; this seems likely in light of the recent recommendation that Arizona be placed in the Middle Division with Nevada and the Northern and Eastern Districts of California.¹⁷ Some have commented that there is a high volume of commercial dealings between Arizona and California and that Arizona relies on California caselaw. It is unclear (and would be helpful to know) to what extent such connections exist and how important such connections should be in determining division lines.

Furthermore, many people seem to assume that the northwest states (Alaska, Idaho, Nevada, Oregon, and Washington) must be grouped together, but if one starts with that premise, then options are limited and dividing the circuit becomes very difficult, especially if a four-way division is not considered. Given the current size and the continued growth (in both caseload and population) in the Central and Southern California Districts, as well as Arizona and Nevada, it seems as though

¹⁷Letter of Chief Judge Proctor Hug to Commission on Structural Alternatives for the Federal Courts of Appeals, October 29, 1998.

there will always be a problem if there is a three-way division. Assuming that a four-way division is acceptable, it might be reasonable (in terms of caseload, population, geography, among other factors) to modify the Commission's recommendation by placing Arizona and Nevada in a separate division:

4-Way Proposal	Caseload (percent)	Population (percent)
<i>Northern Division:</i> Northwest, Hawaii, Guam, NMI	23.9	25.1
<i>Middle Division:</i> Northern and Eastern California	23.7	25.6
<i>Southern Division:</i> Central and Southern California	38.0	37.0
<i>Western Division:</i> Arizona and Nevada	14.4	12.0

Other proposals

I have only discussed the Commission's proposal (as well as a modification of it) and two other plausible options. For the Commission's review, I am attaching several additional permutations, each with strengths and weaknesses in terms of caseload, population, geography, and other factors. (For ease of comparison, I am also including the charts contained in this letter.) It would be helpful to Congress to have the Commission's views on the relative strengths and weaknesses of various options.

MOVING ARIZONA TO THE TENTH CIRCUIT

I am also interested in exploring the idea of moving Arizona to the Tenth Circuit, an idea that seems to have significant merit because it is one of only three proposals recognized by the Commission as having geographic integrity, serving both the federalizing and regionalizing functions of federal courts, and being consistent with the principle of state contiguity in the lower 48 states.¹⁸

The Commission states that disconnecting California from Arizona would be undesirable to the extent that "Arizona follows California law in several areas, and has significant commercial ties."¹⁹ It may be more accurate to observe that, as some say, Arizona has more in common with the Rocky Mountain states than the Pacific coast states.²⁰ I would appreciate an examination of these two lines of thought and would appreciate a more thorough examination of the feasibility of moving Arizona to the Tenth Circuit.

COURT OF APPEALS SITTING IN PHOENIX AT REGULAR INTERVAL

No matter what Division that Arizona is placed in, I think that the Court of Appeals should sit in Phoenix at regular intervals.²¹ This seems reasonable because, as noted above, Phoenix is the seventh most populous city in the nation and one of the Circuit's most populous cities,²² as well as one of the nation's fastest growing cities.²³

CIRCUIT DIVISION

I am also concerned about the size of the proposed circuit division which will resolve inter-divisional, intra-circuit inconsistencies.²⁴ I think that the Commission is right to note that it "seem[s] paradoxical to respond to concerns about the present limited en banc by creating a conflict body that is even smaller."²⁵ The Commission concludes that the Circuit Division's composition will ensure that the views of the

¹⁸ Draft Report at 46.

¹⁹ Draft Report at 48.

²⁰ Draft Report at 48.

²¹ Cf 28 U.S.C. 48.

²² Population Division, U.S. Bureau of the Census, SU-96-10.

²³ Population Division, U.S. Bureau of the Census, SU-96-14.

²⁴ Draft Report at 44.

²⁵ Draft Report at 44.

majority of the court's judges will predominate in that resolution.²⁶ But how will a body of seven judges (representing 28) do this? Currently, the limited en banc, which is comprised of 11 judges, is often criticized for not being representative of the circuit. I am concerned that a body of seven judges would similarly produce decisions that are unrepresentative of the entire court. I believe that the Circuit Division should be expanded to 13 or 15 members.

STRUCTURAL OPTIONS FOR THE COURTS OF APPEALS AND DISCUSSION OF APPELLATE JURISDICTION

Finally, I was interested in the proposals discussed in parts 3 and 4 of the report, such as authorizing the courts of appeals to decide selected cases with two-judge panels and authorizing the judicial council of any circuit to establish district court appellate panels to provide first-level review for designated categories of cases that involve error correction, with discretionary review by the courts of appeals.

I was particularly interested in the statement of Judge Merritt and Justice White on ways to reduce the caseload presented by diversity cases. I do not believe that their plan suggesting changes in federal jurisdiction exceeds the Commission's mandate. As Judge Merritt points out, his plan recommends restructuring diversity jurisdiction by Congress and is aimed at reducing circuit court caseload substantially. This certainly seems to meet the statutory command to make "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." Congress can benefit from all of the Commission's recommendations. I hope that Judge Merritt's statement becomes part of the final report and that the Commission members consider including other proposals that will help with the "expeditious and effective disposition of the caseload of the Federal Courts of Appeals.

conclusion

In closing, I would like to reiterate my appreciation for the Commission's diligent work and detailed draft report. I hope that my concerns can be addressed in the final report. The points I have raised are not meant to imply that reform should not move forward. In fact, lawyers frequently provide me with anecdotal evidence that it takes too long for cases to reach conclusion in the Ninth Circuit, although statistics may show otherwise. I believe firmly that the reasons the Commission cites for division warrant speedy action.

Please do not hesitate to contact me if I can be of assistance. Thank you.

Sincerely,

JON KYL,
United States Senator.

Commission Proposal	Caseload (percent)	Population (percent)
<i>Northern Division:</i> Northwest	21.0	22.4
<i>Middle Division:</i> Northern and Eastern California, Nevada, and Hawaii	32.0	31.5
<i>Southern Division:</i> Central and Southern California and Arizona	47.0	46.1
4-Way Proposal "A"	Caseload (percent)	Population (percent)
<i>Northern Division:</i> Northwest and Hawaii	23.9	25.1
<i>Middle Division:</i> Northern and Eastern California	23.7	25.6
<i>Southern Division:</i> Central and Southern California	38.0	37.0
<i>Western Division:</i>	14.4	12.0

²⁶ Draft Report at 44.

4-Way Proposal "A"	Caseload (percent)	Population (percent)
Arizona and Nevada		
4-Way Proposal "B"	Caseload (percent)	Population (percent)
<i>Northern Division:</i> Northwest and Hawaii	23.9	25.1
<i>Middle Division:</i> Northern and Eastern California	23.7	25.6
<i>Southern Division:</i> Central California	30.4	31.8
<i>Western Division:</i> Southern California, Arizona, and Nevada	22.0	17.5
Option #1	Caseload (percent)	Population (percent)
<i>Northern Division:</i> Northwest and Hawaii	23.9	25.1
<i>Middle Division</i> Northern, Central and Southern California	53.3	50.9
<i>Southern Division:</i> Eastern California, Arizona, and Nevada	22.8	24.0
Option #2	Caseload (percent)	Population (percent)
<i>Northern Division:</i> Northwest and Hawaii	23.9	25.1
<i>Middle Division</i> Northern, Central and Eastern California	54.1	57.4
<i>Southern Division:</i> Southern California, Arizona, and Nevada	22.0	17.5
Option #3	Caseload (percent)	Population (percent)
<i>Northern Division:</i> Northwest and Hawaii	23.9	25.1
<i>Middle Division</i> Northern, and Eastern California, Arizona, and Nevada	38.1	37.6
<i>Southern Division:</i> Central and Southern California	38.0	37.3
Option #4	Caseload (percent)	Population (percent)
<i>Northern Division:</i> Northwest and Hawaii	23.9	25.1
<i>Middle Division</i> Northern, Eastern, and Southern California, Arizona, and Nevada	45.7	43.8

Option #4	Caseload (percent)	Population (percent)
<i>Southern Division:</i> Central California	30.4	31.8
Option #5	Caseload (percent)	Population (percent)
<i>Northern Division:</i> Northwest and Hawaii	23.9	25.1
<i>Middle Division</i> Eastern, and Southern California, Arizona, and Nevada	30.4	29.5
<i>Southern Division:</i> Northern and Central California	45.7	45.4

Senator GRASSLEY. Thank you, Senator Kyl.

Now, Senator Bryan.

Senator KYL. Mr. Chairman, before Senator Bryan, might I add one other request? Judge Bill Browning from the Tucson District Court is here. He was a member of the Commission, and I am not certain whether he is on your panel to testify or not.

Senator GRASSLEY. He is not.

Senator KYL. I would urge the committee to consider at least permitting him to make a brief comment or be available for questions from the committee. He has much to offer.

Thank you.

Senator GRASSLEY. Thank you.

Senator Bryan.

**STATEMENT OF HON. RICHARD BRYAN, A U.S. SENATOR FROM
THE STATE OF NEVADA**

Senator BRYAN. Thank you very much, Mr. Chairman and members of the subcommittee. I appreciate the opportunity to testify before you today on the issues raised by the White Commission and the Federal Ninth Circuit Reorganization Act sponsored by our colleague, Senators Murkowski and Gorton. My comments today will focus on the Commission's recommendations as they relate to the Ninth Circuit Court of Appeals.

Let me observe at the outset that I am pleased that we are having this discussion today in the context of a hearing before the Judiciary Committee. As you know, there have been efforts in the past to divide the ninth circuit through legislative riders on appropriations bills. In my view, an issue of this magnitude, one that will have far-reaching implications not only for the West but for the entire Nation, deserves to be considered in a thoughtful, deliberative manner by this committee. The old saying, "If it ain't broke, don't fix it," summarizes my view about the proposals to divide the circuit, and I am pleased to see that the White Commission came to the same conclusion.

I am concerned, however, with the Commission's proposal for other structural changes in the ninth circuit. The recommendations of the White Commission represent an attempt to develop a solution to a problem that in my view does not exist. I have great respect for the members of the Commission and for their hard work

over the past year, especially given the relatively short timeframe in which they were instructed to complete their study. I do not feel, however, that they have cited any empirical evidence or other data that justifies the proposed divisional structure for the ninth circuit described in their report.

One of the most frequent criticisms of the court by those who support the division is the 14 months on average it takes from the notice of appeal to the determination of the case, which is 4 months greater than the national average. There is a simple reason for this delay. Congress has refused to fill the vacancies that exist on the court. There are currently seven vacancies on the court which represent one-quarter of the authorized judgeships, and for the better part of the last 4 years, the court has functioned with only 18 active judges. It is unfortunate that the Commission was not able to analyze the impact of these vacancies on the court's timetable for disposing of its caseload.

It is also a bit ironic that some members of the Senate who have advocated splitting the ninth circuit have also played a leading role in blocking the effort to fill the vacancies on the court.

Another criticism which has been perceived is a lack of consistency in maintaining a uniform body of Federal law in the Western States due to the size of the court and the large number of possible panel contributions. Although I do not believe there is any evidence to support this criticism, I also do not feel that the Commission's recommendation to create three new adjudicative divisions, including two within the State of California, will do anything to address this perceived problem. In fact, if implemented, it could have just the opposite effect, and I know that Judge Hug will address this issue in more detail.

But I think it is important to note that the overwhelming majority of judges and attorneys in the ninth circuit are satisfied with its current structure.

Underlying the many criticisms that have been leveled at the court is the real issue that some members have proposed splitting the ninth circuit from time to time. They simply do not like the decisions rendered by the court. Some sponsors have made clear their displeasure with many decisions issued by the court, particularly in the area of environmental law. Surely not all of the decisions of the ninth circuit—or, for that matter, any circuit—come down the way that all of us would favor. I myself have cosponsored legislation to reverse certain decisions of the ninth circuit in the past. But I do not believe that differences over the decisions rendered by the ninth circuit are adequate grounds either to split the court or to restructure it.

One of the most telling aspects of the Commission's report, in my opinion, is contained in the additional views of Judge Merrit and Justice White where they state,

We believe that no legislation extending Federal jurisdiction into areas that traditionally fall within the scope of State regulation or prosecution should be enacted without full and informed consideration of the appropriate balance of jurisdiction between State and Federal courts, as well as the effect that proposed legislation will have on the ability

of the Federal courts, including the courts of appeal, to carry out their core functions.

This admonition to Congress is well taken, and it is not a partisan issue. Members of Congress on both sides of the aisle have been increasingly guilty over the years of engaging in a game of one-upsmanship to show which party is tougher on crime, for example, and the result has been the federalization of a wide array of criminal conduct in this country.

One of the results of this endeavor has been to increase the caseload of our Federal courts. I believe it is time for Congress to address this trend before we move to do serious damage to the administration of justice in our Federal court system.

Mr. Chairman, I thank you and the members of the subcommittee for letting me share my thoughts with you today. I believe that the Ninth Circuit Court of Appeals is functioning as well today, if not better, than any other circuit throughout the country, and I would be extremely cautious to implement costly and untested structural changes.

I thank you again, Mr. Chairman.

Senator GRASSLEY. Senator Bryan, thank you.

Now, Senator Reid.

STATEMENT OF HON. HARRY REID, A U.S. SENATOR FROM THE STATE OF NEVADA

Senator REID. Mr. Chairman, members of the committee, I am very grateful that you are holding this hearing. It is extremely important, as Senator Kyl and the other people who have testified this morning have said.

Senator Kyl, it appears—and we have spoken personally on this on a number of occasions—favors a split of some kind. Senator Murkowski favors the Commission's divisional approach.

Mr. Chairman, there is some concern as to how we are going to handle the alleged problems in the ninth circuit. As I have indicated, some of our colleagues have expressed reasons why they feel the ninth circuit should be either split entirely or into three intracircuit divisions recommended by the White Commission.

While the ninth circuit undoubtedly faces challenges which must be addressed, I think that we should approach this very cautiously. I was involved with the establishment of the Commission, as a number of the Senators who are now testifying and have testified were. I recognize the efforts they have put forth. I commend the Commission for stating their recommendations are not based upon any disagreement of court decisions. I have always been concerned that some of the advocates of structural change within the ninth circuit have been driven by dissatisfaction with certain decisions handed down by the circuit, and I commend the Commission for distancing themselves from such motivations.

Mr. Chairman, Congress last passed legislation which significantly changed the structural composition of the Federal Courts of Appeals back in 1981 when the States of Alabama, Georgia, and Florida were separated from the fifth circuit to create the eleventh circuit. I am sure we could identify some similarities and differences between the pre-1981 fifth circuit and the ninth circuit today.

But, Mr. Chairman, there is one distinction that deserves particular attention this morning. In 1981, the overwhelming majority of the circuit judges of the fifth circuit and lawyers who practiced in the fifth circuit agreed that such a major overhaul was the best course of action to follow.

As we consider structural changes in the ninth circuit here this morning, the exact opposite is here today as we had in 1981. In January of this year, in a meeting of the ninth circuit's 35 active and senior circuit judges, 25 judges rejected an outright split or the Commission's recommendations for intracircuit divisions. Only 4 of the 35 voted to approve intracircuit divisions; also, only 4 voted to approve a circuit split; and 2 of the judges abstained completely.

Furthermore, an overwhelming majority of attorneys who practice in the ninth circuit oppose these radical structural changes. This opposition is bipartisan, Mr. Chairman. Actually, it is non-partisan. In fact, of the two judges from whom you will hear today who will argue against a circuit split or adoption of the Commission's recommendation, one is a registered Democrat, the other is a registered Republican.

There is another area of opposition that should be of special significance to our colleagues, especially the chairman and the ranking member of this subcommittee, whose States are not within the ninth circuit. The chief judges of eight of our country's circuit courts of appeals have publicly opposed the intracircuit divisional approach as recommended by the White Commission.

Mr. Chairman, I would also like to call the committee's attention to the statement written and submitted by Prof. Arthur Hellman of the University of Pittsburgh School of Law. He has actually spent most of his life, his academic life, dealing with the Federal courts of appeal, and he has devoted a significant amount of time to the ninth circuit. I think you will find his statement very useful.

Mr. Chairman, I would like to say a few additional things. First, the State of Nevada is very proud of the chief judge of the ninth circuit. Procter Hug has rendered great service to the State of Nevada and to this country as a judge of the Ninth Circuit Court of Appeals. Senator Bryan and I had the distinct pleasure of serving with his father in the Nevada State Legislature. Procter Hug, Sr., was one of the finest men that I have ever dealt with. He was a wonderful member of the State legislature, a great educator, and now one of our high schools in Reno, NV, is named after Procter Hug, the chief judge's father. So we are very proud of Procter Hug, Jr., as well as Procter Hug, Sr.

I would also like to direct your attention to the good work done on this committee by Senator Feinstein, the senior Senator from the State of California. She is going to introduce legislation sometime next week which I think is extremely important, and I am going to support her in her efforts. As I understand her legislation, she would recommend three basic changes:

One, en banc panels would be required to be a majority of the active judges. Right now we have 28 judgeships, so that would mean 15 would be a majority.

Two, Senator Feinstein would require that at least one judge on any panel be from the same region from where the case has originated.

And, three, the decision to hear a case en banc currently requires the approval of 51 percent of the judges. She would drop that percentage to one-third of the judges.

I think this is an important improvement of what we now have. I would hope that she will introduce that legislation next week with me as an original co-sponsor.

Mr. Chairman, I think that what we do here today—what you do here today, I should say, is of extreme importance to the country. The ninth circuit is the largest circuit in terms of population, and when you add in Alaska, certainly in territory—you add Alaska to any circuit, and it will be the largest region, the largest circuit. But we feel that we don't need to radically change what is going on in the ninth circuit. I think the approach of Senator Feinstein is one that we should address very closely. I think it is one we could pass. I think we could do it very quickly. And if that does not work—which I think it would—then we could take another look down the road.

Senator GRASSLEY. Senator Reid, I thank you. I thank all of our colleagues. I have no questions of this panel. I would turn to Senator Torricelli if he does or anybody else that is on the committee that wants to ask our colleagues questions.

Senator TORRICELLI. Thank you, Mr. Chairman.

Mr. Chairman, I have a statement I would like to put in the record at the beginning of the hearing.

Senator GRASSLEY. It will be received and included in the record. [The prepared statement of Senator Torricelli follows:]

PREPARED STATEMENT OF HON. ROBERT G. TORRICELLI, A U.S. SENATOR FROM THE STATE OF NEW JERSEY

Thank you Senator Grassley for holding today's hearing. I would like to welcome Senators Feinstein, Kyl, Reid, Murkowski, Bryan, and Gorton, as well as the other distinguished witnesses.

Article I of the Constitution grants Congress the power to structure the Federal Courts: "The Congress shall have Power * * * To constitute tribunals inferior to the supreme court."

Article III reiterates that power: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress shall from time to time ordain and establish."

As with other exercises of our enumerated constitutional powers, I believe those advocating action carry a heavy burden. There must by necessity be a strong presumption that Congress retain the current court structure.

Beginning with the Judiciary Act of 1789, in which we created the lower federal courts, Congress has exercised its constitutional power with great care.

In 1891, we passed the Circuit Court of Appeals Act, which essentially created the modern federal court structure. Since 1891, we have acted only four times to structurally alter the circuit courts: creating the 10th Circuit in 1929, the D.C. Circuit in 1948, the 11th Circuit in 1981 and the Federal Circuit in 1982.

Thus, history demonstrates that we have shown ample discretion in altering the structure of the circuit courts. We have done so only when a consensus existed that such change was warranted.

As I reviewed the White Commission report, and the testimony to be given today, it became clear that there is no unanimity on the questions before us—other than that fact that the Ninth Circuit is geographically large.

But there was never a question that the Ninth Circuit is large. It encompasses nine states, Guam, and the Commonwealth of the Northern Mariana Islands. The Ninth Circuit Court of Appeals is the largest circuit in the country with 28 authorized judgeships—although it should not go without noting that there are 7 current vacancies on the circuit, a full 25 percent of the seats.

But clearly size is not the question. Instead, we must ask ourselves if the actions we take can make the administration of justice in those federal courts more efficient

and effective. The White Commission found: "There is no persuasive evidence that the Ninth Circuit is not working effectively." As we will hear today, the majority of the judges and attorney's who practice in the Ninth Circuit day in and day out do not think that a change is necessary.

Finally, we must guard—perhaps as much as any other time in the legislative process—against the insertion of political or ideological purposes into this process.

Senator REID. Mr. Chairman, I know you may have some questions, but there are people here who could answer them. I know you have heard a lot of excuses, but I have got my wife waiting.

Senator TORRICELLI. That is the best one possible.

Senator GRASSLEY. Anybody who needs to go obviously can go, but I want to make sure that my colleagues get a chance to ask questions.

Senator FEINSTEIN.

Senator FEINSTEIN. I have no questions.

Senator GRASSLEY. Senator Sessions.

Senator SESSIONS. I guess my question would be: Do any of you want to go further than division and go to an actual split? I was present the day the eleventh circuit was created from the fifth circuit split. It worked marvelously and naturally, and I am almost stunned that people aren't unified at least in some sort of plan to divide this circuit.

Senator GORTON. Well, if I could take that on, of course, from the early 1970's, I have been a devotee of the Hruska Commission recommendation that literally we have a division into new circuits. That was the proposal that I have introduced in the past, and I think Senator Kyl has, and it was what was passed by the Senate here.

The division structure had not occurred to me at any time there. And as I said in my opening remarks, I am willing to admit from my perspective that the White Commission report is preferable to the bill that I was introducing previously. It seems to me that it met, for all practical purposes, all of the previous criticisms of the earlier bills, and because it is universal in nature, it removes the pressure for an increasing number of circuits in the United States as the population and caseload of the whole country grows.

So I guess my conclusion is that I like this better than I did my earlier bills.

Senator SESSIONS. Well, that is good.

Senator KYL. Mr. Chairman, might I make a comment on that?

Senator GRASSLEY. Senator Kyl.

Senator KYL. I think there are two reasons why the White Commission concept, if not the specific proposal, is warranted. The first is political. A circuit split is probably a bridge too far. You have seen the division among us even to have adjudicative divisions and leaving the circuit intact. That is going to be hard enough, let alone splitting the circuit.

But there is a second substantive reason why I think the White Commission was ingenious. There is a point at which if you continue to split circuits, you are probably going to need to consider some kind of intermediate appellate court between the circuit court of appeals and the U.S. Supreme Court to resolve the ever-increasing number of conflicts among the circuits. That is something that I think would be very, very bad, and I know a lot of people agree. And this is one way to obviate that, to create a situation in which

the number of circuits remain the same and you work out any disagreements within the circuit at the circuit level with a special division that would resolve any conflicts between the divisions or among the divisions so that you don't increase the number of conflicts among the circuits which the U.S. Supreme Court would have to resolve.

So it is a way to deal with the future problem of increasing population in this country and the pressure to continue to divide circuits. I think it is pretty ingenious in that regard.

Senator SESSIONS. Well, I am glad to hear you are favorably disposed to consider that. I don't have a strong feeling one way or the other, other than I do not believe it is an effective way to run a court to have one this large. We had testimony—Senator Grassley did—in this committee last year when at least two chief judges of other circuits said that 12 or 14 judges was as large as a circuit should get. The ninth circuit is already twice that size, and its ratio of population to judges is even more than that.

So I think addressing the problem is necessary, and I am open to your suggestions on how to do it.

Senator BRYAN. Mr. Chairman, may I respond? I won't repeat all of my reasons, but as Senator Sessions knows, I favor neither the split nor the administrative division. California is clearly the 800-pound gorilla in this scenario, but the majority, overwhelming majority of practitioners and members of the bar of my State, which, by contrast to California's 32 million, is about 1,800,000, is very comfortable with the present situation. I, like my colleague and friend, Senator Kyl of Arizona, am a member of the bar. I have practiced before the ninth circuit, and I would simply say for those members of the bar in my State and the members of the judiciary, we favor retaining the present system.

I just think the record needs to reflect that.

Senator TORRICELLI. Mr. Chairman.

Senator GRASSLEY. Yes, Senator Torricelli.

Senator TORRICELLI. Thank you, Mr. Chairman.

For me, and perhaps for me alone, this is an argument of first impression. I have heard discussion of this problem, but the ninth circuit is a long way away from home. And I haven't been exposed to a great deal of this before.

Let me simply just suggest the following impression: If indeed this is a problem of size and efficiency, I think all of us would be sympathetic. It is persuasive that the White report noted that it did not discover difficulties in the operation of the circuit. That bears some considerable weight.

One is left wondering whether there is a concern for the operation of the circuit or whether this is a modern equivalent of FDR's court-packing attempt for ideological reasons.

It is further suspect because there are seven vacancies in the circuit, and I trust the same enthusiasm with which people would change the circuit is now leading to pressure to assure that those vacancies are filled so that the circuit is operating properly.

I come to no judgment on any of these, but they are questions in my mind.

I am, though, left finally with this. For whatever the States involved should decide—and I believe the rest of us in the Senate

should largely be guided by the States that are in the circuit and what you think is best for the operation of justice in your own region of the country—the one thing that goes to a national concern where I believe we have a legitimate interest is this issue of dividing a State into these divisions. To me it is somewhat of a contradiction of our concept of national union and how the courts have worked with the States. You can imagine a State administrative action or action of the California State Legislature or, indeed, an agency of the Federal Government in California being in these two divisions, what it will create in a temptation for forum-shopping, or if at any moment there are contradictory views in the two divisions, and the time in which it takes the circuit or the Supreme Court to resolve these conflicts, the State of California or Federal agencies or private citizens would be left in legal limbo.

So I believe this is largely a judgment for all of you to reach, and I think much of the Senate will be guided by your wisdom. But there is in my mind that one national concern in that order in the courts, avoidance of conflict, and efficiency is a legitimate national concern. And at least because it is the first time that this plan of division has been raised, that will attract some attention no matter what you should all decide.

Thank you, Mr. Chairman.

Senator GRASSLEY. Senator Torricelli, I thank—yes, Senator Gorton.

Senator GORTON. Two points to Senator Torricelli. Whatever you think of the ideological predilections of your colleagues in the Senate, Senator, I doubt that they can be applied to Justice White. And, second, I think there is a distinct difference between dividing a State into two circuits and what is little more than an administrative division within the same circuit, which ultimately comes up with the same laws, but it is a consideration and it is one that not only Senator Feinstein raised but Senator Kyl as well.

Senator TORRICELLI. If I could, Mr. Chairman, I think that is a good clarification. But because this is the first time this is done, it isn't entirely clear to me how this would function. Whether it is administrative or whether we are adding a new layer of appeal which will cause not only expense and delay, but conflict. And it is hard to know because it hasn't been done before. That is why I think it should be discussed.

Senator KYL. Mr. Chairman, Senator Torricelli, might I just make one clarification? The White Commission recommendation is that all of the administrative functions of the court be retained centrally. So all of the administration would remain as it is. The only thing that would change would be the adjudicatory panels, the way that the judges are assigned to actually hear cases and decide cases. That would be done by division.

The points you raise I think are well made, and all of these are important considerations, not just for the ninth circuit but because they could theoretically form a precedent for dealing with other circuits as they become larger.

Senator TORRICELLI. There is a central question that I generally don't understand, unlike most questions asked in this institution where people already have the answers in mind. If the California State Government takes some administrative action which someone

believes is contrary to the U.S. Constitution, and they must decide whether or not to go and file this with a district court in San Francisco or Los Angeles, how do we avoid the fact that they are reviewing who the judges are and trying to predetermine a result by engaging in forum-shopping?

Senator GORTON. Well, they are doing that now.

Senator KYL. Yes, Mr. Chairman, if I could, every good lawyer seeks to determine where the best forum would be, and when you have different district courts among which to choose from, obviously that is one of the considerations that you take into account before you file your lawsuit.

The district courts are the court of first impression. That is where the lawsuit is filed, so that is done today. I think it is a bit of a stretch to say now let's see which one of the appellate divisions would decide this depending upon where we file it, and then you are going to have to figure out, well, which one of the judges are likely to sit on the panel. It becomes rather attenuated to use that as a criterion. It is theoretically possible, but I think the way the Commission resolved that was to say that the decisions of any division are not binding on the other divisions and that you have a conflict resolution mechanism for that. It is still theoretically possible, but I think a fairly small matter in the overall scheme of things.

Senator TORRICELLI. Thank you.

Senator BRYAN. Mr. Chairman, if I might, Senator, before we embrace this divisional concept, I think we want to listen very carefully to the testimony of Judge Hug. He believes, that this concept will make it more difficult to develop a consistency in circuit law, and, I think this ought to concern every litigant—that by so doing, we add an additional level of potential appeal which will delay finality. He will make that argument far more persuasive than I, but I hope you will have a chance to hear from him and, if not, to read his testimony.

I thank you, Mr. Chairman.

Senator GRASSLEY. I thank all my colleagues.

Senator GRASSLEY. I now call Ronald Olson. Mr. Olson is a partner with the Los Angeles-based law firm of Munger, Tolles & Olson. He is also a former member of the ABA Committee on the Federal Judiciary and the former chairman of the ABA Litigation Section.

Mr. Olson, we offer you our condolences and understand why you asked to go early, and also, thank you for making it here today to testify under these circumstances. So would you please proceed?

Oh, let me announce not only for you but anybody else, whenever we have this vote, I have worked out with Senator Sessions that I would go vote early and come back, and then he would go vote, so we will not have to call adjournment or temporary recess of the committee hearing.

Would you proceed, Mr. Olson.

STATEMENT OF RONALD L. OLSON FROM MUNGER, TOLLES & OLSON LLP, LOS ANGELES, CA

Mr. OLSON. Thank you, Senator Grassley. Let me say it is a high honor to appear before your committee, a high honor to appear be-

fore my Senator, Senator Feinstein, and just in case it may add a wee bit of credibility to what I have to say, the first 22 years of my life were spent in the great city of Manilla, IA.

Senator GRASSLEY. Spelled with two L's.

Mr. OLSON. Two L's. We both know that.

Senator GRASSLEY. It is one of our 945 outstanding communities in Iowa. [Laughter.]

Mr. OLSON. As a starting premise, I presume that whether one looks from the perspective of a designer of Federal institutions, as each of you does, or from the perspective of a user of Federal institutions, as I do, I think we would all readily and quickly agree that our U.S. Courts of Appeals are among our most important Federal institutions.

From my perspective as a user, a lawyer for 33 years, appearing in Federal courts from here to California, certainly including the courts in the eighth circuit, the fifth, the eleventh, and even in the second, and the great State of New Jersey, I can honestly say that I know of few Federal institutions that operates as effectively or as efficiently as the U.S. Court of Appeals for the Ninth Circuit.

I think it is somewhat ironic that the very document that has served as the basis for the proposed legislation to fundamentally change and divide the ninth circuit does not disagree. The White Commission, whose individual members I have the highest regard for, found, "There is no persuasive evidence that the ninth circuit is not working effectively."

It also wrote,

Maintaining the Court of Appeals for the Ninth Circuit as currently aligned respects the character of the West as a distinct region. Having a single court interpret and apply Federal law in the western United States * * * is a strength of the circuit that should be maintained.

These findings alone, in my opinion, and in the opinion of two different American Bar Association committees that have recently looked at it, the Litigation Section and the Standing Committee on Federal Court Improvements, as well as my own hometown bar association, the Los Angeles County Bar Association, believe that these findings alone should blunt any proposal to fundamentally change or divide the ninth circuit.

With all due respect to Justice Kennedy, who was cited by Senator Kyl a moment ago, it seems to me he has it wrong. The heavy burden of persuasion should not be on those who are advocating the status quo but, rather, on those who are proposing to change a fundamental Federal institution that has served our country well. That is point one.

Point two is the faulty notion that greater regionalism will somehow advance federalism. Each circuit court implements congressional policy and direction from the Supreme Court. I know of no jurisprudence or judicial philosophy or political philosophy that suggests that the national legal function, the interpretation of those laws that you Senators every day work to bring to the benefit of our public, nothing that suggests that national function is better attained through smaller and more sharply regional courts. But that is exactly what the White Commission has proposed.

I would like to insert here, if I may, a comment that is responsive to what I have heard from the Senators thus far this morning, a huge emphasis on the number of reversals coming out of the ninth circuit, opinions coming out of the ninth circuit reversed by the Supreme Court.

I want to say, first of all, that it seems to me the emphasis on numbers is misplaced, for a whole lot of reasons. In the first instance, for every case that is taken by the Supreme Court and reversed, there are hundreds—if you want to look at statistics—where the court must have gotten it right.

But even if you look at the reversals, it seems to me inappropriate to take an aberrational year like 1997 and turn it into a reason to, again, fundamentally change a Federal institution. As Senator Feinstein pointed out, more recent experience is more even, and in the statistical sense, competitive and appropriate vis-a-vis the other circuits.

Second, on that point, I know of absolutely no evidence to suggest that there is a correlation between size and getting it right. None. I don't think there is any that exists.

So far as I know, most of those decisions that were reversed from the ninth circuit came out of three-judge panels, just like most of the decisions that get reversed elsewhere. Three judges, not 28, 24, or 18. But it is three judges who come together with their own independent minds and their own assessment of the legal issues involved.

The Supreme Court takes—and I know this from personal experience of having briefed hundreds of cert petitions—takes only the most important and most difficult questions. And when there is a reversal, it is often by a split decision. And to condemn a court because they come up short on the 5-to-4 vote or the 6-to-3 vote seems to me to be a little wrong-headed.

Third, the proposal that has been made would, in my opinion, only exacerbate the very problem that the Senators seemed to have focused most sharply on. One should understand that the Ninth Circuit Court of Appeals is served by one of the most sophisticated clerk's offices in the country. Among other things that they do is code every issue that comes before the court in every appeal, and by coding these issues, they are within minutes able to relate related cases to the panels deciding any particular case.

The myth that because there are hundreds of opinions coming out of the ninth circuit and judges can't read all as a reason for the number of reversals is, as I suggest, a myth. The judges read those decisions that are most pertinent and relevant to the case before them, and they have many, many tools, including this coding technique, for accomplishing that.

The panel decisions that exist today in the ninth circuit are binding throughout the circuit. Every judge must respect a panel decision that has been made. Under the proposal that will be made—that has been made, each of the three divisions will have decisional autonomy. They are to give substantial weight, whatever that means, to the decisions of the other divisions, but they have decisional autonomy. They can ignore it. In effect, there is an encouragement to differences of view rather than what we now have, a mandated consistency.

All judges today participate in proposing and voting on whether a case should go en banc, every single judge, and when a case is rejected for en banc, every single judge has participated in that judgment that it does not deserve en banc consideration.

When it does go to an en banc hearing, it is correct that it is heard by only 11 of the judges, and I applaud Senator Feinstein and her proposal for improving the current en banc process that we have. And I think it would go a long way toward adding some additional consistency to what we have in the ninth circuit. But I want to contrast that with what the proposal would do.

The proposal would have three divisions, each, as I say, having decisional autonomy. There would be a separate en banc process in each of those divisions. Only the so-called resident judges would vote on whether or not something should go en banc. Those judges sitting out of division, a California judge sitting in the Northern Division, for instance, would not even have the right to vote. And, of course, all of the judges sitting in the other divisions would not have the right to vote. So there would be less not more participation by the court as a circuit in the en banc process.

I would point out that one of the things that would occur in the en banc process as proposed is that after there has been a decision by one of the divisions that is in square conflict, as the White Commission puts it, with a decision in another division, then and only then would this circuit division, the overriding division, court, have the ability to take that conflict and resolve it. It would deny circuitwide en banc consideration of what we now have available to us in addition to conflicts, and that is cases of exceptional importance. And we all know that there are a number of cases of exceptional importance. That is not even a justification for getting to the circuit division consideration.

So I suggest to those who are concerned about the reversal rate that the proposal that has been made will not be helpful, but harmful to what your objective seems to be.

Seemingly, the premise of the White Commission report is the hunch—no analysis has been put forward, but the hunch that greater efficiency and effectiveness will be attained through a tripartite Ninth Circuit. But in practice, for us litigants and lawyers, as well as for the Government, the proposed imposition of regional divisions is sure to add, not subtract, to cost and complexities.

From the Government perspective, staffing and offices of the separate divisions would surely be duplicative and expanded. This splitting to achieve efficiency is not only counterintuitive, but it is at odds with what we see going on every day in our private sector. Today what we have are mergers—mergers that are being justified to the public and to regulators by size, efficiencies, and by the elimination of overlapping employees and functions. This proposal goes the exact opposite direction.

From the user perspective, the absurdity seems obvious. Conducting California statewide business under the jurisdiction of two different Federal court divisions, each with decisional autonomy but for those square conflicts I spoke of, and the notion that a litigant in the West now would have three levels of Federal decision-making—the district court, the regional division, and the circuit division—is sure to add to inefficiency, time delay, and expense for

both business and litigation. And it would also for those same reasons place the Western United States at a disadvantage versus other parts of the country where States operate under a single Federal court system with only two levels of Federal decisionmaking.

My clients, who regularly complain to me about too much litigation expense, time, and complexity, would not see this as a step in the right direction.

The ninth circuit because of its size has, in fact, been one of the most innovative of the Federal circuits. Often it has been first with procedural innovations and automation to the benefit not only of the ninth circuit but all Federal circuits.

Senator SESSIONS [presiding]. Mr. Olson, I believe your time has expired considerably, so—

Mr. OLSON. I thank you very much for the consideration you have given me, and I am delighted to submit my statement and respond to any questions that you would have.

Senator SESSIONS. We would be delighted to. Senator Grassley and Senator Feinstein have gone to vote. I could at least get some of my questions out of the way while they are gone. I am not sure we would want to start the next panel until they return.

Mr. Olson, I suppose my observation just as a person who spent 15 years full-time in Federal court practicing before Federal judges is that we ought to and the goal is to have one national law. Senator Biden made a speech on the floor one night, and I happened to be presiding, and he said he didn't like the idea that some of the members who wanted to split the circuit wanted to do so because they thought they could have home law as opposed to national law and there wasn't but one Constitution. It was one of his best, most eloquent efforts, I thought. That is the goal, to have a uniform national law.

My observation would be that there is a consistently high reversal rate in the ninth circuit. I do not think that is necessarily the most critical issue as to whether it ought to be divided, but I think it is a factor. Would you disagree with me that the larger the court gets, the harder it is to have collegiality, to work out differences, and to speak with one voice?

Mr. OLSON. Let me split that up. With all due respect, I think I would disagree, Senator Sessions. With regard—at least in part, with regard to collegiality, certainly any institution that gets larger lacks some of the personal contact that one has in a smaller institution. But as our former Chief Judge Wallace pointed out, the Federal courts are there to serve not the judges and not their personal relationships, but the people. And I don't think that ought to be a controlling consideration.

I will also point out, however, that the ninth circuit has been in the forefront of using all of the new means of communications to increase collegiality. They conduct conferences, for instance, by videoconference. They have for many, many years communicated through e-mail, which seems to be overtaking the rest of the world, although it hasn't caught up with me yet. So collegiality I think is a bit overrated.

With regard to the reference to getting it right and the reversal rate, again, I want to underscore that by splitting into three divisions, it will only increase the likelihood of there being differences

as opposed to increase the likelihood of there being a consistency and decrease the likelihood of reversals.

Senator SESSIONS. Well, wouldn't that review system that they have set up work out the differences in a more effective way with a new system than with the present system?

Mr. OLSON. No; and let me try to hit that head-on.

First of all, with regard to the review system, let's make sure we understand it. Each division would have decisional autonomy. That means it is, as the White Commission puts it, supposed to give substantial weight to the other divisions, but it is not bound by it. So they can make their own decisions.

Once there is a decision made in a particular circuit, it gets reviewed in that division only if a vote of the resident judges in that division say it should be reviewed en banc in that division.

The only decisions that get attention at the circuit division level, which I think the Senator is referring to mostly, are those where there is, as the White Commission puts it, a square conflict, whether it be by a panel decision or an en banc decisions, but a square conflict between decisions in two different divisions. That leaves a huge, huge room for disagreement.

I will tell you one thing. I have spent time clerking for a Federal judge, and I have spent a lot of time advocating to Federal judges. And for those who want to avoid a square conflict in the way in which an opinion gets written, I suspect it would be fairly easy. I don't think you are going to get the kind of consistency out of this review system that is suggested.

Senator SESSIONS. Well, I think fundamentally there are two problems with the ninth circuit's reversal rate. One of them is that philosophically they are not in tune with the rest of the country. I have read their criminal opinions for 15 years, and I have seen many criminal cases, and it was a well-known fact all over this country that when you don't find any other law to support a criminal defendant's case, you can find a case in the ninth circuit. And judges do not respect those opinions in other circuits as highly as they do opinions from other circuits.

Now, that is a fact. I have been there. I know that. It just happens to be where I spent 15 years of my professional career. So they are out of sync, and dealing with that is part of our confirmation process and it is also the President's responsibility.

I do think perhaps that is not all of it. I wonder maybe there is some way we could develop a closer collegiality. Certainly the judges we have heard testify from the other circuits indicate that they don't want their circuits to grow, that they would rather take on a heavier caseload than to divide or add more appellate judges. They would rather dispose of more cases per judge than add judges.

Let me ask you one question as a practicing lawyer, the statement was made that the bar opposes the division. Has there been any formal survey of that? And what kind of numbers were returned?

Mr. OLSON. First of all, let me say that there has been a formal consideration of it in the Los Angeles County Bar Association, of which I am a member, and it has taken a formal position opposed

to it, as has a large number of other bar associations within the circuit. I cannot cite to them with specificity.

With regard to the American——

Senator SESSIONS. To your knowledge, you are not aware of any circuitwide survey?

Mr. OLSON. Not a circuitwide survey, no.

With regard to the American Bar Association, let me make plain that it has received, to my knowledge, the consideration of those two committees that I have just cited, the litigation section and the Standing Committee on Federal Court Improvements. Both have taken strong stands against the proposal that has been made. They have put before the House of Delegates of the ABA, I am told, for a decision this August, a resolution that would formally assert that position on behalf of the entire ABA. That has not been voted on. Let me make that clear. That at this point is in the form of a resolution.

And if I may comment on what the Senator just said a moment ago about being out of step, I know the integrity with which that concern is expressed by Senator Sessions, and I have followed that point of view as expressed for many years. Whether I disagree or agree is irrelevant. I do think, however, that the Senator answered his own concern by saying that that is not a function of size or efficiency or effectiveness, but a function of who it is that is sitting on the court.

More collegiality between those who, in the Senator's view, have it wrong isn't going to change anything. It seems to me this is an issue to be taken up at the time of confirmation or the time of appointment, and whether or not we are appropriately served in that regard is a wholly separate question than this very fundamental proposal that has been——

Senator SESSIONS. Well, there are a lot of factors there. I think one of the arguments and concerns is that you have so many three-judge panels, the likelihood of an odd panel coming together that has a divergent view from the majority increases, and there is less of a sense that we are bound together and have an obligation to speak with one voice for the circuit, perhaps that is a factor here. Would you deny that, disagree?

Mr. OLSON. I would disagree, and I would, more importantly, argue that the proposal that has been made would only exacerbate the concern the Senator raises. Today, if there is an aberrational panel decision, any single judge on the ninth circuit has the right to propose an en banc reconsideration of that decision. And I am told that with regularity there is hot debate among the judges of the ninth circuit on whether to receive a case en banc. But each single judge can raise that if they think there has been an aberrational decision made. And each single judge gets to vote on whether or not it goes en banc.

Under the new proposal, that would not be the case. Only for the en banc reviews in the divisions, only the resident judges would vote, not the nonresident judges, and none of the judges in the other divisions would vote. You would have less of a participation than you have now, and it would be less reflective of the entirety of the court, of the circuit.

So I think, to my sense, anyway, this would only exacerbate rather than correct the concern that is expressed.

Senator SESSIONS. Well, you make some good observations on that. I think it is a matter that ought to be studied. I think the circumstances requiring splitting of a circuit have occurred before, and we know how that works. This would be a rather novel and unusual approach for sure, and I do believe we should study it.

There does appear to be a political lack of will here. It has been tried and debated, as I understand it, long before I came here to divide this great circuit. So maybe it would be a good thing now to get our next panel up and introduced. Thank you, Mr. Olson, for sharing your insight and the effort you have made to articulate these matters.

Mr. OLSON. Thank you, Senator.

[The prepared statement of Mr. Olson follows:]

PREPARED STATEMENT OF RONALD L. OLSON ¹

INTRODUCTION

Thank you for the opportunity to add my views to the thoughtful debate regarding the workings of the Ninth Circuit, the findings and recommendations of the White Commission, and the Ninth Circuit Reorganization Act.

By way of introduction, I am a Los Angeles lawyer who has for thirty-three years practiced before federal courts throughout the United States. I regularly argue cases before the Ninth Circuit and work with the judges to improve it. I believe the Ninth Circuit to be among the most vital, effective, and innovative courts in which I have practiced, and fear that the changes now proposed will take the Circuit in exactly the wrong direction. I previously submitted prepared testimony to the White Commission, and comments to the White Commission's draft report, and am pleased that the Commission has recognized the wisdom in retaining the Ninth Circuit as single federal Circuit Court for the Western states. I appreciate the invitation to testify again, this time before this Senate subcommittee, and offer the following testimony in opposition to the Commission's recommendation that the Court be reorganized into three semi-autonomous divisions.

1. The White Commission itself acknowledged that the ninth circuit is functioning well and should not be split; therefore, there is no basis to impose the new, complex divisional structure on the well-functioning court

As a lawyer, I place the burden of persuasion on those who seek to change the current structure and operation of the Circuit. Like the states that comprise individual circuits, the boundaries of each circuit are best explained by historical facts that may have less relevance today. However, subsequent history and tradition and the opportunity to share the collective experience of different circuit sizes and management tools are powerful reasons against redrawing circuit boundaries or meddling in their internal organization, absent a compelling reason to do so.

I am not alone in placing the burden on those who ask Congress so fundamentally to alter the internal structure and operations of the Ninth Circuit. The Committee on Long Range Planning of the Judicial Conference of the United States, for instance, has concluded:

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 an increasing caseload.

Proposed Long Range Plan for the Federal Courts (1995).

Here, the White Commission Report itself makes the case for keeping things as they are:

Maintaining the court of appeals for the Ninth Circuit as currently aligned respects the character of the West as a distinct region. Having a

¹ Ronald Olson is a partner in the Los Angeles-based law firm Munger, Tolles & Olson LLP. A copy of his curriculum vitae is attached hereto.

single court 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, is a strength of the circuit that should be maintained.

The Commission also concluded that splitting the Circuit is unnecessary: "We have reviewed all of the available objective data routinely used in court administration to measure the performance and efficacy of the federal appellate courts, but we cannot say that the statistical criteria tip decisively in one direction or the other." In other words, those seeking to change the current operation of the Circuit, according to the Commission itself, have failed to meet their burden to show that change is needed.

The Commission has correctly concluded that the Circuit is neither inefficient nor dysfunctional. My experience as a litigator confirms this. Accordingly, there is no reason to tinker with this well-functioning Circuit.

2. *The proposed divisional structure improperly concedes that Federal court should be structured to secure regional representation and to reflect regional interests*

Despite the fact that the Commission finds no compelling data justifying splitting the Circuit, it nevertheless proposes a "divisional structure," which, for all intents and purposes, does just that. The proposal rests in part on the rather quaint notion that the Circuit is "just too big," and that balkanizing the Circuit into divisions will foster "collegiality" of the judges, thereby increasing the quality of decisionmaking.² Suffice it to say that this idea that Circuits have a natural size limit is unprincipled, sentimental, and fails to face the inevitable consequences of ever increasing case-loads and expanding federal jurisdiction. Like it or not, I predict that the Circuits of the future will look more and more like the Ninth Circuit of today, regardless of judges' and litigants' nostalgia for the smaller courts of years past.³

More troubling, however, is the concession implicit in the proposed "regional" divisions that litigants from certain regions or states are entitled to have their *federal* cases heard by *local* judges. It is no secret that the most recent efforts to restructure the Circuit have been launched by politicians who believe that Ninth Circuit judges have issued opinions detrimental to local interests. One Senator, for instance, has stated that the Ninth Circuit is "dominated by California judges and California judicial philosophy. * * * [T]he interests of the Northwest cannot be fully appreciated or addressed from a California perspective." Putting aside the threshold question of, for example, what constitutes a "California perspective," I am terribly concerned that these regionalist notions have insinuated themselves into the public debate about the working of the Circuit.

The authority we collectively confer on federal judges rests largely upon the premise the judges are to be guided by the Constitution and federal law, not by the varying winds of regional interests. Indeed, the Constitution in its wisdom provides that Article Three judges be appointed for life, in significant part to protect against the pressures of local, state, or regional interests. The federal circuit courts are superimposed upon the fifty states and numerous territories in the face of their vastly differing economies, histories, and cultures. Despite these local differences, however, we expect that the Constitution, as well as the Securities and Exchange Act, the Endangered Species Act, ERISA, RICO, and even the Federal Rules of Civil Procedure and Federal Sentencing Guidelines, all mean the same, and will be enforced with equal vigor, whether the judge interpreting these authorities sits in Guam, Texas or Maine.

Any argument premised on the assumption that judges will *not* limit the bases of their decisionmaking to the law and record before them, but instead will decide

²The Commission presumably relied on testimony such as that submitted by the Honorable Edward Becker of the Third Circuit, whom I admire greatly, and who testified:

[W]hen a circuit gets so large that an individual judge cannot truly know the law of his or her circuit * * * the circuit is too large and must be split. * * * I cannot imagine a judge in a circuit as large as the Ninth, with its staggering volume of opinions, being able to do what we in the Third Circuit do. * * * If this assumption is correct, the Ninth Circuit, according to my rough rule of thumb, needs to be split.

Letter from Hon. Edward R. Becker to the Honorables Byron R. White, Gilbert S. Merrit, Pamela Ann Rymmer, and William D. Browning, and N. Lee Cooper, Esq. of January 26, 1998.

³Hon. J. Clifford Wallace, former Chief Judge of the Ninth Circuit, wisely acknowledged in testimony submitted to the Commission that the life of a judge on a small court may well be more enjoyable than it is on a large court. However, "my preference to live in a small town or to work in a smaller court is not relevant. Federal courts do not exist to serve the preference of federal judges. * * * The real question, then, is not what size of court judges prefer, but which size will work best for the future."

cases with an eye to local interests, should not be countenanced. I fear, however, that the proposed divisional structure, *sub silentio*, acknowledges the validity of these arguments. The majority of judges assigned to a division must be “residents” of the territory encompassed by that division, and their decisions would bind only the districts within that division. Similarly, membership in the Circuit Division, which resolves conflicts among the divisions, is to be determined by lot, with *equal numbers* of judges from each of the Division.

In short, the proposal seems designed at every level to ensure *regional* representation in decisionmaking affecting litigants from that region. The result is not only cumbersome, it sets a sorry precedent, and by its very structure encourages judges of the Circuit to look out for their own when deciding issues of law. The judges of the federal circuits, however, are not, and are not intended to be, representative of their constituents in the same manner as are, for instance, members of the Senate. There is no reason to concede (to the contrary, we are bound to resist) any suggestion that litigants are entitled to be heard by a federal judges haling from the same region. Because the proposed divisional structure institutionalizes a norm—regionalism—that is anathema to our system of federal courts, I oppose it.

3. *The proposed divisional structure moves the court in the wrong direction by adding unnecessary layers of review, precluding circuit-wide review of published decisions, and encouraging intra-circuit conflicts*

Even if I were to assume for the sake of argument that the Ninth Circuit had problems that needed fixing, I cannot think of a worse fix than the one proposed by the White Commission. The divisional system will exacerbate the very problems it seeks to remedy. In short, it moves the Circuit in exactly the *wrong* direction.

For instance, in the face of a perception that the Ninth Circuit is bad at preventing and resolving intracircuit conflicts, the divisional system explicitly permits the courts in one division to *ignore* the holdings of a sister division.

Once a regional division has spoken on a matter of law, the trial courts over which it has jurisdiction will be bound by that decision, regardless of decisions issued in other divisions.

The Commission makes this proposal in the face of its own conclusion that “the circuit’s court of appeals should continue to provide the West a single body of decisional law”! The system, on its face, institutionalizes complacency for, if not outright encourages, intra-circuit conflict.

Nor does the Commission’s proposed creation of the “Circuit Division,” solve the problem. The Circuit Division would not be empowered, either of its own accord or at the request of a litigant, to review division decisions that are plain wrong, or that raise unusually important questions. “[I]ts only authority would be to resolve square interdivisional conflicts,” whatever those are, and even then, its jurisdiction to resolve such conflicts is discretionary.

Nor can a judge in one division request an en banc hearing of an opinion issued by a panel of another division. This aspect of the structure would create a terrible loss. Currently, all judges of the Circuit, including Senior judges, participate in what I am told are vigorous, frank, and detailed debates as to whether a particular case should be reheard en banc.⁴ The divisional structure would severely limit participation in this crucial process of policing panel decisions to maintain uniformity, and in the equally crucial process of providing en banc consideration of matters of great importance.⁵

Moreover, the Circuit Division adds a new layer of review, which is bound to delay the ultimate resolution of appeals. Not only will this new layer inevitably increase the average time from docketing to termination (one of the grounds on which “efficiency” is judged), it also will add to the cost of prosecuting an appeal in the Ninth Circuit. The Circuit Division will not “resolve” conflicts in a vacuum. Rather, as is the case with most other legal processes, litigants must pay their lawyers to act, to do additional research, draft additional briefs, file additional copies of the record, and request that the Circuit Division resolve the conflict. This is expensive. Prosecuting an appeal already is a remarkably expensive proposition for a great number of litigants who find themselves before the Ninth Circuit—Social Security claimants,

⁴Twenty-four of the associates at my law firm served as law clerks to Ninth Circuit judges.

⁵I have witnessed in my own practice the value of en banc review in matters of great importance. I formerly represented the Republic of the Philippines in an action against the Marcos family. On appeal, after the three-judge panel issued its opinion, the case went en banc, not because of any “square conflict,” but, I presume, simply because the case raised important issues of law. I believe that Circuit judges throughout the Circuit, and litigants, should retain this important right to seek en banc review in such circumstances.

persons prosecuting immigration appeals, criminal defendants, and even the typical small business owner in federal court on a contract claim. The creation of any additional hurdles necessarily limits access to justice for these litigants, at least incrementally, as they face the stark reality of the increasing cost of obtaining review. Absent a compelling reason to add additional procedures, layers of review, and the concomitant costs, I cannot support any proposal that does so.

Finally, the divisional approach divides the state of California into separate adjudicative divisions. This is a singularly bad idea, as recognized by, among others Senator Dianne Feinstein, former Governor Pete Wilson, and current Governor Gray Davis. As former Governor Pete Wilson has aptly observed, dividing the state will exacerbate problems of forum shopping in any number of cases, including the numerous challenges to state initiatives that often find their way into federal court in my home state. And Governor Gray Davis has stated that the proposed division of California is at odds with the state's fundamental policy favoring integration and consistency between Northern and Southern California. Not even the Commission can assert that splitting the state will yield any benefits, only that it was the best division it could come up with given the demographics of the West and population of California. Again, this element of the proposed divisional structure simply takes the Court in the wrong direction.

4. *The ninth circuit has a long history of revitalizing itself and improving the quality of justice it delivers; Congress should permit it to continue to regulate itself without outside interference*

As the Commission itself recognizes, efforts to split the Circuit date back as far as 1891. Despite the long history of criticism, even the Commission acknowledges that “[t]here is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively.” The question, especially in light of the century-old criticism that the Circuit is too big, is: how has the Circuit done so well? The answer, I think, is that the Ninth Circuit is at the forefront of innovation in terms of Court management. The Ninth Circuit is a test case for the future, a sort of pilot program, and I fear that mandating the restrictive divisional approach will truncate creative management and innovation of which the Court has long shown itself capable.

As I have testified previously, the Ninth Circuit can, and has, served as a testing ground for numerous techniques in court management. Applying the maxim that innovation follows need, we should allow the Ninth Circuit, including its large, and tremendously knowledgeable and professional clerk's office—to continue to operate without re-definition, and to encourage it to share its experiences and innovations with other circuit courts.

The Ninth Circuit clerk's office, with its staff of research attorneys, is among the smartest and most advanced in the country. In order to handle the Circuit's burgeoning caseload, the clerk's office has developed a number of procedures aimed at preventing the very parade of horrors the proponents of the divisional approach fear (mistakenly) are already upon us. This phenomenon is not particularly remarkable: when an institution increases in size, it often develops management tools that increase efficiency and effectiveness. A few examples of these administrative innovations should suffice.

The Ninth Circuit employs a staff of research attorneys who evaluate appeals as soon as they have been docketed. They read the briefs and assign the appeal a “weight” from one to ten, based on the apparent complexity of the issues and the record. This process assists the clerk's office in distributing roughly equal quantities of work to the various three judge panels sitting for hearings in any given month.

The research attorneys also code the issues presented by a particular appeal, and track the cases raising the issues through a computerized tracking system. This allows the court to group appeals raising the same or similar issues and sends those grouped appeals to the same three judge panel. In this way, a single panel gains expertise in the particular issue and sees it in a variety of factual contexts, which can lead to better reasoned discussion of the implications of deciding the issue one way or another. When the clerk's office is unable to group cases with similar issues together, the office notifies panels that a different panel is also deciding a case that raises the same issue. This allows panels to communicate with one another so as to avoid the possibility that separate panels might simultaneously, or nearly simultaneously, decide the same issue differently.

The Ninth Circuit is also a leader among courts in adopting and integrating advanced communication techniques.⁶ The judges' chambers, for example, have long

⁶These communication techniques take some wind out of the sails of those who presume that geographic breadth of the circuit prevents meaningful and frequent exchange between judges.

been connected to one another through e-mail and other document sharing capabilities. The court even utilizes video conferencing. I, for one, have participated in a video conference with circuit executives. I was told video conferencing is used regularly among judges and among judges and the clerk's office. Finally, communication with the bar is also innovative and effective. Judges throughout the Circuit regularly make themselves available for attorney exchanges and education. As an example of innovative communication, the court produced a video for practitioners that is designed to guide them through the twists and turns of appellate procedure. This video, widely distributed at low cost, reaches an audience far beyond the typical educational program.

Indeed, even today, the Court is engaged in an aggressive self-evaluation, the purpose of which is to study and make recommendations relating to many of the same issues examined by the White Commission, including the en banc process, monitoring of panel opinions, regional considerations, and disposition times, among other issues. Senior Judge David Thompson of San Diego is heading up this ten-member Evaluation Committee, composed of district and circuit judges, and members of the bar and the academy. The Committee is expected to submit its final report within the next few months.

The purpose of my mentioning this Evaluation Committee is not to suggest that Congress should delay action until it hears from that committee. Rather, it is to emphasize that the Ninth Circuit has shown itself time and time again to be adept at self-evaluation and self-criticism, even while laboring under the shadow of Congressional intervention. And, moreover, its efforts have borne fruit, yielding a modest, efficient, innovative, and responsive court that is well prepared to face the future.

CONCLUSION

The Ninth Circuit works well and provides high quality justice to all the citizens of the West. The White Commission has acknowledged as much. To the extent that challenges remain, the Court has shown itself more than capable of meeting them head on, as it always has. The proposal to impose an unwieldy, untested, and unpopular divisional structure takes the Court in exactly the *wrong* direction, and exacerbates the very problems it purports to fix. I urge you to reject the proposals set forth in the White Commission as they relate to the Ninth Circuit, and to oppose The Federal Ninth Circuit Restructuring Act of 1999.

Mr. Olson received his B.S. degree from Drake University in 1963, his J.D. degree from the University of Michigan in 1966, and a Diploma in Law from Oxford University, England, in 1967, at which time he was the recipient of a Ford Foundation fellowship.

In 1967, Mr. Olson was an attorney for the Civil Rights Division of the Department of Justice and in 1968 clerked for Chief Judge David L. Bazelon, United States Court of Appeals for the D.C. Circuit. From 1968 to the present, he has practiced law with the Los Angeles law firm now known as Munger, Tolles & Olson. Mr. Olson is a litigator who was formerly Chairman of the Standing Committee on Federal Judiciary (1991-92), Chairman of the Litigation Section (1981-82), and Chairman of the Alternative Dispute Resolution Committee (1976-86) of the American Bar Association, and was Vice President of the Board of Governors of the State Bar of California (1986-87). He was Chairman of the Board of Trustees of Claremont University Center and Graduate School from 1984-94. Mr. Olson currently chairs the RAND Corporation Executive Committee of its Board of Trustees and RAND's Institute for Civil Justice, as well as the Board of Councilors for the USC Annenberg School for Communication. He is a director of Berkshire Hathaway, Edison International, California Institute of Technology, Pacific American Income Shares, Western Asset Trust, Brennan Center for Justice, Jules Stein Eye Institute, Skid Row Housing Trust and the World Resources Institute. He is also a member of the Los Angeles Business Advisors and the California Citizens Commission on Higher Education. Mr. Olson is a member of the American Bar Association, the American College of Trial Lawyers, and the American Law Institute.

Mr. Olson's field of specialization is commercial litigation, including antitrust, securities, commercial contracts, and business torts. Mr. Olson is a frequent speaker and panel member at law schools and professional associations in the United States and abroad. He has written for law publications and journals. He is both a leading business trial lawyer and spokesman for alternative dispute resolution.

Among his representations are the following: lead counsel for Merrill Lynch in Orange County bankruptcy; co-lead counsel for Universal Studios in trial against

Viacom/Paramount for the ownership of USA Network; lead counsel for Shell Oil Company in CARB gas antitrust case; for Salomon Inc. in connection with the Nasdaq antitrust litigation (DOJ and class actions) and the 1991–92 criminal investigation and governmental claims arising from its conduct of treasury security auctions; for the Republic of the Philippines against the Marcos family; for Alyeska and its oil company owners in the criminal investigation and civil litigation arising from the Exxon Valdez oil spill; and co-counsel for Southern California Edison Company in connection with the restructuring of the California utility industry and lead counsel for Edison in defense of a “Texaco/Pennzoil” claim arising from its attempted takeover of San Diego Gas and Electric. Mr. Olson also counsels individual executives and boards of directors in a range of matters, including corporate governance. Mr. Olson provides pro bono representation to various community organizations including the Skid Row service providers.

Senator SESSIONS. Let’s see. Our next panel would include Chief Judge Procter Hug of the ninth circuit, and also members of the circuit, Judge Pamela Ann Rymer, Judge Andrew Kleinfeld, Judge Diarmuid O’Scannlain, and Judge Charles Wiggins. So if you would step forward?

Judge Hug has been a judge on the ninth circuit since 1977—that is a good tenure—and he became chief judge in 1996.

Judge Rymer has been a judge on the Ninth Circuit Court of Appeals since 1989, and in addition to her duties as judge on the ninth circuit, she has served as a member of the Commission whose report we are discussing today.

Judge Kleinfeld served as a district judge for the District of Alaska from 1986 until 1991, when he was appointed to the Circuit Court of Appeals.

Judge O’Scannlain sits on the ninth circuit in Portland, OR, and has served on the ninth circuit since 1986.

Judge Wiggins was appointed to the ninth circuit in 1984. He also served as a member of the Hruska Commission which recommended splitting both the fifth and ninth circuits in 1973.

I would like to welcome all of you at this time, and, Judge Hug—there you are—thank you very much for your attendance and your leadership. I know you are carrying a heavy load in the circuit. And thank you for your service to your country.

I am a little bit reluctant to start today. Maybe you would rather wait until we get more Senators here, Senator Feinstein and Senator Grassley, who chairs this committee. And they better get back quickly, or I am going to miss my vote.

Judge O’SCANNLAIN. Senator, may I just inquire?

Senator SESSIONS. Yes.

Judge O’SCANNLAIN. We also have Judge William Browning from Arizona, who I understand was actually invited to testify, and I would hope that he could be part of this panel.

Senator SESSIONS. There is Senator Grassley. I would be pleased to have him appear. Senator Grassley, the question is Judge Browning, who also was originally asked, I believe, to appear, has been able to attend. Would you have an objection—

Judge O’SCANNLAIN. Judge William Browning of Arizona.

Senator GRASSLEY [presiding]. No, it won’t be a problem. The only thing is 12:05 we are going to adjourn the meeting to another time because I have to get back to Iowa. And if some other members want to come and keep the committee going, that is a possibility. But I will have to leave at 12:05.

Let’s see. We will start out with you, Judge Hug.

Judge HUG. Yes.

Senator GRASSLEY. So the individual can come.

STATEMENTS OF HON. PROCTER HUG, JR., CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT; HON. PAMELA ANN RYMER, CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, AND MEMBER, COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS; HON. ANDREW J. KLEINFELD, CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT; HON. DIARMUID O'SCANNLAIN, CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT; HON. CHARLES E. WIGGINS, SENIOR JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT; AND HON. WILLIAM BROWNING, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA

STATEMENT OF HON. PROCTER HUG, JR.

Judge HUG. Thank you, Mr. Chairman and members of the committee. I appreciate the opportunity to be here to discuss the Final Report of the Commission on Structural Alternatives for the Federal Courts and Senate bill 253, which implements those suggestions.

My name is Procter Hug, and I am the chief judge of the U.S. Courts for the Ninth Circuit. I have been a member of the Ninth Circuit Court of Appeals for 21 years.

I think the Final Report the Commission rendered has made a valuable contribution to the understanding of the Federal appellate court system. The research placed the current appellate court structure in historical perspective and gathered important statistical information affecting the courts. It also compiled a thorough profile of the method of operations of each circuit court so that each of us in our own circuit courts can benefit from those creative ideas.

The Commission developed several important conclusions that have been reflected in its Final Report, some of which have been commented on by other speakers. I think it is very important that the first conclusion is that, "There is no persuasive evidence that the ninth circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall."

"Accordingly," the Commission stated, "we do not recommend to Congress and the President that they consider legislation to split the circuit."

We consider that to be the most important conclusion of the Commission.

Second, the Commission stated,

There is one principle that we regard as undebatable: It is wrong to realign circuits * * * and to restructure courts * * * because of particular judicial decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.

Third, the statement by the Commission and the conclusion that I think is also important is,

Maintaining the Court of Appeals for the Ninth Circuit as currently aligned, respects the character of the West as a distinct region. Having a single court 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, is a strength of the circuit that should be maintained.

The fourth conclusion:

Any realignment of circuits would deprive the west coast of a mechanism for obtaining a consistent body of federal appellate law, and of the practical advantages of the ninth circuit administrative structure.

The Commission concluded that the ninth circuit should not be split. That conclusion corresponds with the overwhelming opinion of the judges and lawyers in the ninth circuit, as well as the statements of others concerned with this issue who submitted written statements or gave oral testimony before the Commission. Twenty out of the 25 witnesses that testified in Seattle at that hearing agreed that the ninth circuit was operating effectively and were against splitting. Thirty-seven out of the 38 persons who testified in San Francisco reached the same conclusion. The past director of the Federal Judicial Center, William Schwartz, agreed. The chairman of the Long-Range Planning Commission for the Federal Courts, Judge Otto Skopil, agreed, and a great majority of the judges that spoke did as well.

Having strongly opposed the splitting of the ninth circuit, the Commission proceeded further to recommend legislation for a revised method of operation for the Ninth Circuit Court of Appeals through intracircuit adjudicative divisions that amounts to a de facto split of the court of appeals. The essential question then becomes whether the suggested revision of the operation of the court of appeals accomplishes the acknowledged goal of having a single court interpret and apply Federal law in the nine Western States and the Island Territories in an efficient and effective manner, better than the present method of operation. In my opinion, it clearly does not.

The position of the ninth circuit expressed to the Commission is that it is working well and that a great majority of the judges and lawyers in the ninth circuit are satisfied with its current structure. This was confirmed by the survey of the Commission, in which over two-thirds of the judges in the ninth circuit expressed that opinion.

In January 1999, I prepared an "Analysis of the Final Commission Report," in which I expressed wholehearted agreement with the Commission's major conclusion that the ninth circuit should not be split, but serious disagreement with the divisions recommended for the Ninth Circuit Court of Appeals. I submitted this analysis to a meeting of our active and senior judges on January 11, 1999, and of the 35 active and senior judges voting, 25 voted to approve in principle that analysis, 4 judges voted to approve the Commission's recommendation of the creation of divisions for the court of appeals, 4 judges voted for a circuit split, and 2 judges did not vote on that particular matter.

I am drawing my remarks today from that analysis, and I am thus confident that I speak for the great majority of the judges of our circuit court. I have attached a copy of that analysis to my written statement, and it provides more detail than I am able to discuss in this oral presentation. I also provided a copy of that analysis to all of the Members of Congress in a letter that I submitted some time ago.

In the draft report, the Commission recommended legislation to implement this divisional approach not only for the ninth circuit, but for the other circuits when the number of judges on their courts of appeals exceeded 17 judges. I think it is most significant that the chief judges of the first, second, third, fourth, seventh, eighth, and the District of Columbia circuits responded with a joint letter expressing strong opposition of their circuit courts to any such divisional restructuring for their circuits. They said, "The whole concept of intracircuit divisions, replete with two levels of en banc review, has far more drawbacks than benefits." The chief judge of the fifth circuit sent in a separate letter, expressing the concern and reservations that that circuit had about the divisional approach. This, no doubt, resulted in the Commission's modifying its draft report and proposed legislation to eliminate the mandatory requirement for the creation of divisions in the other circuits. The requirement became strictly optional for the other circuits, leaving the ninth circuit conscripted as, in effect, the guinea pig to implement this untested drastic change in what we believe is a seriously flawed method. Senate bill 253 is essentially the same as the revised proposed legislation.

There were many others who responded opposing the divisional structure, and I have detailed those in the analysis.

The Commission acknowledged that there is no persuasive evidence that the ninth circuit is not working effectively. It emphasized the importance of maintaining consistent circuit law throughout the nine Western United States and the Island Territories. Yet it proposed structural changes that will impede that important objective, which neither the ninth circuit nor any other circuit believes is wise or necessary. It is thus very important to examine the reasons why this radical change in structure was necessary or desirable.

The Commission acknowledges that the conclusion of a need for a major structural change in the Ninth Circuit Court of Appeals is not based upon any objective findings. The subjecting findings only identified rather minor differences expressed by the ninth circuit judges and lawyers, compared to the judges and lawyers of other circuits.

Under the present structure of the court of appeals, we have a viable mechanism that maintains the consistency of law throughout the entire circuit. Panel decisions of all of the judges are binding throughout the entire circuit. The limited en banc procedure provides a mechanism whereby all judges participate in the en banc process by the "stop clock" procedure, requests for en banc, memos circulated to other judges, to the entire court, arguing for and against en banc review, and by a vote of all of the active judges on whether to take a case en banc. There is a full participation of all our judges in resolving the circuit law.

Our circuit court has the advantage of the diversity and background, experience, and geographical identity of a large number of judges. The disadvantages of the Commission report can be summarized as follows:

There is no participation of all judges circuitwide in resolving the circuit law as at present. The only participation is within the division.

Resident judges within a division that are assigned to another division would not participate in panels within the resident division for a 3-year period. For example, a judge from Alaska would not be assigned, for example, to the Southern Division, would not participate in any part of the en banc decisions or panel decisions for the Northern unit that is resident.

The proposed circuit division would be an additional level of appeal before finality, involving additional expense and delay.

The resolution of conflicts by the circuit division would be by 13 judges, not representative of the full court or proportionately representative of the divisions. For example, the Northwest Division, which only has 22 percent of the caseload and would have presumably 22 percent of the judges, would have four judges on that court of appeals—or on that circuit division; whereas, the Southern Division, which has 47 percent of the appellate caseload would also have four judges on there, and they would all be serving for the 13 years—in effect, a super-court of judges for 3-year terms with greater power to determine the law of the circuit than any of the other judges in the rest of the circuit.

There would be no participation of judges throughout the circuit in the decisions of the court, as to whether it should take a case en banc. That is only done by a party requesting it.

The ninth circuit has always been willing to re-evaluate itself, its performance, and to experiment with innovations that would lead to greater efficiency and effectiveness. The annual evaluation of the ninth circuit's long-range plan is specifically designed to do just that.

Senator Feinstein is introducing a bill which we are perfectly willing to work with. I think that the ideas that are contained in that of having a situation in which the majority of the court is always on the en banc panel, I think that would work well, and I think the perception would be good; the same way with having regional representation on every panel.

In conclusion, with the Commission having acknowledged after extensive study that there is no persuasive evidence that the ninth circuit is not working effectively, there is no justification for mandating this drastic change in structure that will impede, and not enhance, the continued development of consistent circuit law throughout the nine Western States and the Island Territories.

I thank you for the opportunity to appear before you.

[The prepared statement of Judge Hug follows:]

PREPARED STATEMENT OF PROCTER HUG, JR.

SUMMARY

The Commission on Structural Alternatives for the Federal Courts of Appeals concluded that the Ninth Circuit should *not* be split. The great majority of the judges and lawyers in the Ninth Circuit agree.

The Commission stated: "There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively." It also stressed that maintaining a consistent body of federal appellate law in the Western States and Pacific Rim is a strength of the circuit that should be maintained.

Yet, having indicated that the Ninth Circuit is working effectively and stressing the importance of continuing to maintain consistent law throughout the entire circuit, the Commission proposed legislation that would make a radical change in the structure of the Ninth Circuit Court of Appeals. Senate Bill 253 essentially embodies that proposed legislation. This structural change would undermine, rather than enhance, the important goal stressed by the Commission of *maintaining consistent federal law throughout the Western States and Island Territories composing the Ninth Circuit*.

The proposed legislation would require a revised method of operation for the Ninth Circuit Court of Appeals through three semi-autonomous adjudicative divisions, with the State of California being split between two divisions. There would be an additional court of 13 judges selected from the divisions to resolve only direct conflicts between divisions. This structure has serious disadvantages.

- Neither the panel decisions nor the en banc decisions of any division would bind the other divisions. A circuit-wide en banc hearing for any purpose other than resolving direct conflicts would be abolished. The maintenance and development of consistent circuit law would be seriously hampered.
- The proposed Circuit Division would add an additional level of appeal before finality, resulting in additional expense and delay for litigants.
- The proposal would eliminate the present participation of all judges circuit-wide in resolving circuit law, and would impose serious practical problems in randomly assigning judges among the divisions for three-year terms.
- The likelihood of inconsistent interpretations of federal law would, exist throughout the circuit and would not be adequately addressed by the proposed conflict resolution mechanism of the Circuit Division. Because California would be split between two divisions, there would be different interpretations and enforcement of the law in California.

My view that the disadvantages far outweigh any advantages of the proposed restructuring is shared by a great majority of the judges on the Ninth Circuit Court of Appeals, the Ninth Circuit Judicial Council, the Association of District Judges of the Ninth Circuit, and the United States Department of Justice. The Chief Judges of eight other circuits state that their courts oppose a divisional structure for their circuits.

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE: Thank you for the opportunity to discuss with you the Final Report by the Commission on Structural Alternatives for the Federal Courts of Appeals and Senate Bill 253, *The Ninth Circuit Reorganization Act*. My name is Procter Hug, and I am the Chief Judge of the United States Courts for the Ninth Circuit. I have been a member of the Ninth Circuit Court of Appeals for 21 years.

The Commission was created in the wake of a bill to split the Ninth Circuit into two circuits. Its mission was to study not only the Ninth Circuit but the entire intermediate appellate court structure between the trial courts and the Supreme Court. In undertaking its task, the Commission was concerned with how the circuit courts of appeals were operating, whether the Ninth Circuit or any circuit, should be split, and formulating recommendations for other possible structural changes.

I think that the Final Report the Commission rendered has made a valuable contribution to the understanding of the federal appellate court system. The research placed the current appellate court structure in historical perspective, and gathered important statistical information affecting the courts. It also compiled a thorough profile of the method of operation of each of the circuit courts of appeals, so that each of our circuit courts can benefit from the creative ideas from other circuits.

The Commission developed several important conclusions that have been reflected in its Final Report.

There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Ac-

cordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.

* * * * *

There is one principle that we regard as undebatable: It is wrong to realign circuits (or not realign them) and to restructure courts (or leave them alone) because of particular judicial decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.

* * * * *

Maintaining the Court of Appeals for the Ninth Circuit as currently aligned, respects the character of the West as a distinct region. Having a single court 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, is a strength of the circuit that should be maintained.

* * * * *

Any realignment of circuits would deprive the west coast of a mechanism for obtaining a consistent body of federal appellate law, and of the practical advantages of the Ninth Circuit administrative structure.

The Commission concluded that the Ninth Circuit not be split. That conclusion corresponds with the overwhelming opinion of the judges and lawyers in the Ninth Circuit, as well as statements of others concerned with this issue who submitted written statements or gave oral testimony before the Commission. Among those opposing the division of the Ninth Circuit were the following:

- 20 out of the 25 persons testifying at the Seattle Hearing of the Commission.
- 37 out of 38 of the persons testifying at the San Francisco Hearing of the Commission.
- The Governors of the States of Washington, Oregon, California, and Nevada.
- The American Bar Association.
- The Federal Bar Association.
- The United States Department of Justice and the United States Attorneys within the Ninth Circuit.
- All of the Public Defenders within the Ninth Circuit.
- Respected scholars: Charles Alan Wright, Arthur Hellman, Anthony Amsterdam, Erwin Chemerinsky, Judy Resnik, Jessie Choper, and Margaret Johns.
- The past Director of the Federal Judicial Center, Judge William Schwartz.
- The chairman of Long-Range Planning for the U.S. Federal Courts, Judge Otto Skopil.
- A great majority of the judges and lawyers in the Ninth Circuit.

Having strongly opposed splitting the Ninth Circuit, the Commission proceeded further to recommend legislation for a revised method of operation for the Ninth Circuit Court of Appeals through intra-circuit adjudicative divisions that amounts to a *de facto* split of the court of appeals. The essential question then becomes whether the suggested revision of the operation of the court of appeals accomplishes the acknowledged goal of having a single court interpret and apply federal law in the nine Western United States and the Island Territories in an efficient and effective manner, better than its present method of operation. It clearly does not.

When a whole new concept of operation of the courts of appeals is proposed, the burden should be upon those proposing the change to show that a particular proposal will operate more efficiently, effectively, and better advance the cause of justice than the time-tested procedures that have been in operation for many years. "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload." *Long Range Plan of the Federal Courts* (1995). That burden has not been carried.

The position of the Ninth Circuit expressed to the Commission is that it is working well and that a great majority of the judges and lawyers in the Ninth Circuit are satisfied with its current structure. This was confirmed by the survey of the Commission, in which over two-thirds of the judges in the Ninth Circuit expressed that opinion.

The Commission has proposed that the Ninth Circuit Court of Appeals be divided into three semi-autonomous adjudicative divisions, with the State of California being split into two separate divisions. Panel decisions decided in one division would not be binding precedent in either of the other divisions, and each division would have an independent en banc procedure that would have no precedential effect in the other two divisions. There would be an additional court of 13 judges selected from the divisions to resolve only direct conflicts between the divisions. The likelihood of inconsistent interpretations of federal law would exist throughout the circuit and would not be adequately addressed by the proposed conflicts resolution mechanism. Because California would be split into two divisions, there would also be a substantial risk of different interpretations and enforcement of the same state law in California.

In January of 1999, I prepared an *Analysis of the Final Commission Report*, in which I expressed wholehearted agreement with the Commission's major conclusion that the Ninth Circuit should not be split, but serious disagreement with the divisions recommended for the Ninth Circuit Court of Appeals. I submitted this *Analysis* to a meeting of our active and, senior judges on January 11, 1999. Of the 35 active and senior judges voting, 25 judges voted to approve the *Analysis*, 4 judges voted to approve the Commission's recommendation of the creation of divisions for the court of appeals, 4 judges voted for a circuit split, and 2 judges abstained.

I am drawing my remarks today from the *Analysis*, and I am thus confident that I speak for the great majority of the judges of our circuit court. I have attached a copy of that *Analysis* to my written statement and it provides more detail than I am able to discuss in this oral presentation. On March 31, 1999, I sent a letter to each member of Congress, in which I enclosed a copy of the *Analysis*. With your extremely busy schedules, you may or may not have had an opportunity to review it. What I point out in the *Analysis* is that this is a major change in the operation of the circuit court of appeals, it is not justified by the findings of the Commission, and is a *de facto* split of the Ninth Circuit Court of Appeals. It frustrates the very important goal acknowledged by the Commission, to maintain a consistent body of law throughout the nine Western United States and the Island Territories.

In its draft report, the Commission recommended legislation to implement this divisional approach not only for the Ninth Circuit, but for the other circuits when the number of judges on their courts of appeals exceeded 17 active judges. I think it was most significant that the Chief Judges of the First, Second, Third, Fourth, Seventh, Eighth, and DC Circuits responded with a joint letter expressing strong opposition of their circuit courts to any such divisional restructuring. They said, "The whole concept of intra-circuit divisions, replete with two levels of en banc review, has far more drawbacks than benefits." The Chief Judge of the Fifth Circuit sent in a separate letter, expressing the concern and reservations that circuit has about the divisional approach. The Chief Judge of the Second Circuit sent in an additional separate letter, emphasizing the strong opposition of that court. Thus, all of the other circuits that responded to the Commission expressed their opposition to the divisional approach. This, no doubt, resulted in the Commission's modifying its draft report and proposed legislation to eliminate the mandatory requirement for the creation of divisions in the other circuits. The requirement became strictly optional for the other circuits, leaving the Ninth Circuit conscripted as the *guinea pig* to implement this untested drastic change that we believe is seriously flawed. Senate bill 253 is essentially the same as the revised proposed legislation.

There were many others who responded opposing the divisional structure, as I have detailed in the *Analysis*. Some of these were by:

The United States Department of Justice; Senator Dianne Feinstein; Former California Governor Pete Wilson (present California Governor, Gray Davis, recently announced a similar view) The Ninth Circuit Court of Appeals; The Ninth Circuit Judicial Council; The Association of District Judges of the Ninth Circuit; The Federal Bar Association; The Sierra Club Legal Defense Fund; The Los Angeles County Bar Association; The Chief Judges of the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and DC Circuits; The New York City Bar Association; The Federal Bar Council's Committee on the Second Circuit Courts; and The Chicago Council of Lawyers.

The response of the United States Department of Justice, which participates in 40 percent of the litigation in the federal courts, bears particular note. It responded to the Commission, vigorously opposing the divisional restructuring of the Ninth Circuit or any circuit. It stated, "That proposal would have potentially adverse repercussions for the administration of justice in the Ninth Circuit and, ultimately, across all federal courts of appeals."

The Commission acknowledged that there is no persuasive evidence that the Ninth Circuit is not working effectively. It emphasized the importance of maintaining consistent circuit law throughout the nine Western United States and the Island Territories. Yet, it proposed structural changes that will impede that important objective, which neither the Ninth Circuit nor any other circuit wants to adopt. It is thus very important to examine the reasons why this radical change in structure was necessary or desirable for the Ninth Circuit.

The Commission stated that it had reviewed all of the available objective data routinely used in court administration and found that while there are differences among the courts of appeals, it is impossible to attribute them to any single factor, such as size. In considering the subjective data, the Commission noted that the district judges of the Ninth Circuit do not find the law any more unclear than the judges in other circuits. The Commission then noted that the lawyers of the Ninth Circuit found “somewhat” more difficulty in discerning circuit law and predicting outcomes of appeals than lawyers elsewhere. Thus, the Commission acknowledges that the conclusion of a need for a major structural change in the Ninth Circuit Court of Appeals is not based upon any objective findings. The subjective findings only identified rather minor differences expressed by the Ninth Circuit judges and lawyers, compared to the judges and lawyers of other circuits. This hardly justifies such a radical change.

It is not realistic to believe that consistent law can be maintained in the Ninth Circuit under the divisional structure when panel decisions are not binding throughout the circuit, and when there are three separate en banc courts with no participation of judges throughout the circuit in those decisions. The 13-judge Circuit Division that resolves only direct conflicts between divisions cannot maintain consistent circuit law. Under the present structure, panels are bound to follow the precedent of other panels, and they try their best to do so. Under the proposed system, there is no obligation to follow the precedent of the panels of the other two-thirds of the court. This is certain to develop greater inconsistency in panel decisions. The law of the divisions will inevitably drift apart with little hope of keeping the consistent circuit law that we now enjoy in the Ninth Circuit or restoring it if the legislation is enacted and found to be a serious mistake.

Under the present structure of the court of appeals, we have a viable mechanism that maintains the consistency of law throughout the entire circuit. Panel decisions of all of the judges are binding throughout the entire circuit. The limited en banc procedure provides a mechanism whereby all judges participate in the en banc process by the “stop clock” procedure, requests for en banc, memos circulated to the entire court arguing for and against en banc review, and by a vote of all of the active judges on whether to take a case en banc. There is full participation of all our judges in resolving circuit law.

When a case is taken en banc, the en banc court reviews the full case for purposes of clarifying the circuit law, resolving conflicts, or considering questions of exceptional importance to establish the law of the circuit. There is no additional level of appeal, as there would be with the divisional approach, and there is no litigation upon whether an opinion reflects a direct conflict between divisions or merely distinguishes cases involved, as there would be with the divisional approach.

Our circuit court has the advantage of the diversity and background, experience, and geographical identity of a large number of judges that provide important insights into the applications and development of the federal law throughout the nine Western United States and Island Territories. The stated advantages asserted for the divisional approach are heavily outweighed by the disadvantages.

The disadvantages may be summarized as follows:

- There is no participation of all judges circuit-wide in resolving the circuit law as at present. The only participation is within the division.
- Resident judges within a division that are assigned to another division would not participate in panels within the resident division for a three-year period and would, for that period, have no say in the en banc consideration of panel decisions within the division of their residence.
- The proposed Circuit Division court would be an additional level of appeal before finality, involving additional expense and delay.
- The resolution of conflicts by the Circuit Division court would be by 13 judges, not representative of the full court or proportionately representative of the divisions. The Circuit Division would create a category of what, in effect, would be Super Court Judges, for three-year terms with greater power in determining the law of the circuit.

- There would be no participation of judges throughout the circuit in the decisions of the Circuit Division, as to whether it should take a case or not take a case or let a panel decision stand.
- There are statutory problems lurking in the new procedure, two of which I identify in the *Analysis* but others in an untested procedure could well surface in the future.
- The practical operation of the divisional approach becomes administratively complex in the manner in which the judges are designated to be assigned among divisions, and the manner in which the Circuit Division is to operate, as I have shown in the *Analysis*.

It is gratifying that the Commission recommended that the Ninth Circuit not be split and recognized the importance of having a single court interpret and apply federal law in the Western United States. However, the evidence does not justify the recommended change to a divisional structure of the Ninth Circuit Court of Appeals. The disadvantages of such a structure far outweigh the claimed advantages and do not justify disrupting a court that the great majority of judges and lawyers within the circuit are convinced is operating efficiently and effectively. The Ninth Circuit has always been willing to re-evaluate itself, its performance, and to experiment with innovations that would lead to greater efficiency and effectiveness. The annual evaluation of the Ninth Circuit's long range plan is specifically designed to do so. Concerns that have surfaced in the Final Report of the Commission can be addressed with far less disruption than a whole new divisional structure. At the present, they are being addressed by a special Evaluation Committee that I appointed specifically for that purpose.

The Committee, chaired by Senior Circuit Judge David Thompson, is composed of Ninth Circuit judges from different regions of the circuit, as well as a representative from the district, court bench, a prominent scholar of the federal appellate courts, and an experienced appellate practitioner. The Committee has met over the past several months on numerous occasions and has made a special effort to meet with representatives of the bench and bar throughout the Ninth Circuit in order to get a wide spectrum of participation in the evaluation process.

In conclusion, with the Commission acknowledged, after extensive study, that there is no persuasive evidence that the Ninth Circuit is not working effectively. There is no justification for mandating this drastic change in structure that will impede, not enhance, the continued development of consistent circuit law throughout the nine Western United States and the Island Territories. The other, circuits have all opposed the divisional structure and it has been made optional for them. The Ninth Circuit should be treated the same as the other circuits and should be given the same option.

ANALYSIS OF THE FINAL COMMISSION REPORT BY CHIEF JUDGE PROCTER HUG, JR.

The Commission on Structural Alternatives for the Federal Courts of Appeals submitted its Final Report on December 18, 1998. I have had an opportunity to carefully analyze the report and to discuss it with judges and lawyers. I thought it would be helpful to give my evaluation of the Final Report, as I did with the Draft Report.

SUMMARY

The basic question resolved by the Commission is whether the Ninth Circuit should be split. The strong recommendation of the Commission is that it should not be split. It stated:

Maintaining the court of appeals for the Ninth Circuit as currently aligned respects the character of the West as a distinct region. Having a single court 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, is a strength of the circuit that should be maintained.

The Commission recommended a structural change in the Court of Appeals. It proposed that the Ninth Circuit Court of Appeals be divided into three semi-autonomous adjudicative divisions, with the State of California being split into two separate divisions. Panel decisions decided in one division would not be binding precedent in either of the other divisions and each division would have an independent en banc procedure that would have no precedential effect in the other two divisions.

The question then becomes whether the structural changes, as proposed by the Commission, better serve the prime objective of having consistent law throughout the Ninth Circuit.

When a whole new concept of the operation of the Court of Appeals is proposed, the burden should be upon those proposing the change to show that a particular proposal will operate more efficiently, effectively, and better advance the cause of justice than the time-tested procedures that have been in operation for many years.

The Commission stated that it had reviewed all of the available objective data routinely used in court administration to measure performance and efficiency of the federal courts of appeals but could not say that the statistical data tipped decisively in one direction or the other. It noted that while there are differences among the Courts of Appeals, it is impossible to attribute them to any single factor such as size.

In considering the subjective data, the Commission noted that the district judges of the Ninth Circuit do not find the law insufficiently clear to give them guidance in their decisions any more often than their counterparts in other circuits, but they more frequently report inconsistencies between published and unpublished opinions. The Commission then noted that the lawyers of the Ninth Circuit found "somewhat" more difficulty in discerning circuit law and predicting outcomes of appeals than lawyers elsewhere, but they did report more often a large or grave problem in doing so.

However, the Commission then stated "[b]ut when all is said and done, neither we nor, we believe, anyone else, can reduce consistency and predictability to statistical analysis. These concepts are too subtle, the decline in quality too incremental, and the effects of size too difficult, to allow evaluation in a freeze-framed moment."

The Commission acknowledges that the conclusion of a need for a major structural change in the Ninth Circuit Court of Appeals is not based upon any objective findings. The subjective findings are based upon rather minor differences expressed by the Ninth Circuit judges and lawyers, and the belief of the Commission that a smaller decisional unit just works best. There were many responses to the Commission's Draft Report in opposition to the divisional structure. Some of these were by:

The United States Department of Justice; Senator Dianne Feinstein; Governor Pete Wilson; The Ninth Circuit Court of Appeals; The Ninth Circuit Judicial Council; The Association of District Judges of the Ninth Circuit; The Federal Bar Association; The Sierra Club Legal Defense Fund; The Los Angeles County Bar Association; The Chief Judges of the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and DC Circuits; The New York City Bar Association; The Federal Bar Council's Committee on the Second Circuit Courts; and The Chicago Council of Lawyers.

Under the present structure of the Court of Appeals, we have a viable mechanism that maintains the consistency of law throughout the entire circuit. Panel decisions of all of the judges are binding throughout the entire circuit. The limited en banc procedure provides a mechanism whereby all judges participate in the en banc process by the "stop clock" procedure, requests for en banc, memos circulated to the entire court arguing for and against en banc review, and by a vote of all of the active judges on whether to take a case en banc.

When a case is taken en banc, the en banc court reviews the full case for purposes of clarifying the circuit law, resolving conflicts, or considering questions of exceptional importance to establish the law of the circuit. There is no additional level of appeal, as there would be with the divisional approach, and there is no litigation upon whether an opinion reflects a direct conflict between divisions or merely distinguishes cases involved, as there would be with the divisional approach.

Our circuit court has the advantage of the diversity and background, experience and geographical identity of a large number of judges that provide important insights into the applications and development of the federal law throughout the nine western United States and Island Territories. It is especially important to note that the judges of the nine other circuit courts of appeals who responded to the Commission's draft opposed the divisional approach. The stated advantages asserted for the divisional approach are heavily outweighed by the disadvantages.

The disadvantages may be summarized as follows:

1. There is no participation of all judges circuit-wide in resolving the circuit law as at present. The only participation is within the division.
2. Resident judges within a division that are assigned to another division would not participate in panels within the resident division for a three-year period and would, for that period, have no say in the en banc consideration of panel decisions within the division of their residence.

3. The proposed Circuit Division court would be an additional level of appeal before finality.
4. The resolution of conflicts by the Circuit Division court would be by 13 judges, not representative of the full court or proportionately representative of the divisions. The Circuit Division would create a category of what, in effect, would be Super Court Judges, for three-year terms with greater power in determining the law of the circuit.
5. There would be no participation of judges throughout the circuit in the decisions of the Circuit Division, as to whether it should take a case or not take a case or let a panel decision stand.
6. There are statutory problems lurking in the new procedure, two of which I identify but others in an untested procedure could well surface in the future.
7. The practical operation of the divisional approach becomes administratively complex in the manner in which the judges are designated to be assigned among divisions, and the manner in which the Circuit Division is to operate.

The Ninth Circuit has always been willing to re-evaluate itself, its performance, and to experiment with innovations that would lead to greater efficiency and effectiveness. The annual evaluation of the Ninth Circuit's long range plan is specifically designed to do so. Concerns that have surfaced in the Final Report of the Commission could be addressed with far less disruption than a whole new divisional structure. A great majority of the judges and lawyers within the Ninth Circuit concluded that it is operating efficiently and effectively as a large court and should continue doing so. The case has not been made nor the burden of proof carried for a drastic change in the structure of the Ninth Circuit Court of Appeals.

DETAILED ANALYSIS OF THE FINAL REPORT

Changes from the draft report

The Final Report retains basically the same recommendations as in the Draft Report.

1. Submitting the strong recommendation that the Ninth Circuit should not be split.
2. Proposing legislation that the Ninth Circuit Court of Appeals be divided into adjudicative divisions, whose panel opinions and en banc opinions would not be binding throughout the circuit, with a separate Circuit Division to resolve only conflicts between decisions in the three adjudicative divisions.
3. Proposing legislation that would authorize (though no longer require) other circuits to utilize the adjudicative divisional approach once the number of judges in the Court of Appeals increases beyond 15.
4. Proposing legislation to permit experiments with two-judge panels.
5. Proposing legislation that would permit experimentation with district court appellate panels.
6. Urging Congress to refrain from changing the Bankruptcy Appellate System until the Judicial Conference has had an adequate opportunity to study it and propose any necessary improvements. However, the specific recommended legislation concerning direct appeals with utilization of the Bankruptcy Appellate Panels was eliminated from the appendices.

There are some changes from the Draft Report to the Final Report.

1. The major change is that for *circuits other than the Ninth Circuit*, the proposed legislation no longer *mandates* that the Court of Appeals be divided into adjudicative divisions when the complement of judges exceeds 17. Thus for other circuits, the adjudicative divisional approach becomes entirely optional.
2. The composition of the Circuit Division and method of selection is changed from the 7-judge court originally proposed, to a 13-judge court, composed of the chief judge and 12 other judges in active status chosen by lot in equal numbers from each regional division. The 12 judges would serve non-renewable three-year terms.
3. The Final Report provides that each division would also include some judges not residing within the division, assigned randomly for specified terms of *at least three years*, instead of one year as provided in the Draft Report.
4. The proposed statutory provision specifying the particular composition of the Judicial Council of the Ninth Circuit was eliminated, leaving that matter up to the discretion of the Ninth Circuit, as it does with the other circuits.

5. The seven-year Sunset Provision was eliminated. Thus, the concept of the divisional approach being an “experiment” with a termination period is no longer the case.

COMMISSION REPORT AS IT PERTAINS TO THE NINTH CIRCUIT

Major conclusion—no circuit split

The major conclusion of the Commission is that the Ninth Circuit should not be split. The Commission made the following statements supporting that conclusion.

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

There is one principle that we regard as undebatable: It is wrong to realign circuits (or not realign them) and to restructure courts (or leave them alone) because of particular judicial decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.

* * * * *

Maintaining the court of appeals for the Ninth Circuit as currently aligned respects the character of the West as a distinct region. Having a single court 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, is a strength of the circuit that should be maintained.

* * * * *

Any realignment of circuits would deprive the west coast of a mechanism for obtaining a consistent body of federal appellate law, and of the practical advantages of the Ninth Circuit administrative structure.

The conclusion that the Ninth Circuit should not be split corresponds with the overwhelming opinion of the judges and lawyers in the Ninth Circuit, as well as statements of others concerned with this issue who submitted written statements or gave oral testimony before the Commission. Among those opposing the division of the Ninth Circuit were the following:

- 20 out of the 25 persons testifying at the Seattle Hearing of the Commission.
- 37 out of 38 of the persons testifying at the San Francisco Hearing of the Commission.
- The Governors of the States of Washington, Oregon, California, and Nevada.
- The American Bar Association.
- The Federal Bar Association.
- The United States Department of Justice and the U.S. Attorneys within the Ninth Circuit.
- All of the Public Defenders within the Ninth Circuit.
- Respected scholars: Charles Alan Wright, Arthur Hellman, Anthony Amsterdam, Erwin Chemerinsky, Judy Resnik, Jessie Choper, and Margaret Johns.
- The past Director of the Federal Judicial Center, Judge William Schwartz.
- The chairman of Long-Range Planning for the U.S. Federal Courts, Judge Otto Skopil.
- A great majority of the judges and lawyers in the Ninth Circuit.

Adjudicative Divisions for the Ninth Circuit Court of Appeals

Having strongly opposed the division of the Ninth Circuit, the Commission proceeds further to recommend a revised method of operation for the Ninth Circuit Court of Appeals through intra-circuit adjudicative divisions. The essential question then becomes whether the suggested revision of the operation of the Court of Appeals accomplishes the acknowledged goal of having a single court interpret and apply the federal law in the nine western United States and the Island Territories in an efficient and effective manner better than its present method of operation.

When a whole new concept of the operation of courts of appeals is proposed, the burden should be upon those proposing the change to show that a particular proposal will operate more efficiently, effectively, and better advance the cause of justice than the time-tested procedures that have been in operation for many years.

The position of the Ninth Circuit expressed to the Commission is that it is working well and that a great majority of the judges and lawyers in the Ninth Circuit are opposed to a split. This was confirmed by the survey of the Commission in which over two-thirds of the judges in the Ninth Circuit expressed that opinion.

The Commission has proposed that the Ninth Circuit Court of Appeals be divided into three semi-autonomous adjudicative divisions, with the State of California being split into two separate divisions. Panel decisions decided in one division would not be binding precedent in either of the other divisions, and each division would have an independent en banc procedure that would have no precedential effect in the other two divisions. The Commission, in its Final Report, stated that this is essential to its conception of the operation of the divisions. Comments recommending changes to this aspect of the proposal were rejected as antithetical to the proposed divisional structure.

Findings supporting the divisional structure

It is important to assess the arguments the Commission believed required a change in the operation of the Ninth Circuit Court of Appeals. The Commission noted that the arguments had both objective and subjective components. With regard to the objective component, the Final Report states:

We have reviewed all of the available objective data routinely used in court administration to measure the performance and efficiency of the federal appellate courts, but we cannot say that the statistical criteria tip decisively in one direction or the other. While there are differences among the courts of appeals, differences in judicial vacancy rates, caseload mix, and operating procedures make it impossible to attribute them to any single factor such as size.

The Final Report then considered the subjective opinions of the district judges and lawyers in the Ninth Circuit. With regard to the district judges, the Final Report notes that the district judges in the Ninth Circuit do not find the law insufficiently clear to give them guidance in their decisions anymore often than their counterparts in other circuits, but they more frequently report that difficulties stem from inconsistencies between published and unpublished opinions.

With regard to the lawyers in the Ninth Circuit, the Final Report indicates that Ninth Circuit lawyers found *somewhat* more difficulty discerning circuit law and predicting outcomes of appeals than lawyers elsewhere and more often than others reported a large or grave problem in doing so. However, the Commission stated, “[b]ut when all is said and done, neither we nor, we believe, anyone else, can reduce consistency and predictability to statistical analysis. These concepts are too subtle, the decline in quality too incremental, and the effects of size too difficult to isolate, to allow evaluation in a freeze-framed moment.”

The reaction of the lawyers would be a concern that the Ninth Circuit would wish to address to determine the source of any problem or whether there really is a problem and to consider reasonable steps that can be taken to remedy the problem if it is serious. However, the fact that there is just *somewhat* more difficulty than in other circuits does not seem to justify a major change in the structure of the Ninth Circuit Court of Appeals.

Thus, it would appear that the conclusion of a need for the major structural change in the Ninth Circuit Court of Appeals is not based upon any objective findings. The subjective findings are based on rather minor differences expressed by the Ninth Circuit judges and lawyers, and the belief of the Commission that a smaller decisional unit just works best.

Responses in opposition to divisional structure

There were many responses to the Commission in opposition to this divisional structure, both as the idea pertained to the Ninth Circuit and as it pertained to other circuits in the future. Some of these responses were as follows:

- The United States Department of Justice submitted its response, noting that it approached its perspective from that of a litigant that participated in over 40 percent of the cases heard in the federal courts of appeals. In opposing the recommendation for the creation of intra-circuit divisions, the Justice Department stated, “we agree with the draft report’s recommendation that the Ninth Circuit should not be split at this time, and we concur generally in its view that ‘[t]here is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall.’ In our view, the lack of evidence supporting circuit splits also counsels against what we view as the principal recommendation contained in the draft report—the creation of divisions for

the Ninth and other large circuits. That proposal would have potentially adverse repercussions for the administration of justice in the Ninth Circuit and ultimately across all federal courts of appeals.”

- Senator Dianne Feinstein wrote: “Since your report was released on October 7, I have talked with federal judges, members of the Bar, and legal scholars in California to discuss the recommendations of the Commission. The overriding consensus among judicial and legal leaders is that it would be disastrous if California were split into Northern and Southern Divisions. Concerns expressed to me about the proposal to divide California focus on the following issues:

The Middle Division (Northern California) and the Southern Division (Southern California) would not be bound precedentially by each other’s decisions. Lawyers would engage in “forum shopping” within the same State for favorable rulings. California corporations subject to federal jurisdiction could be subject to varying interpretations of the same federal and state laws. This could compel businesses to build headquarters in other States where there is no conflict within the federal court system. The lack of uniformity and certainty in the law could create chaos in our state. Imagine if two California divisions disagreed on the constitutionality of any state-wide initiative or law. This could do extraordinary damage to Californians’ faith in the integrity and fairness of the judicial system. Another layer of judicial review within the Ninth Circuit would have enormous costs and enlarge the federal bureaucracy.”

- Governor Pete Wilson, then Governor of the State of California, responded that “the proposal to divide the Ninth Circuit Court of Appeals into three divisions—which would split California—would be counterproductive and not in the best interests of the people of California.” He noted that the divisional arrangement proposed by the Commission would not only undermine the objective of having a single court interpret and apply the law in the western United States but would also raise new problems. He then listed five specific problems.
- The Ninth Circuit Court of Appeals, the Ninth Circuit Judicial Council, and the Association of District Judges of the Ninth Circuit all voiced opposition to the divisional approach.
- The Federal Bar Association pointed out that although there are regional issues “the much larger portion of appellate issues and caseload are not so regionally unique.” They expressed concern that the regional advantage might come at too high a price—“lack of inter-division stare decisis and of meaningful en banc review.”
- The Sierra Club Legal Defense Fund calls the proposed divisional structure “a solution in search of a problem with little evidence to support the need for such changes.” They cite the survey in the Commission Report, which showed that over two-thirds of the circuit judges and the district judges do not favor circuit reconfiguration.
- The Los Angeles County Bar Association stated, “As a representative of many private and public consumers of judicial services in the Ninth Circuit, we * * * register our fundamental disagreement with the proposed restructuring of the Ninth Circuit into divisions. We believe this so-called ‘divisional arrangement’ will present many, if not all, of the difficulties that the Commission acknowledges would accompany a split of the Circuit. Indeed, as we explain below, we see the proposed divisional structure as a *de facto* split of the Circuit that would, in effect, split California. Yet, the notion of splitting California is the very option that the Draft Report calls ‘undesirable.’ Draft Report at 46. We believe this same concern applies with equal force to the proposed division of any state.” They noted new problems that the divisional arrangement would create: inconvenience and cost; inconsistent interpretation of California state law; forum shopping and delay tactics; and increased confusion for litigants.
- The Chief Judges of the First, Second, Third, Fourth, Seventh, Eighth, and DC Circuits wrote a joint response to the divisional approach, stating that “The whole concept of intra-circuit divisions, replete with its two levels of en banc review, has far more drawbacks than benefits.”
- Judge Winter, Chief Judge of the Second Circuit, wrote a separate letter on behalf of his court “to indicate a strong and unanimous opposition to the Commission’s recommendation of mandatory divisions in courts of appeals with authorized judgeships over a certain number.” He listed several reasons. “First because such divisions have never been tried, we have no experience with them. The present organization of the regional courts of appeals is hardly working so badly that mandatory resort to a very different and untested form of organiza-

tion is called for.” He then stated it would increase forum shopping and require more judges and concluded “Finally, and most importantly, the major premise of the recommendation for mandatory divisions appears to be that appellate courts with 18 judges or more will inevitably lead to an unacceptably incoherent case law. We do not agree with that major premise. Moreover, we believe that the proposal for mandatory divisions will lead either to more incoherence in case law rather than less or to intolerable collateral consequences.”

- Judge Politz, the Chief Judge of the Fifth Circuit, wrote saying that the judges on his court are very concerned and voiced considerable reservations about the proposal for mandatory divisions for circuits with 18 or more active judges. Judge Edith Jones of that court expressed her opposition more colorfully, in that she believes this to be “a dagger pointed at the heart of the Fifth Circuit, with our currently authorized 17 judgeships.”
- The New York City Bar Association opposes the recommendation that the federal courts of appeals are required to split themselves into divisions. They recognize that such division is “very nearly the functional equivalent of splitting it into separate circuits.” They conclude that this should only be done in extreme circumstances.
- The Federal Bar Council’s Committee on the Second Circuit Courts opposes divisions and argues that this will cause greater disharmony in circuit law and an additional burden caused by another layer of review.
- The Chicago Council of Lawyers opposes divisional organization of the Court of Appeals. “[T]his is another bad solution to a ‘not proven’ problem.” They state that the basis for the Commission’s recommendation is that according to an unpublished survey, lawyers and district court judges in the Ninth Circuit are “somewhat” more likely “to have trouble discerning circuit law, and that the court is too large for ‘collegiality’ to work effectively.” The Council does not concede that either of these are genuine concerns. It does point out, however, that the divisional approach will “if anything increase uncertainty and hinder collegiality.”

Comparison of circuit divisions as opposed to the current operation of the circuit court

The essential question is whether the proposed divisional approach is so superior to the current method of operation as to justify changing the basic structure of the Ninth Circuit Court of Appeals.

Present operation of the court

- Panel decisions are binding throughout the circuit and other panels are obligated to follow that precedent unless it is overruled en banc. The circuit has developed a sophisticated issue coding procedure and all panels are notified when the same issue is before two or more panels. The first panel to have the issue submitted to it has priority to resolve the issue. However, there is frequently contact between panels having the same issue for consideration of another panel’s view.
- There is no empirical evidence that the conflict between panels of the Ninth Circuit is any greater than any other circuit.
- A limited en banc process operates effectively and involves the entire court.

Any circuit judge, including senior judges, can call for a “stop clock,” which is usually done when a judge wants the panel to consider an objection to a part of the decision.

Any judge, including senior judges, can call for en banc and write memos supporting the en banc call or comment on the en banc call of other judges. Generally, there are many insightful memos.

All active judges vote on whether to take a case en banc. The limited en banc process is representative of the court as a whole because all of the circuit judges can submit memoranda for or against the en banc call, and all active circuit judges vote on whether to take the case en banc. If the case is not taken en banc, this is a decision of the full court that the panel opinion should stand.

The limited en banc decisions are fully accepted by the court as being the final decision of the court as a whole. A majority of the active judges can have a limited en banc decision reviewed by the full court. Since 1980, there have been only five such requests, and the majority of the active judges have never voted to consider a limited en banc decision before a full court en banc. From 1980 to 1997, there have been 173 cases heard by the limited en banc court. 33 percent of the decisions were unanimous and 75

percent of the decisions were rendered by a majority vote of 8-to-3 or greater. This is strong indication that a full court en banc would not have reached a different decision.

In the calendar year 1996, there were 25 calls for en banc that were voted on by the full court and 12 of the cases were taken en banc. In calendar year 1997, there were 39 calls for en banc that were voted on by the full court and 19 of the cases were taken en banc. In calendar year 1998, there were 45 calls for en banc that were voted on by the full court and 16 of the cases were taken en banc. The full-court participation should be judged not only upon those cases that were taken en banc, but by those cases that were called for en banc, upon which the full court voted.

There could well be changes in the limited en banc process that would further improve its operation, as suggested by the Justice Department and others. But, these are minor adjustments that could be made and still retain the function of resolving circuit-wide precedent both as to conflicts and as to questions of exceptional importance.

Divisional operation

- Panel decisions in a division would have a binding precedential effect only in that division and no binding precedential effect in either of the other two divisions.
- The Circuit Division only resolves conflicts between panels in different divisions. Unless there is a conflict with a decision from another division, the law of each division is not reviewed within the circuit, which leaves questions of exceptional importance unreviewed in the Ninth Circuit.
- A very significant difference is the lack of participation in the development of circuit-wide law by all judges. A judge in one division cannot call for en banc in another division, but more important, does not participate in the development of circuit law through the stop clock or en banc procedure, or by circulating memos in support of or opposed to en banc consideration.
- The makeup of the Circuit Division is not proportionately representative of the court as a whole. The Circuit Division is composed of the chief judge and 4 judges from each division. The Northern Division has only 22 percent of the caseload and would be expected to have 22 percent of the judges, whereas the Southern Division has 47 percent of the caseload and would be expected to have 47 percent of the judges, yet the two divisions would be equally represented on the Circuit Division court.
- There is no input from any of the judges in any of the divisions to seek to have a case heard by the Circuit Division. The statute specifies that the application is to be made by a party to the case. Furthermore, the Circuit Division has discretion whether to take a case or not, regardless of what a majority of the judges of the circuit would consider to be a conflict.
- The Circuit Division presents an additional level of appeal for litigants before they achieve finality.

RELATIVE ADVANTAGES OF THE TWO STRUCTURES

The present structure

- There is a circuit-wide mechanism that maintains the consistency of law throughout the circuit and is not dependent upon there merely being a conflict between divisions of the court.
- There is circuit-wide participation by the judges in the development of the circuit law. The panel decisions of all the judges are binding throughout the entire circuit. All of the judges participate in the en banc process for the entire circuit by the stop clock procedure, requests for en banc, memos circulated to the entire court arguing for and against an en banc review, and by a vote of all of the active judges on whether to take a case en banc.
- When a case is taken en banc, the en banc court reviews the full case for the purposes of clarifying the circuit law, resolving any conflicts, or considering questions of exceptional importance to establish the law of the circuit.
- There is no additional level of appeal as there would be with the divisional approach.
- There is no litigation on whether an opinion reflects a direct conflict between divisions or merely distinguishes the cases involved, as would be the case with the proposed Circuit Division.

- The circuit court has the advantage of diversity in the background, experience, and geographical identity of a large number of judges, which provide important insights into the application and development of federal law throughout the nine western United States and Island Territories.

The divisional structure

The asserted advantages for the divisional approach, as detailed in the Final Report, are as follows:

- Smaller decisional units will promote consistency and predictability because the judges in the smaller units will have a better opportunity to monitor the decisions of all the panels within that division.
- The judges within a division would sit together more frequently, contributing to greater collegiality among those judges, and more predictability as to the results of appeals. Judges in a division would become much more of a “known bench,” fostering judicial accountability and public confidence.
- Divisional en banc procedure would arguably operate more effectively.
- Each judge would arguably be relieved of having to keep current with the decisional output of the entire Ninth Circuit Court of Appeals. However, when decisions of other divisions are to be “accorded substantial weight,” there would still remain some responsibility on the part of the judges to keep current with the decisions of the other divisions.

The question is whether these asserted advantages really exist and, if so, are outweighed by the disadvantages of the divisional operation.

Disadvantages of divisional operation

- There is no participation of all judges circuit-wide in resolving circuit law, as at present. The only participation is within the division.
- Resident judges within a division that are assigned to another division, as contemplated in the Final Report, would, for that three-year period, have no say in the en banc consideration of panel decisions within the division of their residence. For example, if a circuit judge who resides in Alaska is randomly assigned for three years to the Southern Division, he would have no say in the en banc process of the Northern Division.
- The resolution of conflict by the Circuit Division would be by judges, not representative of the full court or even proportionately representative of the divisions.
- The Circuit Division would create a category of what, in effect, would be Super Circuit Court Judges with three-year terms, to determine conflicts in circuit law without the participation of any other judges in the circuit.
- There would be no participation of judges throughout the circuit in the decisions of the Circuit Division. In fact, the Circuit Division procedure is only initiated by a party, not a judge, and the Circuit Division can, by a vote of those Super Judges, elect not to consider a case.
- There are statutory problems lurking in the new procedure, which we may not realize. I can identify two.
- There is a problem under the statute for the Circuit Division to resolve conflicts unless there are two contemporaneous conflicting decisions. If a case in the Northern Division conflicts with a case decided in the Middle Division two years prior, the Circuit Division can only affirm, reverse, or modify the Northern Division case. It cannot modify the Middle Division case. The statute does not provide for the Circuit Division decision to become the law of the circuit. It only affects the decision of the Northern Division.

The Final Report states that existing circuit law will be in effect until overruled by a division. However, the statute does not say so. If this is not the case, it would create real problems of determining circuit law. Assuming, however, that existing law is intended to remain in effect, as the Final Report states, and the statute is so amended, this still creates a significant problem. If a division overrules an existing precedent, this would not be binding circuit-wide unless there is a case in another division that is in conflict and can be modified. The existing precedent would remain in effect in the other divisions.

The practicality of how the divisional structure would work

The Commission stated:

By constituting divisions with both resident and nonresident judges, the divisional structure respects and heightens 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. The divisional structure draws on the circuit's full complement of judges while restoring 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.

The Commission also indicated that the divisions should be composed so as to equalize the perjudge caseload, with each division having a maximum of 11 judges and a minimum of 7. As I will demonstrate, an equal division of the caseload will dictate there being 6 judges in the Northern Division, 9 in the Middle Division, and 13 in the Southern Division.

The caseload for the Ninth Circuit Court of Appeals for the fiscal year that ended September 30, 1998, was 9,070. The appeals originating from each of the divisions is as follows:

		Percent
Northern Division	1,988	22
Middle Division	2,831	31
Southern Division	4,251	47
Total:	9,070	100

The average caseload for the 28 judges authorized for the Ninth Circuit Court of Appeals would be: 9,070 divided by 28=324 appeals perjudge. The number of judges to be fairly allocated to each Division would be:

Northern Division	1,988 divided by 324=6
Middle Division	2,831 divided by 324=9
Southern Division	4,251 divided by 324=13
Total:	28 ¹

¹ If the Northern Division were allocated an additional judge to come from either the Middle Division or the Southern Division, it would mean a substantial increase in caseload for the judges of that division. If the additional judge were to come from the Middle Division, the caseload per judge in the Middle Division would be 353 cases per judge or 1,061 per panel, as opposed to 284 cases per judge or 852 per panel in the Northern Division. Since the judges sit in panels of 3, this would mean that a judge in the Northern Division would have 209 fewer cases per year than a judge in the Middle Division. A nearly identical result would be obtained if the additional judge were to be allocated from the Southern Division. Thus, a fair allocation of the caseload would be as shown with the Northern Division having 6 judges.

Following the formulation provided by the Commission Report, that the majority of the judges be residents of the division, with other division judges being assigned to that division, the result would be as shown on the following chart:

Division	Present Authorized Judgeships in Division	Judges Allocated by Caseloads	Majority of Allocated Judges	To be Assigned From Other Divisions	To Be Assigned To Other in Divisions
Northern	9	6	4	2	5
Middle	7	9	5	4	2
Southern	12	13	7	6	5

Thus, for example, in the Northern Division, there would be better than a 50 percent chance that a resident judge would be assigned to another division for three years. During that time, the assigned judge would take no part in the panel decisions of the division in which the judge resides, and the judge could take no part in the en banc court in the judge's division. Furthermore, the judge is not expected to keep up on the decisions in the judge's resident division. The same is essentially true for the other divisions, with a somewhat lesser chance of being assigned to another division.

The designation of the presiding judge of each division presents an interesting scenario. Under the statute, the age and time limitations are the same for a presiding judge as for a chief judge, then it goes by seniority, provided that only judges

resident in and assigned to the division are eligible. The process would operate as follows:

The presiding judge of the Northern Division would be Judge O'Scannlain, unless, of course, he was one of the five judges randomly assigned to another division. In that case, it would fall to the next judge in seniority that was not assigned to another division. If an assigned judge returns, and is senior and otherwise eligible, I presume that the returning judge would replace the presiding judge.

In the Middle Division, Judge Willie Fletcher would be the presiding judge, unless, of course, he is assigned to another division. In that event, one of the new judges, yet to be appointed and confirmed, would take the position. (Judges Browning, Hug, and Brunetti would be ineligible).

In the Southern Division, Judge Schroeder would be the presiding judge, unless, of course, she is assigned to another division, in which case the position would go to the next eligible judge in seniority that was not assigned to another division.

All this is further complicated in the first three years by the fact that the initial terms of assignment out of division are staggered one-year, two-year, and three-year terms.

The composition of the Circuit Division that resolves circuit conflicts also presents some interesting questions. The 13-judge court is composed of the chief judge and 4 active judges chosen by lot from each division. The Northern Division, which has less than 22 percent of the caseload, with 6 judges allocated, would have representation on the Circuit Division court equal to the Southern Division, with 47 percent the caseload and 13 judges allocated. The judges drawn from a division need not be residents of the division, but under the statute, can be one of the assigned judges.

The point is that the Circuit Division court is much less representative of the full court than our present limited en banc court. The Circuit Division is skewed by non-proportional divisional representation. Also, with three-year terms it may be many years before a judge would serve on that court. Our present limited en banc court is drawn at random from the full court. If a judge has not been drawn to be on the en banc court for three successive times, he is automatically placed on the en banc court. Thus, a judge is guaranteed to be on the limited en banc court at least every fourth time the court is constituted.

CONCLUSION

The work of the Commission has been valuable in placing in historical perspective the development of the Federal Appellate System, and conducting hearings and surveys, and in obtaining written comments from a wide spectrum of those concerned with the future of the Federal Appellate System. Many of the recommendations will be valuable in informing future developments.

It is gratifying that the Commission recommended that the Ninth Circuit not be split and recognized the importance of having a single court interpret and apply federal law in the western United States. However, the evidence does not justify the recommended change to a divisional structure of the Ninth Circuit Court of Appeals. The disadvantages of such a structure far outweigh the claimed advantages and do not justify disrupting a court that the great majority of judges and lawyers within the circuit are convinced is operating efficiently and effectively. The Ninth Circuit has always been willing to re-evaluate itself, its performance, and to experiment with innovations that would lead to greater efficiency and effectiveness. The annual evaluation of the Ninth Circuit's long range plan is specifically designed to do so. Concerns that have surfaced in the Final Report of the Commission can be addressed with far less disruption than a whole new divisional structure.

Senator GRASSLEY. Thank you, Mr. Chief Judge.
Now, Judge Rymer.

STATEMENT OF HON. PAMELA ANN RYMER

Judge RYMER. Thank you very much, Chairman Grassley, members of the subcommittee, Senator Feinstein. I am Pam Rymer, and I very much appreciate the opportunity of testifying. But in view of Senator Sessions' introduction of me as a member of the Ninth Circuit Court of Appeals, I think I should make it very clear to you that I am here representing and speaking in behalf of the Commission on Structural Alternatives for the Federal Court of Appeals.

Our recommendations with respect to the ninth circuit, are, of course, reflected in S. 253.

Justice White, who chaired the Commission, of course, submitted a written statement to you. But he also asked me to convey directly to you his strong conviction that this legislation must be enacted.

As you know, the Congress created the Commission in great measure at the urging of the ninth circuit to make an independent study of structural alternatives for the Federal Courts of Appeal, which we did, as instructed, with particular reference to the ninth circuit.

The Commission conducted an extensive study and concluded two things that are of equal importance: The circuit, which is an administrative entity with no adjudicative functions, "ain't broke," and it should not be fixed.

But equally important, the Court of Appeals for the Ninth Circuit is broke and should be fixed, but cannot be fixed without structural change. The reason is the Court of Appeals is too large to function well as a single decisionmaking unit, yet the caseload will likely continue to grow, and with that, the need for even more judges to handle it. In the opinion of two-thirds of the Federal circuit judges throughout the country, an appellate court stops acting like an appellate court should act if it has more than 11 to 17 judges.

The Ninth Circuit's Court of Appeals has 28 authorized and 19 senior judges with another five requested. Unlike any other appellate court in the Nation, its judges do not sit together as a full court en banc to develop and maintain a coherent and consistent body of law. Instead, that critical function is consigned to a limited en banc court, which is randomly constituted on a case-by-case basis. Neither do its judges sit with each other regularly enough on panels to get a true understanding of their colleagues' jurisprudence or to polish off the rough edges, like any good partnership or marriage.

And the court's output is too large to read, let alone for each judge personally to keep abreast of, think about, digest or influence. Inevitably, over time, there is a toll on coherence and consistency, predictability and accountability.

For this reason, a majority of the justices of the U.S. Supreme Court unequivocally say that it is time for change. They review the work of all appellate courts in the country. And as you can see from their letters to the Commission, each of the five justices to comment on the ninth circuit thinks that the Ninth Circuit's Court of Appeals is too big to function well. The Commission unanimously agreed.

It is important. The problem with the Ninth Circuit's Court of Appeals has nothing to do with good will or good administration. No amount of either, and the court has both good will and very good administration, no amount of either can make it possible for 30, 40, or 50 or more judges to decide cases together. It simply cannot be done, and that is the problem.

The problem is not that the court does not work. If the problem were that the court does not work, then administration, and technology and ideas for operational improvement might make a difference, but it is not. Nor is the problem reversal rate. That is not

a problem that the Commission identified or that the Commission believes should weigh into the consideration of structural alternatives one or another. We made that very clear in the report and in the language that Chief Judge Hug just quoted.

The problem with the court of appeals is that it cannot work because there are too many judges for the court to be a court. Therefore, to position the court of appeals so that it can function well, requires restructuring to downsize the decisionmaking units. The divisional structure that the Commission recommends will reduce adjudicative units to manageable proportions, each with 7 to 11 judges, a doable caseload and a rational area of responsibility.

In turn, divisional judges can sit together as a full bench when they need to. That will make the division a true and traditional en banc court that can correct panel errors and can develop and maintain a coherent and consistent body of law. Because divisional judges will serve with each other more frequently on panels and will participate in crafting proportionately more of the opinions that speak for the division, they can keep abreast of the output and the views of their colleagues.

But in addition to size, there are two other values that are extremely important and should not be ignored: One is a regional connection because circuits, in the main, have regional roots, and the other is a Federal perspective because it is Federal law, not regional law, that a Federal court must apply. The divisional structure takes account of enhances both values.

On the one hand, a majority of the judges on each division will reside in a district served by that division, and on the other hand, judges from elsewhere in the circuit will be assigned to different divisions for a term to provide judge power where needed and to cross-pollinate the divisions with diversity. In this way, the Federal appellate court in the ninth circuit will be less remote to those whose lives and fortunes depend on its decisions, yet still be a court that is capable of maintaining uniformity, where uniformity itself is a substantial interest to be served.

Of course, the divisions may diverge in how they interpret Federal law over time. But—and this is very important—mostly this will not matter because lawyers and district judges in each division will only need to worry about the law of that division; unlike today, when even subtle differences between panels throughout the circuit does matter because district courts are bound to follow and, thus, to try to figure out the law of the entire circuit.

However, there may well be issues where itself is the compelling interest. And in that circumstance, in that limited circumstance only, the circuit division can resolve a substantial and square conflict. Even so, the circuit division will not be a group of super judges. Indeed, circuit division judges will be far less super than limited en banc judges are today. For unlike limited en banc judges, the circuit division will have no power to rehear panel or divisional decisions to correct the result or to resolve issues of exceptional importance. These are true en banc functions that the Commission believes are too significant to be left to chance, as they are now, but should, instead, be entrusted only to divisions that sit as a full bench or to the U.S. Supreme Court. Nor will the circuit

division be an extra level of appeal. That is expensive and cumbersome.

There are three possible levels of review now: Panel rehearing, limited en banc rehearing and full court rehearing. And there will be three possible levels of review under the divisional structure: Panel rehearing, divisional en banc rehearing and circuit division review, if required to resolve squarely conflicting divisional decisions.

As a practical matter, this will seldom happen because only 10 percent of the cases reheard in the last 10 years have been deemed en banc worthy on account of conflict. There should be even less conflict under the divisional structure because the division creating the conflict will have to create it, advisedly and squarely. In any event, essentially no extra work will be involved, since the issue and the conflict will have been fully briefed and already the subject of two fully reasoned, albeit squarely conflicting, divisional decisions.

In my mind, the only really tough call has to do with what to do about California. No solution is perfect, given how much California contributes to caseload. Personally, having been a lawyer in Los Angeles for nearly 20 years and a district judge in Los Angeles for 6 more years, I see no problem at all with putting California into different divisions.

As Justice John Paul Stevens explains in his letter, which I attached to my written statement and quoted on page 18, and which I urge you to read carefully, as Justice Stevens explains,

To do so creates no more potential for inconsistency or forum shopping than now exists. For under the California state system, decisions of one Court of Appeal do not bind others. And under the Federal system, there can always be different decisions by different district judges.

So people who live and work throughout the State of California already face and already deal with inconsistent determinations of both State and Federal law. And under the structural arrangement, the circuit division will be there if a square conflict, in fact, occurs.

Having said that, if, for other reasons, it seems preferable to postpone the inevitable, the Commission sees no magic to the particular divisional arrangement that the Commission recommended. California could be a division by itself, but the downside is that from day one, if it has enough judges to handle the caseload, it would start off being very close to the limit of not functioning effectively as an appellate tribunal.

Therefore, to me, it makes the most sense to do now what will be best for the future, and that is to pass the bill in its present form. As the Chief Justice of the United States has told you, this structure will address head on most of the significant concerns raised about the court of appeals and would do so with minimal to no disruption in the circuit's administrative structure.

Senator Grassley, thank you for your indulgence. I very much appreciate your consideration of the White Commission's proposals. We urge your favorable action on S. 253.

[The prepared statement of Judge Rymer follows:]

PREPARED STATEMENT OF PAMELA ANN RYMER

EXECUTIVE SUMMARY

The White Commission was created by Congress to recommend structural alternatives for the federal courts of appeal, with particular reference to the Ninth Circuit.

Neither better case management, nor good administration, nor more judges can avoid the need for alternatives.

The reason is: Beyond a range of 11–17 judges, an appellate court is too big to function well because it can no longer sit together as a full court to rehear cases en banc; read and keep up with the court's output; sit with each other regularly; take other steps (such as pre-filing circulation of opinions) to assure the coherent, consistent, and predictable development of the law; and hold each other accountable for decisions rendered in the name of the court.

At 28 active and 19 senior judges (with 5 more requested), the Ninth Circuit's Court of Appeals has too many judges to function well. But instead of splitting the *circuit*—which is only an administrative entity with no adjudicative responsibilities and that “ain't broke,”—fix the *court of appeals*, which is an adjudicative body, that is.

Because of its size, the Ninth Circuit's Court of Appeals is the only court in the country that does not sit together as a full court to develop and maintain a coherent and consistent body of law. Instead, it delegates en banc functions to a limited en banc court of less than half of its authorized judgeships (11) that is randomly constituted on a case-by-case basis. Its members do not sit regularly with each other on panels. Also because of its size, the court's output is too great for all judges to read all of the court's decisions. Inevitably there is a toll on coherence and consistency, predictability and accountability.

A majority of the Supreme Court and one-third of the judges on the Ninth Circuit's Court of Appeals believe these realities are serious enough to warrant change.

The divisional concept responds to the principal concerns about the “Ninth Circuit” by producing a judicial unit that is small enough to function well yet also provides a mechanism for maintaining uniform law on issues where consistency throughout the west is important. It also respects the regional roots of the circuit system by assuring that a majority of the judges in each division reside in a district served by that division, but it retains an appropriate federalizing focus through assignment of judges from elsewhere in the circuit, a common set of rules and procedures, and the Circuit Division which may resolve squarely conflicting decisions on issues where uniformity matters to the circuit.

The divisional structure prescribed in S. 253 is sensible and workable.

Asserted “disadvantages” are not difficulties but strengths.

A circuit-wide en banc process is not necessary as the divisions will sit as a full bench to decide issues of exceptional importance and to maintain coherent and consistent law in the division. Divisional decisions should not bind other divisions because that would put the court of appeals back to square one—a condition that ultimately cannot work.

Replacing the circuit-wide limited en banc with a divisional full court en banc will increase—not decrease—judicial participation and accountability.

The Circuit Division does not add a cumbersome new level of review, as there are no more levels than are presently available and both the parties' and the Circuit Division's work can largely be done on the existing record. Nor is the Circuit Division a collection of “Super Circuit Court Judges,” since its power (to resolve square conflicts only) is considerably less than a limited en banc court's, which may take a case in order to reconsider and then resolve cases of exceptional importance, cases that pose inter-circuit conflicts, and cases that create an intra-circuit conflict.

Once up and running, the divisional structure should make it easier to organize calendars as assignments will be more stable, and it should not be more complicated to support or staff as the divisions will continue to be administered centrally.

The problem of putting parts of California into different divisions is “seriously exaggerated”; inconsistency and forum shopping opportunities exist already and will not be exacerbated by a divisional structure. That said, there is no magic to the particular divisional arrangement the Commission thinks is preferable, except that it will work now and for the foreseeable future. California could be a division by itself, but a “California” division with an adequate number of judges to handle the case-load would immediately be too large to function well.

As the Chief Justice of the United States has said, the divisional proposal for the Ninth Circuit Court of Appeals “addresses head-on most of the significant concerns

raised about that court and would do so with minimal to no disruption in the circuit's administrative structure."
S. 253 should be enacted.

I appreciate the opportunity of testifying in support of the recommendations of the Commission on Structural Alternatives for the Federal Courts of Appeals which, with respect to the Ninth Circuit, are reflected in S. 253, the "Ninth Circuit Reorganization Act," that provides for restructuring the Court of Appeals for the Ninth Circuit into adjudicative divisions. I was privileged to serve on the Commission chaired by retired Supreme Court Justice Byron R. White, and to work with N. Lee Cooper, the immediate past President of the American Bar Association; Hon. Gilbert S. Merritt, former Chief Judge of the Sixth Circuit and Chair of the Executive Committee of the Judicial Conference of the United States; and Hon. William D. Browning, who was Chief Judge of the District of Arizona as well as a member of the Judicial Conference of the United States and the Judicial Council of the Ninth Circuit.¹

In the wake of decades of concern about the size of the Ninth Circuit and a rider to the Appropriations Bill in 1997 that would have split the circuit,² the Commission was established to study structural alternatives for the federal courts of appeals—with particular reference to the Ninth Circuit. Although the Ninth Circuit was a special focus of the Commission's work, its charge was broader and our recommendations with reference to the Ninth Circuit grew out of the study we undertook of the federal appellate system as a whole, its present condition and future capacity.

The most significant fact that emerged is the growth in caseload that federal courts across the country have experienced in recent years. Appellate courts have been disproportionately affected because the number of circuit judges has not kept pace with the growth. To an extent, caseload pressures are exacerbated by unfilled vacancies, but the problem is more systemic than that.

Better case management is a band-aid that helps alleviate, but does not cure, the problem. Appellate courts (including, in particular, the Ninth Circuit's) have responded to increased demand by adding staff support, tracking cases differently depending upon their difficulty, providing ADR, borrowing judges, and taking advantage of technology to coordinate consideration of related issues. At the same time, fewer appeals are orally argued and fewer result in fully reasoned, published dispositions. With all that has been accomplished, however, most courts appear close to the limit of their ability to manage the caseload more effectively and efficiently—yet still render decisions that are, and are perceived to be, fairly and fully considered by Article III judges.

Curtailling jurisdiction could also relieve caseload pressure. Indeed, all members of the Commission believe that restoring and retaining a more appropriate balance of federal and state jurisdiction is critical to enabling the federal courts to perform their core constitutional functions in the future. That said, we cannot realistically count on changes in jurisdiction to solve the caseload problem.

Another palliative is to increase the number of judges, but the problem with this solution is that at some point an appellate court becomes too large to function effectively as a single judicial decision-making unit. Unlike judges on a district court, appellate judges must work together to develop the law of the court's jurisdiction. Two-thirds of the circuit judges throughout the country (including one-third of my colleagues on the Court of Appeals for the Ninth Circuit) believe that the maximum number of judges for an appellate court to function well lies somewhere between eleven and seventeen. Beyond this range there are too many judges:

- To sit together as a full court en banc;
- To read the court's output;
- To sit with each other regularly;
- To take steps such as pre-filing circulation of proposed opinions to assure coherence and consistency, predictability and stability; and

¹ While I am testifying as a member of the White Commission, I am also a United States Circuit Judge for the Ninth Circuit and was a district judge for the Central District of California. I currently serve on the Executive Committee of the Court of Appeals and am Administrative Unit Judge for the Southern Unit as well as a member of the Judicial Council for the Ninth Circuit. I have previously been a member of the Executive Committee of the Ninth Circuit Judicial Conference and was its Chair.

² The rider, passed by the Senate, would have split the Circuit by establishing a new Twelfth Circuit of Alaska, Arizona, Hawaii, Idaho, Montana, Oregon, Washington, Guam and the Northern Mariana Islands, leaving California and Nevada in the "old" Ninth.

- To hold each judge accountable for decisions that are rendered in the name of the court.

Historically, when the number of circuit judges needed to deal with a circuit's increasing caseload has gone beyond a tolerable number, the circuit has been split and two new circuits have been created, each with an acceptable number of judges to handle the caseload of the newly aligned circuit (at least for a while). This happened with the "old" Fifth and Eighth Circuits earlier in the century. Inevitably until now, splitting the circuit has been seen as the way to solve the conundrum of the Ninth Circuit, thought by many to be too large in terms of judges, caseload, and population.

But there are downsides—and limits—to circuit splitting. For one thing, to make more, smaller circuits tends to Balkanize federal law and adversely to affect the federalizing function of a federal court of appeals. For another, everyone to look at the question has agreed that no regional circuit should have fewer than three states. This is so for reasons both of policy and practicality: a federal appellate court should be more than a single state court since it declares *federal* law that speaks beyond state boundaries; as such, its judges should come from, and be appointed by and with the consent of senators who are concerned about the interests of, more than one or two states. In addition, the only forum where inter-circuit conflict can be resolved is the United States Supreme Court. This makes splitting a single large state (California, for example) between two different circuits especially undesirable. Finally, there are obvious costs, both to the fiscal and legal order, in creating an entirely new, essentially duplicative, apparatus.

Thus the question Congress posed to the Commission: Are there structural alternatives for the federal courts of appeals, in particular the Court of Appeals for the Ninth Circuit? The answer is yes. Instead of splitting a circuit that "ain't broke," fix the appellate court that is.

A court of appeals is different from the circuit, and the difference is critical to the White Commission's analysis. Even though an appellate judge is a "circuit" judge and the court of appeals is commonly called the "circuit" court, the circuit is not the court of appeals or vice versa. A circuit is an *administrative* entity that is the governance mechanism for all courts and judges within the geographic area it covers—district courts, bankruptcy courts, and magistrate judges as well as the court of appeals. A circuit has no *adjudicative* role; adjudication is entirely a *court* function. Therefore, to the extent there are perceived problems with a court of appeals on account of the fact that it has grown too large or would be too large if an adequate number of judges were appointed to handle the caseload, the *court of appeals* can be restructured without the *circuit* being split to achieve it.

In the case of the Ninth Circuit, no one seriously questions how the *circuit* performs its administrative functions. The circuit's size allows for flexibility in assignment, economies of scale, and a common body of law for the Pacific Rim and the western part of the United States—all of which are positive values. But many circuit judges, lawyers who practice within the circuit, and a majority of justices on the United States Supreme Court question how the *court of appeals* performs its adjudicative functions.³ It is significantly larger than any other collegial court in this country,⁴ and there are serious concerns about creeping inconsistency, lack of predictability, and the absence of review of decisions by all judges on the court.

Alone among the circuits, the Ninth Circuit's Court of Appeals does not sit together en banc, as a full court, to develop and maintain a coherent and consistent body of law. By statute, federal appellate courts may go en banc for three purposes: to decide issues of exceptional importance, to resolve intra-circuit conflict, and to avoid inter-circuit conflict. Instead of a full court en banc, the Ninth Circuit's appellate court has a "limited en banc." The limited en banc court is constituted on a case-by-case basis, consisting of the Chief Judge and ten judges who are randomly drawn for the particular case. Whatever the limited en banc court decides is the law of the circuit, unless a majority of the full court votes for a rehearing by the full court—a possibility that exists in theory but has never happened in practice. In addition to limiting full court review of panel decisions to eleven judges, only 57 per-

³ Letters written by the Chief Justice and by Justices Stevens, O'Connor, Scalia, Kennedy and Breyer to the Commission are available on the Commission's web site but are attached for convenience as Exhibit A to this statement. Survey results are summarized in the Commission's Working Papers.

⁴ "Collegial" in this context does not mean friendly or sociable or enjoying one another's company. Nor does it connote that judges get along personally or agree on the law. Rather, a "collegial" court is one that must work together, over time, to develop a consistent, coherent, and predictable body of law for the jurisdiction.

cent of the Ninth Circuit's appellate judges read all or most of the opinions of the court. This is a far lower percentage than in other circuits with smaller courts.

I believe a smaller court that can sit together regularly in panels, that can convene as a full bench to correct panel error and to maintain a body of coherent and consistent law, and that can monitor all of its output, is better for the administration of justice than a bigger court that cannot. The benefits of a smaller tribunal can be obtained without splitting the circuit, but it will take structural change to make it happen. S. 253 appropriately requires the Court of Appeals for the Ninth Circuit to be restructured into adjudicative divisions, as the White Commission recommends.

The proposed arrangement creates a Northern Division for the Districts of Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington; a Middle Division for the Districts of Northern and Eastern California, Guam, Hawaii, Nevada, and the Northern Mariana Islands; and a Southern Division for the Districts of Arizona and Central and Southern California. Each division will consist of seven to eleven judges,⁵ a majority of whom are resident within the region served by the division. Judges can be drawn at random from outside the division to provide judge-power as needed, and to cross-pollinate the divisions with judges from around the circuit.⁶ Thus, each division will have a regional connection without losing a federal perspective. At the same time, each division is small enough for every judge to read every decision and for the division to sit comfortably together as a full bench en banc, thereby authoritatively declaring the law (and correcting errors) for districts within the division. Because this might eventually lead to divergence among divisions, the Commission recommends (and S. 253 provides for) a Circuit Division to maintain circuit-wide uniformity on issues where consistency is important to the circuit but on which the divisions have taken squarely conflicting positions.⁷ In this respect the Circuit Division has discretion only to break a "tie" in the interest of consistency. The Circuit Division has no discretion to rehear issues of exceptional importance or to avoid inter-circuit conflict; these functions repose solely in the divisions, sitting en banc, or in the United States Supreme Court where certiorari would be available (as it is now) from panel decisions, from divisional en banc decisions, and from Circuit Division decisions.

I believe this structure responds to the principal concerns expressed about the "Ninth Circuit." It reduces the size of the judicial decision-making unit, and replaces the circuit-wide limited en banc—which does not work like a true en banc works—with a full division en banc in which all division judges have a voice and a vote. With these changes, each judge will no longer be "charged" with the output of the whole court, but can concentrate on the output of the division. All circuit judges can again be expected to read all decisions that speak for them. In this way, inconsistency and lack of predictability will be less likely and coherent development of the law more likely.

In addition, the divisional structure accomplishes three other objectives that the Commission believes are worthwhile. First, it preserves flexibility for the future. Unlike circuits, divisions and their composition can change up, down or sideways as changes in caseload require. Second, the divisional structure produces a judicial unit of suitable size yet provides a mechanism for maintaining uniform law on issues where consistency throughout the west is important. Finally, it makes the federal appellate court in the Ninth Circuit less remote to those whose lives and fortunes depend on its decisions. To some extent tension between the regional roots of circuit organization and the federalizing function of its court of appeals is inevitable, but the structure proscribed in S. 253 goes a long way toward reconciling the two.

The divisional structure is sensible and workable. For sure, it has not been tried before in the form proposed and there is understandable reluctance on the part of bench and bar alike to experiment with any structural alternative.⁸ After all, we

⁵You may wish to consider whether a cap of 13 is preferable given the size of the caseload and its distribution within the circuit.

⁶Judges drawn for out-of-division service would not move to that division; they would simply travel to that division's place of holding court, as circuit judges do now when they are assigned to an argument calendar that convenes at a location where they do not live.

⁷The Circuit Division would be composed of the Chief Judge and six to twelve other judges drawn equally but randomly from each division. They would serve on the Circuit Division for a term of three years as well as their own division.

⁸As the Commission's Final Report explains, the Ninth Circuit's previous experiment with regional calendaring was so totally different that no pertinent conclusions can be drawn from it. Likewise, the "old" Fifth Circuit's experience is dissimilar in that it operated through divisions only in transition. But the step is nevertheless not radical in the Ninth Circuit, for it already has Administrative Units, Northern, Middle and Southern.

were brought up on stare decisis. However, the important thing is what furthers the administration of justice in the long run. The Commission's is not a perfect solution. Nor can there be one, with a state as large as California as part of the mix. However, it is a viable solution that is preferable to splitting the circuit or to letting the court of appeals grow to 40, 50, 60 or more judges. No one suggested during the course of our study how that many judges can decide cases *as a court*, for panels speak with authority for the court as a whole only so long as the full court is perceived to be capable of speaking for itself if it disagrees.

I am, of course, familiar with the concerns that have been expressed about how the divisional concept would work. I understand where they are coming from, because a known quantity—even a flawed one—may seem safer than an unknown one, which surely is imperfect as well. However, I disagree that the “disadvantages” are genuine difficulties.⁹ In reality they are strengths of the divisional structure that correspond to weaknesses of the status quo. In my view, the “disadvantages” do not come close to outweighing the advantages of the divisional structure.

The perceived disadvantages are that divisional decisions would not bind other divisions and the circuit-wide en banc would no longer exist to maintain and develop circuit law; that the Circuit Division would be an additional and cumbersome level of appellate review, resulting in additional expense and delay; the present participation of all appellate judges circuit-wide in resolving circuit law would be eliminated, and practical problems of assignment would ensue; and “splitting” California would produce different interpretations and enforcement of the law within the state. However, as I see it:

1. A circuit-wide en banc process is not effective and is not necessary to the divisional concept, since the divisions will sit as full courts to decide issues of exceptional importance and to maintain coherent and consistent law within the division. Divisional decisions should not bind other divisions because otherwise, the Court of Appeals for the Ninth Circuit is back to square one: All circuit judges would have to try to read and monitor all decisions of all divisions, and participate in the rehearing process for all of the court's output (at least up to the time a case goes to a limited en banc court).

2. The divisional structure replaces the circuit-wide limited en banc for issues of exceptional importance with a full court divisional en banc in order to increase participation of judges in that function. The limited en banc process permits no participation in the outcome by judges who are not drawn for a limited en banc court. Because not all judges have a say in it, the limited en banc is too limited to result in a decision that truly speaks for all judges on the court. It is also a time-consuming process that is regarded by some judges as not worth the candle, particularly since the composition of the limited en banc court (unlike a true en banc) is not known when voting occurs. By contrast, under the divisional structure every divisional judge will both participate in the en banc process and be on the en banc court. In this way issues of exceptional importance will be resolved for the division by every judge on the division. This generates greater participation *and* closer attention to the outcome. While judges will presumably continue to review petitions for rehearing and be able to make sua sponte calls for en banc rehearing, circulate memoranda in support of or in opposition to going en banc, and (if active) vote on whether to take the case en banc, their participation will not stop at this point as it may do now. For under the divisional structure, if a matter does go en banc, each judge will be assured a place on the bench.¹⁰

3. Although the Circuit Division may appear at first glance to add a new level of review, it really doesn't. Today in the Ninth Circuit, a panel decision may be reheard by the panel, by a limited en banc court, and by the full court (something which hasn't happened, but could). All of this can take place without the parties wishing it to, and they can be asked to file supplemental briefs and must show up for reargument—which adds expense, and the process can unfortunately take a long time—which means delay for the litigants. Under the divisional structure,

⁹Chief Judge Hug has succinctly summarized them in his Analysis of the Final Commission Report (January 11, 1999), which I believe has been circulated to your Committee and to other members of Congress.

¹⁰Chief Judge Hug's Analysis suggests a related disadvantage, that resolution of conflict by the Circuit Division would be by thirteen judges, not representative of the full court or even proportionately representative of the divisions. The short answer is that 13 out of 28 is more “representative” than 11 out of 28, which is how the limited en banc court is currently composed. But the real point is that the Circuit Division (unlike the present limited en banc court) will have limited power—its only authority will be to weigh in on one side or the other of a square conflict. That assignment could well be done by fewer even than 13 because two entire divisions will already have fully considered the issue.

a panel decision may be reheard by the panel, by the full division, and by the Circuit Division but only if the panel decision (left in place by the full division) or the en banc decision squarely conflicts with the settled law of another division. In other words, there are precisely the same number of possible layers of review under the divisional structure as under the present limited en banc system.

In any event, if the Circuit Division takes a reasonable view of its mission—which we must assume that it will—then it is unlikely to have that much to do, for it will be the rare case that qualifies.¹¹ Inconsistency alone is not sufficient for Circuit Division review. There must be square and significant conflict. Each division will take care of its own inconsistencies, and inconsistencies between divisions are inconsequential (because they are not precedential outside the division) unless they directly (and deliberately) occur with respect to issues on which uniformity throughout the circuit is important. Thus, the Circuit Division’s jurisdiction will not be triggered unless some division creates a square conflict on an issue where consistency matters.¹² Even then, additional work for the parties (and the Circuit Division) should be minimal because the petition for rehearing in the division will have raised the conflict and the Circuit Division will already have the benefit of a fully developed record and two reasoned (but conflicting) opinions.

Accordingly, the Circuit Division is not at all a collection of “Super Circuit Court Judges.”¹³ While serving on it, judges may have to read more petitions for rehearing than their colleagues, and upon occasion will get to break a tie. But if anything, a judge serving on the Circuit Division will be far less of a “super judge” than a judge who serves on a limited en banc court at present. Unlike limited en banc judges, Circuit Division judges will have no power to reconsider issues that are exceptionally important, or to correct wrong decisions; that will be for the divisions to do, sitting together in a true en banc.

4. At first, the divisional structure will no doubt be more complicated to staff because it is different. But there should be no more difficulty in randomly assigning a judge from Billings to Pasadena for eight panels per year for three years than in sending him randomly to Pasadena, or San Francisco, or Portland, or Seattle, or sometimes Anchorage or Honolulu during the same period. In either case that judge will have to be scheduled along with other members of the panel.¹⁴

The same support the Clerk’s office now provides to the Court of Appeals for the Ninth Circuit will sustain the new divisional structure as well. Some internal adjustments will no doubt have to be made, but they are minor and have no significant effect on the way the court of appeals does business. Rules will be the same circuit-wide. Motions, screening, and calendaring will also be essentially the same except for being reorganized by division. The clerk’s ability to identify related issues will continue to be helpful to divisional panels, especially to the extent they try to avoid conflict—as they should. Divisions would sit (and hear argument)

¹¹Only 10 percent of limited en bancs in the last ten years have been to correct a conflict.

¹²The Commission assumed that all divisions will be bound by current Ninth Circuit law even though S. 253 does not require continuation of Ninth Circuit precedent, because it is reasonable to suppose that the Ninth Circuit Court of Appeals would so provide by rule.

The Chief Judge’s Analysis suggests there may be two other, related glitches in the statutory scheme. One is the inability of the Circuit Division to modify the first conflicted case when it has become final. However, this is no different from an en banc court’s power under the present regime. A limited en banc court may only decide the case in front of it, but once it does it overrules prior inconsistent authority. The same would be true of a Circuit Division decision that adopts the second inconsistent opinion; that rule would become the law circuit-wide and prior authority (including the first conflicted case) would be overruled. The second problem has to do with what happens if a division overrules an existing precedent, in that it would not be binding circuit-wide unless there is a case in another division that is in conflict and can be modified. However, the division that overruled existing Ninth Circuit precedent (that is binding elsewhere) would itself create a conflict that the Circuit Division could resolve.

¹³See Analysis of the Final Commission Report by Chief Judge Procter Hug, Jr. (January 11, 1999), p. 22.

¹⁴The Chief Judge’s Analysis suggests two other problems. First, that resident judges within a division who are assigned to another division would have no say in the en banc consideration of panel decisions within the division of their residence. While true, this doesn’t matter. Where a judge’s chambers is located is irrelevant to the law of the division on which that judge serves. Each division will speak for every judge sitting on the division and every judge sitting on the division will have a say in its decisions. It will also be the case under the divisional structure that a majority of the judges on each division will always be a resident in the division, yet no individual judge is (or should be) guaranteed a spot on the division in which he or she lives. The second problem has to do with designation of the presiding divisional judge, which might turn out to be a brand new judge or a judge who is not a division resident. However, the senior active judge traditionally presides on all panels, no matter how recently confirmed. Since presiding at divisional en bancs is the divisional presiding judge’s only role, it seems logical for the senior active judge within the division to be so designated.

where the court now does and the Clerk would have offices where she has offices now.

The particular divisional arrangement in S. 253 works logistically. It might work better with a 13 judge cap because the caseload could be more evenly apportioned, and of course it would be easier with 33 judges than 28. But assignments are necessarily complicated at present, and making them more permanent should not add to the burden.

5. As Justice Stevens points out, the problem of splitting California between two circuits is “seriously exaggerated.” It follows that the problem of putting parts of California into different divisions is also “seriously exaggerated.” Justice Stevens explains:

It is, of course, true that occasionally there will be conflicting interpretations of both State and Federal issues that will require resolution either by use of the certification process for the former, or by our Court’s review of the latter, but such temporary uncertainty is not new to the law. It would differ only in degree from the comparable uncertainty that attends conflicting rulings on state court questions in different California jurisdictions, conflicting rulings on federal questions in different federal districts within California and in different federal circuits today. In my considered opinion, the importance of this concern pales in comparison with the disadvantages associated with a circuit that is so large that even the most conscientious judge probably cannot keep abreast of her own court’s output.

In short, to put parts of California into different divisions does nothing to California that California does not do to itself. California’s system allows for the same inconsistency and the same forum shopping that it is said the divisional arrangement would foster. One state court of appeal is not bound by the decisions of another state court of appeal. Therefore, state law (and state court determinations of federal law) can be different depending upon where in the state one lives or does business. By the same token, the federal system has itself long tolerated inconsistent determinations of federal law by different circuits. These inconsistencies survive until settled by the United States Supreme Court, but in the meantime persons who travel or do business in different circuits simply deal with the problem. The divisional concept is unremarkable in this respect. It would neither create a forum-shopping opportunity that does not currently exist, nor subject Californians to the possibility of disagreement on the law (including constitutionality of state-wide initiatives) that does not happen already.

Even though it is possible that resolving an intra-state inter-divisional conflict might entail an extra step in the unusual situation where one of the California divisions refuses to defer to a prior divisional decision on point, the conflict would get resolved and, I believe, efficiently. Today, if a federal district court in Los Angeles decides an issue of state or federal law differently from a federal district court in San Francisco, and if the issue is appealed, it can be resolved by the Court of Appeals for the Ninth Circuit, although it may take a limited en banc court to do it. Under the divisional structure, if the same conflict were to persist after divisional review, it could be resolved by the Circuit Division.

As seems clear, no alternative involving California is perfect because the “big state” problem is not easily solved.¹⁵ Ultimately I do not believe that it can be solved without structural change, for it is unlikely that California’s contribution to caseload will greatly change. The options are at least equally, if not more unattractive. To split California between two *circuits* leaves the United States Supreme Court as the only forum for resolving inconsistency, whereas to put the state in different *divisions* of the *same circuit* allows for the conflict to be resolved within the circuit. Similarly, to make California its own division is problematic because the caseload and number of judges required to handle it would start the “California” division off at (or over) the top of the maximum number of judges a decisional unit should have to function well. However, recognizing the disparate caseload impact that would follow, in the short run it would be possible to make California a single division, with Arizona and Nevada in another, and the remaining states and territories a third.

No matter how configured, the divisional proposal resolves the debate about the Ninth Circuit. As the Chief Justice says of the divisional proposal for the Ninth Circuit Court of Appeals, it is “better than merely a compromise between those who

¹⁵California produces approximately 4,000 appeals annually, or 60 percent of the circuit’s appellate work. Thirteen of the authorized judgeships are held (or may be held if present nominees are appointed) by California residents.

have advocated a split of the circuit and those who argue for the status quo. It appears to me to address head-on most of the significant concerns raised about that court and would do so with minimal to no disruption in the circuit's administrative structure."

I therefore urge your favorable action on S. 253.

EXHIBIT A

SUPREME COURT OF THE UNITED STATES,
Washington, DC, October 22, 1998.

DEAR BYRON,

Thank you for providing me with a copy of the October 7, 1998 Draft Report of the Commission on Structural Alternatives for the Federal Courts of Appeals. I write to commend you and the Commission for your efforts. The thorough analysis of historical and contemporary information about the federal circuit system in the United States is all the more impressive in that it was accomplished in only nine months since the appointment of the Commission. And while I believe that the entire draft report contains useful guidance for the circuit system as a whole, I write in particular support of the proposal to organize the Court of Appeals for the Ninth Circuit into three regionally based adjudicative divisions.

I share many of the concerns expressed by my colleagues, on the Court who previously corresponded with the Commission and advocated that some change in the structure of the Court of Appeals for the Ninth Circuit is needed. The challenges to stay abreast of the law within a circuit with 28 authorized judges—already a near impossibility—will continue to grow as the circuit's caseload increases. Similarly, the en banc review process in a court so large is problematic. As to complaints that the Ninth Circuit is slow to dispose of its cases, I would add to the anecdotal evidence in that regard by referring to the fact that our Court will hear oral argument in, our November session in *Hughes Aircraft Company v. Jacobson, et al.*, a case that was argued and submitted to the Court of Appeals for the Ninth Circuit on November 4, 1993. The circuit opinion deciding the case, however, was not filed until January 23, 1997, and a petition for rehearing was not denied until October 23, 1997, nearly four years after oral argument. The effect of such delays on public confidence in our system of justice is obvious.

The proposal to create three divisions in the Court of Appeals for the Ninth Circuit with a Circuit Division for conflict correction strikes me as better than merely a compromise between those who have advocated a split of the circuit and those who argue for the status quo. It appears to me to address head-on most of the significant concerns raised about that court and would do so with minimal to no disruption in the circuit's administrative structure. As to the caseload problem facing not only the Ninth Circuit, but all, federal courts, I agree with the Commission's statement that significant changes need to be made in the jurisdiction of the federal courts. I also agree with the separate statement filed by Judge Merritt and you that changes in diversity jurisdiction are needed. In particular, I agree with the proposed elimination of in-state plaintiffs' diversity jurisdiction.

Congratulations again on a well-written report.

Sincerely,

WILLIAM REHNQUIST.

SUPREME COURT OF THE UNITED STATES,
Washington, DC, June 23, 1998.

Justice BYRON R. WHITE,
Chair, Commission on Structured Alternatives for the Federal Courts of Appeals,
Thurgood Marshall Building, Washington, DC.

DEAR BYRON: You have written to invite me to offer any thoughts or suggestions I might have regarding the Commission's work. My comments will doubtlessly echo those of others who have addressed the Commission, but I am pleased to offer some general observations.

Our nation has long been proud of its federal court system. The federal courts have traditionally been perceived as of the highest quality. The ability of the federal circuits to continue to perform work of the highest caliber, however, has recently been placed under the strain of a large number of unfilled vacancies. I serve as the Circuit Justice for the Ninth Circuit and, as you know, there are today seven unfilled vacancies on the Ninth Circuit Court of Appeals, and ten on its District Courts. These vacancies obviously have a negative effect on the ability of the Ninth

Circuit to carry out its work in a timely manner. The Chief Justice has already spoken to this issue, and I share his concerns.

The pressures on the federal courts have been escalating rapidly because Congress has been enacting broad provisions under federal law criminalizing conduct historically regulated under state and local police powers. The result has been a significant expansion of federal court jurisdiction. All of this makes the work of your Commission very important indeed.

With respect to the Ninth Circuit in particular, in my view the circuit is simply too large. It embraces nearly one-fifth of our nation's population. It handles roughly one out of every five appeals in the federal system. With 28 appellate judges, it is nearly twice the size of the next largest circuit. Because of its cumbersome size, the Ninth Circuit alone among the federal circuits is currently forced to use en banc panels comprised of eleven selected judges. See 92 Stat. 1663, Rule 35-3 (CA9 1994).

Such panels, representing less than one-half of the authorized number of judges, cannot serve the purposes of en banc hearings as effectively as do the en banc panels consisting of all active judges that are used in the other circuits. It is important to the federal system as a whole that the Courts of Appeals utilize en banc review to correct panel errors within the circuit that are likely to otherwise come before the Supreme Court. It is also important that every circuit review en banc its rules that are in conflict with other circuits in order to examine the wisdom of perpetuating the conflict. The Ninth Circuit resolved only eight out of 4,841 cases en banc in the twelve months ending September 30, 1997. During that same period, this court granted hearing on 25 cases from CA9, and summarily decided 20 more. These numbers suggest that the present system in CA9 is not meeting the goals of en banc review.

In my view, some division or restructuring of the Ninth Circuit seems appropriate and desirable. I have no particular suggestion regarding how that division should be drawn, but I hope that the Commission will take a fresh and independent look at the alternatives. It is human nature that no circuit is readily amenable to changes in boundary or personnel. We are always most comfortable with what we know, and it is unrealistic to expect much sentiment for change from within any circuit. The main difficulty I expect that the Commission may encounter when weighing the alternatives is the size in population of California, which, even if all alone, would continue to be the largest of the federal circuits. In some proposals I have seen it suggested that Arizona be placed with non-contiguous areas in the Pacific Northwest. I find that proposal troublesome. Perhaps Arizona could be placed in the Tenth Circuit, although I am aware that judges in the Tenth Circuit are opposed to such a change. Or perhaps California itself could be divided and placed within two different circuits.

There are also other proposals for setting up separate divisions within CA9, or for setting up some district court appellate panels to handle most of the error correction part of the appellate review process. These approaches are untried but should be weighed along with the other options.

If you believe I can be of any more specific assistance, I will be pleased to respond. You have an unenviable task.

Sincerely,

SANDRA DAY O'CONNOR.

SUPREME COURT OF THE UNITED STATES,
Washington, DC, August 24, 1998.

Hon. BYRON R. WHITE,
Chairman, Commission on Structural Alternatives for the Federal Courts of Appeals,
Thurgood Marshall Building, Washington, DC.

DEAR BYRON: Please forgive me for being so slow in responding to your invitation to comment on the Ninth Circuit issue. I would like to make just one point. In my opinion the arguments in favor of dividing the circuit into either two or three smaller circuits overwhelmingly outweigh the single serious objection to such a change. That objection, of course, is the concern about placing some California districts in one circuit and the remainder in another.

I realize that members of the California Bar regard this possibility as unacceptable, but I have long believed that their concerns are seriously exaggerated. It is, of course, true that occasionally there will be conflicting interpretations of both State and Federal issues that will require resolution either by use of the certification process for the former, or by our Court's review of the latter, but such temporary uncertainty is not new to the law. It would differ only in degree from the

comparable uncertainty that attends conflicting rulings on state court questions in different California jurisdictions, conflicting rulings on federal questions in different federal circuits today. In my considered opinion, the importance of this concern pales in comparison with the disadvantages associated with a circuit that is so large that even the most conscientious judge probably cannot keep abreast of her own court's output.

Having some notion of the time and effort that you have devoted to this assignment, I want to express my special thanks for what you have done and are continuing to do. It is characteristic of someone who never pauses to ask what his country can do for him because he has answered the more important question so often and so consistently.

Sincerely,

JUSTICE JOHN PAUL STEVENS.

—————
 SUPREME COURT OF THE UNITED STATES,
Washington, DC, August 21, 1998.

The Honorable BYRON R. WHITE,
*Chairman, Commission on Structural Alternatives for the Federal Courts of Appeals,
 Thurgood Marshall Building, Washington, DC.*

DEAR BYRON: I have refrained from conveying to you my views concerning realignment of the Ninth Circuit, since I think it unlikely that I can contribute any fact or consideration that you and the distinguished members of your commission are not already aware of. However, after reading the thoughtful letter of Justice Kennedy—who does have special expertise on the subject—I find myself so thoroughly in agreement with his analysis that I must send along a seconding statement.

I will add to what he has said only two points: First, the function of en banc hearings—which the current size of the Circuit discourages, and the incomplete and random nature of its en banc panel deprives of predictability—is not only to eliminate intra-circuit conflicts, but also to correct and deter panel opinions that are pretty clearly wrong (which occasionally occur, of course, in any Circuit). The disproportionate segment of this Court's discretionary docket that is consistently devoted to reviewing Ninth Circuit judgments, and to reversing them by lop-sided margins, suggests that this error-reduction function is not being performed effectively. The following figures are compiled from the statistics maintained by the Clerk's Office:

October Term	Total SCt Cases Argued ¹	Argued From CA9	Reversed or Vacated	Unanimous	Two or Fewer Dissents	Unargued Summary Reversals
1997	94	17	14	10	13	0
1996	88	21	20	12	12	6
1995	90	12	10	4	10	2
1994	94	17	12	5	10	1
1993	95	14	12	9	10	0
1992	113	22	15	6	11	1

¹ Excludes cases where writ of certiorari was dismissed as improvidently granted.

My second point is that, in my judgment, this Court will have no difficulty sustaining whatever additional caseload will be created by the addition of a Circuit, and by the necessity of being especially prompt in resolving conflicts between the two Circuits containing California, (The latter necessity could be reduced by requiring an en banc heading when either of the two Circuits wishes to depart from a holding of the other.) Indeed, it may well be that the new Circuits' greater ability to perform what I have called the error-reduction function will result in a net decrease in our business from that part of the country. But if an increase does occur, our docket has been such in recent years that I am confident we can manage it. For all the very good reasons described by Justice Kennedy, the additional effort will be well spent.

I wish you and your colleagues success in your difficult task.

Sincerely,

JUSTICE ANTONIN SCALIA.

SUPREME COURT OF THE UNITED STATES,
Washington, DC, September 9, 1998.

The Honorable BYRON R. WHITE,
Chairman, Commission on Structural Alternatives for the Federal Courts of Appeals,
Washington, DC.

DEAR BYRON: Chief Judge Hug was kind enough to send me a copy of the letter to you of August 29, written on behalf of past, present and yet-to-be Chief Judges of the Ninth Circuit, which challenges my assertion that a disproportionate number of cases from the Ninth Circuit are regularly taken by this Court for review, and a disproportionate number reversed.

The letter contends—without citing any data—that the percentage of this Court’s discretionary docket devoted to reviewing CA9 judgments (18 percent over the past six terms combined) “corresponds very closely to the percentage of cases decided in the Ninth Circuit, as compared to the total in the country.” Letter at 4. As far as I can discern, this latter percentage represents a fraction, the numerator of which is all cases decided on the merits in CA9, and the denominator of which is all cases decided on the merits in all Federal Circuits—a figure that averages 17.2 percent over the five terms ending with OT 1996 (the figures for OT 1997 are not yet available). It is meaningless, however, to compare that percentage (CA9’s share of the United States Circuit Court docket) with CA9’s share of this Court’s *entire* docket—which includes, of course, many cases taken from *state* courts. A proper evaluation would compare CA9’s share of Circuit Court business with CA9’s share of this Court’s docket *devoted to Circuit Court cases*. That comparison shows that during the five-year period in which CA9 disposed of an average of 17.2 percent of all Circuit business, CA9’s cases occupied an average of 25.3 percent of this Court’s Circuit docket—a share that is larger by almost half.

October Term	CA9’s Share of US Circuit Court Docket ¹ (percent)	CA9’s Share of SCt Docket Devoted to Reviewing US Circuit Courts ² (percent)
1997	Not available	21.5
1996	18.7	32.3
1995	16.2	20.3
1994	15.9	26.2
1993	17.1	23.7
1992	18.1	24.2

¹These numbers are compiled from the annual reports of the Director of the Administrative Office of the United States Courts. The percentages refer to the Ninth Circuit’s share of the total number of appeals decided on the merits during the twelve-month period ending September 30 that corresponds roughly to the indicated Supreme Court Term. The Director’s statistics do not include cases from the Federal and Armed Forces Circuits.

²To facilitate comparisons, these numbers exclude cases from the Federal and Armed Forces Circuits.

The Chief Judges also assert—again, without citing any data—that the Ninth Circuit’s record during OT 1997 of being reversed 82.4 percent of the time falls within the “historical norm for the Court’s reversals nationwide.” *Id.* During the last six terms, however, this Court’s nationwide reversal rate has never exceeded 71.1 percent. For every term within that period, CA9’s reversal rate has appreciably—sometimes drastically—exceeded the national average. And the gap is even more pronounced when one compares CA9’s reversal rate, not with the combined reversal rate for all courts, but with the more relevant figure of the combined reversal rate for all courts *other than* CA9: Averaging the figures for the last six terms, CA9’s reversal rate is 81 percent, and the average for all other courts 57 percent.

October Term	CA9’s Reversal Rate (percent)	Nationwide Reversal Rate Including CA9 (percent)	Nationwide Reversal Rate Excluding CA9 (percent)
1997	82.3	58.9	53.3
1996	95.2	71.1	62.7
1995	83.3	61.0	56.9
1994	70.6	66.3	65.2
1993	85.7	52.9	42.5
1992	68.2	64.2	63.1

There must be added to the inordinate frequency of reversal, of course, the likewise inordinate frequency with which reversal has been by a unanimous or near-unanimous Supreme Court, as described in my earlier letter.

There is, in short, no doubt that the Ninth Circuit has a singularly (and, I had thought, notoriously) poor record on appeal. That this is unknown to its Chief Judges may be yet another sign of an unmanageably oversized Circuit.

Sincerely,

JUSTICE ANTONIN SCALIA.

SUPREME COURT OF THE UNITED STATES,
Washington, DC, August 17, 1998.

The Honorable BYRON R. WHITE,
Chairman, Commission on Structural Alternatives for the Federal Courts of Appeals,
Washington, DC.

DEAR BYRON: In response to your invitation, I am pleased to comment on the question of the geographic boundaries of the United States Court of Appeals for the Ninth Circuit. Based on my observations and perspective as a former judge of that court and as a member of this Court, I submit the reasons for dividing the Ninth Judicial Circuit outweigh the reasons for retaining it as now constituted.

BACKGROUND

In 1975, the Court of Appeals for the Ninth Circuit, anticipating an increase in its thirteen authorized judgeships, began informal discussions to decide whether to recommend division of the Circuit. There was a difference of opinion; but a majority of the judges, myself among them, concluded the Circuit should maintain its geographic boundaries at least until it could operate for a time with a full complement of judges. We wanted to experiment, to determine the advantages and disadvantages of a large Court of Appeals. So the court did not recommend changes in its geographic jurisdiction. A 1978 statute, Pub.L. 95-486 (92 Stat. 1633), authorized ten new judges for the court. In response, and as permitted by the new statute, the court implemented a limited en banc panel composed of fewer than all the court's judges. Some of us wanted nine judges on the panel, others thirteen. The resulting compromise was eleven.

In part, I think, because some of us did recognize that the large circuit was an experiment, we devoted tremendous time and energy to make it a success. We hoped the opportunity to decide a large number of cases might yield principles of decision which would bring more clarity and cohesion to the law than if the Circuit were smaller. We thought the bar would benefit if nine states were to have a single resolution of any common issue. More ambitious suggestions, such as assigning judges to discrete subject areas for a period of time, were thought problematic and were not pursued.

As the Federal Courts Study Committee observed, the Courts of Appeals have been faced for more than a decade with a "crisis of volume." *Report of the Federal Courts Study Committee* 109 (April 2, 1990). Like all of its sister circuits, the Ninth Circuit confronted the problem by innovations and changes, not the least important of which was the successful use of Bankruptcy Appellate Panels. The Committee was also correct to note, however, that increases in productivity "seem to be approaching their limit." *Ibid.*

Few members of the public, indeed all too few members of the Bar, appreciate the scholarship and dedication of the individual judges on our courts of appeals. I retain the greatest admiration and respect for all of my former colleagues. Since I have left the Court of Appeals, their workload has again increased in dramatic proportions. It is remarkable that they have been able to manage the case load, though it seems to me unfair to ask them to continue to process such a high number of cases per judge. This heavy case load makes it all the more urgent to ensure that the size of the circuit is not an additional and systemic problem.

REASONS FOR CONCERN ABOUT PRESENT SIZE

I have not had the opportunity to study all the submissions made to your Commission, but my present view is that the large Circuit has yielded no discernible advantages over smaller ones. From my discussions with the judges of the court and my review of some of the material submitted in support of retaining the Circuit with its present boundaries, what is striking is the relative absence of persuasive, specific justifications for retaining its vast size. A court which seeks to retain its authority to bind nearly one fifth of the people of the United States by decisions of its three-

judge panels, many of which include visiting Circuit or District Judges, must meet a heavy burden of persuasion. In my view this burden has not been met. The size of the Ninth Circuit has a number of disadvantages, a few of which I shall mention.

First, a laudable desire to respect the views and prerogatives of other judges on the court tends, I think, to encourage judges to avoid general principles so that other members of the court can write on the same subject. The result is a certain lack of clarity and cohesion in the case law of the Circuit.

Second, there is an unacceptable risk of intra-circuit conflicts, or, at the least, unnecessary ambiguities. A large number of dispositions tends to make it difficult for judges to keep abreast of the jurisprudence of the court. Soon after the 10 judges were added in 1978, not to mention the five additional judges in 1984, see Pub.L. 98-353 (98 Stat. 346), I found I could not read all of the published dispositions of my own court. This in turn causes inadvertent intra-circuit conflicts. Further, even when judges in good faith attempt to follow *stare decisis*, a certain potential for error exists. The risk and uncertainty increase exponentially with the number of cases decided and the number of judges deciding those cases. Thus, if Circuit A is three times the size of Circuit B, one would expect the probability of an intra-circuit conflict in the former to be far more than three times as great as in the latter. The number of en banc decisions should be correspondingly higher, yet the Ninth Circuit, which is the largest circuit by far, does not use its en banc process more often than other circuits. In some years the Ninth Circuit has had fewer en banc hearings than other circuits even in terms of absolute numbers. True, en banc hearings are such a small percentage of the total number of dispositions system-wide that no clear comparative pattern of utilization emerges, even on a ten-year study. It is quite apparent, however, that the Ninth Circuit does not come close to the number of en banc hearings necessary to resolve intra-circuit conflicts, much less to address questions "of exceptional importance." Fed. R. App. Proc. 35(a). Uncertainty and lack of cohesion in the law are antithetical to the ends of our judicial system.

A decision in an en banc case, as a general rule, requires more time, more deliberation, and more writing than go into the ordinary three-judge panel opinion. The result, however, is beneficial. Products of en banc consideration, majority opinions and separate writings, reflect extra efforts invested in the process and represent appellate judging in one of its most instructive forms. En banc opinions assist other courts, including the Supreme Court, in resolving difficult legal issues. And where circuit precedent has been "overtaken by the tide" of authority from other Courts of Appeals, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F. 2d 871, 876 (CADC 1992) (en banc), rehearing en banc allows a circuit the opportunity to assess the soundness of its earlier views and, if need be, to put its house in order before the Supreme Court must do so. If the Ninth Circuit were divided, then the necessity for more en banc hearings, and the harm from the failure to use the device often enough, would be reduced.

Third, even if the Court of Appeals does have a consistent internal law in a number of subject areas, its size prevents the multiple panel opinions that sometimes produce inter-circuit conflicts. In other words, if the Ninth Circuit were to be divided into two or more circuits, then we would be more likely to have the benefit of more than one panel opinion on a given issue and would have the advantage of the views of more judges. While intra-circuit conflicts or ambiguities and the instability they create are harmful to the system, inter-circuit conflicts, where there is reasoned and deliberate disagreement, are instructive to the system as a whole and in particular to the Supreme Court.

Fourth, although I deplore the tendency to increase the number of Article III judges and to expand the jurisdiction of the federal courts, past experience would seem to show that, even if federal jurisdiction is not increased, a certain number of additional judges will be needed in the future. The Commission's report will be influential in considering the size of the Circuit not just at present but for perhaps two decades. The Commission, therefore, may wish to consider what recommendation it would make if the Ninth Circuit were to have 40 or more judges. The likelihood of the addition of some judges is a further reason to divide the Circuit now, so that the problems I note are not exacerbated.

Fifth, the recruitment of judges is a relevant consideration. A talented lawyer or jurist who contemplates the prospect of service on a court which should be designed to offer the benefits and rewards of a collegial relationship might well hesitate before agreeing to serve on a court where some 3000 different combinations of judges will make up the panels, and where he or she will be the junior judge on a court of 28 active judges, in addition to valued senior members.

This brings me to a sixth observation about the Ninth Circuit even in its present size. Our constitutional tradition has been one of broad community participation in the judicial selection process. When a court is seen as an integral part of a commu-

nity, then persons and groups from the community as a whole, and not just the bar, can insist that the political branches consider nominees who are distinguished by their fairness, detachment, and impartiality. The sense of shared identity and responsibility dissipates, however, when a circuit is so large that the makeup of a panel is a luck-of-the-draw proposition, with a strong likelihood of drawing judges having no previous attachment to the affected community. In these circumstances there is less incentive for groups other than political ones to become involved in the judicial appointment process. If the selection and nomination process is accessible and meaningful only to those with partisan interests, there will be a tendency to give less consideration to those qualities of judicial temperament and demeanor that are essential to a fine judiciary. I am concerned, then, that in the future the large size of the Circuit will have an adverse effect on the judicial selection process. Justice must be detached but should not be remote; judges must be impartial but ought not to be faceless. When an appellate court becomes as large as the Ninth Circuit, there is a greater risk that unfortunate influences—will predominate in the appointment process. Special interests work best when simple lines of responsibility are blurred.

This is related to my seventh concern, which is that the present size of the Ninth Circuit is not sensitive to the vital necessity of preserving the values of federalism. As noted by the Judicial Conference's most recent study of the federal courts, those values are reflected in our long tradition of appointing judges to serve a specific region. See Judicial Conference of the United States, *Long Range Plait for the Federal Courts* 43 (December 1995). For this reason, and because of the undesirability of any of the contemplated structural alternatives for the federal appellate system, see *Report of the Federal Courts Study Committee* 116–124 (April 2, 1990), our present system should be preserved and strengthened. The legal communities and other constituencies in the separate states ought to have a real interest in the judges of their respective circuits, and the judges, conversely, ought to have historic and professional ties to the regions they serve. The experiment accepted in 1978 represents a notable departure from the design which has served us so well. What began as an experiment should not become the status quo when it has not yielded real success. In my view the judicial system would be better served if the states of the present Ninth Circuit were to comprise more circuits than one.

POSSIBLE WAYS TO DIVIDE THE CIRCUIT

It is one thing to identify a problem, another to solve it. How to split the Ninth Circuit is a difficult, sensitive question. In an attempt to offer some assistance, I make these brief observations.

The States of Alaska, Washington, Oregon, Idaho and Montana have a community of interest and a geography that justify assigning them to their own circuit. There is no reason to hold these Northwest states hostage to the difficulty of determining a proper circuit for California, Arizona, Hawaii, and Nevada. If the solution for the latter states is not at hand, that could be studied and debated while the Northwest states concentrate their energies on at once forming a cohesive and effective circuit.

The problem with the remaining states, of course, is the vast population of the State of California. California's population today is the rough equivalent of the entire population of the United States at the time of the Civil War. The problem, however, suggests its own solution. Serious consideration should be given to assigning California to two different circuits. The Districts of Northern and Eastern California could be in one circuit, with, say, Hawaii and Nevada. The Districts of Central and Southern California could form another, with Arizona, Guam, and Saipan. These are just illustrative possibilities, for I have not studied projected case loads or population figures.

The described alignment would give Senators from California a special interest in two circuits, not just one. The attendant advantages of manageable size and sensible administration, however, seem to me to overcome that objection, if indeed it be one. If California were not divided, moreover, the number of judges required for California alone would constitute a circuit so large that the deficiencies already present in the Ninth Circuit might persist.

If California were assigned to two circuits, it would, of course, be imperative to ensure prompt resolution of any conflict between these circuits with respect to issues affecting California. I have seen no proposal for an inter-circuit en banc procedure that makes sense or is fair to the bar and litigants of the State. To take just one example, a bill in the House of Representatives in the 103d Congress provided that, in the event of a conflict between the two circuits, the "California" judges from each Circuit would constitute in inter-circuit en banc. See H.R. 3055, 103d Cong. § 3 (1993). This is contrary to our tradition and to sound judicial principles. After

being appointed some judges find it necessary or convenient either to move to California or to move away from it, depending on their individual situations. Does mere residence while serving on the court determine who is a "California" judge? In addition, an inter-circuit en banc should bind both circuits, but it would be inappropriate and destructive of collegiality to require "non-California" judges to be bound by their "California" colleagues on important questions of law. Yet this would be the necessary result, for even if the cases prompting an inter-circuit en banc arose from California, the en banc decision would bind both circuits in cases arising from all other states.

At one time, I thought the absence of a fair and workable proposal for an inter-circuit en banc mechanism was an all but insurmountable objection to allowing two circuits to operate within a single state. I have begun to think this is not an obstacle. The judicial system could function well without an inter-circuit en banc, leaving to the Supreme Court the responsibility to resolve any inconsistent decisions affecting the single state. After all, the government of the United States functions well despite the possibility of having to litigate a question in multiple circuits and the concomitant possibility of conflicting decisions in those courts. Furthermore, duplicative litigation and potential conflict between two circuits in the same state would hardly be unfamiliar to California, which like every state already faces the possibility of litigating the same question in both state and federal court. Where such litigation results in a conflict between a state's highest court and a federal court in that state on a question of federal law, our Court resolves the conflict. *See, e.g., South Dakota v. Yankton Sioux Tribe*, ___ U.S. ___, 118 S.Ct. 789 (1998) (conflict between the Supreme Court of South Dakota and the Eighth Circuit). No one has suggested that such conflicts are the result of some serious dysfunction of judicial structures. If duplicative litigation, in practice, should result in an excessive burden on the State of California, the statutes and rules governing transfer and consolidation of cases could no doubt be adapted to mitigate the problem. Thus, although not insensitive to the potential burden to California of having to defend its laws in two different circuits, I believe the advantages attendant to California in having concise, orderly, predictable case law in two circuits would outweigh the temporary problems of a few conflicting decisions, decisions which can have prompt resolution in this Court. The advantages to all of the other states of the present Ninth Circuit have been enumerated.

CONCLUSION

My present view is that if the Ninth Circuit were divided, the new alignment could better serve the orderly and efficient administration of justice. My further conclusion is that the State of California could be assigned to two different circuits and the Supreme Court could act with the necessary speed and determination to resolve any conflicts that create difficulty or uncertainty in administering and enforcing the laws and policies of that State.

I extend to you and your Commission my greetings and special thanks for undertaking this study, which will be of vital importance to the federal courts and to our judges, who remain devoted to preserving the integrity of the justice system.

Sincerely,

JUSTICE ANTHONY M. KENNEDY.

SUPREME COURT OF THE UNITED STATES,
Washington, DC, September 11, 1998.

The Honorable BYRON R. WHITE,
Chairman, Commission on Structural Alternatives for the Federal Courts of Appeals,
Thurgood Marshall Building, Washington, DC.

DEAR BYRON,

You have asked three questions: What major problems do the Courts of Appeals face? What measures would I recommend to resolve them? What works well in the federal appellate system? I shall address those questions in order, drawing upon my former experience (1990–1994) as Chief Judge of the First Circuit—our smallest Circuit Court of Appeals. I have not worked in the Ninth Circuit, and I shall not express a view about whether that Circuit has special problems that warrant its division. I suspect, however, that, at least to some extent, the Ninth Circuit's experience reflects the more general problems that every circuit faces.

My conclusion is that your Commission should, among other things, examine the various forms of restructuring the appellate system suggested in Chapter 10 of the Long Range Plan for the Federal Courts. The States, when faced with serious problems of congestion, have had to consider restructuring—including the use of addi-

tional “tiers” of review. And the federal courts eventually may have to do the same. In the meantime, we should continue our efforts to maintain efficiency in the face of increasing caseload—through, for example, “tracking” and “alternative dispute resolution.” Your Commission might also explore ways of preventing unnecessary caseload increases, say through institutionalizing efforts to inform Congress about the practical impacts of proposed legislation upon the federal courts (which, of course, affects the practical implementation, and hence the ultimate effect, of any new statute).

1. The major problem, in my view, is one of congestion. That congestion grows out of the fact that growth in appellate caseload cannot, or should not, simply be matched through a corresponding increase in the size of the federal appellate system.

On the one hand, the number of federal appellate cases now approximates 50,000 per year, having multiplied by a factor of ten to fifteen over the past half century. The caseload of the First Circuit, a court of six active, and five senior, judges, for example, now approximates 1500, or, say, 250 cases per active judge per year. (The First Circuit had about 1200 cases per year when I was a member of that court.) Of course, many cases disappear from a docket through settlement or some obvious procedural failing. Others contain only a simple fact-related issue that may require little of a judge’s time for resolution. Senior judges provide considerable assistance. Nonetheless, in my experience, about one-third or so of the total docket contained cases raising serious legal issues—those that would each call for a significant amount of a judge’s time leading to a full judicial opinion. The result (if I extrapolate from the 1200-case-per-year First Circuit docket of a few years ago and assume considerable help from senior judges) is that each active judge might sit on three-judge panels considering, say, 150 to 160 such cases per year and might write, say, fifty to sixty full opinions. Given the various other demands on a judge’s time, including brief reading, hearing argument, and considering simpler cases and motions, this means that a judge must write a full opinion in two to four days on *average*. Obviously, the growing caseload means that, at some point, time available on average is inadequate.

On the other hand, creating more judicial time by increasing the size of the federal appellate system itself creates serious problems. It makes conflicts of various sorts (including “intangible” conflicts) more likely. It makes it ever more difficult for the appellate system to speak with an authoritative legal voice. It means too many equally authoritative circuit court opinions for the bar or the academy readily to absorb (and to criticize). It ever more significantly favors those who have the resources to “keep up” with an evolving state of the law. I do not know the “right” number of federal appellate judges, but I do believe that, for reasons such as these, the appellate system is not infinitely expandable.

2. To ameliorate this kind of problem, one must either cut back the intake or improve the system’s efficiency. Cutting back intake is difficult because of the risk that closing federal court doors will significantly disadvantage one, or another, class of litigants. In theory, one might work out a system that would assure each such class adequate legal remedies elsewhere and without, for example, imposing new burdens upon state courts. But the practical difficulties involved in providing the necessary assurances are great. It may prove easier to prevent an unnecessary increase in federal caseload through careful attention to the likely practical impact of proposed new federal legislation. But that will require more than federal judges simply pointing out to Congress that a proposed new federal law will mean more federal cases. It requires analysis of how the congestive impact of a proposal might inhibit achieving the proposal’s own objectives (or those of other, existing laws) as well as suggestions as to how the proposal’s specific objectives can better be achieved in less congestive ways. Although judges understand the practical impact of additional caseload, I believe that the Department of Justice is institutionally better equipped to factor such-matters into the drafting of particular bills, to bring them to Congress’s attention, and to shape the laws that emerge from the legislative process accordingly. Those “separation of powers” considerations that make it inappropriate for the Department of Justice to administer the federal judicial system do not prevent the Department and the Judiciary from working together, and with Congress, in respect to this kind of matter. And I believe your Commission might usefully explore better ways of their doing so.

Improving the system’s efficiency (enabling the system to process more cases without adding a commensurate number of new judges) involves a variety of approaches that are not mutually exclusive. The appellate courts are currently trying many of them. They include greater reliance upon alternative dispute resolution (including mediation at the appellate level), case management systems, and

certain incentive-based systems. Most circuits, including the First and the Ninth, have developed informal “tracking” systems, which rely upon staff attorneys to prepare simple matters for decisions that are embodied in something less than full opinions. The First Circuit’s system worked well. Studies of the Ninth Circuit’s system also have reached favorable conclusions. Unless the system is to be changed radically, this kind of staff resource should receive necessary funding, and you may wish to say so.

I recognize that congestion, at some point, may require radical change. In my view, the kind of structural change that would be easiest for the federal system to absorb would amount to additional “tiering.” States have typically created additional tiers to deal with congestion. In the Nineteenth Century, Congress established the federal courts of appeals in part for similar reasons. And, if one counts the federal Supreme Court, many state systems involve four tiers.

I do not advocate the creation of a new federal “fourth tier” between the present courts of appeals and the Supreme Court. I do believe, however, that it is worth considering the possibility of other forms of “tiering.” For example, one might add between district and appellate courts three-judge panels, made up in part of district judges, to consider fact-intensive “error correction” appeals, say, with further appellate review discretionary. Appointment of additional district judges to such panels would avoid some (though not all) of the “more judges” problems I discussed earlier. To repeat, I am saying only that this, or related, proposals maybe worth exploration in some detail.

Regardless, I believe that the congestion problem is serious, that it will get worse, that its solution will involve a choice of lesser evils, and that an eventual solution that involves some form of tiering may prove more practical and less problematic than various other restructuring suggestions that have been made. For that reason, I suggest that the Commission further explore the structural suggestions made in Chapter Ten of the Long Range Plan, and in particular those related to tiers.

3. You conclude by asking what “is working well in the federal appellate courts.” I am not an alarmist. The appellate courts normally work well—particularly when federal appellate judges focus upon, and decide, particular significant questions of law. The federal judge is meant to be independent and conscientious, devoting the time and attention that a particular litigant’s individual legal problem requires for proper decision, irrespective of the litigant’s wealth, position, or power. That, in my experience, is roughly how the federal appellate courts have worked, do work, and will continue to work. Still, the need for a guarantee about the future may help explain why I am glad your Commission has begun to tackle the congestion problem.

Yours sincerely,

STEPHEN BREYER.

Senator GRASSLEY. Thank you.

Senator Kleinfeld. Or, I mean, Judge Kleinfeld.

STATEMENT OF HON. ANDREW J. KLEINFELD

Judge KLEINFELD. I am only a judge. I do not get a vote. [Laughter.]

Thank you, Chairman Grassley, Senator Feinstein, members of the committee. I appreciate the honor of being allowed to testify before you. I testify on behalf of myself in order to give you the benefit of my experience as a judge on the U.S. Court of Appeals for the Ninth Circuit.

My feeling has been, for a long time, that the court should be split. The fifth circuit was split into the fifth and eleventh circuits. The eighth circuit was split into the eighth and the tenth circuits. Those splits worked out fine. There were no great complexities. It was a simple way of dealing with the problem of growth of the circuits.

However, I also think that the Commission has done a very fine job, and nobody in a political system gets everything they want. Why, even if I were a Senator, I would only have one vote, and I

am not. And I think the Commission is a very fine solution to the problem of the ninth circuit as a decisional body.

The Commission has said that, as a decisional body, the ninth circuit should be divided. Although as an administrative body, it should not be divided. The Commission has done a fine job, and I urge you to adopt it.

The problem that you are dealing with is one of the oldest problems that has been a political issue in the United States. When the Founding Fathers were trying to put together the Constitution, they had to deal with the problem that some states were a lot bigger than other states. Then the chief problem was Virginia. California did not exist. But it was the same kind of problem. Virginia was much bigger, much more powerful, controlled much more wealth, as well as having much more population, than other States. Somehow they had to organize the Republic so that Virginia would not so dominate the other States as to prevent them from expressing their own autonomy, but that there would be a Federal union in which Virginia would be adequately represented. They did it. The problems never go away. The problems of the ninth circuit continues.

This problem of the ninth circuit has continued for quite a while. I read in the Commission report that the first proposals to split the ninth circuit were in the 1930's. It made me think of the case of Jarndis v. Jarndis in Charles Dickens' novel "Bleak House," where people were born into the case and died out of the case.

I have been born into this. I am not even all that young a judge, though I like to think of myself that way, but I was not born until 1945, and splitting the ninth circuit was already an old chestnut by then. And unless you take action, I am going to die out of it, even though I am a pretty young judge, and I think I will be serving for quite a while yet. There is an enormous cost in money and in time of this process, and I do not think the process can be ended until you adopt the Commission report, or something like it, to divide the adjudicative responsibilities of the ninth circuit.

Part of the cost is money. I have been able to chat with the panel that I am on this morning while I am here because all three of us happen to be here. You have a lot of judges who have been flying back and forth. I flew on a free ticket that I got with mileage because I just hate to spend Government money when I am not making decisions and cases, but you cannot always do that, not everybody does it.

The money cost is nothing compared to the time cost. The time we have spent since I have been on the ninth circuit, in my 8 years, we have had so many court meetings devoted to the issue of a split, the staff of the ninth circuit has been doing so much work on whether we should split. This has been going on for decades, remember. We have been generating staff reports with statistics and memoranda advocating issues on why we should not split. People go back and forth to Washington, DC, and I am sure that with your political experience, you recognize that bar resolutions, and newspaper editorials and magazine articles do not happen by themselves. They all take judicial time, too. At the least, it takes time for the judges to be interviewed. Frequently, it takes more than that.

Once, when I was on the Board of Governors of our State bar association about 20 years ago, the chief judge of our district, I believe at the behest of the chief judge of the circuit, came to us for a resolution. He wanted a resolution against splitting the ninth circuit. We retired into executive session, agreed that none of us much cared whether the ninth circuit was split, but we all cared a lot about keeping the chief judge with the organized bar, so we adopted the resolution opposing the split.

Now, that involved a phone call, maybe a few phone calls, it involved the chief judge of the district court spending his morning with us at the Board of Governors of the bar association. There is a lot of time that goes into this. It ought to be spent deciding cases, but it will not be until the split issue is resolved, and it is not going to be resolved until you split the decisional function of the ninth circuit. It will just be a "Bleak House" that goes on and on and people are born into and die out of.

The reason that the issue arises, I believe is exactly what Judge Rymer has said. A decisional unit as large as ours cannot function in the traditional effective way that a court of appeals does. Now, that has nothing to do, and it cannot be solved by, the quality of the judges. The quality of the judges and the diligence of the judges on my court overwhelms me. I have never dealt with any group of people as intelligent and as diligent to serve the public interest, as devoted to the law, as the judges of my court. The quality is simply overwhelming.

But the job cannot be done by this large a unit. There are no economies of scale to the appellate process. We do not manufacture goods, we do not run a railroad. It is a job that is done with much greater facility by a smaller than a larger unit. The reason for that is the necessity of communication within the unit.

The kinds of quality differences or quality problems that the size of the unit causes were very well explained to me by a friend recently. I was at the local bar picnic, and the assistant general counsel of the university and I—we're friends—and we were chatting, and he was complaining that he cannot guarantee his clients even qualified immunity because he cannot tell what the law is.

He says that we are frequently inconsistent with the trend of the law in the rest of the country and what he knows the Supreme Court is going to do. So he has to tell his clients to follow ninth circuit law because the district court will be bound by it, but he also has to tell them that the result may depend on the panel and that if the ninth circuit grants cert, it will reverse. As a result, he cannot confidently bring about compliance with the law by his client, whose only interest is compliance so that they can avoid litigation and judgments against them.

The two reasons are simple, the reasons why we cannot function as a decisional unit, considering how large we are. One is that we cannot read or effectively communicate orally to each other the contents of our decisions. The problem is not getting information on our desk through some staff statistical report or tip that a decision may affect our decision, it is getting it from our desks into our heads. There are too many decisions to do that with.

The second problem is that we are, so far as I know, the only court in the English-speaking world, that does not sit en banc, the

only appellate court that does not sit en banc. Our en bancs consist of less than half the judges, and the majority, six judges, is less than a quarter of the judges on our court. So they cannot effectively speak for the court. It is a roll of the dice. Appellate decision making should not be that way.

Two-thirds of the judges in the country say that the largest size that is feasible for an appellate court is somewhere between 11 and 17. Sounds right to me.

Finally, I would like to remind you that it is entirely an accident that the Ninth Circuit Court of Appeals is as big as it is. The court was created for a jurisdiction that consisted of California, San Francisco mainly, and empty space. The space is filled in. We are now 20 percent of the population of the country. If we make a mistake, and we do make mistakes, the consequences affect far too much of the country. We have too much power because we affect too much of the country.

The issue before you is serious. It is not as manageable perhaps as dividing up a regional office of the Veterans Administration, but neither is it like cessation of states from the Union. It is not that serious. The fifth circuit and the eighth circuit divided without any problems. Dividing the decisional unit of the ninth circuit strikes me as somewhere closer on the spectrum to dividing up a regional office of the Veterans Administration than to cessation of States from the Union. It is manageable. You have got an excellent report. Many Senators called for it, and I urge you to do it so we can get back to deciding cases full time.

[The prepared statement of Judge Kleinfeld follows:]

PREPARED STATEMENT OF ANDREW J. KLEINFELD

MR. CHAIRMAN AND SENATORS: Since the beginning of the Republic, one of our more intricate political problems has been the great difference in the populations of the states. The Founding Fathers struggled with the tremendous size of Virginia relative to the other states at the Constitutional Convention. Today you struggle with the problems of judicial administration caused by the immense population of California, compared to all the other states in its judicial circuit. A single group of judges cannot hear all the federal appeals from a state as large as California, and also hear all the federal appeals from the eight smaller states in the circuit, without sacrificing reckonability and coherence of the law.

The last time the issue of dividing the Ninth Circuit came under consideration in the Senate, many who were wary of change called for study by a commission of experts prior to taking any action. A very distinguished commission was appointed, chaired by the Honorable Byron R. White, Associate Justice of the Supreme Court. The White Commission has recommended, basically, that you split the Ninth Circuit into three separate decisional units to decide cases, but keep it together as an administrative unit. While a traditional split, as Congress did with the Eighth Circuit and the Fifth Circuit in past decades, would be simpler and in my view better because of the simplicity, the White Commission's proposal would be a great improvement over the status quo.

The Commission concluded, after extensive study, that an appellate court with as many judges as the Ninth Circuit is too big. The Fifth Circuit reached the same conclusion when it approached our size and recommended to you that it should be divided, in 1970. It was, resulting in the present very successful arrangement of the Fifth and Eleventh Circuits. The White Commission said "in our opinion, apparently shared by more than two-thirds of all federal appellate judges, the maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between eleven and seventeen." The Commission explains that in a court bigger than that, the judges cannot read each others' opinions and correct errors *en banc*.

I believe that a simple split of the Ninth Circuit, like the previous splits of the Fifth Circuit into the Fifth and Eleventh, and the Eighth Circuit into the Eighth

and Tenth, would be better for the law than the White Commission proposal insofar as it relates to the Ninth Circuit. Senator Murkowski's earlier bill had proposed a simple split of the Ninth Circuit into the Ninth and Twelfth. The complexity and novelty of the Commission approach are worrisome, because they will generate unpredictability and complexity for lawyers and novel administrative burdens for quite some time. But they would largely solve the problems we now have in monitoring and achieving consistency and coherence in the law of our circuit. The White Commission proposal would be much better than taking no action, and allowing the problems for the public of a gargantuan circuit to continue unremedied.

If you adopt the bill recommended by the White Commission, I recommend that you eliminate the provision that some judges shall be drawn to sit with divisions other than their own. The values to be promoted by this innovation are slight, relative to the losses to those judges' divisions. The smaller states, as in the northwest, are unlikely to have more than one judge on the Ninth Circuit. If the only judge from a state were drawn to sit with another division for several years, as the bill now provides, that judge's division would lose the benefit of that judge's particularized knowledge. That would leave the people of that judge's state subject to the adjudication of a unit, none of whose judges knew as much about it.

My remarks are addressed only to the portions of the bill affecting the United States Court of Appeals for the Ninth Circuit. My remarks are not addressed to the provisions that would affect other circuits, district court appellate panels, or any other provisions. You are doubtless hearing from judges on those other courts about those provisions. Of course the complexity of the issues raised by these other provisions can be avoided if you simply split the Ninth Circuit like the old Eighth and the old Fifth.

Before addressing the problems of size, I'd like to say something about the costs of the process itself. This issue of whether to split the Ninth Circuit has been the subject of legislative attention since before I was born. Unless you split the Ninth Circuit, I am sure that the debate will continue after I die. The people suffer when their judges spend so much of their time as this process takes on a matter other than adjudicating cases. We have had numerous court meetings devoted to the issue of the split since I was elevated to the Ninth Circuit eight years ago. The staff of the Ninth Circuit assists the circuit leadership, as it has for decades, in preparing and circulating statistics and memoranda addressing whether the circuit should be split. Several of our judges, and all of our chief judges for many years, have spent a great deal of time in going to Washington to address the issue. And here we are again, today.

And I am sure that with your political experience, you recognize that bar resolutions, newspaper editorials, magazine articles, and contributions to the debate also take judicial time. When I was on the board of governors of the Alaska Bar Association almost twenty years ago, the chief judge of the district court came to our meeting, and asked us for a resolution opposing a Ninth Circuit split. As I recall, the chief judge had asked him to solicit it. When he left the room so that we could deliberate privately, we agreed that none of us much cared whether the Ninth Circuit was split, but we all cared whether the chief judge was happy with the organized bar, so we gave him a unanimous resolution. He had spent the better part of a morning getting it. Judicial attention to whether the Ninth Circuit should be split, including testimony in Congress, phone calls, letters, contacts, interviews, meetings with newspaper editorial boards, faxing, mailing, clipping, and compiling, has been extensive for decades. All this judicial attention to the split issue takes a lot of time away from deciding cases. And it will not stop until Congress splits the Ninth Circuit.

Our existing Ninth Circuit has many of the best appellate judges in the United States. We have had a succession of superb chief judges. In my appellate experience as a practicing lawyer, I never saw panels of more capable judges, or better prepared judges, than those of the Ninth Circuit. Yet our reputation does not reflect this high quality. I was sent a clipping from a small town newspaper in Kentucky, about one of our many Supreme Court reversals, characterizing us with such phrases as "sharply rebuked," "grave abuse of discretion," "stinging lecture," "scolded the lower court," "procedural legerdemain," and "negligence." Despite the high quality of our judges, our Supreme Court reversal rate is notorious.

A friend of mine who is assistant General counsel to a university told me he cannot reliably keep his client in compliance with the law, because on important issues it is impossible to comply with Ninth Circuit law and Supreme Court law simultaneously. Even though district courts must follow Ninth Circuit law, he must warn his client that Ninth Circuit law in some critical areas is inherently unstable because the Supreme Court will reverse it when they grant certiorari. He may think that the Ninth Circuit approaches to some of these issues are preferable to the Su-

preme Court's, but that does not solve the university's problem of knowing what law to follow. We owe people better than this.

Why are judges so good making so many errors? That is a serious question, and I do not think, in view of our Supreme Court record, that it can be avoided. The reason, I suggest, is our size. We have so many judges that we cannot read each others' opinions, and we cannot correct errors by effectively rehearing cases *en banc*.

In every organization, there has to be some size limit, at the bottom end and the top end; such that if the organization was smaller or bigger, it would be less efficient. That is probably why dentists' offices do not grow to the size of General Motors, and General Motors is not operated out of a small garage. Justice Brandeis wrote, in *The Curse of Bigness*, "In every business concern there must be a size limit of greatest efficiency. What the limit is will differ in different businesses and under varying conditions in the same business. But whatever the business or organization, there is a point where it would become too large for efficiency and economic management, just as there is a point where it would be too small to be an efficient instrument. The limit of efficient size occurs when the disadvantages attendant on the size outweigh the advantages, and for large size, when the centrifugal force exceeds the centripetal." There are no economies of scale for appellate courts. In our particular activity, we become less efficient rather than more efficient beyond a certain size.

READING EACH OTHERS' DECISIONS

Judges on the same court should read each others' decisions. We are so big that we cannot and do not. That has the practical effect that we do not know what judges on other panels are deciding. It is odd word usage to call a public body a "court," in the singular, if its judges neither sit together as one body, nor read each others' opinions.

The Ninth Circuit issues too many decisions for anyone to read. We learn of decisions of our own court, affecting our own cases, when they are cited to us by lawyers or by our law clerks. This deprives the people we serve of two important services a court should provide. We cannot give them consistent, reliable applications of law to the facts of their cases. And we cannot spot and correct errors by other panels.

The White Commission said "[t]he volume of opinions produced by the Ninth Circuit's Court of Appeals and the judges' overall workload combine to make it impossible for all the court's judges to read all the court's published opinions when they are issued."

Note that the Commission spoke only about the published opinions. There are around nine times as many unpublished opinions that we cannot even attempt to monitor. One of my law clerks collected a year's worth of dispositions, and weighed them at the end of the year. They weighed forty pounds. Most of what we do that is important is not statements of rules, because you, not we, legislate. Our job is application of law to the facts of particular cases. Where there is nothing novel about the issues of law, we usually do that in unpublished dispositions, but those who must live with the results say that although we state the rules of law fairly consistently, our applications of it in unpublished dispositions are quite inconsistent.

This problem of not knowing what other panels are deciding is purely a function of size. It has nothing to do with the rate at which judges produce opinions. If each judge generates the same number of published decisions per year on a small court or a large one, there will be four times as many decisions to read if the court is four times as large. Even if everything else about a large court and a small one is the same, the judges on the court can read their own, court's decisions only if it is a small court.

Thus judges on a large court, though of the highest quality, will do a less capable job than judges on a smaller court of maintaining coherent, consistent law. They simply cannot maintain the same level of knowledge of what their own court is doing. Technology cannot repair this problem. We already have excellent systems for getting decisions into the hands of all the judges. The problem is not getting the information from the writing panel to the other judge's desks. It is getting the contents of a decision from the judge's desk into the judge's head.

The fastest, easiest way of letting one panel know what another is doing is usually for judges to talk about it. Sometimes one of the judges on a panel mentions that another recently decided a related question, or has it pending. On a small court, the ordinary discussion at conference probably does much of the job of maintaining consistency in the law. But a Court of 28 judges has more than 3,000 possible combinations in which panels sit. Add to that all the visiting judges, and we are not likely, in so large a court, to learn what we need to know by easy oral interchange in conference. We just do not overlap enough in our sittings. The White

Commission said that a much smaller decisional unit than the Ninth Circuit “would become much more a ‘known bench,’ fostering judicial accountability and public confidence.” But as the White Commission pointed out, on a court as large as ours, “it would be rare for a judge to sit with every other judge of the court more than once or twice in a three-year period.” There is one judge on our court with whom I have never sat on a three judge panel, even though that judge was active rather than senior for four years during my tenure.

The problem I have been discussing harms the consumers of our decisions, not the producers. If we render inconsistent decisions, the district courts, practicing lawyers, and, most important, the general public cannot effectively comply with the law. The great scholar of the common law tradition, Karl Llewellyn, characterized the chief virtue of appellate opinions as providing “reconability of result.” Professor Llewellyn said “spend a single thoughtful weekend with a couple of recent volumes of reports from your own supreme court, * * * and you can never again, with fervor or despair, make that remark about never knowing where an appellate court will hang its hat. Spend five such weekends, and you will be getting a workable idea of the local geography of hat racks.” Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals*, 179 (1960).

When I was a practicing lawyer, I was generally able to predict with great accuracy what the Supreme Court of my state would do, *even where there was no case in point*. I read its decisions as they came down, and as Llewellyn suggests, I knew what the thinking process of each of the five justices would be when faced with a new problem. Of course, there were occasional surprises, but not very many, to me or to other lawyers. Our clients benefited from advice based on this high degree of reckonability. They could learn from their lawyers what the law was, comply with it, and avoid the expense and misery of litigation.

The Ninth Circuit, because of its size, is not and cannot be a reckonable court. No district judge and no lawyer can, by reading even a few hundred of our decisions, predict what our court will do in the next case. Even if the decisions could be read, there are over 3,000 combinations of judges who may wind up on panels, so the exercise would not be worth the time. At best, the bar can predict that we will restate our clear holdings as controlling law. But different panels may apply the same holdings to similar facts in different ways. The disparateness will naturally be higher in unpublished dispositions. When a circuit grows to a size such that its judges cannot read and correct other panels’ decisions, district judges and lawyers trying to figure out what the law is are compelled to say that it depends on who is on the panel.

A court that is not reckonable is of far less use to the general public, the lawyers who represent them, and the trial judges who must adjudicate their cases, than one whose outcomes can be predicted. There is no expense caused by the law that can be so great as the expense to the public of not knowing what it is. That expense to the public is much greater than all the salaries, courthouses, air fares, and other government budget expenses, as large as those are. If people cannot, with the assistance of good lawyers, say what the law is, the unpredictability generates lawsuits. Courts should settle disputes, not create them.

EN BANC

The other fundamental problem of an overly large court such as ours is with its *en banc* process. Traditionally on a court that decides cases in panels consisting of fewer than all the judges, there is a process, called *en banc*, by which all the judges on the court sit together to rehear a case about which importance, inconsistency, or possible error makes them especially concerned.

On a small court, the *en banc* process often works so well as a possibility that few *en banc* rehearings are needed. Judges know, from frequent sittings together, what outcomes will be viewed as erroneous by majorities of their colleagues. On a large court like ours, it is a formal, very time consuming, device.

The practical upper limit on the size of an efficient appellate court is the number of judges who can effectively sit together *en banc*. Sitting together effectively requires three things: (1) an oral argument in which the unstructured give and take between counsel and the judges can accommodate the practical needs of all the judges to air difficult issues; (2) a conference in which reasoned deliberation rather than mere voting can take place; (3) an opinion writing process that can work the views of those judges in the majority into a majority opinion. Other circuits sit together *en banc* with as many as 17 judges. The Fifth Circuit, before it split, as it approached the size of the present Ninth Circuit, decided that it could not effectively sit *en banc*.

The Ninth Circuit has by circuit rule limited its *en banc* panel to 11 judges. Traditionally "*en banc*" has meant the entire court. To the best of my knowledge, we are the only appellate court in English common law tradition that calls less than the entire court "*en banc*." But we do not sit *en banc* in the traditional sense of the word. That means we have no mechanism for assuring that our decisions are collegial.

The word "collegiality" in its traditional meaning is critical to the *en banc* process. The word is sometimes used in contemporary speech to mean some combination of civility and bonhomie. That is not its dictionary definition. The traditional definition is "shared authority among colleagues." The word is derived from "the doctrine that bishops collectively share collegiate authority." Because we do not rehear cases as a full court, we cannot assure that our decisions represent shared authority among all our colleagues.

The people are entitled to have us act with shared authority. We were not put in office to be 28 individuals each imposing our idiosyncratic individual will on the 50 million people of our circuit. The *en banc* process is what an appellate court uses to rein in those judges who may mistakenly canter off the trail of established principles of law. But our *en banc* process does not work, as the frequent Supreme Court reversals of our *en banc* dispositions show.

The White Commission points out that "the entire body of judges for whom an *en banc* opinion speaks should have a voice in that opinion." Yet we cannot. On other courts, *en bancs* can assure that mistaken decisions are repaired in accord with the views of the court as a whole. But not on ours. We have no true *en banc*. Our *en banc* rehearings are before 11 judges. Eleven is just another panel, not even 40 percent of our 28 judge court. When an *en banc* panel is divided 6 to 5 on a case or an issue, the majority of the *en banc* panel is not even a quarter of the full court.

There is no reason to think that an *en banc* panel of eleven is representative of the court. For one thing, no Judge really represents another. We are not organized by party and we are not representatives. We decide things individually.

It is not especially likely that any particular *en banc* will be representative of the court as a whole in any sense. An *en banc* panel is like a random draw of ten (the number of judges drawn for an *en banc*, in addition to the chief judge who sits automatically) cards from a deck. It will rarely come out as a straight or flush. Even though a coin tossed enough times will come out heads half the time, a single series of ten tosses will not usually come out five heads, five tails. For example, consider two judges on our court who are philosophically quite distinct, Judge Betty Fletcher and Judge O'Scannlain. From 1987 to 1997, ten full years in which they were both active on the court, Judge Fletcher served on 62 *en bancs*, Judge O'Scannlain on only 34. Despite a random draw, one served almost twice as often as the other on *en banc* panels! If you run a judicial process as a crap shoot, then crap shooters' principles will affect the outcomes. The principle here seems to be, "when you're hot, you're hot."

BENEFITS OF A SMALLER CIRCUIT

The serious concerns addressed above would be alleviated by adopting the White Commission proposal or splitting the Ninth Circuit. Both changes would also afford positive benefits. Particularly for the less populated states, the judges deciding the cases would have much more familiarity with the law, procedure, customs of the bar, and social and economic conditions on which their decisions would be superimposed.

Much federal law is not national in scope. Quite a lot of federal litigation arises out of federal laws of only local applicability, such as the Bonneville Power Administration laws, the laws regarding Hopi and Navaho relations, the Alaska National Interest Lands Conservation Act, and the Alaska Native Claims Settlement Act. It is easy to make a mistake construing these laws when unfamiliar with them. Yet it is a rare law clerk who has ever heard of any of these complex federal laws. For example, a judge who sits once in ten years in Alaska, as we do now on the Ninth Circuit, is unlikely to have a working, knowledge of the two tremendously important Alaska laws mentioned, which come up in Alaska federal litigation all the time. This unfamiliarity leads to errors, as in a recent 9-0 reversal by the Supreme Court, after more than a year of intense political turmoil in Alaska.

Much federal procedure mirrors state procedure in the particular district. For example, Federal Rule of Civil Procedure 4 imports state procedure. Where law is not specified, bar and bench customs in the different localities often fill it in. It is very helpful for judges to know how releases, attorney's fees contracts, and other documents for common transactions, are typically written in a state, so that they know when something is suspicious and when it is ordinary. In diversity cases, we are

required to apply state law in federal court. Yet on our court, ordinarily no judge on the panel has intimate familiarity with the law and practices of the state in which the case arose, except for California.

Social conditions also vary, in ways that can color judges' reactions to facts, and disable them from understanding the factual settings of cases not arising in California. For example, Judges from Los Angeles tend to have different assumptions about who possesses guns and what for, than do judges from Idaho, Montana, and Alaska, who tend to associate gun ownership with longtime law-abiding residents of the state. Native Americans have reservations in most states in our circuit, but in Alaska reservations have generally been abolished. It is quite possible for Alaska lawyers not to point this out in a brief because it is so obvious and well known, and for Ninth Circuit judges on a panel and their law clerks, who have never been to Alaska, not to know it.

A critically important virtue of smaller circuits or decisional units is that it limits the impact of our mistakes. Sometimes we are going to be wrong. When we are wrong in a way that affects one American out of five, as we do now, that is very wrong indeed. Because error is inevitable, limiting its consequences is a good idea.

Those who advocate more jumbo circuits like the Ninth Circuit overlook these costs. The logic of those who argue in favor of keeping the Ninth Circuit as it is implies that all of the circuit courts in the United States should be consolidated into a single giant circuit court, which would function as a pool from which panels of judges would be drawn for the whole country. If you can imagine the problems of maintaining coherence and predictability of the law in such a circuit, you need only apply some discount to see what the problems are in the Ninth Circuit.

There has been a lot of political debate about whether a split would favor liberals or conservatives, or one interest or another, that strikes me as a red herring. The political motives of the advocates for both sides do not have much bearing on which position would be better as a matter of judicial administration. People can seek good things for bad reasons, and bad things for good reasons. The regional distribution of judicial philosophies among members of the Ninth Circuit is entirely fortuitous. The president, with the advice and consent of the senate, picks judges, and can find lawyers of whatever philosophy the president wants in any state. It is perfectly legitimate for the political branches of our government, not the judiciary, to decide which states should be in which circuits. That is where the Constitution places the responsibility. In the White Commission's view and mine, non-political concerns of judicial administration require smaller decisional units than we now have in the Ninth Circuit.

The Ninth Circuit now decides cases for about twenty percent of the nation's population and forty percent of its territory. It is too big. I urge you to split it, preferably simply as with the Fifth and Eighth Circuits, or else as a decisional unit, in accord with the White Commission recommendation.

Thank you.

Senator GRASSLEY. I have 28 minutes left. I hope I can hear all three of you. Normally, judges enforce time. I did not want to enforce time, but you are cognizant of the time limits.

And I am going to ask Senator Feinstein if she would ask her questions. I am going to submit mine for answer in writing, and then you would adjourn the meeting. And I want to make it clear to all of you that we will ensure—my questions may not cover all of the issues that you want to bring up. I will take additional written testimony from any of you to supplement anything that you may have wanted to say to other members in rebuttal to the questions that Senator Feinstein would ask.

Judge O'Scannlain.

STATEMENT OF HON. DIARMUID F. O'SCANNLAIN

Judge O'SCANNLAIN. Thank you very much, Mr. Chairman and Senator Feinstein.

I would like to begin by stating that as a sitting active circuit judge, I support the White Commission's findings, and I am in general agreement with Judge Rymer's comments, but will emphasize certain points. I will not repeat my written remarks, but I would

request that you have the appendix to my remarks handy because I do want to refer to a couple of items.

First and foremost, this neverending judicial saga of what to do about that judicial Goliath, the ninth circuit, an epic that, as we have heard dates back to before World War II, must be brought to closure, and decisively.

The White Commission of 1998 and the Hruska Commission of 1973 both came to the same conclusion. Regardless of which party controlled the Congress when these separate Commission were appointed, they both concluded that the ninth circuit needs restructuring.

S. 253 is the most carefully crafted and sophisticated legislative solution thus far, and hopefully should be the vehicle to resolve the ninth circuit's future, hopefully, for a long time. And there is nothing sinister, immoral, fattening, politically incorrect or unconstitutional about the restructuring of judicial circuits. This is simply the natural evolution of the Federal appellate court structure. As courts grow too big, they evolve into more manageable judicial units.

When the circuit courts of appeals were created in 1891, there were only nine regional circuits. Since then, the District of Columbia circuit was created, the tenth circuit was split off from the eighth, the eleventh circuit was split off from the fifth, and in due course, I have absolutely no doubt either the ninth circuit will be restructured along the lines of S. 253 or a new twelfth circuit will be created.

No circuit, not even mine, Mr. Chairman, has a God-given right to an exemption from the laws of nature. There is nothing sacred about the ninth circuit keeping essentially the same boundaries for over 100 years. And frankly, I am mystified by the relentless refusal of some of my colleagues, including my beloved chief and my brother, Wiggins, to contemplate the inevitable.

The problem, as we have heard, with the ninth circuit can be summarized quite simply. We are too big now and getting bigger every day. Although we are officially allocated 28 judges, we currently have 21 active judges, but 19 senior judges. In other words, there are 40 U.S. circuit judges on our court today. And when the seven existing vacancies are filled, our court will have 47 judges.

Now, I have compiled a roster of the ninth circuit judges, which is on exhibit A of my prepared remarks. And I think you may find it quite revealing when you turn to it. It is a remarkable array of judge power, more judges on one court than the entire Federal judiciary when the circuit courts of appeals were created.

And in the chart you will see the composition going back to appointees of President Kennedy, President Nixon, President Carter, all of the way down to the appointees and the nominees of President Clinton. And knowing that with the possible exception of three of the nineteen, these judges are doing 100 percent down to 25 percent, depending on each individual, of the work of a sitting active judge.

Chart 2 reveals that the ninth circuit has almost double the number of judges as the next largest circuit and more than quadruple that of the smallest when the senior judges are taken into account.

Chart 3 gives a sense of the enormity of the circuit's population relative to other circuits and the caseload tracks population quite closely.

Together, these charts reveal that the ninth circuit has double the average of number of judgeships, handles double the average number of appeals and has double the average population of all courts of appeals in the country. As we can see, the ninth circuit is already two circuits in one.

Now, is the extraordinarily large size of our court and of our population a cause for concern? Well, the White Commission, and before it the Hruska Commission, thought so, and so do I. As Judge Rhymer explained, any court with more than 11 to 17 judges lacks the ability to render clear, circuit-consistent and timely decisions. And I, as a member of this court, would agree with that.

In addition to handling his or her own share of the 9,000 appeals filed last year, each judge is faced with the Sisyphean task of keeping up with all of us, his colleagues' opinions. And as Judge Rymer reported in her report, only about half of the ninth circuit judges read all or most published opinions, which, frankly, is as embarrassing as it is intolerable.

And furthermore, because of the circuit's geographical reach, judges must travel on a regular basis from far-away places throughout the circuit to attend hearings and court meetings. I am very much relieved that I only have to travel from Portland to San Francisco in circuit, and I am just in awe of the fact that my colleague from Fairbanks, AK, has to make that trip as often as I do. It is tough enough for me when the flight is only less than 2 hours. But if you are coming all of the way from Fairbanks on a regular basis, that is probably one day each direction. Much of this time and expense could be avoided if the divisional restructuring plan or an outright circuit split were implemented.

At 52 million people and counting, we are faced with a fundamental choice: Either do nothing and let the court of appeals become more unwieldy, or restructure the circuit into more manageable regional entities. The White Commission recognized that the first option is not responsible, and the latter option is inevitable. And I agree.

But on this point, my chief judge and I appear to disagree, although with the greatest respect. In his report vigorously opposing reform, my chief emphasizes that the White Commission recommended that the ninth circuit not be split.

Well, with respect, this misses the point, and frankly obfuscates the real defects of the Court of Appeals. Rather, the Commission's principal findings are:

No. 1, that a Federal appellate court cannot function effectively with more than 11 to 17 judges;

No. 2, that the consistent, predictable and coherent development of the law over time is best fostered in a decisionmaking unit smaller than what we have;

No. 3, that a disproportionately large proportion of lawyers practicing before the circuit deemed the lack of consistency in the case law to be a grave or large problem;

No. 4, that the outcome of cases is more difficult to predict in the ninth circuit than in other circuits; and

No. 5, that our limited en banc process has not worked effectively.

Those are the principal recommendations of the Commission report. The Commission's main finding was that the Ninth Circuit Court of Appeals—and I am glad Judge Rymer emphasized that point. We are not saying that the circuit is not operating effectively, but the court of appeals has its limitations, and the result being that the Commission is not saying that creating new circuits is inherently bad.

My chief also characterizes the fact that the chief judges of eight other circuits have expressed opposition to the Commission's divisional restructuring plan as evidence of strong disapproval of restructuring among the Federal judiciary. Again, however, with respect, my brother, misreads the actual details. What these chief judges are opposed to is the creation of intracircuit divisions with respect to the heir own circuits, none of whom have our problems. And, frankly, they are right.

As a judge on the ninth circuit, I must also take issue with my colleague's assertion that an overwhelming majority of ninth circuit judges oppose reform. A large proportion of judge in our court; that is, yet a minority, do favor restructuring, many strongly so.

As Judge Rymer reported and as my chief has indicated in his testimony today, one-third of our judges have said so in a Commission survey. And with respect to that court meeting on January 21, I will leave it up to my chief to decide if he may wish to make public the minutes which would disclose the exact vote tally and the identity of those voting and the specific questions that were presented.

In any event, I am authorized to tender the letter which you find at exhibit B, bearing today's date, which is written on behalf of six of us, including a Californian, who are willing to go public in support of reorganization. Now, since sending that letter to the printer so I could make your deadline for submitting the testimony, I made a few telephone calls, and I can now represent for the record that three more California members of my court wish to be shown as joining in that letter; Judge Rymer, of course, Judge Hall of Pasadena, and Judge Fernandez of San Bernadino.

And I have reason to believe there are many ninth circuit judges, including other Californians, who, if given the opportunity, would vote today for an outright split-off of the five Northwest States into their own circuit.

And while I am at it, many district trial court judges agree that this is also necessary. After denying that anything is wrong, our official court position straddles the fence by arguing that we can alleviate any problem simply by making changes at the margin. In response to the Commission report, our chief has appointed an Evaluation Committee, which has since suggested various quick fixes. But I must respectfully disagree, once again, that any problems with our court can be solved by tinkering at the edges. The time has come when cosmetic changes will no longer suffice and a significant restructuring is necessary.

As you may recall, Mr. Chairman, from my testimony before the full committee, and I remember that Senator Feinstein was an active participant back in September 1995, I have become a public

proponent of the Hruska Commission's recommended structuring plan, but after starting out upon my appointment to this court in 1986 opposed to any change whatsoever.

And as Senator Hatfield and Senator Gorton would recall, I refused to support their efforts throughout the eighties to split the court because they appeared to be motivated by dissatisfaction with some environmental law decisions of our court.

Mr. Chairman, we have moved past those inappropriate concerns. The more I consider the issue from the judicial administration perspective today, the more I appreciate the benefits of the White Commission's restructuring proposal. Not only will the creation of smaller judicial decisionmaking units in the form of divisions promote consistency, predictability and improved decision-making, these divisions will be more connected to the various regions involved.

Now, I am not here to defend S. 253 in minute detail, but I do urge the committee to give serious consideration to doing something to address the problems, which not only I have outlined, but the Commission report outlines, and frankly, all of the witnesses so far have indicated there are problems. And I presume that is the basis upon which Senator Feinstein wishes to offer some legislation to address a perception of problems.

If we go with the Commission's plan, of course, we can make adjustments to the divisional structure to cope with political realities; for example, placing California in its own division and making other adjustments, if that is what it takes, to make the legislation acceptable.

But in the event that Congress receives too much resistance to the Commission's divisional approach, then it should specifically consider an outright split along the lines of the three alternative reorganization plans. They are listed as A, B, C in the report. All three are meritorious.

Finally, Mr. Chairman, please do not be deterred by nitpicking criticisms of the Commission's proposal. Men and women of good will can fashion modifications to the plan to satisfy the greatest number. The ninth circuit's problems are not going to go away, and they will only get worse. We have been engaged in gorilla warfare on this circuit split issue for much too long. You must force us to restructure now one way or another so that we can end the distractions caused by this neverending controversy and get back to doing the job of judging, which is why the President appointed us, and you confirmed us.

Thank you, Mr. Chairman, for allowing me to make these remarks. I would be happy to accept any questions that you wish to ask.

Thank you.

[The prepared statement of Judge O'Scannlain follows:]

PREPARED STATEMENT OF DIARMUID F. O'SCANNLAIN

EXECUTIVE SUMMARY

The strains from the size and ever-increasing caseload of the Ninth Circuit present us with a fundamental choice: do nothing and let the circuit become even more unwieldy, or restructure the circuit into more manageable regional entities. The White Commission, recognizing the need for smaller decisional units to promote

consistency and predictability in adjudication, concluded that the first option is not feasible and that the latter option is inevitable. I agree. The Commission was prescient in its recognition of the Ninth Circuit's problems, and its creative recommendations, now in the form of S. 253, deserve careful consideration.

The natural evolution of the federal appellate court system entails the restructuring of circuits in response to changes in population and workload. As courts grow too big, they are restructured into more manageable judicial units. No circuit has a God-given right to an exemption from inevitable restructuring. The only legitimate consideration is the optimal size and structure for judges to perform their duties. Although it has been suggested that we can fix the problems plaguing the Ninth Circuit by tinkering at the edges, I agree with the Commission's implicit finding that a more significant overhaul is needed. I commend the Commission's divisional restructuring approach. With fewer judges in each division, collegiality of adjudication within divisions will rise, and consistency of law will be improved.

The same phenomena that counsels for the divisional restructuring approach also counsels for a split. I think that we should implement S. 253, which is a step in the right direction. If it does not work or if the obstructionists prevent the passage of S. 253, however, then there should be an outright split of the circuit, which is probably inevitable anyway. Most of all, we should end the guerilla warfare and let us get back to judging.

Good morning, Chairman Grassley and Members of the Subcommittee. My name is Diarmuid O'Scannlain, and I am a judge on the United States Court of Appeals for the Ninth Circuit with chambers in the Pioneer Courthouse in Portland, Oregon. Thank you for inviting me to appear before you today to discuss the future of the Ninth Circuit, an issue of great significance to the federal judiciary as a whole.

I

Having served as a federal appellate judge for over a dozen years on what has long been the largest court of appeals¹ in the federal system and having written repeatedly on issues of judicial administration,² welcome the chance to offer my perspectives as a member of the court in this never-ending saga of "what to do about that judicial monster," the Ninth Circuit. I have heard my colleague Judge Rymer's persuasive presentation, and I have read the Commission's report and most of its accumulated testimony. I support the Commission's findings and am in general agreement with Judge Rymer's comments, but I will emphasize certain points in particular. But this judicial epic which has been going on since at least World War II must be brought to closure, and decisively. S. 253 is the most carefully crafted legislative solution thus far and should be the vehicle to resolve the Ninth Circuit's future once and for all. Your choice is either to implement S. 253, probably with some adjustments in details, or to order an outright split. Congress can no longer afford to luxuriate in passivity over the future of this lumbering judicial entity.

When the circuit courts of appeals were created over one hundred years ago by the Evarts Act of 1891, there were only nine regional circuits. Today, there are twelve. For a long time, each court of appeals had at most three judges each; indeed, the First Circuit was still a three-judge court when I was still in law school. Over time, courts grew to six, seven, seventeen, and eventually, to a high of twenty-eight judges for my court. The District of Columbia Circuit can trace its origin as a separate circuit to a few years after the Evarts Act was passed.³ The Tenth Circuit was split off from the Eighth in 1929. The Eleventh Circuit was split off from the Fifth Circuit in 1981.⁴ And, in due course, I have absolutely no doubt, either the Ninth Circuit will be restructured along the lines of S. 253 or a new Twelfth Circuit will be created out of the Ninth.

And there is nothing sinister, immoral, fattening, or unconstitutional about the restructuring of circuits. This is simply the natural evolution of the federal appellate court structure responding to population changes. As courts grow too big, they are restructured into more manageable judicial units. No circuit, not even mine, has a God-given right to an exemption from the laws of nature. There is nothing sacred about the Ninth Circuit's keeping essentially the same boundaries since 1855. The

¹I have previously served as Administrative Judge for the Northern Unit of our court and two terms as a member of our court's Executive Committee.

²See Statement of Diarmuid F. O'Scannlain, *Hearing Before the Committee on the Judiciary, United States Senate*, S. Hrg. 104-810, at 69-77 (Sept. 13, 1995); Diarmuid F. O'Scannlain, *A Ninth Circuit Split Commission: Now What?*, 57 *Montana L. Rev.* 313 (1996); Diarmuid F. O'Scannlain, *A Ninth Circuit Split is Inevitable, But Not Imminent*, 56 *Ohio St. L.J.* 947 (1995).

³The original name of this court was the Court of Appeals for the District of Columbia. In 1934, this court was renamed the United States Court of Appeals for the District of Columbia.

⁴This is not to mention the Federal Circuit, which was created in 1982.

only legitimate consideration is the optimal size and structure for judges to perform their duties. We certainly have no vested interest in retaining a structure that may not function effectively, and Congress has a responsibility through its oversight to prod the judiciary to keep up with the changing times.

The White Commission was prescient in its recognition of the Ninth Circuit's problems, and its creative recommendations, now in the form of S. 253, deserve careful consideration and sensible adjustments towards the ideal. Judge Rymer has well articulated the real problems and a sound solution which will either be the model for all large circuits or an interim step toward eventual split into two or three circuits. Frankly, I am mystified by the relentless refusal of some of my colleagues to contemplate the inevitable; as loyal as I am to my own circuit, I cannot oppose the logical evolution of our judicial structure as we grow to colossus size.

The problem with the Ninth Circuit can be stated quite simply: we are too big now, and getting bigger every day. This is so whether you measure size in terms of number of judges, caseload, or population. Even though we are officially allocated 28 judges, we currently have 21 active judges and 19 senior judges. In other words, regardless of our allocation, there are *forty* judges on the Ninth Circuit *today*. And when the seven existing vacancies are filled, we will have 47 judges.⁵ I have compiled a roster of Ninth Circuit judges in Exhibit A, which you may find quite revealing. To put the figure of 47 in perspective, consider the fact that this is almost double the number of total judgeships as the next largest circuit (the Sixth Circuit) and *more than quadruple* that of the smallest (the First Circuit).⁶ The exceptional size of the Ninth Circuit is illustrated in Charts 1 and 2. With every additional judge that takes senior status, we grow even larger. Indeed, if we get the five new judgeships that Judge Rymer mentioned we have asked for, there will be 52 judges on the circuit, while the average size of all other circuits today is 14 active judges.⁷

Table 3 and Chart 3 give a sense of the enormity of the Ninth Circuit's caseload and population relative to other circuit. Last year, we handled 9,070 appeals—over double the average (4,484) and almost 1,000 more than the next busiest court (the Fifth Circuit).⁸ Looking at population, the Ninth Circuit's nine states and two territories, which range from the Rocky Mountains to the Sea of Japan and from the Mexican Border to the Arctic Circle, contain over 52 million people, or 21 million more than the next largest circuit (the Fifth).⁹ Tellingly, the Ninth Circuit has *double* the average number of judgeships (28 vs. 14), handles *double* the average number of appeals (9,070 vs. 4,484), and has *double* the average population (52 million vs. 23 million).¹⁰ In essence, the Ninth Circuit already is two circuits in one.

Is the extraordinarily large size of the Ninth Circuit a cause for concern? The Commission thought so. And so do I. After careful analysis, the Commission concluded that any court with more than eleven to seventeen judges lacks the ability to render clear, circuit-consistent, and timely decisions. I agree that a court with as many judges as the Ninth cannot continue to function well. Courts of appeals have two principal functions: correcting errors on appeal and declaring the law of the circuit. Having more judges helps us keep up with our error-correcting duties, but, as Judge Rymer has outlined, it *hampers* our law-declaring role by making it more difficult to render clear and consistent decisions.

The White Commission found that what an appellate court needs for consistency and predictability in adjudication—values fundamental to the effective administration of justice—is small decision-making units. Consistency of law in the appellate context requires an environment in which a reasonably small body of judges has the opportunity to sit together frequently. Such interaction enhances understanding of one another's reasoning and decreases the possibility of misinformation and misunderstandings. Because the Ninth Circuit has so many judges, the frequency with which any pair of judges hears cases together is quite low, thus making it difficult to establish effective working relationships in developing the law.

⁵See Exhibit A; Table 1. With the exception of three judges—one of whom is no longer accepting calendar assignments, one of whom is recuperating from cancer surgery, and one who is temporarily sitting only on screening calendars, all of our senior judges carry a substantial load ranging from 100 percent to 25 percent of a regular active judge's load.

⁶See Table 2; Chart 2.

⁷If senior judges on other circuits are factored in, the average is 21 total judges per circuit.

⁸See Table 3. There may be slight variations in terms of the summary statistics reported here and those reported elsewhere as a result of differences in sources. I use caseload statistics provided by the Administrative Office of the United States Courts in a report entitled *Judicial Business of the United States Courts: Annual Report of the Director* and population statistics compiled by the United States Census Bureau.

⁹See Table 3.

¹⁰See Tables 2 and 3.

In addition, as several Supreme Court Justices have commented, the risk of intracircuit conflicts is heightened in a court which publishes as many opinions as the Ninth.¹¹ In addition to handling his or her own share of the 9,000 appeals filed last year, each judge is faced with the Sisyphean task of keeping up with all his colleagues' opinions. Frankly, we are losing the ability to keep track of our own precedents. As Judge Rymer reported, only about half the Ninth Circuit judges read all or most published opinions, which is as embarrassing as it is intolerable. It is imperative that judges read opinions as they are published, since this is the only way to stay abreast of circuit developments as well as to ensure that no intra-circuit conflicts develop and that, when they do (which, alas, is inevitable as we continue to grow), they be reconsidered en banc. This task is too important to delegate to staff attorneys.

As consistency of law falters, predictability erodes as well. The Commission pointed out that a disproportionately large number of lawyers indicated that the difficulty of discerning circuit law due to conflicting precedents was a "large" or "grave" problem in the Ninth Circuit. From my own experience since 1986, I can tell you that this problem has worsened notably as the court has grown in size. Predictability is difficult enough with 28 active judgeships. But this figure understates the problem because it does not count either the senior judges who participate in the court's work (most very actively) or the large numbers of visiting district and out-of-circuit judges who are not counted in our present 40-judge roster.

The White Commission recommended a restructuring of the circuit in part because of its finding that the circuit's en banc process is not working correctly. As a member of the court, I can tell you that, although the en banc process, in theory, promotes consistency in adjudication by resolving intra-circuit conflicts once and for all, this has not been the case in the Ninth Circuit. All courts of appeals other than the Ninth Circuit convene en banc panels consisting of all active judges. The Ninth, however, uses limited en banc panels comprised of eleven of the twenty-eight active judgeships. This limited en banc system appears to work less well than other circuits' en banc systems; because each en banc panel contains fewer than half of the circuit's judges and consists of a different set of judges, en banc decisions do not incorporate the views of all judges and thus may not be as effective in settling conflicts or promoting consistency. Relatedly, several Supreme Court Justices have commented that the Ninth Circuit fails to hear cases en banc often enough to settle intra-circuit conflicts or to correct wrongly decided opinions.¹²

The Ninth Circuit's problems do not just hinder judicial decision-making, but also create administrative difficulties and waste. Because of the circuit's geographical expansiveness, judges must travel, on a regular basis, from faraway places throughout the circuit to attend court meetings and hearings. For example, in order to hear cases, my colleague Judge Kleinfeld must, many times a year, fly from Fairbanks, Alaska to distant cities including San Francisco and Pasadena. In addition, he must travel on a quarterly basis to attend court meetings generally held in San Francisco. Obviously, all this travel entails not only time, but a considerable amount of cost. Either the divisional restructuring plan or an outright circuit split would do much to curtail this extensive travel and expense.

II

At 52 million people and counting, we are faced with a fundamental choice: either do nothing and let the circuit become even more unwieldy, or restructure the circuit into more manageable regional entities. The White Commission recognized that the first option is not feasible, and the latter option is inevitable. I agree. However, some say: If it ain't broke, don't fix it. This is the position of our Chief Judge of the Ninth Circuit, who has circulated a report vigorously opposing any restructuring of the circuit.

In his report, Chief Judge Hug emphasizes that the White Commission recommended that the Ninth Circuit not be split. With respect, this misses the point and obfuscates the real defects of the court of appeals. Rather, the Commission's principal findings are:

1. That a federal appellate court cannot function effectively with more than eleven to seventeen judges;

¹¹ See Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* 38 (Dec. 18, 1998) [hereafter "White Commission Report"].

¹² See Letter from Justice Sandra Day O'Connor to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Court of Appeals 2 (June 23, 1998); Letter from Justice Anthony M. Kennedy to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Court of Appeals 3 (August 17, 1998).

2. That decision-making collegiality and the consistent, predictable, and coherent development of the law over time is best fostered in a decision-making unit smaller than what we now have;
3. That a disproportionately large proportion of lawyers practicing before the Ninth Circuit deemed the lack of consistency in the case law to be a “grave” or “large” problem;
4. That the outcome of cases is more difficult to predict in the Ninth Circuit than in other circuits; and
5. That our limited en banc process has not worked effectively. In light of these many problems—and notwithstanding the Ninth Circuit’s longstanding official position that everything is working just fine—the White Commission unequivocally recommended a substantial restructuring of the circuit’s adjudicative operations. The Commission’s main finding was that the Ninth Circuit Court of Appeals is not functioning effectively, not that creating divisions is better than creating new circuits. The Report’s principal finding relates to the Court of Appeals’s adjudicative functions which can only be cured by smaller decision-making units.

Chief Judge Hug reports that there is strong opposition to restructuring among the federal judiciary. Specifically, he characterizes the fact that the chief judges of eight other circuits have expressed opposition to the Commission’s divisional restructuring plan as evidence of their opposition to reforming the circuit. Again, however, with respect, Chief Judge Hug misreads the actual details. What these chief judges are opposed to is the creation of intra-circuit divisions with respect to their *own* circuits, none of whom have our problems.

As a judge on the Ninth Circuit, I must also take issue with my chiefs assertion that “[t]he view that the serious disadvantages of the restructuring proposal outweigh any possible advantages is shared by an overwhelming majority of the judges on the Ninth Circuit Court of Appeals.” Again, with respect, this is simply untrue. A large proportion of judges on our circuit favor restructuring, many strongly so. As Judge Rymer reported, approximately one third of judges said so in response to a survey by the Commission. In addition, I am authorized to tender the attached letter (Exhibit B) bearing today’s date on behalf of six Ninth Circuit judges including another Californian who are willing to “go public” in support of reorganization. In my personal opinion, there are many judges, including Californians, who, if given the opportunity, would vote for an outright split off of the Northern Division into its own circuit. We had a court meeting on January 21 in which an actual vote on the White Commission Report was taken, and I leave it to my chief to decide if he wishes to disclose the exact vote tally and identities of those voting. Suffice it to say that nothing has transpired since the actual survey which would lead me to doubt that the roughly one-third/two-thirds alignment with respect to the Commission’s findings is still accurate. As a final comment on this point, I would note that conspicuously absent from Chief Judge Hug’s report is the fact that, of the five Supreme Court Justices who commented on the Ninth Circuit in letters to the Commission, “all were of the opinion that it is time for a change.”¹³ The Commission itself reported that, “[i]n general, the Justices expressed concern about the ability of judges on the Ninth Circuit Court of Appeals to keep abreast of the court’s jurisprudence and about the risk of intracircuit conflicts in a court with an output as large of that court’s.”¹⁴

After denying that anything is wrong, our official court position straddles the fence by arguing that we can alleviate any problems simply by making changes at the margin. In response to the Commission Report, the Chief Judge appointed an Evaluation Committee, which has since suggested various quick fixes. I must respectfully disagree that any problems with our circuit can be solved by tinkering at the edges. The time has come when cosmetic changes will no longer suffice and a significant restructuring is necessary. I am *not*, however, saying that our circuit as a whole is already broke. I would emphasize that Chief Judge Hug and the Clerk of the Court are presently doing a marvelous job of administering this fifteen-court circuit as a whole, but my instant focus is on where we go from here. If the Ninth Circuit Court of Appeals is not yet broke, it’s certainly on the verge.

III

How, then, should the Ninth Circuit be restructured? Frankly, I think that the toughest issue facing the long-term planner is what to do with California, which is, in itself, larger than any existing multi-state circuit in terms of population. What

¹³ White Commission Report at 38.

¹⁴ *Id.*

are the options? One option is to make California a circuit by itself. A second is to align it with other states. A third is to place California within two or more circuits or divisions. I would like to emphasize what is perhaps the most significant of the White Commission's well-considered findings with respect to exactly how the Circuit should be reorganized: that decisions of the district courts within the same state may indeed be reviewed by different divisions without difficulty. This finding comports with the conclusion of the Hruska Commission over 25 years ago, which recommended that two of California's four district courts be included in a newly created Twelfth Circuit. California now represents over 60 percent of the total workload of our nine-state and two-territory circuit.¹⁵ Whatever Congress decides to do—be it an outright circuit split or the creation of divisions—it should no longer be deterred from entertaining the possibility that appeals from the four districts within California be allocated to different appellate courts.

Critics argue that placing California within two different divisions would encourage forum shopping and subject Californians to diverging lines of federal authority. I specifically agree with Judge Rymer and the White Commission that the potential for forum shopping would increase only marginally because California litigants *already* can choose in which district to file and because any “division conflicts” could be quickly and expeditiously resolved. Like Judge Rymer, I was struck by the comments of Justice Stevens, Justice Scalia, and Justice Kennedy that the consequences of splitting California between two circuits have been seriously exaggerated.¹⁶

I think that the Commission has crafted a well-considered, detailed proposal for restructuring the circuit that will help to alleviate many of the problems that the Commission identified and that I outlined earlier. I have become a public proponent of the Hruska Commission's recommended restructuring plan over the last four years after starting out in 1986 opposed to any change whatsoever. The more I consider the issue, however, the more I appreciate the benefits of the White Commission's restructuring alternative. By creating smaller judicial-decision making units in the form of divisions, the Commission's proposal will promote consistency in law, predictability, and collegiality. These divisions will certainly be more connected to the regions involved. This is exactly what we need. If we go with the Commission's plan, we can, of course, make adjustments to the divisional structure as necessary to cope with political realities, perhaps for example, placing California within its own division and making other adjustments as necessary.

I am not here to defend S. 253 in minute detail, but I do urge the Committee to give serious consideration to doing *something* to address the many problems I have outlined. The divisional restructuring embodied in the present bill is most certainly worthy of consideration. In the event that Congress receives too much resistance to the divisional approach, in particular, then, as the only other alternative, it should specifically consider an outright split along the lines of the three alternative reorganization plans—Options A, B, and C—outlined by the Commission on pages 54–57 of the Report. These are, of course, the “Variation on the ‘classical split,’” the “‘Classical split’ plus realignment of Tenth Circuit to reduce size of new Ninth,” and the “Division of California between two circuits to reduce size of new Ninth,” respectively. My personal preference is Option C, which approximates the reorganization plan recommended by the Hruska Commission. This plan has a number of concrete benefits, resulting principally from the fact that it would create an even sharing of the Ninth Circuit's current caseload.

At the same time, I am also sensitive to political concerns which may cause delay before putting part of the same state in two separate circuits for the first time. But this simply counsels in favor of trying the Commission's divisional approach. Let's give S. 253 a chance to work first time. But this simply counsels in favor of trying the Commission's divisional approach. Let's give S. 253 a chance to work first.

IV

Mr. Chairman, do not be deterred by nit-picking criticism of details of the Commission's proposal. Men and women of good will can fashion modifications to the plan to satisfy the greatest number. And if the obstructionists wear you down, then go ahead and split us—permanently into two or more circuits as the alternative. The Ninth Circuit's problems won't go away, they will only get worse.

¹⁵ See Tables 4, 5.

¹⁶ See Letter from Justice John Paul Stevens to Justice Byron R. White, Chairman, Commission on Structural Alternatives for the Federal Court of Appeals 1 (August 24, 1998); Letter from Justice Antonin Scalia to Justice Byron R. White, Chairman, Commission on Structural Alternatives for the Federal Court of Appeals 1–2 (August 21, 1998); Kennedy, *supra* note 14, at 3.

We've been engaged in guerilla warfare on this circuit split issue for quite some time now. What we need to do is get back to judging. You must force us to restructure now, one way or another, so that we can concentrate on our sworn duties and end the distractions caused by this long-running controversy.

v

Thank you, Mr. Chairman, for allowing me to appear before you today. I would be happy to answer any questions you may have.

APPENDIX

- Exhibit A -- All Ninth Circuit Judges by Seniority
- Exhibit B -- Letter from Judges Eugene A. Wright, Joseph T. Sneed, Robert R. Beezer, Diarmuid F. O'Scannlain, Thomas G. Nelson, and Andrew J. Kleinfeld to Chairman Charles E. Grassley
- Chart 1 -- Number of Judgeships by Circuit
- Chart 2 -- Number of Total Judges (Active Judgeships + Senior Judges) by Circuit
- Chart 3 -- Population by Circuit
- Chart 4 -- Population by State Within Ninth Circuit
- Chart 5 -- Number of Appeals by State Within Ninth Circuit
- Table 1 -- Active Ninth Circuit Judges by Seniority
- Table 2 -- Number of Judges by Circuit
- Table 3 -- Population and Caseload by Circuit
- Table 4 -- Population and Number of Appeals by District within Ninth Circuit
- Table 5 -- Population and Number of Appeals by State within Ninth Circuit
- Table 6 -- Population and Number of Appeals under White Commission's Divisional Restructuring Plan
- Table 7 -- Population and Number of Appeals under Option A
- Table 8 -- Population and Number of Appeals under Option B
- Table 9 -- Population and Number of Appeals under Option C

EXHIBIT A
ALL NINTH CIRCUIT JUDGES BY SENIORITY
(as of July 16, 1999)

Judge	Appointed by	State	City	Status (Active/Senior)
1. Browning	Kennedy	California	San Francisco	ACTIVE
2. Wright	Nixon	Washington	Seattle	Senior
3. Choy	Nixon	Hawaii	Honolulu	Senior
4. Goodwin	Nixon	California	Pasadena	Senior
5. Wallace	Nixon	California	San Diego	Senior
6. Sneed	Nixon	California	San Francisco	Senior
7. Hug	Carter	Nevada	Reno	ACTIVE (Chief Judge)
8. Skopil	Carter	Oregon	Portland	Senior
9. Schroeder	Carter	Arizona	Phoenix	ACTIVE
10. Fletcher, B.	Carter	Washington	Seattle	Senior
11. Farris	Carter	Washington	Seattle	Senior
12. Pregerson	Carter	California	Woodland Hills	ACTIVE
13. Alarcon	Carter	California	Los Angeles	Senior
14. Ferguson	Carter	California	Santa Ana	Senior
15. Nelson, D.	Carter	California	Pasadena	Senior
16. Canby	Carter	Arizona	Phoenix	Senior
17. Boochever	Carter	California	Pasadena	Senior
18. Reinhardt	Carter	California	Los Angeles	ACTIVE
19. Beezer	Reagan	Washington	Seattle	Senior
20. Hall	Reagan	California	Pasadena	Senior
21. Wiggins	Reagan	Nevada	Las Vegas	Senior
22. Brunetti	Reagan	Nevada	Reno	ACTIVE
23. Kozinski	Reagan	California	Pasadena	ACTIVE
24. Noonan	Reagan	California	San Francisco	Senior
25. Thompson	Reagan	California	San Diego	Senior
26. O'Scannlain	Reagan	Oregon	Portland	ACTIVE
27. Leavy	Reagan	Oregon	Portland	Senior
28. Trott	Reagan	Idaho	Boise	ACTIVE
29. Fernandez	Bush	California	Pasadena	ACTIVE
30. Rymer	Bush	California	Pasadena	ACTIVE
31. T.G. Nelson	Bush	Idaho	Boise	ACTIVE
32. Kleinfeld	Bush	Alaska	Fairbanks	ACTIVE
33. Hawkins	Clinton	Arizona	Phoenix	ACTIVE
34. Tashima	Clinton	California	Pasadena	ACTIVE
35. Thomas	Clinton	Montana	Billings	ACTIVE
36. Silverman	Clinton	Arizona	Phoenix	ACTIVE
37. Graber	Clinton	Oregon	Portland	ACTIVE
38. McKeown	Clinton	Washington	Seattle	ACTIVE
39. Wardlaw	Clinton	California	Pasadena	ACTIVE
40. W. Fletcher	Clinton	California	San Francisco	ACTIVE
41. [Berzon]	[Clinton]	[California]	[San Francisco]	Nominee
42. [Paez]	[Clinton]	[California]	[Pasadena]	Nominee
43. [Gould]	[Clinton]	[Washington]	[Seattle]	Nominee
44. [Goode]	[Clinton]	[California]	[San Francisco]	Nominee
45. [Fisher]	[Clinton]	[California]	[Pasadena]	Nominee
46. [Duffy]	[Clinton]	[Hawaii]	[Honolulu]	Nominee
47. [Wash. seat]	[Clinton]	[Washington]	[Seattle/Spokane]	Nominee
SUMMARY: Authorized Judgeships		28	ACTIVE Judges	21
			Senior Judges	+ 19
			Sitting Judges	40
			Vacancies	7
			Total, including nominees	47

EXHIBIT B

UNITED STATES COURT OF APPEALS
for the NINTH CIRCUIT

July 16, 1999

The Honorable Charles E. Grassley
Chairman, Subcommittee on Administrative
Oversight and the Courts
Senate Judiciary Committee
308 Hart Senate Office Building
Washington, D.C. 20510

RE: Ninth Circuit Reorganization Legislation

Dear Chairman Grassley:

We are active and senior judges of the United States Court of Appeals for the Ninth Circuit who are delighted to learn that your Committee has scheduled hearings on the report by the Commission on Structural Alternatives for the Federal Courts of Appeals and its proposed implementing legislation S.253, the Ninth Circuit Reorganization Act. Having reviewed the report, we agree with the Commission that the optimum size of a federal appellate court is between seven and eleven active judges. While each of us may have some quibbles with the specific proposal, we are pleased that there is now an appropriate legislative vehicle within which to discuss the future of the Ninth Circuit.

Each of us is convinced that a split of the Ninth Circuit is inevitable. Indeed, we are persuaded that the same compelling reasons which support the Commission's recommendation for divisions even more forcefully compels the need for a formal split of the Ninth Circuit itself. Whether legislation results in restructuring into divisions somewhat along the lines of the Commission report, or in an outright split into two or more circuits, we feel that the underlying findings of the Commission are irrefutable. The Pacific Northwest states should remain intact either as a division or as the keystone for one of the realigned new circuits and we endorse options A, B and C on pages 54 - 57 of the Report to that extent.

Sincerely,

Eugene A. Wright
Senior United States Circuit Judge
Seattle, Washington

Joseph T. Sneed
Senior United States Circuit Judge
San Francisco, California

Robert R. Beezer
Senior United States Circuit Judge
Seattle, Washington

Diarmuid F. O'Scannlain
United States Circuit Judge
Portland, Oregon

Thomas G. Nelson
United States Circuit Judge
Boise, Idaho

Andrew J. Kleinfeld
United States Circuit Judge
Fairbanks, Alaska

CHART 1
NUMBER OF JUDGESHIPS BY CIRCUIT

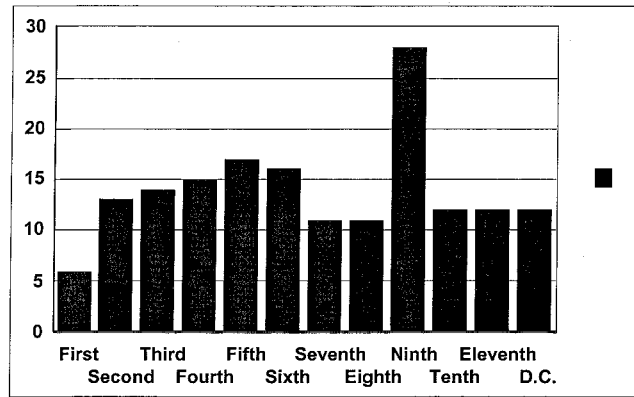
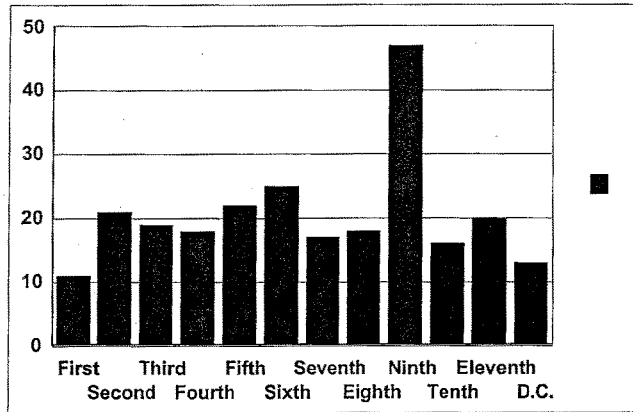
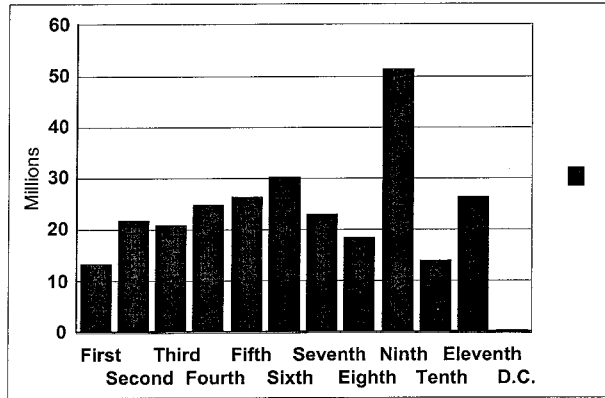


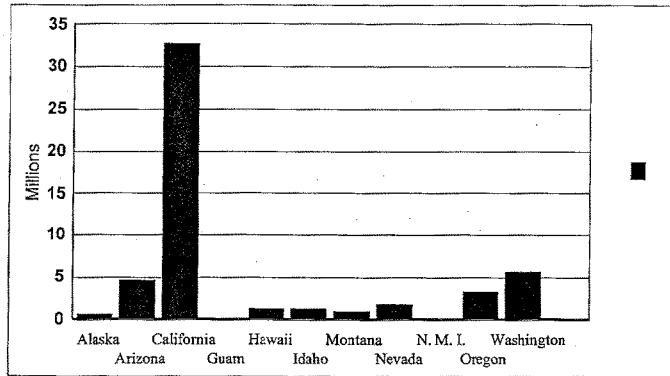
CHART 2
NUMBER OF TOTAL JUDGES
(ACTIVE JUDGESHIPS + SENIOR JUDGES)
BY CIRCUIT



**CHART 3
POPULATION BY CIRCUIT**



**CHART 4
POPULATION BY STATE
WITHIN NINTH CIRCUIT**



**CHART 5
NUMBER OF APPEALS BY STATE
WITHIN NINTH CIRCUIT**

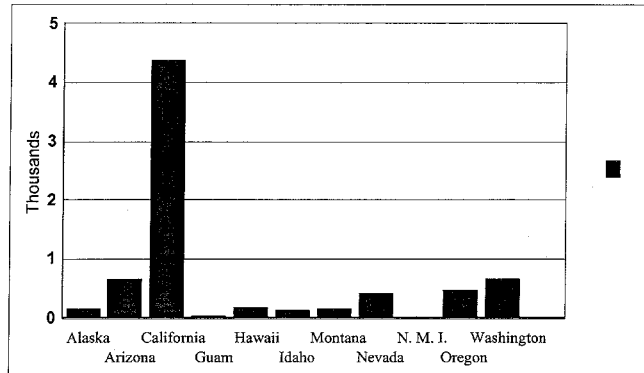


TABLE 1
ACTIVE NINTH CIRCUIT JUDGES BY SENIORITY
(as of July 16, 1999)

Judge	Appointed By	District	City	Division Under White Commission Proposal
Hug	Carter	Nevada	Reno	Middle
Browning	Kennedy	N.D. California	San Francisco	Middle
Schroeder	Carter	Arizona	Phoenix	Southern
Pregerson	Carter	C.D. California	Woodland Hills	Southern
Reinhardt	Carter	C.D. California	Los Angeles	Southern
Brunetti	Reagan	Nevada	Reno	Middle
Kozinski	Reagan	C.D. California	Pasadena	Southern
O'Scannlain	Reagan	Oregon	Portland	Northern
Trott	Reagan	Idaho	Boise	Northern
Fernandez	Bush	C.D. California	Pasadena	Southern
Rymer	Bush	C.D. California	Pasadena	Southern
Nelson, T.G.	Bush	Idaho	Boise	Northern
Kleinfeld	Bush	Alaska	Fairbanks	Northern
Hawkins	Clinton	Arizona	Phoenix	Southern
Thomas	Clinton	Montana	Billings	Northern
Tashima	Clinton	C.D. California	Pasadena	Southern
Silverman	Clinton	Arizona	Phoenix	Southern
Graber	Clinton	Oregon	Portland	Northern
McKeown	Clinton	W.D. Washington	Seattle	Northern
Wardlaw	Clinton	C.D. California	Pasadena	Southern
Fletcher, W.	Clinton	N.D. California	San Francisco	Middle
[Berzon]	[Clinton]	[N.D. California]	[San Francisco]	[Middle]
[Paez]	[Clinton]	[C.D. California]	[Pasadena]	[Southern]
[Gould]	[Clinton]	[W.D. Washington]	[Seattle]	[Northern]
[Goode]	[Clinton]	[N.D. California]	[San Francisco]	[Middle]
[Fisher]	[Clinton]	[C.D. California]	[Pasadena]	[Southern]
[Duffy]	[Clinton]	[Hawaii]	[Honolulu]	[Middle]
[Washington seat]	[Clinton]	[W.D./E.D. Wash.]	[Seattle/Spokane]	[Northern]

TABLE 2
NUMBER OF JUDGES
BY CIRCUIT
 (as of March 1999)

Court	Headquarter City	Appellate Judgeships	%	Senior Judges	%	Total Judges*	% U.S.
First	Boston, MA	6	3.6%	5	6.3%	11	4.5%
Second	New York, NY	13	7.8%	8	10.0%	21	8.5%
Third	Philadelphia, PA	14	8.4%	5	6.3%	19	7.7%
Fourth	Richmond, VA	15	9.0%	3	3.8%	18	7.3%
Fifth	New Orleans, LA	17	10.2%	5	6.3%	22	8.9%
Sixth	Cincinnati, OH	16	9.6%	9	11.3%	25	10.1%
Seventh	Chicago, IL	11	6.6%	6	7.5%	17	6.9%
Eighth	St. Louis, MO	11	6.6%	7	8.8%	18	7.3%
Ninth	San Francisco, CA	28	16.8%	19	23.8%	47	19.0%
Tenth	Denver, CO	12	7.2%	4	5.0%	16	6.4%
Eleventh	Atlanta, GA	12	7.2%	8	10.0%	20	8.1%
D.C.	Washington, DC	12	7.2%	1	1.3%	13	5.3%
Total		167	100%	80	100%	247	100%

* Total judges includes authorized judgeships and senior judges.

SOURCE: 28 U.S.C. § 44; Administrative Office of the United States Courts, United States Court Directory 5-74 (March 1999).

**TABLE 3
POPULATION AND CASELOAD
BY CIRCUIT**

Court	Population* (1998 figures)	% Pop.	Number of Appeals (10/1/97-9/30/98)	% Appeals
First	13,421,910	4.9%	1,437	2.7%
Second	22,040,253	8.0%	4,796	8.9%
Third	20,978,065	7.6%	3,613	6.7%
Fourth	25,119,764	9.2%	4,897	9.1%
Fifth	26,880,673	9.8%	8,096	15.0%
Sixth	30,393,855	11.1%	4,704	8.7%
Seventh	23,168,021	8.4%	3,297	6.1%
Eighth	18,603,862	6.8%	3,330	6.2%
Ninth	52,182,464	19.0%	9,070	16.9%
Tenth	14,264,347	5.2%	2,582	4.8%
Eleventh	26,910,186	9.8%	6,356	11.8%
D.C.	523,124	0.2%	1,627	3.0%
Total	274,486,524	100%	53,805	100%

* State figures as of July 1, 1998; territorial figures as of 1998.

SOURCE: Administrative Office of the United States Courts, Judicial Business of the United States Courts: Annual Report of the Director 90 (1998); U.S. Census Bureau, State Population Estimates and Demographic Components of Population Change: July 1, 1997 to July 1, 1998 <www.census.gov/population/estimates/state/st-98-1.txt> (visited July 9, 1999); U.S. Census Bureau, County Population Estimates and Demographic Components of Population Change: July 1, 1997 to July 1, 1998 <www.census.gov/population/estimates/county/co-98-1/98C1_06.txt> and <www.census.gov/population/estimates/county/co-98-1/98C1_53.txt> (visited July 9, 1999); U.S. Department of Commerce, Statistical Abstract of the United States 810 (1998).

**TABLE 4
POPULATION AND NUMBER OF APPEALS BY DISTRICT WITHIN NINTH
CIRCUIT**

Court	City	Authorized District Judgeships	Population (1998 figures)	% Pop.	Appeals (10/1/97 - 9/30/98)	% Appeals
D. Alaska	Anchorage	3	614,010	1.2%	159	2.2%
D. Arizona	Phoenix	8	4,668,631	9.0%	654	9.0%
C.D. California	Los Angeles	27	16,405,141	31.4%	2133	29.2%
E.D. California	Sacramento	6	6,195,612	11.9%	705	9.7%
N.D. California	San Francisco	14	7,141,154	13.7%	927	12.7%
S.D. California	San Diego	8	2,924,643	5.6%	634	8.7%
D. Guam	Agana	1	146,000	0.3%	46	0.6%
D. Hawaii	Honolulu	3	1,193,001	2.3%	171	2.3%
D. Idaho	Boise	2	1,228,684	2.4%	139	1.9%
D. Montana	Helena	3	880,453	1.7%	167	2.3%
D. Nevada	Las Vegas	4	1,746,898	3.3%	422	5.8%
D. N. Mariana Is.	Saipan	1	67,000	0.1%	12	0.2%
D. Oregon	Portland	6	3,281,974	6.3%	466	6.4%
E.D. Washington	Spokane	4	1,267,071	2.4%	140	1.9%
W.D. Washington	Seattle	7	4,422,192	8.5%	528	7.3%
TOTAL		97	52,182,464	100%	7,303*	100%

* Excludes the following cases: bankruptcy (323), tax court (87), NLRB (40), administrative agencies (1,173), and original proceedings (144).

SOURCE: 28 U.S.C. § 133; Administrative Office of the United States Courts, Judicial Business of the United States Courts: Annual Report of the Director at 106 (1998); U.S. Census Bureau, State Population Estimates and Demographic Components of Population Change: July 1, 1997 to July 1, 1998 <www.census.gov/population/estimates/state/st-98-1.txt> (visited July 9, 1999); U.S. Census Bureau, County Population Estimates and Demographic Components of Population Change: July 1, 1997 to July 1, 1998 <www.census.gov/population/estimates/county/co-98-1/98C1_06.txt> and <www.census.gov/population/estimates/county/co-98-1/98C1_53.txt> (visited July 9, 1999); U.S. Department of Commerce, Statistical Abstract of the United States 810 (1998).

TABLE 5
POPULATION AND NUMBER OF APPEALS BY STATE WITHIN
NINTH CIRCUIT

State	Authorized District Judgeships	Population	% Pop.	Appeals	% Appeals
Alaska	3	614,010	1.2%	159	2.2%
Arizona	8	4,668,631	8.9%	654	9.0%
California	56	32,666,550	60.2%	4,399	63.0%
Guam	1	146,000	0.3%	46	0.6%
Hawaii	4	1,193,001	2.3%	171	2.3%
Idaho	2	1,228,684	2.4%	139	1.9%
Montana	3	880,453	1.7%	167	2.3%
Nevada	4	1,746,898	3.3%	422	5.8%
N. Mariana Islands	1	67,000	0.1%	12	0.2%
Oregon	6	3,281,974	6.3%	466	6.4%
Washington	11	5,689,263	10.9%	668	9.1%
TOTAL	97	52,182,464	100%	7,303*	100%

* Excludes the following cases: bankruptcy (323), tax court (87), NLRB (40), administrative agencies (1,173), and original proceedings (144).

**TABLE 6
POPULATION AND NUMBER OF APPEALS UNDER
WHITE COMMISSION'S DIVISIONAL RESTRUCTURING PLAN**

Division	Appellate Judgeships	Population	% Pop.	Appeals	% Appeals
Northern Division-- 6 District Courts: Alaska, Idaho, Montana, Oregon, E.D. Washington, W.D. Washington	9	11,694,384	22.4%	1,599	21.9%
Middle Division-- 6 District Courts: E.D. California, N.D. California, Guam, Hawaii, Nevada, N. Mariana Is.	7	16,489,665	31.6%	2,283	31.3%
Southern Division-- 3 District Courts: Arizona, C.D. California, S.D. California	12	23,998,415	46.0%	3,421	46.8%
TOTAL	28	52,182,464	100%	7,303*	100%

**TABLE 7
POPULATION AND NUMBER OF APPEALS UNDER OPTION A**

Circuit	Appellate Judgeships	Population	% Pop.	Appeals	% Appeals
Southwestern Circuit-- 6 District Courts: Arizona, C.D. California, E.D. California, N.D. California, S.D. California, Nevada	18	39,080,079	74.9%	5,475	75.0%
Northwestern Circuit: 9 District Courts: Alaska, Guam, Hawaii, Idaho, Montana, N. Mariana Is., Oregon, E.D. Washington, W.D. Washington	10	13,100,385	25.1%	1,828	25.0%
TOTAL	28	52,182,464	100%	7,303*	100%

* Excludes the following cases: bankruptcy (323), tax court (87), NLRB (40), administrative agencies (1,173), and original proceedings (144).

**TABLE 8
POPULATION AND NUMBER OF APPEALS UNDER OPTION B**

Circuit	Appellate Judgeships	Population	% of Pop. in Remaining Ninth Circuit	Appeals	% of Appeals in Remaining Ninth Circuit
Southwestern Circuit-- 8 District Courts: C.D. California, E.D. California, N.D. California, S.D. California, Guam, Hawaii, Nevada, N. Mariana Is.	16	35,819,449	75.4%	5,050	76.0%
Northwestern Circuit: 6 District Courts: Alaska, Idaho, Montana, Oregon, E.D. Washington, W.D. Washington	9	11,694,384	24.6%	1,599	24.0%
Total for Remaining Ninth Circuit:	25	47,513,833	100%	6,649*	100%
New Tenth Circuit: Arizona, Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming	15	18,932,978	-	3,236	-

**TABLE 9
POPULATION AND NUMBER OF APPEALS UNDER OPTION C**

Circuit	Appellate Judgeships	Population	% Pop.	Appeals	% Appeals
Southwestern Circuit-- 7 District Courts: Arizona, C.D. California, S.D. California, Guam, Hawaii, Nevada, N. Mariana Is.	15	27,151,314	52.0%	4,072	55.8%
Northwestern Circuit: 8 District Courts: Alaska, E.D. California, N.D. California, Idaho, Montana, Oregon, E.D. Washington, W.D. Washington	13	25,031,150	48.0%	3,231	44.2%
TOTAL	28	52,182,464	100%	7,303*	100%

* Excludes the following cases: bankruptcy (323), tax court (87), NLRB (40), administrative agencies (1,173), and original proceedings (144).

Senator GRASSLEY. My former colleague, Judge Wiggins.

STATEMENT OF HON. CHARLES E. WIGGINS

Judge WIGGINS. Thank you, Mr. Chairman. I am delighted to have the opportunity to appear before you in your present status. You have come a long way since we were colleagues in the House of Representatives.

Senator GRASSLEY. There are a lot of people in the House that say coming to the Senate is not very far. [Laughter.]

Judge WIGGINS. Well, I commend you, and I am proud of you.

I appear as a senior judge from the ninth circuit. I have been on the ninth circuit for 15 years; prior to that, I practiced law for 16 years; and prior to that I served for 12 years in the House of Representatives, a colleague of our chairman.

I have a problem with my sight. I cannot see any more, and so I am not going to testify consistent with my submitted statement. But I urge you to read it and to consider what is there. I am just going to extemporize for about 5 minutes and say something that I feel very deeply about.

The ninth circuit is a fine institution. We have an example of the quality of judges right here at this table, and I am proud to say that they are colleagues of mine. There is not a case that is submitted to Judge Andy Kleinfeld, who resides in Alaska, that originates in Southern California, that I would not be proud to have him sit on because he would provide judgment and a fair decision. And I think the other side is true; that he would not find that I am unqualified to sit on cases that intimately affect Alaska because I try to be fair as well.

The whole notion of dividing the circuit has to consider the present personnel and the fact that they are going to remain. We have some judges who are characterized as liberals, some characterized as conservatives, and a great many in the middle. They are all going to remain deciding cases in the future, how many divisions, subdivisions we ever make of the ninth circuit.

The second problem, and maybe the fundamental problem is size, but it is the fact that population is increasing. The population of the ninth circuit is increasing about 5 percent a year, and it is going to continue in the future, whatever the subdivisions of the circuit may be. One of these days the Congress is going to have to address that problem. It is a tough political problem, and I do not want to speak to it now.

The other problem is subject matter jurisdiction. The circuit has to hear cases that you assign, the Senate and House of Representatives assign to us. We do not have any choice in the matter. The selection of judges is a political decision as well. But the personnel, the subject matter jurisdiction is a problem that you must one of these days come to grips with. You could appoint a Commission truly to make revisions in the subject matter jurisdiction of the circuit courts of appeal, and you would be doing something constructive. The present proposal has nothing to add to its constructive result in the circuit. It is addressing a problem that is not a problem.

I am proud to serve on the circuit. I think my colleagues up here are fine members of the circuit, and they should be permitted to decide cases wherever the circuit. We need more judges, of course.

But because we need more judges, we should not sidetrack the fundamental problem that we have too many cases. We have 9,000, approximately, arising in the circuit now; 55,000, approximately, across the country.

The problem that people have addressed here is not confined to the ninth circuit. We have Senator—a Senator that has a southern accent. I cannot see him up there. But he may be affiliated with the fifth circuit. That is presently a problem that they are up about 17 judges. The eleventh circuit is presently a problem, and those are the next two areas that are going to be addressed if you establish the precedent of subdividing the ninth circuit.

Now, we are doing a good job. We are truly doing a good job. There is a lot of political interest in subdividing the circuit, but those are not meritorious, and I urge you, strongly urge, to leave well enough alone. You should put this divisive issue behind us. I would recommend that you just file the White Commission report and take no action with respect to it.

I served as a member, as you know, on the Hruska Commission. I am getting to be the last surviving member of the Hruska Commission. We made some mistakes. We made some mistakes in dividing California, but we made some fundamental findings that there is one law existing across the country. It is the same law in New York City as it is in Fairbanks, AK, and as it is in Los Angeles. We should not encourage regionalism. That is fundamentally wrong.

Now, you are a national officer, and I am too, to some extent. We are applying national law. To the extent that we are citizens of our State and our interests may be at odds with the national law, the national law should prevail. This fosters regionalism, and that is wrong. We are not going to survive as a court with 40 courts that the magic formula of 17 or 11 mandate.

Now, you have got to study the issue of concentrating in larger circuits because it is inevitable. The population is growing up, and the caseload that you have assigned to this is going up as well. The only answer is larger circuits.

Let me urge you, and I will conclude, that this is a terribly important subject. It is a national issue, and I urge you, as national officers, to foster one law for the Nation. It is the way the Constitution was founded.

Thank you very much, Mr. Chairman.

[The prepared statement of Judge Wiggins follows:]

PREPARED STATEMENT OF CHARLES E. WIGGINS

SUMMARY

The Ninth Circuit operates well with its present structure and boundaries. The drive to split the circuit is animated by political concerns, not by a desire to improve the federal appellate courts. Therefore, I oppose the White Commission's restructuring of the circuit as well as any other plan that would divide the circuit.

The argument that the circuit is just "too big" collapses under scrutiny. As the White Commission made clear, there is no reason to believe that the circuit is too large to administer justice fairly and effectively. In addition, modem technology has shrunk the circuit. Modem jets cover large distances in minutes or hours. We also can communicate instantaneously across vast distances, rendering face-to-face meetings less important. Finally, splitting the circuit would do little to ease the travel burden that remains.

One of the prime factors motivating proponents of a split is provincialism—the belief that judges from a state should decide cases that originate in that state. Provincialism is inconsistent with the purpose of the federal court system, which strives to interpret and apply national law uniformly. Federal law should not mutate to satisfy local constituents; federal law is the same nationwide.

Political philosophy is another factor motivating proponents of a split. This is an illegitimate motive. Tampering with the federal courts because of the political or judicial philosophies of particular judges is inconsistent with the separation of powers doctrine and the independence of the judiciary.

My name is Charles Wiggins, and I'm a Senior Judge on the Ninth Circuit, where I have served for the last fifteen years. Prior to that, I served twelve years in the House of Representatives. My primary committee assignment was the Judiciary Committee, where I served for a number of years as the ranking Republican member on the Courts and Intellectual Property subcommittee. As a member of the Judiciary Committee, I was given the privilege of serving on a variety of important, special commissions; most relevant to this hearing, I served 25 years ago as a member of the Hruska Commission. Thus, I have devoted a quarter of a century to the careful study of the jurisdiction and boundaries of the several circuits. Over this time, with the benefit of subsequent study and experience, I have concluded that some of the conclusions of the Hruska Commission were erroneous, and I can no longer support them.

I have concluded, as a result of extensive study of the subject, that the overall functioning of our appellate system will not be improved by adding further circuits to the present structure, but that the problems with the present structure are traceable to the growth in population and the expansion of subject matter jurisdiction for the circuits.

Accordingly, we must direct our efforts to narrowing the subject matter jurisdiction of the circuits, and we should attempt to reduce the number of circuits, making them larger, not smaller. Therefore, I oppose the recommendations of the White Commission, as well as any other proposals that would further subdivide the existing circuits, and I urge this body to file the White Commission's recommendations without taking action.

I will not analyze the particular shortcomings of the Commission's recommendations. Other witnesses will adequately engage in that analysis. Instead, I am going to undertake an explanation of why this Commission's recommendations are before you at all. I am satisfied that there are no cogent reasons to tamper with the physical size of the Ninth Circuit, except that it is perceived to be in the political interests of its sponsors.

I. Is the circuit too big?

As a starting point, let me confront the foremost argument for a Division, namely that the Ninth Circuit is just "too big." Proponents of a Ninth Circuit split frequently justify their position by asserting that the circuit is just that—"too big." This, of course, begs the question: too big for what? The key question should be whether the Ninth Circuit is too large to administer justice fairly and effectively. The answer to this question is easy—it is not. As the White Commission proclaimed "there is no persuasive evidence that the Ninth Circuit is not working effectively or that creating new circuits will improve the administration of justice in any circuit or overall."

The other potential argument is that the Ninth Circuit is "too large," not because it is unable to carry out its mission, but because administering justice over such a large territory is burdensome on both judges and litigants. I disagree with this assessment as well. Over the past century the circuit has operated effectively despite its massive boundaries, and, today, the circuit's large territory imposes fewer hardships on judges and litigants than ever before. We live in a shrunken world. As technology continues its giant leaps forward, our old way of looking at large distances becomes increasingly obsolete. Our judges no longer traverse the circuit's large distances via horseback. In the early years of this century, travel was a significant burden. For example, it took about three days to travel from Los Angeles to San Diego, yet this is a minor distance in comparison to the circuit as a whole. Likewise, a trip from San Francisco to Sacramento was itself a journey of a couple of days. But at that time there was, no outcry against the size of the circuit. Only now, after we have managed to shrink, practically speaking, the distances that separate one part of our country from another, do we hear that the circuit is "too big." But this argument cannot coexist with the high technology world around us. Not only has our modern system of air travel made it easier to cover large distances, but the

importance of travel itself diminishes as technology advances. Judges in San Diego or Los Angeles can communicate easily and instantaneously with judges in Boise and Fairbanks via electronic mail, fax machines, conference calls and videoconferencing. With time, many of our traditional ways of conducting court business, relying as they do on face-to-face communication, will become obsolete.

It is also important to understand that splitting the circuit does very little to reduce what travel burden remains. Clearly, lawyers and judges in rural parts of Alaska, Montana or Idaho bear a more significant travel burden than do judges or lawyers in San Francisco or Los Angeles. Nevertheless, the travel burden on these parties will remain significant even after the unveiling of a circuit split. It is difficult to travel to court meetings or oral arguments from rural Alaska. But it is only marginally more difficult to travel from rural Alaska to San Francisco than it is to travel from rural Alaska to Portland, Oregon. The relatively minor additional travel time is grossly insufficient to justify a fundamental transformation of the federal appellate system.

For these reasons, I believe the cry that the circuit is “too big” collapses under close scrutiny.

II. The problem of provincialism

Another primary motive animating many proponents of a split I label provincialism. This is the belief that Judges from State X should decide cases from State X. Some of the key proponents of a split argue that California judges should not be deciding cases from Alaska, or Montana, or other Northwestern states. Under scrutiny, this argument shows itself, not only flawed, but even illegitimate. The United States Court of Appeals is charged primarily with interpreting and applying national law, not regional law, not state law. There is only one national law, enacted in D.C., under authority derived from the U.S. Constitution. The proponents' theory only makes sense if we believe that judges in Alaska should interpret the Constitution or federal statutes in an Alaska-friendly manner, and that California judges should interpret the same law in a California-friendly manner. But this is not the purpose of the federal judiciary. The U.S. Constitution is the same in California as it is in Alaska, it's the same in New York as in Florida. This is equally true of federal statutory law. For example, Congress did not pass, and the President did not sign, separate Americans with Disabilities Acts for Alaska and California. Thus, federal law is the same, region to region, and state to state. The goal of the federal judiciary is to achieve uniformity in interpretation, without splintered interpretations designed to favor the local constituency. National law is not an appropriate forum for regional experimentation; this is the proper exercise of state law. Where the Constitution entrusts matters to the federal government, the law applies to all and should apply uniformly to all. The uniform application of national law is harmed, not helped, when the courts of appeals are splintered into smaller adjudicative bodies in order to tailor their views to local constituencies.

Splitting a circuit to appease regional interests deprives a circuit of the diversity of background that circuits need in order to interpret and apply national law in a uniform manner. Proponents of a Ninth Circuit split often argue that judges from other parts of the circuit, particularly California, are insufficiently familiar with life in the Pacific Northwest to decide cases arising in the northwest. I disagree, first, with the claim that California judges lack sufficient familiarity with their northern neighbors to adjudicate disputes from the northern states. It is true that no judge can be intimately familiar with the culture, background, and lifestyle of every party that comes before his or her court. Some judges that have an intimate understanding of logging or fishing in the rugged northwest may be unfamiliar with the lives of inner-city Los Angelinos. The reverse is often true as well. But let us remember, federal law is not designed to appeal to a small segment of the nation, it is written to apply to all Americans. Thus, we have long recognized that more diversity, not less, is necessary for a healthy circuit. A political generation ago, the Hruska Commission was given the task of exploring the state of the circuit courts, including their boundaries. In laying out the general principles through which decisions on the circuit courts should be made, the Hruska Commission articulated a truth that we must not lose sight of today: provincialism is a danger, not a benefit, to the courts of appeals. The Hruska Commission warned that we must avoid circuit courts that “lack the diversity of background and attitude brought to a court by judges who have lived and practiced in different states.” 62 F.R.D. 223, 237. The Commission rightly noted that “such diversity is a highly desirable, and perhaps essential, condition in the constitution of the federal courts.” *Id.* As the White Commission report makes clear, this Hruska Commission finding still rings true. *See* White Commission Report at 49. The federal appellate courts cannot cater to local tastes or interests if they are to satisfy their function of applying a uniform body of law uniformly.

That being the case, the circuit courts should be composed in a way that best accomplishes that goal, by having judges from different parts of the country and different backgrounds working together to create truly national interpretations of our national law.

The key, then, is not to break the circuit courts into small bodies that cater to local tastes. The key is to ensure that the circuit courts are comprised of judges that represent the full diversity of the circuit. The proper question is whether the different regions of the circuit are adequately represented on the court by judges from the different regions. I would argue that the present Ninth satisfies this goal. But if it does not, the remedy is to appoint and confirm judges that ensure that all regions of the circuit are adequately represented, the remedy is not to splinter the circuit into smaller bodies that cannot effectively represent broad viewpoints.

It is also important to remember that the Ninth Circuit is not the only circuit that is growing rapidly. The Judicial Conference of the United States projects that the number of filed appeals will multiply by a factor of seven in the next twenty years. See Lloyd D. George, *The Split of the Ninth Circuit: Is It Really Our Best Option?*, 6–Jun Nev. Law. 5. Thus, to maintain smaller 12–15 judge circuits, while still maintaining viable caseloads per judge, would require up to 40 circuits by the year 2020. *Id.* Maintaining uniformity in the federal law would be an almost-impossible task with such a large number of circuits. Thus, it is necessary to readjust our thinking about the federal circuit courts. The circuit courts of the future, whether we like it or not, will be large circuits. Our only hope for an effective court of appeals system lies in finding ways to make large circuits work better; the answer is not to ignore the clear growth trends and stubbornly demand the small circuits that are, more and more, becoming a relic of the past.

Furthermore, smaller circuits cannot allay the concerns expressed by many proponents of a split. Many split proponents, particularly those from the Northwest, claim that their states are dominated by California. Again, I disagree with this assertion. But even if they are right, splitting the Ninth Circuit sets a bad precedent for those smaller states that are concerned with the dominance of a larger neighbor. Splitting the Ninth may remove Alaska from under California's real or imagined dominance, but only at the expense of those smaller states left in the Ninth. Whatever states remain tied to California, most likely Nevada, Arizona, maybe Hawaii, will be more dominated by California than Alaska or Montana ever were, because the other smaller states that once comprised the circuit have left, taking their judges with them. The only answer to large state dominance in the circuits is larger circuits, where many smaller states can balance one large one.

The Ninth is not the only rapidly growing circuit. Soon Congress will have to decide whether to divide a number of others. If Congress is concerned with the dominance of large states, it must set an important precedent by keeping the Ninth Circuit together. Otherwise, many other small states may soon find themselves in splintered circuits of their own, joined with a large and dominant neighbor and without any other small states that can provide balance to their circuit.

III. Political philosophy

The final motivation behind a circuit split is even more troublesome than provincialism. There is a perception among many conservatives that our circuit is a "liberal" circuit that is out-of-touch with the Supreme Court, and the other circuits. I strongly believe that this characterization is unfair. As one intimately familiar with the judges on the Ninth Circuit, I can say with confidence that our circuit is diverse, with a few liberals, a few conservatives, and many moderates. But however you view the philosophy of the Ninth, splitting the circuit for political reasons is illegitimate and would, in any case, be ineffectual in promoting the political philosophies of its proponents.

Let me first address illegitimacy of a political restructuring of the circuit. We have long recognized, ever since President Roosevelt's attempt to pack the Supreme Court with favorable justices, if not before, that it is illegitimate for the political branches to alter fundamentally the character of the federal judiciary for political reasons. The Constitution is clear; the federal judiciary is an apolitical body, separate and equal to the political branches and unaccountable to them. Article III serves as a constant reminder that the federal judiciary cannot be played with to accomplish political whims, it cannot be punished because of a judge's political views. Elected officials have come and gone. As the old were replaced by the new, the prevailing political views on Capitol Hill often changed. Time has had the same effect on the federal judiciary. As old judicial personalities were replaced by new judges, prevailing judicial philosophies have often changed. What has remained constant throughout the century is the effectiveness with which the Ninth Circuit has administered justice. To alter significantly the structure of the federal judiciary because of disagreements

with some judges' political views cuts to the heart of judicial independence, and fundamentally strains the separation of powers that animates our Constitution. Under our constitutional system, it is the interplay between the President and the Senate that places federal judges on the bench and, consequently, gives a district, a circuit, or the Supreme Court a liberal, conservative, or moderate character. These elected officials must then live with the results of the political process until they can alter the character of the courts through this political process. Over the long term, this process serves the country well.

Second, speaking practically, and setting aside the illegitimacy of restructuring the federal judiciary for political reasons, splitting the Ninth Circuit because of its perceived "liberal" character will not achieve the goals of its conservative proponents. Splitting the circuit does not replace "liberal" judges with "conservative" judges. The same judges will still occupy the appellate bench, and they will still produce decisions consistent with their judicial views. Thus, a split for political reasons cannot reduce the number of "liberal" decisions, nor can it increase the number of "conservative" ones. The theory, then, must be that a split will create a new circuit with a more conservative bent in the Northwest, while leaving California to its liberal judges. This theory is fundamentally flawed. Speaking as one intimately familiar with the court and its judges, I can say with a great deal of certainty that a Northwestern circuit will have a character very similar to that of the Ninth Circuit as it presently stands. There is no Mason-Dixon line in this circuit. Chopping California off from the Northwest will create two circuits, but it will not create a conservative circuit and a liberal circuit.

IV. Conclusion

In conclusion, the White Commission's recommendations, and any other plan to split the Ninth Circuit, are inherently flawed. First, because of a rapidly increasing population, the demand for circuit judges will continue to rise dramatically. If we are to maintain uniformity in our federal appellate system, the circuit courts of the future will be large circuits; splintering our appellate system into a multitude of small circuits can only increase conflict, not uniformity. Thus, we must search for ways to make large circuits work better, primarily by reducing the subject matter jurisdiction of the circuit courts to make case loads more manageable. Second, the reasons given for a Ninth Circuit split collapse under scrutiny. The circuit is not "too big." Though large, it allows for the fair and effective administration of justice. And practically speaking, the circuit gets smaller every day with every technological leap forward. Finally, the motives animating circuit split proposals are illegitimate. Provincialism is a misguided motive because it jeopardizes the federal courts' duty to administer national law uniformly. Likewise, splitting a circuit because of the political philosophies of some federal judges threatens the separation of powers upon which our governmental system is based. I therefore urge the Committee to maintain the circuit's present structure.

Senator GRASSLEY. Thank you, Judge Wiggins.

Before I call on Judge Browning, who will finish the panel, I want to say that Assistant Attorney General Acheson also had another commitment and will be submitting her testimony for the record. I appreciate her willingness to testify.

[The prepared statement of Ms. Acheson follows:]

PREPARED STATEMENT OF ELEANOR D. ACHESON

Good morning. I appreciate the opportunity to appear before the Subcommittee on Administrative Oversight and the Courts to express the views of the United States Department of Justice on the final report of the Commission on Structural Alternatives for the Federal Courts of Appeals and on S. 253, the Ninth Circuit Reorganization Act. The Department opposes enactment of S. 253.

INTRODUCTION

In 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals to study, for one year, "the present division of the United States into the several judicial circuits" and "study the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit."¹ The five-member Commission, chaired by retired Supreme Court Justice

¹Sec. 305(a)(1)(B)(i, ii), Pub. L. No. 105-119, 111 Stat. 2491 (1997).

Byron White, provided the Justice Department and other interested parties two opportunities to submit ideas concerning these subjects, once at the beginning of the Commission's work and again in response to the Commission's draft report. The Department appreciated the opportunity to contribute to the Commission's work. A copy of the Department's official comments to the Commission on Structural Alternatives have been submitted for the record and are incorporated as part of the Department's testimony.

In its final report, the Commission made recommendations in four general areas regarding the structural reorganization of the courts of appeals: *First*, the Commission specifically rejected the suggestion that the Ninth Circuit be split, noting that there was "no persuasive evidence" supporting a realignment of the circuit.² Instead, the Commission recommended that the Ninth Circuit be divided into three semi-autonomous decisional regions. Under this novel arrangement, none of these regional divisions would be obligated to follow the others' precedents and any "square conflicts" in their decisions could be resolved by a Circuit-wide division called the Circuit Division. *Second*, the Commission recommended that each other federal Court of Appeals be granted the statutory authority to divide into regional divisions and to establish a Circuit Division once its bench reached 15 or more active judges. *Third*, the Commission urged that the Courts of Appeals be granted the authority to experiment with appellate panels consisting of two judges, instead of the three-judge panel that is the norm. *Fourth*, the Commission recommended that the Courts of Appeals be permitted to use panels consisting of two federal District Court judges and one federal Circuit Court judge when resolving cases that involve the routine application of well-settled law or that involve certain subject matter areas. S. 253, the Ninth Circuit Reorganization Act, was introduced in response to the White Commission's report and incorporates all four of the Commission's recommendations.

Because S. 253 so closely tracks the White Commission's recommendations, our written testimony before this Subcommittee draws from the comments submitted to the Commission by the Department.

GENERAL VIEWS OF THE DEPARTMENT OF JUSTICE

The structural reforms contained in S. 253 have serious, far-reaching implications for the structure and functioning of the federal courts. The Justice Department approaches these issues from our perspective as a frequent litigant in the federal system—a participant in over 40 percent of the cases heard in the federal courts of appeals—which must reconcile tensions in the results and reasoning of decisions in order to assess how to proceed in federal investigations and prosecutions, to give advice to client agencies, and to consider whether to seek review of decisions adverse to the government.

We begin with the observation that all available means of non-structural reform should be attempted and assessed before structural changes are imposed on the federal courts. In our comments to the White Commission, we expressed the view that structural changes should be undertaken only if a pervasive and well-documented problem exists, that problem cannot be addressed within the existing structure, and a workable solution can be devised whose advantages outweigh its immediate and potential detriments. Guided by those principles, we agree with the White Commission's recommendation—and the sponsors of S. 253—that there is no basis for a split of the Ninth Circuit.³ In our view, the lack of any compelling evidence supporting a circuit split also counsels against what we view as the principal recommendation contained in S. 253—the mandated creation of divisions for the Ninth Circuit and the recommended extension of this proposal to other large circuits. That proposal would have potentially adverse repercussions for the administration of justice in the Ninth Circuit, and ultimately across all federal courts of appeals.

We believe that mechanisms short of a split (divisional or otherwise) should be tried first—particularly since the provisions in S. 253 would likely exacerbate, rather than ameliorate, the main problem we perceive: the Ninth Circuit should employ adequate mechanisms to review and reconcile panel decisions that conflict or are in tension with one another, or that require correction by the court as a whole. Therefore, before recommendations such as those contained in S. 253 are enacted, we urge the adoption of the non-structural reforms suggested in this testimony and our earlier submissions to the White Commission.

In this vein, we note and applaud the Ninth Circuit's current efforts to evaluate its own processes to determine how it can enhance more consistent decision-making

² White Commission Final Report (hereafter "Final Report") at 29.

³ Final Report at 29.

and reduce docket backlog. We understand that the Chief Judge recently created a Ninth Circuit Evaluation Committee to consider these issues, solicit public comment, and make recommendations to the Court. We believe that the Circuit should be afforded an opportunity to consider and implement changes proposed as a result of these processes before Congress acts.

We now provide our views on S. 253.

SECTION 2: REGIONAL DIVISION OF THE 9TH CIRCUIT

Section 2 of S. 253 would divide the Ninth Circuit into Northern, Middle and Southern Divisions, with California split between the Middle and Southern Divisions. Between seven and eleven active judges would serve in each division, with the presiding judge of each division chosen in the manner that currently exists for the selection of a circuit's chief judge. A majority of judges serving on each division would be residents of the districts over which that division has jurisdiction, but each division would also include some judges not residing within the division, assigned randomly or by lot for terms of at least three years. Judges from each division would hear appeals arising from district courts within the division's geographic boundaries. Each division would use an en banc procedure to rehear cases from within the division. One division's decisions, whether panel or en banc, would not "be regarded as binding precedents in the other regional divisions."⁴ Finally, a non-regional "Circuit Division" consisting of thirteen judges would be formed. The Circuit Division panel would include the Chief Judge of the Circuit, plus four randomly selected judges from each of the three regional divisions. The 13-judge Circuit Division would have discretionary jurisdiction to review "any final decision rendered in any of the court's divisions that conflicts on an issue of law with a decision in another division," but only after a panel decision had been reviewed by the division en banc or had been denied divisional en banc review.⁵ The Circuit Division would not have the jurisdiction to review decisions for error, decisions that conflict with another circuit's decision, or decisions involving issues of exceptional importance.

In our view, this proposal is not likely to significantly advance, and instead is likely to detract from, the goals the Ninth Circuit Court of Appeals strives to achieve—consistency of decisions, efficiency in resolving cases, and the appearance that all of its decisions reflect the views of the Court as a whole. Indeed, section 2 of S. 253 is likely to create greater confusion in Ninth Circuit law, further delay the resolution of appeals, and undermine the representativeness (and thus, the legitimacy) of the Court's decision-making process. We outline our specific concerns below.

UNIFORMITY AND CONSISTENCY OF DECISIONS

A basic tenet of American jurisprudence is that federal law should be applied as uniformly as possible within and across circuits. National uniformity and predictability are particularly important to the Department of Justice, which must enforce federal law and advise federal agencies about the meaning of that law throughout the country. The Department also plays a special role in the process of unifying the meaning of federal law: as the most frequent litigant in the federal courts, the Department, through the Solicitor General, exercises considerable restraint in choosing which cases the United States brings to the courts of appeals.

It is of paramount importance that federal law be interpreted consistently regardless of the location of the court or the composition of the judicial panel. Rather than reduce the amount of intra- and inter-circuit conflicts created by Ninth Circuit decisions, we believe that S. 253's divisional structure would effectively validate, and even encourage, the development of such conflicts. Indeed, S. 253 is explicit that "the decisions of 1 regional division shall not be regarded as binding precedents in the other regional divisions."⁶

S. 253 purports to delineate a way of resolving conflicts among divisions through the mechanism of a "Circuit Division." The Circuit Division's only role, however, would be to resolve "conflicts on * * * issue[s] of law" between the regional divisions. It is unclear from the legislation what a "conflict" is and how a conflict is different from the existence of other decisions that are difficult to reconcile but which nonetheless point the law in different directions. Often, the creation of a conflict is not clear, much less immediately clear. And because the decisions of other divisions are not binding precedents, judges would be less likely to distinguish, discuss, or even cite decisions from outside their division. Overall, the Circuit Division mecha-

⁴ § 2(b)(5).

⁵ § 2(c)(2).

⁶ § 2(b)(5).

nism, as proposed, does not provide an effective mechanism for the resolution of the many intra-circuit inconsistencies that the semi-autonomous division system would produce.

The inability of the Circuit Division to review cases not involving inter-divisional conflicts on issues of law may have a further pernicious effect—insulating many decisions from Supreme Court review. The Circuit Division’s narrow jurisdictional mandate would effectively preclude Circuit-wide review of matters of exceptional importance, cases that conflict with decisions of other circuits, and cases in which the intra-circuit disagreement is significant but does not rise to the level of a “conflict.” Such cases would be decided solely at the divisional level, and those decisions would not be binding circuit-wide. That structure would inevitably multiply the number of decisions within the Ninth Circuit that conflict with decisions of other circuits, while simultaneously creating a possible impediment to Supreme Court review. It is uncertain whether Supreme Court Justices would vote to grant certiorari in cases that present conflicts between only one division of the Ninth Circuit (rather than the Circuit as whole) and another circuit. The discretionary nature of certiorari jurisdiction suggests that parties opposing review will argue that the Supreme Court should give the Ninth Circuit as a whole an opportunity to overturn a divisional decision so as to bring the division into harmony with the other circuit’s decision. The proposed divisional structure therefore might serve to insulate decisions of the Ninth Circuit from further review, effectively isolating it from the rest of the federal court system.⁷

The probability that S. 253’s divisional structure could spawn greater inconsistency in Circuit law would be particularly problematic in California. Under S. 253, the State of California would be split between the Middle and Southern Divisions of the Ninth Circuit, neither of which would be required to follow the precedent of the other. We do not support dividing any State in this manner, because, as much as possible, federal rights and responsibilities should be the same for all citizens within a State. Splitting California between two divisions that are not bound by each other’s precedent would yield different interpretations of federal and state law, and could result in inconsistent federal court rulings regarding the constitutionality of the same California law.⁸ For the reasons discussed above, Supreme Court review and resolution of these inconsistencies might be rare and, at a minimum, protracted, particularly with the requisite added layer of Circuit Division (following divisional en banc) review. In addition, the existence of different divisions within one State could encourage forum shopping among those seeking to assure a more favorable audience to adjudicate questions of federal and state law, as well as delays in the reconciliation of conflicting decisions.⁹

⁷That concern is not theoretical. In the area of criminal law, the Supreme Court in recent Terms has reversed decisions of the Ninth Circuit in which that Circuit alone has held the particular view of the issue presented and been in conflict with every other circuit to have considered that issue. See *United States v. Ramirez*, 118 S.Ct. 992 (1998), rev’g, 91 F.3d 1297 (9th Cir. 1996); *United States v. Hyde*, 520 U.S. 670 (1997), rev’g, 92 F.3d 779 (9th Cir. 1996); *United States v. Watts*, 519 U.S. 148 (1997), rev’g, 78 F.3d 1386 (9th Cir. 1996) and 67 F.3d 790 (9th Cir. 1995); *United States v. Armstrong*, 517 U.S. 456 (1996), rev’g, 48 F.3d 1508 (9th Cir. 1995) (en banc); *United States v. Mezzanato*, 513 U.S. 196 (1995), rev’g, 998 F.2d 1452 (9th Cir. 1993); *United States v. Shabani*, 513 U.S. 10 (1994), rev’g, 993 F.2d 1419 (9th Cir. 1993); *United States v. X-Citement Video*, 513 U.S. 64 (1994), rev’g, 982 F.2d 1285 (9th Cir. 1992); *United States v. Padilla*, 508 U.S. 77 (1993), rev’g, 960 F.2d 854 (9th Cir. 1992); see also *Almendarez-Torres v. United States*, 118 S.Ct. 1219 (1998) (overruling *United States v. Gonzalez-Medina*, 976 F.2d 570 (9th Cir. 1992)); *Neal v. United States*, 516 U.S. 284 (1996) (overruling *United States v. Muschik*, 49 F.3d 512 (9th Cir. 1995)). A process that insulated from Supreme Court review those types of erroneous division panel decisions that conflicted with other circuit decisions would be unfortunate. In our view, rather than creating a structure that might insulate such decisions from Supreme Court review, the Ninth Circuit should employ a more vigorous en banc procedure to address those types of conflicts and erroneous decisions.

⁸We have not had an opportunity to assess completely to what extent the proposed geographical divisions, including dividing California, would create the possibility of conflicting jurisprudence on a range of substantive areas of law of particular interest to the United States. However, the federal government’s unique docket, which includes issues involving public lands and ecosystem management, wildlife and marine resource issues, and Native American rights and interests. Those issues do not neatly fit into, but transcend, the boundaries of the proposed geographic divisional structure and may be adversely impacted by any inconsistent interpretation of federal law that would result from the proposed division of the Ninth Circuit into geographic divisions.

⁹Although splitting California between two regional divisions makes S. 253 all the more objectionable, keeping California in the same division does not remedy our general concerns that the proposed restructuring of the Circuit would increase the number of inconsistent decisions, delay the appellate process, and decrease the representativeness of the Circuit’s decisions. Placing

EFFICIENT RESOLUTION OF CASES

The interest in achieving an expeditious appellate process is important for all kinds of cases, but it is particularly acute in two areas in which the Ninth Circuit has large caseloads: criminal cases, in which the defendant's liberty, as well as the victim's and public's interest in finality, are at stake; and immigration cases, in which the Ninth Circuit currently reviews as much as 50 percent of the nationwide caseload and in which delay defers a determination of the alien's status and can encourage new case filings. A swifter and less cumbersome process in such matters is in the interest of both the government, which must enforce the law, and the individual, whose resources typically cannot sustain vigorous multi-tier litigation.

By adding another layer of review, the Ninth Circuit restructuring contained in S. 253 would delay the completion of the judicial process for litigants. Following an adverse panel decision, an aggrieved litigant could seek en banc review by the Division en banc court, as would now be true of the Circuit as a whole. A denial of such a petition would, in many cases, precipitate a further request for rehearing at the Circuit Division level.¹⁰ The evaluation of a case for alleged conflicts with a decision of another panel would only add to what is already a protracted period for finally resolving cases.

The White Commission justified this divisional structure partly on the grounds that smaller decisional units might increase efficiency by reducing the volume of precedent judges would be required to consult and monitor (thereby saving these judges time). We doubt that the creation of smaller decisional units would save much time or that Circuit judges will deem it advisable to disregard the development of law in the other divisions of the Circuit. Because S. 253 contemplates that a number of judges would be assigned outside their division of residence for substantial periods of time, it is unlikely that judges would benefit substantially over the long run by ostensibly being relieved of the burden of monitoring other divisions' opinions. While serving outside their division of residence, they would presumably be expected to keep abreast of the decisions of at least two divisions—their division of permanent residence and their division of temporary assignment. And if, over a three-to-five year period, they might be assigned to all three divisions, that monitoring responsibility would be hindered by a failure to have kept up with the output of all three divisions. Whatever benefit might accrue to individual judges with respect to the burden of monitoring opinions, therefore, is likely to be only modest and incomplete, at best.

Indeed, the use of smaller decisional units may not only be ineffective as a means of reducing delay, but may also have undesirable collateral effects. By creating a smaller pool of judges from which panels would be selected, litigants would be able to better predict the identity of a panel's judges. But it is precisely to discourage litigants from attempting to tailor their arguments for particular judges that many circuits do not publicly announce the judges on the panel until shortly before argument. And under the proposed divisional plan, predictability may encourage forum shopping (especially within California) or tactics to delay pursuit of an appeal to await either the periodic change in judicial composition within a division or the resolution of a pending case raising the same issue in a different division. A unified circuit avoids those anomalies.¹¹

APPEARANCE OF LEGITIMACY

As the Supreme Court has recognized time and again, the authority of the judicial branch is tied to its legitimacy. One important aspect of a court's legitimacy is the perception of the public and the bar that when a judge or a panel of judges speak,

California in one division would, moreover, implicate several other problems including, most notably, the size of any division with sufficient judges to handle California's immense appellate volume (which currently accounts for 60 percent of the cases within the Ninth Circuit). It is difficult to see how any "California division" that would decide 4,000 or more cases with 18 or more judges would offer significant advantages in terms of size as compared to the existing Ninth Circuit. Indeed, such a division would probably have to employ some form of limited en banc review and would undercut the Circuit Division's representativeness (at least if its membership was comprised of equal numbers of judges from each regional division).

¹⁰ Although it is difficult to demonstrate a "conflict" between two or more judicial decisions, our experience opposing petitions for a writ of certiorari in the Supreme Court suggests that a large number of litigants nonetheless will try. It seems likely that the Circuit Division will forgo review in several cases while awaiting for inter-division conflicts to become sufficiently clear to warrant Circuit division review and resolution. This may further delay the time for consistent Circuit precedent to be established.

¹¹ Filling existing vacancies on the Circuit, or creating new judgeships, as S. 1145, the Federal Judgeship Act of 1999, would do, would be preferable ways to reduce judicial workload and thereby increase the speed with which appeals are decided.

they speak for the entire court of which they are members. More to the point, the views of a panel of judges on the Court of Appeals should represent the views of the entire Circuit Court. In all other Circuits but the Ninth, this is always the case because all of the judges on the Circuit have either implicitly approved of the decisions of the three-judge panels (by opting not to rehear the case en banc) or have reheard the case en banc with all of the non-recused, active judges on the Circuit participating. The Ninth Circuit, however, employs a limited en banc procedure under which the Circuit's en banc panel is comprised of 11 judges—the Chief Judge and 10 other judges selected at random. As a result, the Ninth Circuit's en banc panel involves fewer than a majority of the Circuit's 28 active judgeships. Thus, the Ninth Circuit has been criticized on the ground that its en banc decisions are not representative of even a majority of the judges on its court.

Instead of making the court more representative, S. 253 is likely to reduce the representativeness of the Ninth Circuit's decisions. Once a three-judge panel issues an opinion, each regional division would have the opportunity to rehear the case en banc. This en banc process would involve every active judge on the regional court. However, given that the divisional court would consist of only 7 to 11 judges, at least two of whom joined the majority decision being challenged, a litigant would likely face an uphill battle in obtaining divisional en banc review. In those rare instances where en banc review were granted, the decisions issued within any regional division would be representative of the views of the judges in that region. This representativeness at the regional division level does not reach the Circuit level, however. At the Circuit level, S. 253 would create the Circuit Division to replace the limited en banc structure currently employed by the Ninth Circuit. While the Circuit Division is slightly more representative than the limited en banc because it increases the number of judges from 11 to 13, the 13 Circuit Division judges still do not constitute a majority of the 28 judges on the Ninth Circuit and are not selected randomly for each en banc case (they are instead assigned by lot for three year terms). The Circuit Division would only operate where there is a "conflict" on a legal issue, however. In every other case, the decision of the regional en banc court (of 7 to 11 judges) would be the final word of the 28-judge Circuit. As a result, S. 253 would appear to undermine the representativeness, and hence the legitimacy, of the Ninth Circuit's decisions.

* * * * *

Our serious reservations about implementing S. 253 are magnified by the recognition that the move to any divisional structure would likely be irreversible.¹² Once regional divisions are created—and differences in divisional law are permitted to flourish—the Ninth Circuit would have little ability to reunify. Instead, the restructuring compelled by S. 253 would lead in only one direction—to an eventual split of the Circuit. But this result is precisely what the White Commission found to be unwarranted and unworkable. Rather than proceed down this inevitable path to split of a Circuit viewed by its users (and its evaluators) as operating reasonably well, we respectfully suggest that Congress should instead, at least as a first effort, direct the Ninth Circuit to study and implement constructive changes in relation to the specific areas of concern identified by the White Commission and the Department.

ALTERNATIVES TO DIVISIONAL RE-STRUCTURING

From our perspective as litigants, the Ninth Circuit's primary shortcoming is traceable not principally to its large number of judges or geographical size, but rather to its failure effectively to address erroneous panel decisions in important cases and to review cases in which a meritorious claim of conflict is presented. This problem is already being mitigated in the light of the recent upswing in the number of cases that the Ninth Circuit has voted to hear en banc. The problems that continue to persist, while admittedly difficult to quantify, nonetheless appear susceptible to amelioration by nonstructural means, as suggested in our submissions to the White Commission. Indeed, the Circuit's en banc mechanism, if modified, is particularly well suited to solving many of these problems. If that course is followed, structural changes might ultimately prove to be unnecessary and their attendant difficulties and dislocations avoided. After a period of experience with non-structural alternatives and an assessment of legal and demographic trends, the need for any structural reforms might become clearer.

Improving the opportunity for en banc review. There are a number of discrete but effective ways to increase the opportunities for en banc review of panel decisions.

¹²Creating regional divisions on an experimental basis would, for the reasons described in the text, be equally irreversible. Thus, a "sunset" provision would not remedy our concerns.

In particular, Congress might consider granting the courts of appeals a dispensation to lower the statutory requirement that a majority of the Circuit's active-service judges must vote affirmatively to rehear a case en banc. The success of the Supreme Court in exercising its discretionary review based on the votes of less than a majority is a model that should be studied for application in the courts of appeals' en banc process. A similar "4/9s" rule might well work at the Circuit level.

Other actions could better alert Circuit judges to the need for en banc review. For example, the recently amended Federal Rule of Appellate Procedure 35(b)(1) now requires litigants to set forth at the outset of any petition requesting en banc rehearing a summary statement regarding why the case creates an inter-Circuit or intra-Circuit split or involves a question of exceptional importance. In addition, opinions to be published that distinguish or disagree with existing precedent should be circulated among the judges of the Circuit for review before publication. Staff personnel could be deployed to act as an additional check in the review of panel decisions for potential conflict with other circuit decisions.

Although a system of increased availability of rehearing en banc would require some investment of judicial resources, it seems likely that time expended en banc in clarifying the law of the circuit and resolving issues of exceptional importance would in the long run be repaid by a corresponding reduction in litigation and an enhanced ability of the Ninth Circuit as a whole to speak through the en banc procedure. The short-term costs of increased en banc review may well pay substantial long-term dividends.

Improving the representativeness of the en banc panel. The Ninth Circuit should also consider methods of enhancing the representativeness of its en banc panel. The most direct way to do so is to increase the number of judges who sit on the en banc panel from 13 judges to 15. With 15 judges, the Circuit's en banc decisions would properly represent the views of a majority of the Circuit's active membership. Except for the Chief Judge, these judges should be selected at random. Judges who call for en banc rehearing or who authored the three-judge panel's opinion should not automatically be placed on the en banc panel, for that might skew the representativeness of the panel, and the legitimacy of the resulting en banc opinion.

* * * * *

In the long term, we recognize that demographic changes in the Nation's population may well necessitate structural changes in the court of appeals system. If and when that occurs, the analysis contained in the White Commission's final report will provide valuable insight on the potential options to be considered. At this time, however, we believe that these non-structural alternatives should be explored first and that any structural reforms should be reserved for a time when these other alternatives are no longer workable.

SECTION 2A: REGIONAL DIVISION OF OTHER CIRCUITS¹³

Section 2A of S. 253 would give all appellate courts with more than 15 authorized judgeships discretion to adopt a divisional arrangement such as the one set out for the Ninth Circuit.¹⁴ These courts would be permitted to organize themselves into two or more adjudicative divisions, each capable of rehearing cases en banc. Each judge would be assigned to a specific division for a substantial period of time, and each division would exercise exclusive jurisdiction over the appeals assigned to it. Any Circuit that opted to reorganize itself would be required to create a Circuit Division modeled on the one set out for the Ninth Circuit, involving no more than 13 judges and convened solely to resolve "conflict[s] [regarding issues of law] in the decisions or 2 or more divisions."

The Department of Justice does not support the recommendation that the remaining circuits be permitted to split themselves into semi-autonomous adjudicative divisions when they reach a certain number of judgeships. We do not believe such a significant change in the federal appellate structure is justified, particularly before non-structural alternatives of the type we have suggested are implemented and their effects evaluated.

The implementation of a nationwide adjudicatory divisions plan would create for each circuit the types of problems we have identified in our discussion of the proposed changes to the Ninth Circuit. Moreover, widespread enactment ultimately would result in a completely restructured system overall, adding a fourth layer of review throughout much of the federal judicial system, creating differing paths of

¹³The version of S. 253 provided to us contains two section 2s. For ease of reference, we refer to the second section 2, which is entitled "Assignment of Judges; Panels; En Banc Proceedings; Divisions; Quorum" as section 2A.

¹⁴ § 2A(a) (creating new 28 U.S.C. § 46(d)).

access to the Supreme Court depending on geography, and allowing varying bodies of law to be developed by numerous mini-courts of appeals in relative isolation from one another.¹⁵

As an alternative to section 2A, we recommend implementing experimental non-structural changes of the type described above with regard to the Ninth Circuit. At a minimum, we suggest that section 2A be deleted from S. 253 until such time as the existence of systemic problems in other circuits sufficient to warrant such a change has been found and to allow litigants and judges an opportunity to assess whether the proposed structural changes would improve the quality of justice.

SECTION 2A: TWO-JUDGE PANELS

Section 2A of S. 253 would authorize federal appellate courts to use two-judge panels, and to allow the courts to designate by rule those case types suitable for such disposition. The legislation leaves it entirely to the court to determine when a case assigned to a two-judge panel should be referred to a three-judge panel for hearing or decision.

The Department's experience with various screening procedures employed by the courts of appeals, including summary affirmance, leads us to question whether it is necessary for Congress to authorize two-judge panels and whether such panels would actually conserve judicial resources. We have further questions regarding whether this provision ensures both adequate procedures for assessing how cases are selected for decision by such panels and necessary safeguards for determining how a third judge is to be brought into the process when the two-judge panel reaches an impasse. We are also concerned about how this provision would affect the public's perception of the administration of justice by the courts. If the two-judge panel provision is to be adopted at all, we believe it would best be implemented as an experiment for a limited duration in a few courts to allow Congress, courts, and litigants an opportunity to assess the change.

SECTION 3: DISTRICT COURT APPELLATE PANELS (DCAP)

Section 3 of S. 253 would authorize judicial councils to create a "district court appellate panel service" with district and circuit judges from the circuit. The judicial council would specify categories of cases appropriate for DCAP jurisdiction and the panel would have exclusive jurisdiction over those cases. Although S. 253 is silent on this point, the White Commission opined that diversity cases would be likely prospects for DCAP jurisdiction, as well as sentencing appeals and cases that "generally require the reviewer to apply well-settled legal rules to varying fact patterns."¹⁶ Panels created from the DCAP service would consist of two district judges and one circuit judge designated by the chief judge of the circuit. District judges would not review judgments from the courts on which they serve. Further review of decisions by a DCAP would be discretionary in the court of appeals. In addition, the panel itself could transfer a case to the court of appeals if disposition involved a determination of a question of law it deemed appropriate for the court of appeals.

In our view, the use of DCAP services in the Courts of Appeals would likely result in a net cost to litigants and to the judicial system as a whole, even if it produced an incidental reduction in the burdens on the courts of appeals. Accordingly, we are not persuaded that the creation of DCAPs is warranted or desirable.

First, the use of DCAPs would not reduce the overall judicial workload—instead, it would simply divert much of the workload for some appeals from busy appellate judges to busy district court judges. Although the factual justification underlying this legislative proposal is unstated, it may be a response to the statistical trends recorded in Table 2–3 of the White Commission's final report, which suggest that in the past century the per-judge caseload for circuit judges has increased five-fold

¹⁵In addition, section 2A's proposal to create divisions in the courts of appeals may result in the development, over time, of even more complex and varied local rules of procedure. The Department has worked extensively with the Advisory Committee on Appellate Rules to develop simplified, centralized rules of appellate procedure and to reduce the number and range of local appellate rules. Section 2A gives considerable flexibility to the courts of appeals in creating independent divisional systems. Thus, we remain concerned that the proposed structural rearrangement could derail efforts to develop nationally uniform procedural rules.

Moreover, the considerable leeway afforded to circuits other than the Ninth to develop divisions does not foreclose the possibility that circuits might create special subject-matter divisions. For the reasons the Department set forth in its submissions to the White Commission, we would be concerned about the creation of subject-matter divisions. Such a possibility would add an element of potentially great variability in practice and procedure among different areas of practice.

¹⁶Final Report at 64.

while that for district judges has only doubled.¹⁷ Without a more careful analysis of the workload of district judges, however, it would be premature to base conclusions on those numbers alone. The statistics do not capture the increasing complexity of time-consuming pre-trial practice, trials, and sentencing proceedings, as well as district judge assignments to court of appeals cases. Absent more definitive data, it seems unwarranted to conclude that district judges are sufficiently underutilized that they may absorb the extra work contemplated by this provision. Indeed, overall the proposal may require even more judicial resources than are now required at both the district court and court of appeals level, because in at least some instances the court of appeals would grant permission to take a further appeal after a DCAP decision and would in any event have to consider requests for the exercise of discretionary review. Thus, the courts (as well as the parties) could incur the expense of conducting two appeals instead of just one before seeking Supreme Court review.

Second, section 3 calls for judicial councils, rather than Congress, to determine the class of cases to be adjudicated by DCAPs. That assessment, however, involves policy decisions about the nature of the underlying legal disputes, including a substantive evaluation of the applicable law. Such significant policy decisions, such as whether diversity cases should be handled in a distinctive manner, should be made by Congress, rather than by the judicial councils.¹⁸

Moreover, we question whether the administration of justice would be served by creating a class of appellate courts inferior to circuit courts of appeals and assigning cases deemed to be less significant to them. Certainly service on such courts is not made to seem attractive as described in the White Commission's reports, since it seems unlikely that a circuit judicial council would assign the most interesting classes of cases to any court other than its own court of appeals. Finally, section 3 states that "[f]inal decisions of district court appellate panels may be reviewed by the court of appeals, in its discretion." Such discretionary review raises the possibility that a litigant might be foreclosed from having the right to seek Supreme Court review of a decision that the court of appeals declined to review.

For the foregoing reasons, the Department opposes section 3 and the creation of District Court Appellate Panels. At a minimum, this provision should be adopted only as a temporary pilot project that would operate in a single court, in carefully and explicitly designated categories of cases selected by Congress, and only for a limited period of time.

CONCLUDING REMARKS

I have outlined the more important of the concerns of the Justice Department based upon its review of the Federal Ninth Circuit Reorganization Act of 1999. The White Commission has performed a valuable service in studying the United States court of appeals system and proposing ideas for its future organization. We are not, however, convinced that either its conclusions or any other data evidence a need for the structural reforms contained in S. 253. As we noted above, the provisions contained in S. 253 themselves risk creating greater inconsistencies in the law, greater delay in the resolution of cases, and greater challenges to the representativeness and legitimacy of the courts of appeals. Accordingly, while circumstances may one day warrant the adoption of structural changes, other measures should be tried first. We are committed to working with this Subcommittee and the Ninth Circuit to develop and, where appropriate, implement such proposals.

I thank you for the opportunity to submit the views of the Department of Justice to this Subcommittee.

Senator GRASSLEY. For the record, my own absence, after 12:05, is because I have other commitments in my State.

I now call on Judge Browning.

STATEMENT OF HON. WILLIAM BROWNING

Judge BROWNING. Senator, thank you.

Senator GRASSLEY. Would you take the microphone, please.

Judge BROWNING. I am sorry. Thank you very much. I, too, appreciate the opportunity to appear before the committee and speak on behalf of the Commission, of which I was a member.

¹⁷Final Report at 14.

¹⁸Section 3 does not contain any formal recommendation concerning how diversity cases should be treated, so we have not included an analysis of that issue in this testimony.

Obviously, I join in the written remarks of Justice White and Justice Merit, Professor Meador, who was the executive director of our Commission, and Judge Rymer's remarks here today. I join in those without qualification.

I think it needs to be said, not that I take any particular offense, that there was never, during the course of this Commission, almost a year's work, 10 months, and I made every meeting, save one when I was ill, a discussion about the political ideology of judges on the ninth circuit. Not once did that subject come up. Not once, even in jest, was there any reference to who appointed that judge. The review was dispassionate, it had to do not with ideological outcome of cases, but with the effectiveness of the court of appeals as an adjudicative body.

I think Judge Wiggins has framed the disagreement that the Commission has with the current status quo very well, and that is they do not believe, those who support the current ninth circuit, that there is such a thing as it being too big. If in addition to the numbers Judge O'Scannlain set forth a moment ago, the court had a full complement of judges, senior judges, it would also have visiting judges in increasing numbers from other circuits who have no way to keep up with what the ninth circuit law is. They have a law clerk who tells them the highlighted cases that come to their attention, but they do not understand what the collegial approach to adjudication in the ninth circuit is.

The same is true of my fellow district judges. I sit here with some trepidation with the court of appeals, but let me quickly distinguish myself. I am not a member of that court, and they are happier about that, I am sure, than I am. But I have sat with that court on many occasions, and I have sat with some of the judges testifying here today. I have never been treated with anything other than the utmost respect. I have never been subject to any criticism or comment, other than a disagreement honestly felt about my views, if that were the case. So that was never anything we discussed.

We held six public hearings throughout this country, from New York to San Francisco. The two on the Pacific coast were the most, obviously, highly attended by ninth circuit judges. I posed the question at both of those hearings: How big is too big? I asked the leadership of the ninth circuit, I asked other members of the ninth circuit, and, ladies and gentlemen, Senators, I never got a response, which I take to mean, and which I think Judge Wiggins has reiterated, is that it cannot be too big.

In 1954, the Ninth Circuit Court of Appeals voted among itself, with no prodding from this body or anyone else, to divide the ninth circuit. They were a much smaller court then, but they felt that the ninth circuit was unmanageably large, not in terms of the number of judges, but in terms of the geography and the difficulty in getting together to decide cases. Those problems have been resolved, in large part, by modern transportation. But it is interesting to note that the court voted internally to divide or recommend to Congress that it divide itself. That recommendation was forwarded to the judicial conference who joined in the recommendation and sent it on to the Congress.

Six months later, the ninth circuit reversed itself and said we do not want to split or divide. The judicial conference also advised the Congress that the ninth circuit had done that and withdrew the proposed legislation.

The next meaningful event was the 1973 Hruska report, of which Judge Wiggins was a member. That report identified virtually all of the problems we speak about here today, over 20 years ago, over 25 years ago, and it is interesting that the ninth circuit now, since the issuance of the final draft of the White Commission report, has formed a committee to study these problems. And I can integrate them, but they are all problems that have existed for over 25 years. And respectfully, Senator Feinstein, I have not seen the legislation you propose to introduce, but it deals with problems that have existed for 25 years. And one wonders why those problems are just now being addressed.

In order to flesh out that observation, I would refer the committee to Justice Kennedy's letter to the Commission, which is attached to Judge Rymer's written remarks. He was a member of the Ninth Circuit Court of Appeals. He talks about personal experience, as well as his observations as a member of the U.S. Supreme Court. He notes that over 20 years ago the subject of division of the ninth circuit came up in court meetings, and people who advocated it, among them himself, were dissuaded by the ninth circuit's promise and effort, which was a good-faith and sincere effort, and no one has ever doubted that, to find procedural, administrative and other ways to alleviate the problems that have been identified here today.

As Justice Kennedy says in his letter, that was a failed experiment. He went along with it as one of the detractors saying, "All right. We should experiment. But after 25 years, we * * *" in his words "* * * have come no further." And I think that that is a particular telling letter, and I commend it to all of you.

The next meaningful event was in 1984, when the fifth circuit split, and it split as a result of the recommendation in 1973 of the Hruska report. Reference has been made, I think by Senator Sessions and perhaps by panelists, about the split of that circuit.

There is an interesting book, which I commend to all of you. The name of it is, "A Court Divided," talking about the split of the fifth into the fifth and eleventh, as we know them today. That was not done, as Mr. Olson suggests, with a light heart and realization of problems superficially. That was done, grown men, experienced judges, who were in tears, as they voted to split that court.

There was no less emotion in keeping that court together than today exists in the ninth circuit. What there was was a realization that they can no longer function as a unified court. That is what led to the split. I think that as one looks at that, one sees that the time has come for the ninth circuit to be divided.

Opponents claim there is no objective evidence that the circuit needs to be split, yet a committee has been formed by the circuit leadership, by Chief Judge Hug, to look into the very matters we cite as objective evidence that it does need to be split: dispositional times, the inability of judges to keep abreast of the ninth circuit's output, things of that nature.

I also commend, because it has been talked about today, the opinions of the U.S. Supreme Court Justices who responded to our inquiry; Justice Rehnquist, Justice Scalia, Justice Stevens, Justice Kennedy and Justice O'Connor, and Justice Breyer, who did not make a specific recommendation regarding the ninth circuit, but all of the others did. The remaining three; Justice Thomas, Justice Ginsburg and Justice Souter, declined to make any comment at all. But of those who commented and made recommendations, they unanimously recommend a circuit division or split. I think that is important not because of the reversal rate of the ninth circuit, though I will address that just briefly, but because these are the people who judge the work product of the ninth circuit. These are the people who see it and the results of it as judges, viewing judges, on a regular basis.

With regard to the reversal rate, everything that is said about its minimal importance is true, but it is also true that the ninth circuit is the most reviewed circuit in the country. The U.S. Supreme Court takes more of its cases than anyone else's; it is the most reversed circuit in the country, according to Judge Justice Scalia, whose letter is also in the file, and I commend those figures to you in response to I believe Justice Hug's comments about that; it is the circuit reversed unanimously by the U.S. Supreme Court the most; and it is the circuit, when reversed, which draws the fewest dissents in the U.S. Supreme Court. There is some message there. The message has been out there for all to read and hear for years.

I see, Senator, that my time has expired, and I do not want to impose upon you. It has been a long morning. I have more to say, and I will answer any questions. But if you wish me to, and you will allow me to, I will supplement these remarks in writing to shorten the hearing this morning.

Senator FEINSTEIN [presiding]. I thank you, Judge Browning, and I thank you for your comments.

Let me just commend this panel. And it is wonderful for me to listen to each of you because your logic is crisp and your conclusions are definitive. And the precision with which you spoke was very much appreciated. So it was really a great treat for me, who listens to a lot of panels, to listen to all of you.

I would like to proceed by making a few comments. And then asking each one of you to quickly reflect on these comments in any way you choose.

I represent California. I do have that parochial interest. Although the State is so big it is hard to think of it sometimes as parochial. But the people of California whose legal concerns come before the Federal bar must be served by a unity of law within the State. To me, this proposal is powerfully flawed in that regard because in the urging of these three divisions, it balkanizes that unity of law, in my view.

I would like to enter into the record some letters, two letters from the Los Angeles County Bar Association, dated April 14, and April 16, specifically on the proposal; a letter from Governor Wilson, dated April 15 of this year. And if I might quote one point: Governor Wilson—since we began discussing this 5 years ago—he has very eloquently made the argument of judicial gerrymandering.

In his letter here, he says, "This bill does the same, and it is worse because it would divide the West Coast into not two, but three segments, each with its own precedents not binding on the other regions and would add another layer of judicial review to appellate proceedings, adding delay and expense to adjudications."

[The information referred to is located in the appendix.]

Senator FEINSTEIN. I would then like to enter into the record a letter from the State Bar of California, dated May 17, 1999, speaking about the proposal on behalf of virtually every large and major bar association in the State of California. They specifically cite L.A. County, San Francisco, San Diego, Beverly Hills, Alameda County, the Federal Bar, Northern District, Los Angeles and Orange County Chapters, the John Langston Bar, the Black Women Lawyers' Association and the Women Lawyers of Los Angeles, and the Lesbian and Gay Bar Association as well.

So you have got a picture from the very diverse bars of the State of California.

[The information referred to is located in the appendix.]

Senator FEINSTEIN. I would then like to offer a letter to me from Governor Gray Davis, dated July 7 of this year, and I would like to quote from it as well.

The legislation would subdivide the appellate function of the ninth circuit into three semi-autonomous regional divisions and split the State of California in half. The northern part of the State would be placed in one division and the southern part of the State in another. The court's rulings in one division would not be binding on the other. I find this proposal to split the State alarming. Not only is the proposal untried and unproven, it creates a separation between north and south that is inimical to what I am attempting to accomplish as governor.

We need to bring our people together and de-emphasize our differences. The Senate Bill 253 does just the opposite. Furthermore, splitting California between two divisions would likely result in inconsistent Federal rulings on important California laws; one ruling covering the north and a different ruling covering the south. As a result, businesses operating in California would be subject the conflicting State law, making it more costly to do business in California.

The proposed legislation is also likely to foster more disputes and more litigation. For example, if a State law were found unconstitutional in the division covering Northern California, the decision would be binding only in that part of the State, leaving us with a law that is valid in the south and invalid in the north.

While SB 253 creates a circuit division to resolve conflicts between divisions, that body is powerless to do anything until such time as an inconsistent decision is rendered by the division covering Southern California. Thus, it will be necessary to file a second suit in the second division to achieve uniformity in the law.

[The information referred to is located in the appendix.]

Senator FEINSTEIN. Now, let me quote from comments of the U.S. Department of Justice on the draft report, in three places. On page 4 out of 15 pages, the Justice Department states that the proposal would unnecessarily delay the administration of justice. I am just quoting from a part of it.

By adding another layer of review, the suggested ninth circuit restructuring would delay the completion of the judicial process for litigants. Following an adverse panel decision, an aggrieved litigant would seek en banc review by the division en banc court, as would now be true of the circuit as a whole. A denial of such a petition would, in many cases, precipitate a further request for rehearing at the circuit division level. Evaluation of a case for alleged conflicts with a decision of another panel would only add to what is already a protracted period for finally resolving cases.

They go on to say, as I just stated from both governors' letters, that dividing California is undesirable, for essentially the same reasons. So it is in a more legalistic form, but I will not read that.

So, why do I not just stop there and ask each of you to quickly, with your views, respond as directly as you can to these individual comments, and I will begin with the presiding Judge, Judge Hug.

Judge HUG. Thank you, Senator Feinstein.

I think one thing that is very important to recognize and I think Judge Rymer brought it out very well. These really are very separate courts. The divisions of the circuit court of appeals are very separate and as she indicated the circuit division, that 13-Judge one, really is going to, and as she envisions it operating, not have much to do with straightening out the law of the circuit.

So, we really have three separate courts of appeals operating. And, as you mentioned, it does present a very real situation, a real problem with the State of California being in two separate divisions. And I can see, say, for example, one of the controversial propositions, having been interpreted by, say, the middle division, and in the meantime, say, for example, it is held unconstitutional, we do not have a resolution of it in the Southern Division, where California is involved. So, we have two with no binding precedent. If the Supreme Court does not take it up, we have got two situations between the two divisions in California. It is a very serious problem.

It is a serious problem for the whole circuit for that same reason. I think that there are more subtle differences also that, for example, a search and seizure resolution of how appropriately to search a house. If you are going to have different resolutions to that in these different divisional courts, that is going to present real serious problems and is going to be contrary to keeping a development of a total circuitwide law.

Senator FEINSTEIN. Judge Hug, in the interest of fairness I do not want to cut you off but I have to. I have a 1 o'clock plane.

Judge HUG. OK.

Senator FEINSTEIN. So, we need to go rather rapidly and I want to give everyone a chance to respond.

Judge HUG. That is all I had to say.

Senator FEINSTEIN. Thank you very much.

Judge Rymer.

Judge RYMER. The short answer to your question is then do not divide California between two divisions. There is no magic to that. It is sensible, in my judgment, because I think eventually that is going to have to happen because in order to service the people of California more judges will be required than can function effectively together as a single decisionmaking unit. But that is the short answer.

The long answer is also short and that is that putting parts of the State of California into different divisions will exactly mirror what the State of California has done for itself. Because it is precisely the same structure that the California Court of Appeals has got, precisely. So, it will create no new problem that California does not already have, does not live with, has not adjusted to, very, very well.

Finally, with respect to things like Constitutionality of State propositions, it is something I simply do not understand. If, as Judge Hug suggests, one division says that a ballot proposition is unconstitutional that is going to win and the Governor of the State is going to be enjoined, period. He cannot enforce that ballot proposition. So, I do not understand the problem. It exists in the State of California now. And one final note.

California—

Senator FEINSTEIN. Would you comment on the search and seizure argument, which is a little different than a ballot measure?

Judge RYMER. Sure.

Sure. It is a difference. If there comes to be a difference between what the northern division says about search and seizure and the southern division, it is a difference that does not matter to anyone. Because only the lawyers in the district courts within each division will be bound by that division's law. They only have to be concerned that the divisional law is consistent.

It just does not matter if the law is the same throughout the West. If it does matter and if there is a square conflict, then the circuit division can, in fact, step up to the plate and resolve it if uniformity of the law throughout the Western part of the United States is, in fact, crucial.

Senator FEINSTEIN. Thank you.

Judge Kleinfeld.

Judge KLEINFELD. Thank you, Senator.

Your concern about dividing California strikes me as serious and well-taken. I do not think it affects the Northwest. It seems too bad to saddle the Northwest and the other parts of the circuit with a decisional body that is too big to work effectively because of concerns about dividing California.

It may be that simply changing the divisions around so that California is not divided would be to reconcile these interests. California could be its own division or it could be a division with one or two other States, instead of being divided as the Commission says and you could still keep the commission structure.

The second thing that occurs to me is you already have incoherence of Federal appellate law in California. Right now, it is not because of a difference between North and South, it is because we are too big to work effectively as a decisional body.

We have decisions in death penalty cases out of California that I cannot reconcile. And the only way that I can make any sense of them is that different panels decided them. We are too big to work effectively and create coherent law for California as it is.

Senator FEINSTEIN. Thank you very much.

Judge Scannlain.

Judge SCANLAIN. Senator Feinstein, I tend to be pretty pragmatic. And if the California member of the Senate Committee on the Judiciary has expressed profound concerns about putting California into two separate divisions or two separate circuits, then it is not going to happen, and I would not want to force that issue in any possible way.

It seems to me what that counsels is that S. 253 is going to have to go through some modification and either California becomes its own separate division or that California, perhaps some day if not sooner, becomes its own separate circuit. Something will occur with respect to California which will respond to the underlying problem and I gather there is a fair amount of agreement, Senator. I see no reason at all why some of your suggestions could not be taken into account in the legislation that you are proposing which I have not yet seen but which has been described so far.

But I wish, on the other point, I wish Senator Torricelli were here because he might be rather mystified by the curious argument from people on the west coast that somehow they are sacred and they cannot have separate circuits compared to the east coast.

Senator FEINSTEIN. You do not believe we are sacred? [Laughter.]

Judge SCANLAIN. On some things, absolutely.

But the whole idea that you cannot have separate circuits in the west coast is really frankly just not worth pursuing. You have got the first, second, third, fourth and the eleventh on the Atlantic Coast and as far as I know those freighters are not colliding any more frequently because they do not know what the law is than the freighters going from the west coast to the Far East.

So, those are my responses.

Thank you, Senator.

Senator FEINSTEIN. Thank you, Judge.

Judge Wiggins.

Judge WIGGINS. There is not a problem, do not fix it. I would not address these problems by creating a new circuit. Leave well enough alone. That is my answer, do not address it.

Senator FEINSTEIN. Thank you very much.

Judge Browning.

Judge BROWNING. Senator, my remarks would not be remembered so much for what they are as for the fact that they made you miss your plane, so, I will be brief. [Laughter.]

Senator FEINSTEIN. That is a good adaptation, actually.

Judge BROWNING. Let me just comment. All of the comments that have been made to the point you raised, I would agree to. I want to comment only on the layer of review. There is exactly the same review today as this Commission report proposes. They are called by different names, but they have the same number of appeals.

What has not been said and what this committee, I think, should study and look into is that since the limited en banc procedure has

gone into effect in the ninth circuit, which I believe was 1973 or 1974, there has also been a procedure where the ninth circuit can set en banc, meaning entire judicial panel would sit. That has never in the history of the ninth circuit been used. That does not mean it is not available. It just means that ninth circuit judges, for whatever reason—and I suspect their workload is a big part of it—have not seen fit to go en banc with a full panel.

So, the Governor's comment about an additional layer of review, I think, omits that simply because it has never happened but it exists. It is there. And I am sure my friends on the ninth circuit will tell you they receive petitions every month of lawyers who ask them to convene that huge 28-judge panel. But the lairs have been so far unsuccessful.

With regard to the admiralty question it is not a big concern in Arizona so I will leave it to others. [Laughter.]

Senator FEINSTEIN. Thank you very much.

Thank all of you very, very much. I think it has been a very interesting hearing. Clearly the issues have been joined and the dialog will continue. And I want to thank you on behalf of our Chairman, Senator Grassley, as well, and this hearing is adjourned.

[Whereupon, at 12:32 p.m., the committee was adjourned.]

APPENDIX

PROPOSED LEGISLATION

11

106TH CONGRESS
1ST SESSION

S. 253

To provide for the reorganization of the Ninth Circuit Court of Appeals,
and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 19, 1999

Mr. MURKOWSKI (for himself and Mr. GORTON) introduced the following bill;
which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for the reorganization of the Ninth Circuit Court
of Appeals, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Federal Ninth Circuit
5 Reorganization Act of 1999".

6 **SEC. 2. DIVISIONAL ORGANIZATION OF THE COURT OF AP-**
7 **PEALS FOR THE NINTH CIRCUIT.**

8 (a) REGIONAL DIVISIONS.—Effective 180 days after
9 the date of enactment of this Act, the United States Court
10 of Appeals for the Ninth Circuit shall be organized into

★(Star Print)

1 3 regional divisions designated as the Northern Division,
2 the Middle Division, and the Southern Division, and a
3 nonregional division designated as the Circuit Division.

4 (b) REVIEW OF DECISIONS.—

5 (1) NONAPPLICATION OF SECTION 1294.—Sec-
6 tion 1294 of title 28, United States Code, shall not
7 apply to the Ninth Circuit Court of Appeals. The re-
8 view of district court decisions shall be governed as
9 provided in this subsection.

10 (2) REVIEW.—Except as provided in sections
11 1292(c), 1292(d), and 1295 of title 28, United
12 States Code, once the court is organized into divi-
13 sions, appeals from reviewable decisions of the dis-
14 trict and territorial courts located within the Ninth
15 Circuit shall be taken to the regional divisions of the
16 Ninth Circuit Court of Appeals as follows:

17 (A) Appeals from the districts of Alaska,
18 Idaho, Montana, Oregon, Eastern Washington,
19 and Western Washington shall be taken to the
20 Northern Division.

21 (B) Appeals from the districts of Eastern
22 California, Northern California, Guam, Hawaii,
23 Nevada, and the Northern Mariana Islands
24 shall be taken to the Middle Division.

1 (C) Appeals from the districts of Arizona,
2 Central California, and Southern California
3 shall be taken to the Southern Division.

4 (D) Appeals from the Tax Court, petitions
5 to enforce the orders of administrative agencies,
6 and other proceedings within the court of ap-
7 peals' jurisdiction that do not involve review of
8 district court actions shall be filed in the court
9 of appeals and assigned to the division that
10 would have jurisdiction over the matter if the
11 division were a separate court of appeals.

12 (3) ASSIGNMENT OF JUDGES.—Each regional
13 division shall include from 7 to 11 judges of the
14 court of appeals in active status. A majority of the
15 judges assigned to each division shall reside within
16 the judicial districts that are within the division's ju-
17 risdiction as specified in paragraph (2), except that
18 judges may be assigned to serve for specified, stag-
19 gered terms of 3 years or more, in a division in
20 which they do not reside. Such judges shall be as-
21 signed at random, by means determined by the
22 court, in such numbers as necessary to enable the
23 divisions to function effectively. Judges in senior sta-
24 tus may be assigned to regional divisions in accord-
25 ance with policies adopted by the court of appeals.

1 Any judge assigned to 1 division may be assigned by
2 the chief judge of the circuit for temporary duty in
3 another division as necessary to enable the divisions
4 to function effectively.

5 (4) PRESIDING JUDGES.—Section 45 of title
6 28, United States Code, shall govern the designation
7 of the presiding judge of each regional division as
8 though the division were a court of appeals, except
9 that the judge serving as chief judge of the circuit
10 may not at the same time serve as presiding judge
11 of a regional division, and that only judges resident
12 within, and assigned to, the division shall be eligible
13 to serve as presiding judge of that division.

14 (5) PANELS.—Panels of a division may sit to
15 hear and decide cases at any place within the judi-
16 cial districts of the division, as specified by a major-
17 ity of the judges of the division. The divisions shall
18 be governed by the Federal Rules of Appellate Pro-
19 cedure and by local rules and internal operating pro-
20 cedures adopted by the court of appeals. The divi-
21 sions may not adopt their own local rules or internal
22 operating procedures. The decisions of 1 regional di-
23 vision shall not be regarded as binding precedents in
24 the other regional divisions.

25 (c) CIRCUIT DIVISION.—

1 (1) IN GENERAL.—In addition to the 3 regional
2 divisions specified under subsection (a), the Ninth
3 Circuit Court of Appeals shall establish a Circuit Di-
4 vision composed of the chief judge of the circuit and
5 12 other circuit judges in active status, chosen by lot
6 in equal numbers from each regional division. Ex-
7 cept for the chief judge of the circuit, who shall
8 serve ex officio, judges on the Circuit Division shall
9 serve nonrenewable, staggered terms of 3 years each.
10 One-third of the judges initially selected by lot shall
11 serve terms of 1 year each, one-third shall serve
12 terms of 2 years each, and one-third shall serve
13 terms of 3 years each. Thereafter all judges shall
14 serve terms of 3 years each. If a judge on the Cir-
15 cuit Division is disqualified or otherwise unable to
16 serve in a particular case, the presiding judge of the
17 regional division to which that judge is assigned
18 shall randomly select a judge from the division to
19 serve in the place of the unavailable judge.

20 (2) JURISDICTION.—The Circuit Division shall
21 have jurisdiction to review, and to affirm, reverse, or
22 modify any final decision rendered in any of the
23 court's divisions that conflicts on an issue of law
24 with a decision in another division of the court. The
25 exercise of such jurisdiction shall be within the dis-

1 cretion of the Circuit Division and may be invoked
2 by application for review by a party to the case, set-
3 ting forth succinctly the issue of law as to which
4 there is a conflict in the decisions of 2 or more divi-
5 sions. The Circuit Division may review the decision
6 of a panel within a division only if en banc review
7 of the decision has been sought and denied by the
8 division.

9 (3) PROCEDURES.—The Circuit Division shall
10 consider and decide cases through procedures adopt-
11 ed by the court of appeals for the expeditious and
12 inexpensive conduct of the division's business. The
13 Circuit Division shall not function through panels.
14 The Circuit Division shall decide issues of law on the
15 basis of the opinions, briefs, and records in the con-
16 flicting decisions under review, unless the Circuit Di-
17 vision determines that special circumstances make
18 additional briefing or oral argument necessary.

19 (4) EN BANC PROCEEDINGS.—Section 46 of
20 title 28, United States Code, shall apply to each re-
21 gional division of the Ninth Circuit Court of Appeals
22 as though the division were the court of appeals.
23 Section 46(e) of title 28, United States Code, au-
24 thorizing hearings or rehearings en banc, shall be
25 applicable only to the regional divisions of the court

1 and not to the court of appeals as a whole. After a
2 divisional plan is in effect, the court of appeals shall
3 not order any hearing or rehearing en banc, and the
4 authorization for a limited en banc procedure under
5 section 6 of Public Law 95-486 (92 Stat. 1633),
6 shall not apply to the Ninth Circuit. An en banc pro-
7 ceeding ordered before the divisional plan is in effect
8 may be heard and determined in accordance with ap-
9 plicable rules of appellate procedure.

10 (d) CLERKS AND EMPLOYEES.—Section 711 of title
11 28, United States Code, shall apply to the Ninth Circuit
12 Court of Appeals, except the clerk of the Ninth Circuit
13 Court of Appeals may maintain an office or offices in each
14 regional division of the court to provide services of the
15 clerk's office for that division.

16 (e) STUDY OF EFFECTIVENESS.—The Federal Judi-
17 cial Center shall conduct a study of the effectiveness and
18 efficiency of the divisions in the Ninth Circuit Court of
19 Appeals. No later than 8 years after the effective date of
20 this Act, the Federal Judicial Center shall submit to the
21 Judicial Conference of the United States a report summa-
22 rizing the activities of the divisions, including the Circuit
23 Division, and evaluating the effectiveness and efficiency
24 of the divisional structure. The Judicial Conference shall
25 submit recommendations to Congress concerning the divi-

1 sional structure and whether the structure should be con-
2 tinued with or without modification.

3 **SEC. 2. ASSIGNMENT OF JUDGES; PANELS; EN BANC PRO-**
4 **CEEDINGS; DIVISIONS; QUORUM.**

5 (a) IN GENERAL.—Section 46 of title 28, United
6 States Code, is amended to read as follows:

7 **“§ 46. Assignment of judges; panels; en banc proceed-**
8 **ings; divisions; quorum**

9 “(a) Circuit judges shall sit on the court of appeals
10 and its panels in such order and at such times as the court
11 directs.

12 “(b) Unless otherwise provided by rule of court, a
13 court of appeals or any regional division thereof shall con-
14 sider and decide cases and controversies through panels
15 of 3 judges, at least 2 of whom shall be judges of the
16 court, unless such judges cannot sit because recused or
17 disqualified, or unless the chief judge of that court cer-
18 tifies that there is an emergency including, but not limited
19 to, the unavailability of a judge of the court because of
20 illness. A court may provide by rule for the disposition
21 of appeals through panels consisting of 2 judges, both of
22 whom shall be judges of the court. Panels of the court
23 shall sit at times and places and hear the cases and con-
24 troversies assigned as the court directs. The United States
25 Court of Appeals for the Federal Circuit shall determine

1 by rule a procedure for the rotation of judges from panel-
2 to-panel to ensure that all of the judges sit on a represent-
3 ative cross section of the cases heard and, notwithstanding
4 the first sentence of this subsection, may determine by
5 rule the number of judges, not less than 2, who constitute
6 a panel.

7 “(e) Notwithstanding subsection (b), a majority of
8 the judges of a court of appeals not organized into divi-
9 sions as provided in subsection (d) who are in regular ac-
10 tive service may order a hearing or rehearing before the
11 court en banc. A court en banc shall consist of all circuit
12 judges in regular active service, except that any senior cir-
13 cuit judge of the circuit shall be eligible to participate,
14 at that judge’s election and upon designation and assign-
15 ment pursuant to section 294(e) and the rules of the cir-
16 cuit, as a member of an en banc court reviewing a decision
17 of a panel of which such judge was a member.

18 “(d)(1) A court of appeals having more than 15 au-
19 thorized judgeships may organize itself into 2 or more ad-
20 judicative divisions, with each judge of the court assigned
21 to a specific division, either for a specified term of years
22 or indefinitely. The court’s docket shall be allocated
23 among the divisions in accordance with a plan adopted by
24 the court, and each division shall have exclusive appellate
25 jurisdiction over the appeals assigned to it. The presiding

1 judge of each division shall be determined from among the
2 judges of the division in active status as though the divi-
3 sion were the court of appeals, except the chief judge of
4 the circuit shall not serve at the same time as the presid-
5 ing judge of a division.

6 “(2) When organizing itself into divisions, a court of
7 appeals shall establish a circuit division, consisting of the
8 chief judge and additional circuit judges in active status,
9 selected in accordance with rules adopted by the court, so
10 as to make an odd number of judges but not more than
11 13.

12 “(3) The circuit division shall have jurisdiction to re-
13 view, and to affirm, reverse, or modify any final decision
14 rendered in any of the court’s divisions that conflicts on
15 an issue of law with a decision in another division of the
16 court. The exercise of such jurisdiction shall be within the
17 discretion of the circuit division and may be invoked by
18 application for review by a party to the case, setting forth
19 succinctly the issue of law as to which there is a conflict
20 in the decisions of 2 or more divisions. The circuit division
21 may review the decision of a panel within a division only
22 if en banc review of the decision has been sought and de-
23 nied by the division.

24 “(4) The circuit division shall consider and decide
25 cases through procedures adopted by the court of appeals

1 for the expeditious and inexpensive conduct of the circuit
2 division's business. The circuit division shall not function
3 through panels. The circuit division shall decide issues of
4 law on the basis of the opinions, briefs, and records in
5 the conflicting decisions under review, unless the division
6 determines that special circumstances make additional
7 briefing or oral argument necessary.

8 “(e) This section shall apply to each division of a
9 court that is organized into divisions as though the divi-
10 sion were the court of appeals. Subsection (c), authorizing
11 hearings or rehearings en banc, shall be applicable only
12 to the divisions of the court and not to the court of appeals
13 as a whole, and the authorization for a limited en banc
14 procedure under section 6 of Public Law 95-486 (92 Stat.
15 1633), shall not apply in that court. After a divisional plan
16 is in effect, the court of appeals shall not order any hear-
17 ing or rehearing en banc, but an en banc proceeding al-
18 ready ordered may be heard and determined in accordance
19 with applicable rules of appellate procedure.

20 “(f) A majority of the number of judges authorized
21 to constitute a court, a division, or a panel thereof shall
22 constitute a quorum.”.

23 (b) TECHNICAL AND CONFORMING AMENDMENT.—
24 The table of sections for chapter 3 of title 28, United

1 States Code, is amended by amending the item relating
2 to section 46 to read as follows:

“46. Assignment of judges; panels; en banc proceedings; divisions; quorum.”.

3 (c) MONITORING IMPLEMENTATION.—The Federal
4 Judicial Center shall monitor the implementation of sec-
5 tion 46 of title 28, United States Code (as amended by
6 this section) for 8 years following the date of enactment
7 of this Act and report to the Judicial Conference such in-
8 formation as the Center determines relevant or that the
9 Conference requests to enable the Judicial Conference to
10 assess the effectiveness and efficiency of this section.

11 **SEC. 3. DISTRICT COURT APPELLATE PANELS.**

12 (a) IN GENERAL.—Chapter 5 of title 28, United
13 States Code, is amended by adding after section 144 the
14 following:

15 **“§ 145. District Court Appellate Panels**

16 “(a) The judicial council of each circuit may establish
17 a district court appellate panel service composed of district
18 judges of the circuit, in either active or senior status, who
19 are assigned by the judicial council to hear and determine
20 appeals in accordance with subsection (b). Judges as-
21 signed to the district court appellate panel service may
22 continue to perform other judicial duties.

23 “(b) An appeal heard under this section shall be
24 heard by a panel composed of 2 district judges assigned
25 to the district court appellate panel service, and 1 circuit

1 judge as designated by the chief judge of the circuit. The
2 circuit judge shall preside. A district judge serving on an
3 appellate panel shall not participate in the review of deci-
4 sions of the district court to which the judge has been ap-
5 pointed. The clerk of the court of appeals shall serve as
6 the clerk of the district court appellate panels. A district
7 court appellate panel may sit at any place within the cir-
8 cuit, pursuant to rules promulgated by the judicial council,
9 to hear and decide cases, for the convenience of parties
10 and counsel.

11 “(c) In establishing a district court appellate panel
12 service, the judicial council shall specify the categories or
13 types of cases over which district court appellate panels
14 shall have appellate jurisdiction. In such cases specified
15 by the judicial council as appropriate for assignment to
16 district court appellate panels, and notwithstanding sec-
17 tions 1291 and 1292, the appellate panel shall have exclu-
18 sive jurisdiction over district court decisions and may exer-
19 cise all of the authority otherwise vested in the court of
20 appeals under sections 1291, 1292, 1651, and 2106. A
21 district court appellate panel may transfer a case within
22 its jurisdiction to the court of appeals if the panel deter-
23 mines that disposition of the case involves a question of
24 law that should be determined by the court of appeals.

1 The court of appeals shall thereupon assume jurisdiction
2 over the case for all purposes.

3 “(d) Final decisions of district court appellate panels
4 may be reviewed by the court of appeals, in its discretion.
5 A party seeking review shall file a petition for leave to
6 appeal in the court of appeals, which that court may grant
7 or deny in its discretion. If a court of appeals is organized
8 into adjudicative divisions, review of a district court appel-
9 late panel decision shall be in the division to which an ap-
10 peal would have been taken from the district court had
11 there been no district court appellate panel.

12 “(e) Procedures governing review in district court ap-
13 pellate panels and the discretionary review of such panels
14 in the court of appeals shall be in accordance with rules
15 promulgated by the court of appeals.

16 “(f) After a judicial council of a circuit makes an
17 order establishing a district court appellate panel service,
18 the chief judge of the circuit may request the Chief Justice
19 of the United States to assign 1 or more district judges
20 from another circuit to serve on a district court appellate
21 panel, if the chief judge determines there is a need for
22 such judges. The Chief Justice may thereupon designate
23 and assign such judges for this purpose.”

24 (b) TECHNICAL AND CONFORMING AMENDMENT.—
25 The table of sections for chapter 5 of title 28, United

1 States Code, is amended by adding after the item relating
2 to section 144 the following:

“145. District court appellate panels.”.

3 (e) MONITORING IMPLEMENTATION.—The Federal
4 Judicial Center shall monitor the implementation of sec-
5 tion 145 of title 28, United States Code (as added by this
6 section) for 8 years following the date of enactment of this
7 Act and report to the Judicial Conference such informa-
8 tion as the Center determines relevant or that the Con-
9 ference requests to enable the Conference to assess the
10 effectiveness and efficiency of this section.

○

QUESTIONS AND ANSWERS

MUNGER, TOLLES, & OLSON LLP,
Los Angeles, CA, August 19, 1999.

The Honorable CHARLES E. GRASSLEY,
*U.S. Senate Committee on the Judiciary, Subcommittee on Administrative Oversight
and the Courts, Washington, DC.*

DEAR SENATOR GRASSLEY: I am writing in response to your letter of July 29, which arrived while I was out of the office on business and vacation. I apologize for the tardiness in responding.

Taking your questions as presented, I have the following responses:

RESPONSES OF RONALD L. OLSON TO QUESTIONS FROM SENATOR GRASSLEY

I. DESTROYED COLLEGIALITY

Answer 1. Certainly there is some correlation between the size of an institution and the intimacy of its members.¹ However, in my opinion, as an active advocate and court watcher, the size of the Ninth Circuit has not interfered with the collegiality needed for sound judicial decision-making. Well-over 90 percent of the judicial decision-making occurs within 3-judge panels. Hence, the overall size of the circuit is secondary to how well these 3-judge panels relate. Here, my experience suggests that individuals on 3-judge panels are not only cordial with each other but genuinely interested in sharing views and analysis in a way that leads to a prompt and fair decision. At least 3 factors bear on this experience:

(a) Typically, each panel comes together for a full-week of argument, shared analysis and tentative decision-making. This intense shared professional relationship may well promote more “collegiality” in decision-making than one would have in an environment of fewer circuit-wide judges sitting more randomly with each other and for shorter time periods.

(b) Second, it is obvious that, because of its size, the Ninth Circuit makes an extra effort to maintain professional collegiality through in-person and tele-picture conferences and through its existing administrative offices in San Francisco and Pasadena.

(c) Third, the important collegiality is that which stimulates communication related to decision-making. With the help of a sophisticated clerk’s office that codes issues in each case, judges are prompted to have timely communications with other judges who have expressed themselves on related matters. Further, I would argue that important professional collegiality, such as that which occurs at the annual circuit conferences, is enriched by the presence and participation of a greater number of judges. Indeed, my personal experience in other professional settings is that the smaller the group, the more personal and social the experience, and the larger the group, the more professional the experience.

2. QUALITY OF COURT OPINIONS

Answer 2. I know of no meaningful analysis of the comparative quality of federal court appellate opinions. I would argue that in the Ninth Circuit the depth and accuracy of legal analysis, the integrity of the process and the results, and the timeliness of opinions (especially if adjusted to account for the Ninth Circuit’s work for so long without a full complement of authorized judges) is equal to that of any other circuit in the country. I would further argue that the 1997 Supreme Court reversal rate for the Ninth Circuit is a meaningless indicator of the “quality of opinions.” I am personally familiar with many of those Ninth Circuit opinions and know them to present very difficult policy questions on which the Supreme Court itself was divided and know that the alternative result of the Ninth Circuit was generally supported by sound analysis and judicial integrity. I would further note that Justice Scalia’s reliance on reversal rates to support the view that the Ninth Circuit is con-

¹Nonetheless, this point should not be overstated, either with respect to better decision-making or intimacy itself. Some 32 years ago, I clerked on the United States Court of Appeals for the D.C. Circuit, then a very small court sitting together on a single floor of the Courthouse. Despite its small size and physical intimacy, two of the more prominent judges not only disagreed philosophically and in judicial decisions but refused to speak to each other and communicated only by formal memoranda.

sistently out-of-step with the Supreme Court is not borne out in more current years, not borne out by a longer-term analysis than years referenced by Justice Scalia, and, in any event, is essentially meaningless. Different views are not dishonest views and may well be constructive as part of the national debate on difficult policy questions. Nor does a different result indicate that the decision is less well-reasoned or less well-expressed or have less integrity. In any event, there is no known correlation between the size of the circuit and “getting it right” with the Supreme Court.

3. TIMELY DISPOSITION OF CASES

Answer 3. The experience of our law firm suggests that the Ninth Circuit is timely in reporting its decisions. However, I know that your committee and the Ninth Circuit have access to complete statistics for the Ninth Circuit and for other circuits, and I would, therefore, defer to those statistics. However, the speed of decision-making is not, in my opinion, meaningfully related to the size of the circuit. As noted before, most decisions are made by 3-Judge panels and most opinions are written by a single judge. The diligence of the individual judges on the panels and writing the opinions overwhelms any other factor in determining timeliness. Finally, it must be noted that the Ninth Circuit has long labored with less than a full complement of authorized judges. In my opinion, filling judicial vacancies would have a far more positive effect on timeliness than reorganizing the existing circuit. Indeed, the proposed tripartite division would seem likely to slow the disposition of those cases that received the additional review by the circuit division.

4. WHAT EVIDENCE WOULD SUPPORT REORGANIZATION?

Answer 4. My answer to this question is articulated best by the “Proposed Long Range Plan for Federal Courts,” adopted by the Judicial Conference of the United States in December 1995, and the resolution adopted by the House of Delegates of the American Bar Association in August 1999. Both of these policy-making bodies agree that restructuring should not occur without “compelling empirical evidence to demonstrate adjudicative dysfunction.” An aberrational case such as *Hughes Aircraft Company vs. Jacobson* occurs from time to time in most circuits. An occasional aberrational case does not equal “compelling empirical evidence” of adjudicative dysfunction. Nor is there any indication that the unacceptable delay associated with *Hughes Aircraft* was attributed to the size of the Ninth Circuit.

In conclusion, I again thank you, Senator Grassley, and the Judiciary Subcommittee on Administrative Oversight and the Courts for your attention to this important matter and for giving me the opportunity to participate in the hearing. If I can be of any further assistance, please let me know.

Sincerely yours,

RONALD L. OLSON.

RESPONSES OF PROCTER HUG, JR. TO QUESTIONS FROM SENATOR GRASSLEY

Question 1. The commission has suggested allowing appellate courts to use panels of two judges—instead of the traditional 3 judge panels—to hear appeals. However, the legislation does not offer a solution where there is a split between the judges on a two judge panel. How should such a disagreement be handled?

Answer 1. The two judges assigned to such panels will rarely disagree because the panels would “primarily” decide “cases in which the outcome is clearly controlled by well-settled precedent.” (Report at 63.) If disagreement or doubt does arise, the Commission recommends the two judges “enlist a third judge to participate in the decision, or refer the case to a regular three judge panel for hearing.” (*Id.*) Either alternative would provide an efficient and effective mechanism for resolving the few disagreements that might occur. We have successfully employed similar procedures in the screening program maintained by our Court.

Question 2. The Commission states that the Circuit Division should only hear “square conflicts” between the regional divisions. Critics argue that this will cause the law of the different regions to drift apart over time and erode the uniformity of circuit law to the point where the law of the circuit is insignificant. On the other hand, if the circuit division takes more than “square conflicts” in order to provide more uniformity in the circuit, it will be operating like another full layer of appeal. What is likely to be the practical way in which the circuit division operates and what consequences will this have on the circuit as a whole?

Answer 2. The dilemma exposed by Senator Grassley’s question provides yet another persuasive reason for rejecting the divisional structure proposed by the Com-

mission. At a minimum, the circuit division will create an additional layer of appeal before finality, compounding the delay, cost, and administrative burdens of the appellate process. Limiting the jurisdiction of the circuit division to resolving “square interdivisional conflicts,” (Report at 45), will generate additional litigation and leave questions of exceptional importance unresolved in the Ninth Circuit. Three autonomous, adjudicative divisions will erode the uniformity of circuit law, and ultimately create more work for the Supreme Court.

RESPONSES OF PROCTER HUG, JR. TO QUESTIONS FROM SENATOR THURMOND

Question 1. Judge Hug, as you know the size and number of the Federal Circuits has changed over time as the country has grown. In 1929, the Tenth Circuit was created, in 1981, the Eleventh, and in 1982 the Federal Circuit was created. Indeed, Judge O’Scannlain testified that “There is nothing sacred about the Ninth Circuit’s keeping essentially the same boundaries since 1855. The only legitimate consideration is the optimal size and structure for judges to perform their duties.” Do you disagree with this statement of Judge O’Scannlain, and is it your belief that the Ninth Circuit should never be split no matter how large it gets?

Answer 1. I do not disagree with Judge O’Scannlain’s statement that optimal size and structure for the court of appeals to perform its duties should be the primary consideration. However, no one knows what the optimal size of the Ninth Circuit (or any other circuit, for that matter) may be. The Commission conceded that the size of a circuit, and its resulting effects on the consistency and predictability of its decisional law, are “too subtle * * * to allow evaluation in a freeze-framed moment.” (Report at 40.) We do know, however, based on our experience over the last fifteen years, that twenty-eight judgeships are not too many to enable the court of appeals to operate effectively. I agree with the Long Range Plan of the Federal Courts, adopted by the Judicial Conference of the United States, that no circuit should be split unless or until there is “compelling empirical evidence” that it is not functioning effectively. (Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, at 44 (1995).) The Commission failed to meet that burden.

Question 2. Judge Hug, the Commission’s report recognizes a consensus among appellate judges that in order to function effectively a court of appeals should be made up of no more than seventeen judges. Of course, the Ninth Circuit is beyond that number with 28 judges. Do you disagree with this consensus of the Appellate judges? Please explain.

Answer 2. Yes, I disagree. If you look closely at the Commission’s working papers you will see that the Commission’s “consensus” includes views of judges on courts that have never had more than 17 judges. The response from the judges on the only federal appellate court that has exceeded that number—the Ninth Circuit—are quite different: $\frac{2}{3}$ of the judges (and lawyers) of the Ninth Circuit are satisfied that the present court of appeals is functioning well with 28 judges, and should not be restructured. When our court of appeals grew from 3 to 7, 7 to 9, 9 to 13, 13 to 23, and 23 to 28, critics proclaimed that the court had exceeded its maximum practicable size before the new judges arrived. They were wrong. As I testified, I believe we have effectively demonstrated that a large court of appeals can function well, delivering quality justice and coherent, consistent circuit law in the face of an increasing workload.

U.S. COURT OF APPEALS, NINTH CIRCUIT,
Fairbanks, AL, August 11, 1999.

The Honorable CHARLES E. GRASSLEY,
Chairman, Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary, U.S. Senate Washington, DC.

DEAR SENATOR GRASSLEY: Thank you for your perceptive questions about the White Commission Report. Below I restate the questions and Then give my answer.

RESPONSES OF ANDREW J. KLEINFELD TO QUESTIONS FROM SENATOR GRASSLEY

Question 1. Many have expressed a concern about splitting the State of California, into two regions. I am interested in any drawbacks there would be to a plan that would arrange The divisions differently by keeping California intact in one region. What drawbacks would there be to such a plan? On the other hand, what advantages does splitting California between divisions offer that outweigh the potential problems of forum shopping?

Answer 1. I also have doubts about the desirability of splitting California into two federal appellate divisions. As the White Commission points out, California already has multiple appellate divisions in its state court system and the inter-divisional, en banc could reconcile conflicts. Nevertheless, a simple split of The Ninth Circuit as Congress did with the Eighth and the Fifth, with all of California left in the remaining Ninth Circuit, seems like a better idea to me. The White Commission report's general scheme could be kept, with the divisions altered somewhat, to avoid splitting California. For example, California could be one division, Alaska, Washington, Oregon, Idaho, and Montana another, and Arizona, Nevada, and Hawaii a third. But even if The White Commission Report is adopted as is, I think it is better for California than the status quo. Because the Ninth Circuit is too big for us to read each other's decisions, or maintain an effective en banc procedure, California already lacks coherent federal law. Instead of one coherent body of law for Northern California, and another coherent body of law for Southern California, federal appellate law for California now depends much too much on the composition of the particular panel.

Question 2. What extra costs, if any, would be involved with implementing S. 253? Would you see any increase in any personnel positions, including judgeships?

Answer 2. My guess is that splitting the Ninth Circuit would save money, not cost money. It would have no effect on the number of judgeships necessary. However the circuit is split, judges could be allocated according to the percentages of the caseload going to the new circuits or new divisions. It is possible that the complexity of The White Commission plan would require some additional administrative assistance, but I am not at all sure that this is true. If we had a simple split of the Ninth Circuit, probably administration would cost less, because it is always simpler to administer a smaller unit. I do not see any difference in needs for buildings according to whether we are one circuit, two, or three, or one, two, or three divisions. If we were to split the circuit and require 21 Northern headquarters, there is a substantially vacant federal court building in Portland, the Gas Solomon Courthouse, which could be used for this immediately. Once a new district court facility is constructed in Seattle, the now shared federal courthouse in Seattle would also be an entirely appropriate and adequate headquarters.

Question 3. The commission has suggested allowing appellate courts to use panels of two judges—instead of the traditional 3 judge panels—to hear appeals. However, the legislation does not offer a solution where there is a split between the judges on a two judge panel. How should such a disagreement be handled?

Answer 3. There are several possibilities for handling disagreements between two judges on a two judge panel. The one that commends itself to me is for the two judge panel to refer the case back to the clerk's office for reassignment to a three judge panel. The court could decide by general order or a circuit rule whether the same two judges should be on the three judge panel automatically, if they volunteer, or only if they are drawn according to the random process. We do something like this in our screening process for simple cases. A three judge panel either adopts a staff recommendation after a quick look at the case, or asks the clerk's office to assign it to a regular three judge panel for fuller consideration.

Question 4. Opponents of the Commission's proposal say that there is no evidence that justifies reorganizing the Ninth Circuit. In your opinion, is there evidence that would justify such a reorganization? Specifically, what is it (please give examples if possible)? And if such evidence does not exist at this time, what sort of evidence would justify a reorganization?

Answer 4. The clearest evidence that reorganization is necessary is that a majority of Supreme Court Justices have said that it is. They review what we do, and they think repair is needed.

A clear example of the kind of distortion that can occur when fewer than all the judges on a court serve on an en banc panel is in *Thompson v. Caldero*, 120 F.3d 1045 (9th Cir. 1997) (en banc). In this case, as the dissents make clear, a majority of the en banc panel, but a minority of the court, made a surprising decision in a death penalty case, which the dissenters believed was outside the scope of the en banc call. In any other court, the scope of the en banc call would be of little importance, but where fewer than all the judges serve on the en banc panel, the scope of the call is critical, because it represents the only time that the entire court votes. The Supreme Court later characterized what the majority of our en banc panel (but a majority of our court) did as "a grave abuse of discretion." *Calderon v. Thompson*, 523 U.S. 538, 542 (1998). Whether a man lives or dies should not depend on who happens to be drawn for a panel.

Question 5. The Commission states that the Circuit Division should only hear "square conflicts" between the regional divisions. Critics argue that this will cause

the law of the different regions to drift apart over time and erode the uniformity of circuit law to the point where the law of the circuit is insignificant. On the other hand, if the circuit division takes more than “square conflict” in order to provide more uniformity in the circuit, it will be operating like another full layer of appeal. What is likely to be the practical way in which the circuit division operates and what consequences will this have on the circuit as a whole?

Answer 5. It is hard to predict just how the circuit division will develop, because the idea is new. My hope would be that the circuit division would take very few cases, so that it would not turn into an expensive additional layer of appeal for the parties. I see no harm in having the different regions of the circuit drift apart with regard to substantive law, especially if California is left as one division, perhaps with Arizona, Nevada, and Hawaii as the Southern division.

There is no more of an intrinsic problem with California, Idaho, and Arizona taking different views than in New York, Illinois, and Texas taking different views on issues of federal law, New York, Illinois, and Texas are in different circuits and do exactly that. Likewise, Massachusetts, New York, Virginia, and Florida, though all East Coast states, are all in different circuits. It simply is not a problem. Supreme Court Justices have frequently characterized the differing views of the circuit as a public benefit, because the Supreme Court can then see how the issue develops as it “percolates” in the circuits.

Sincerely yours,

ANDREW J. KLEINFELD/BGF,
Circuit Judge.

RESPONSES OF DIARMUID F. O’SANNLAIN TO QUESTIONS FROM SENATOR GRASSLEY

Question 1. Many have expressed a concern about splitting the State of California into two regions. I am interested in any drawbacks there would be to a plan that would arrange the divisions differently by keeping California intact in one region. What drawbacks would there be to such a plan? On the other hand, what advantages does splitting California between divisions offer that outweigh potential problems of forum shopping?

Answer 1. The most serious drawback of keeping California intact in one region is that the resulting division would be disproportionately large, whether measured in size of population or caseload. California now has 63 percent of the Ninth Circuit’s total workload and about the same proportion of population. If California were kept intact by itself and the remainder of the states divided between two other divisions, the California division would have more than triple the workload of each of the other two divisions (enough, incidentally, to justify being a stand alone circuit by itself, which wouldn’t be a bad idea alternative, by the way).

I have never been impressed by the “forum shopping” charge. As the White Commission recognized, litigants in California are already free to choose the district court in which they file. Any “division splits” could be quickly and expeditiously resolved whether by the Circuit Division in the proposed legislation or by an inter-circuit panel if Option C were adopted.

In any event, I would not object to an all-California division as a consensus compromise to accommodate the regional interests involved.

Question 2. What extra costs, if any, would be involved with implementing S. 253? Would you see any increase in any personnel positions, including judgeships?

Answer 2. New courthouses would not be required in either the Southern or Middle Divisions, because the current spacious Pasadena and San Francisco courthouses would presumably serve as the headquarters of those divisions, respectively. There is an empty federal courthouse in Portland, Oregon, the “Gus J. Solomon Federal Courthouse,” which would be available at no cost (except minimal remodeling) as the Northern Division headquarters if Congress agrees so to designate.

I do not believe that the implementation of S. 253 would require an increase in the number of judgeships. Further, the existing court personnel both the staff attorneys and the administrative personnel would simply be reallocated among the three divisions.

The geographical expansiveness of our present circuit requires judges to expend considerable time and resources traveling from distant cities to panel hearings and court hearings, which are primarily in California. S. 253 would do much to curtail extensive travel expense.

Question 3. The commission has suggested allowing appellate courts to use panels of two judges—instead of the traditional 3 judge panels—to hear appeals. However,

the legislation does not offer a solution where there is a split between the judges on a two judge panel. How should such a disagreement be handled?

Answer 3. I agree with the White Commission that federal appellate courts would benefit from having the flexibility to adjudicate some cases using two-judge panels, because this proposal would conserve resources without any loss in fairness. If the judges on a two-judge panel disagree over how to resolve the case, a third judge, drawn at random, would be enlisted (as we do now on two-judge motions matters) or the case would be calendared for consideration by a regular three-judge panel.

Question 4. Opponents of the Commission's proposal say that there is no evidence that justifies reorganizing the Ninth Circuit. In your opinion, is there evidence that would justify such a reorganization? Specifically, what is it (please give examples if possible)? And if such evidence does not exist at this time, what sort of evidence would justify a reorganization?

Answer 4. There is much evidence that justifies reorganizing the Ninth Circuit. First, after careful analysis, the White Commission concluded that any court with more than eleven to seventeen judges lacks the ability to render clear, circuit-consistent, and timely decisions, and I agree. In light of this finding, the Ninth Circuit, with 28 authorized judgeships (not to mention our 19 senior judges), has far more than the maximum number of judges with which a circuit can function effectively.

Second, as several Supreme Court Justices have commented, the risk of intracircuit conflicts is heightened where a circuit publishes as many opinions as the Ninth Circuit does. Frankly, we are losing the ability to keep track of our own precedents. As Judge Rymer reported, only about half the Ninth Circuit judges read all or most published opinions. It is imperative that judges read opinions as they are published, since this is the only way to stay abreast of circuit developments as well as to ensure that no intra-circuit conflicts develop and that, when they do, they be reconsidered en banc.

Third, as the Commission reported, a disproportionately large number of lawyers indicated that the difficulty of discerning circuit law due to conflicting precedents was a "large" or "grave" problem in the Ninth Circuit. From my own experience since 1986, I can tell you that this problem has worsened notably as the work of the court has grown.

Fourth, the Ninth Circuit's limited en banc system has not worked well to promote consistency of law, which can only be guaranteed by regular full court en banc rehearings. Several Supreme Court Justices have criticized the court for failing to rehear a sufficient number of cases en banc.

Question 5. The Commission states that the Circuit Division should only hear "square conflicts" between the regional divisions. Critics argue that this will cause the law of the different regions to drift apart over time and erode the uniformity of circuit law to the point where the law of the circuit is insignificant. On the other hand, if the circuit division takes more than "square conflicts" in order to promote more uniformity in the circuit, it will be operating like another full layer of appeal. What is likely to be the practical way in which the circuit division operates and what consequences will this have on the circuit as a whole?

Answer 5. The jurisdiction of the Circuit Division appropriately balances the two competing needs identified by Senator Grassley. By having Jurisdiction only over "square conflicts," S. 253 will promote uniformity of the law of the circuit, but avoids creating a full additional layer of appeal. I must concede, however, that it is difficult to predict exactly how the Circuit Division will operate in practice.

Question 6. The report states that one concern in dealing with the Ninth Circuit is the need to "respect the character of the West as a distinct region." However, this region of the country is by no means homogeneous. Why are states on the west coast so similar to other states that they need to remain in the same circuit?

Answer 6. The notion that the West has a distinct character which immunizes it from the normal evolution of federal judicial institutions is, quite frankly, a joke on Congress. If any American region has a distinct character, it would be the South which now spans three circuits, the most recent split having occurred in 1980 by carving out Alabama, Florida, and Georgia from Louisiana, Mississippi, and Texas into the Eleventh Circuit. And while we're at it, what about the law of the Midwest? The Sixth, Seventh, and Eighth Circuits all include states in the Midwest, yet no one seriously contends that having three circuits has been deleterious to the development of the law of that region.

The argument that we need to keep the circuit together so that we can retain a consistent law for the west coast is also absurd. The states along the eastern seaboard are divided among five different circuits. I challenge critics of S. 253 to produce evidence that the failure to keep all the states on the east coast in the same circuit has produced deleterious effects. Are freighters colliding more frequently off

Cape Hatteras or Long Island than the Pacific Coast because of the uncertainties of maritime law on the East Coast? Of course not.

U.S. COURT OF APPEALS NINTH CIRCUIT,
Las Vegas, NV, August 3, 1999.

Hon. CHARLES E. GRASSLEY,
Chairman, Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary Washington, DC.

DEAR CHUCK: I was pleased to appear before your committee and am willing to respond to the questions you asked in subsequent correspondence.

First, you should appreciate that I do not support the proposed legislation now pending in the Senate. I would recommend that you avoid the problem entirely by rejecting the legislation. Nevertheless, I am willing to respond further to your inquiries.

RESPONSES OF CHARLES E. WIGGINS TO QUESTIONS FROM SENATOR GRASSLEY

Answer 1. The first suggestion is to substitute in certain classes of cases appellate panels of two judges instead of three. You have asked me to comment on the possibility of a split between the appellate panels of two. The legislation is silent on this possibility. I would recommend that if the appellate panels of two are provided for in legislation, the possibility of splits must be resolved by referring the split panel to a third judge who should participate in the proceedings. I have observed that the Commission has proposed a reduction in size of panels for the handling of routine cases but insists on enlarging the en banc court to provide a full review of the two judge panel decision. I think that this is an inconsistent proposal which should be rejected by the Senate. Nevertheless, circuits should be permitted to examine options to the traditional three judge panels in certain categories of cases. I see no disability in their doing so now.

Answer 2. The second question raises the issue of the resolution of "clear conflict" by regional divisions. The proposal is not worthy of further consideration by the Senate. It is a product of the divisional concept recommended by the White Commission. I reject that proposal in its entirety. I would predict that the resolution of square conflicts between the divisions will unsettle the law of the circuit.

I doubt that you will accept my recommendations, Chuck, but I have given a great deal of thought to this issue and have concluded that the Ninth Circuit is not too large and does not need correcting. The Courts of Appeal of other circuits should be restructured and should be combined to promote larger and fewer circuits. The growth in population and the evident inability of Congress to limit the subject matter jurisdiction of the Courts of Appeal make the consideration of consolidation an inevitable solution.

Warmest personal regards,

CHARLES E. WIGGINS.

RESPONSE OF JON P. JENNINGS, ACTING ASSISTANT ATTORNEY GENERAL, TO A
QUESTION FROM SENATOR GRASSLEY

Question 1. Those who support the Commission's proposals cite a lack of collegiality and the current en banc procedure as major problems with the Ninth Circuit. Since you do not support the Commission's proposals, what, if anything, would you propose to alleviate these problems?

Answer 1. As we observed in our written testimony, the Justice Department believes that the three primary goals that the Ninth Circuit Court of Appeals strives to achieve are consistency of its decisions, efficiency in resolving cases, and the appearance that all of its decisions reflect the views of the Court as a whole. While collegiality may contribute to these primary goals, we do not see it as an end in itself, nor do we see that the size of a court has an impact on the general collegiality of the court's membership. By the same token, we do not believe that the Ninth Circuit's size is the cause of any lack of consistency in its decisions. Instead, we think that the inconsistencies may stem from a failure of the Circuit to correct erroneous or conflicting panel decisions in an effective manner. As you are aware, the Ninth Circuit already has an en banc procedure in place to address such panel decisions. That procedure could nevertheless be improved by making slight modifications aimed at serving two goals: increasing the availability of en banc review and increasing the representativeness of the en banc panel itself.

Three modifications in particular might accomplish these ends. *First*, reducing the number of active judges who must vote to rehear a case en banc from the current requirement (a majority) to some lesser number would increase the opportunities for en banc reconsideration of panel decisions. We suggested a “4/9s” threshold in our testimony, but understand that Senator Feinstein has proposed a 40 percent threshold in the Ninth Circuit Court of Appeals En Banc Procedures Act of 1999 (S. 1403). Either proposal would be an improvement over the existing requirement. *Second*, circulating opinions that distinguish or disagree with existing precedent to the Circuit judges before those opinions are published may avert the creation of conflicting precedent or, at the very least, better alert the judges to the need for en banc review of particular decisions. *Third*, increasing the number of judges who sit on the Ninth Circuit’s en banc panel from 11 to 15 would make the Circuit’s en banc decisions more representative because those decisions would then be more likely to reflect the views of a majority of the Circuit’s 28 active judges. As the most frequent litigator in the federal courts of appeals, the Justice Department is committed to working with this Subcommittee and the Ninth Circuit to improve the quality and consistency of decisions in that Circuit.

ADDITIONAL SUBMISSIONS FOR THE RECORD

LOS ANGELES COUNTY BAR ASSOCIATION,
Los Angeles, CA, April 14, 1999.

Re: Senate Bill 253—Federal Ninth Circuit Reorganization Act of 1999

Hon. DIANNE FEINSTEIN,
U.S. Senate, Hart Senate Office Bldg., Washington, DC.

DEAR SENATOR FEINSTEIN: We are writing to express our concerns over and opposition to the restructuring of the Ninth Circuit, as proposed in Senate Bill 253 (“S. 253”). As set forth below and in the enclosed analysis, we have seen no reliable evidence or data justifying the unprecedented and problematic structural changes proposed by the pending legislation.

Some twenty-five years ago, the Hruska Commission cautioned that any realignment of courts of appeal should proceed with me: “[T]he present [circuit] boundaries * * * have stood since the nineteenth century. * * * Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents.” Commission on Revision of the Federal Court Appellate System, *The Geographic Boundaries of the Several Judicial Circuits: Recommendations for Change* (Dec. 1973), reprinted in, 62 F.R.D. 223, 228 (1973). These sentiments were echoed more recently in the United States Judicial Council’s Long Range Plan for Federal Courts (1995): “Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.” *Id.* at 44.

Proponents of the reorganization of this Circuit have identified no compelling evidence that the current structure and performance of the Ninth Circuit satisfies the requisite high standards justifying change. We thus were heartened to see that the report of the Commission on Structural Alternatives (the “White Commission”) embraced these conclusions and that the pending legislation does not seek a division of this Circuit. Indeed, the White Commission’s analysis of the more frequently proposed options for splitting the Ninth Circuit amply demonstrates the problems associated with any attempt to disturb an appellate court that is operating reasonably well.

While S. 253 does not propose, a split of the Ninth Circuit, it does adopt the White Commission’s recommendation that the Circuit be reorganized into three “divisions” staffed by judges located both within and outside that division, that the state of California be split among two divisions (thereby subjecting litigants in the state to potentially conflicting interpretations of state law and encouraging problematic forum shopping), and that significant cases raising far reaching issues of law be resolved by newly created “division en banc courts,” with Circuit wide en banc adjudication limited to cases involving inter-divisional conflicts. It is our firm belief that this proposed restructuring of the Circuit is ill advised and would create a great many more problems than it solves. Our view is premised on the conclusions and concerns set forth in the attached analysis.

Practitioners have been well served over the years by the existence of an independent and high caliber federal appellate system that has worked to minimize the incidence of unwarranted, disparate interpretations of law. Any determination that the Ninth Circuit, or any other court of appeal, requires restructuring should result from the presentation of data and evidence establishing compelling reasons to change the status quo, and riot from any particular political or ideological agenda.

While we applaud the White Commission’s opposition to the split of the Ninth Circuit and its willingness to consider creative vehicles for improving the operation of our courts of appeals, we question the wisdom of the proposed statutorily mandated creation or divisions. This de facto split of the Ninth Circuit will require the Circuit to implement an unprecedented structure that has grave implications for businesses and litigants in California and throughout the Circuit. In lieu of this unworkable proposal, we urge Congress to allow the Circuit the flexibility and opportunity to continue to experiment with innovative reforms designed to improve the operations of this and other federal appellate courts in the coming years.

We greatly appreciate your consideration of our views on this important issue and welcome the opportunity to provide any further information that may be of assistance.

Very truly yours,
 LEE SMALLEY EDMON,

THERESE M. STEWART,

<i>President, Los Angeles County Bar Association.</i>	<i>President, Bar Association of San Francisco.</i>
TODD F. STEVENS, <i>President, San Diego County Bar Association.</i>	LINDA WIGHT MAZUR, <i>President, Beverly Hills Bar Association.</i>
JAMES I. FISHER, <i>President, Alameda County Bar Association.</i>	GEORGE M. DUFF, III, <i>President, Federal Bar Association, Northern District of California Chapter.</i>
THOMAS E. HOLLIDAY, <i>President, Federal Bar Association, Los Angeles Chapter.</i>	JULIE MCCOY AKINS, <i>President-Elect, Federal Bar Association, Orange County Chapter.</i>
JONATHAN R. IVY, <i>President, John M. Langston Bar Association.</i>	KATEESA CHARLES DAVIS, <i>President, Women Lawyers Association of Los Angeles, Inc.</i>
LINDA S. PETERSON, <i>President, Women Lawyers Association of Los Angeles,</i>	PAULA TESKE, <i>Co-President, LHR: The Lesbian Gay Bar Association.</i>
HUGH BIELE, <i>Co-President, LHR: The Lesbian and Gay Bar Association.</i>	

LOS ANGELES COUNTY BAR ASSOCIATION,
Los Angeles, CA, April 16, 1999.

Re: Senate Bill 253

Hon. DIANNE FEINSTEIN,
U.S. Senate, Hart Senate Office Bldg., Washington DC.

DEAR SENATOR FEINSTEIN: I am writing in response to your letter of March 10, 1999, soliciting input from the Los Angeles County Bar Association on pending legislation that seeks to restructure the Ninth Circuit Court of Appeals. As the largest voluntary bar organization in the Circuit; our Association has, followed this issue with great interest and, based on the views and experiences, of our members, has grave concerns about the unprecedented proposed divisional reorganization of the Ninth Circuit. Our view that a divisional arrangement would create a great many more problems than it solves is shared by over a dozen other bar associations located throughout California.

This Association and the many other bar organizations joining in the enclosed analysis wholeheartedly agree with your observation that the proposed split of California among divisions would be troublesome, especially for practitioners and businesses who practice in this state. Our opposition to the suggested split of the Circuit into divisions does not, however, stem solely from the proposed placement of California in two different divisions. Rather, the attached analysis reflects our fundamental disagreement with the notion that the Circuit would benefit from a divisional structure.

Even if California were placed in a single division, the proposed divisional structure would create a cumbersome, inefficient, and problematic system for the handling of appeals that would adversely impact the administration of justice in this Circuit. Isolating California in a single division not only would fail to address the many problems posed by a divisional structure (as discussed in greater detail in the attached analysis), but also would implicate other concerns. Indeed, we question what benefits would be gained from the formation within the Circuit of a division of the size that would be needed to handle the immense appellate caseload arising from California's appeals. Moreover, we worry that this divisional arrangement could serve as a precursor for a California-only Circuit—a structure that would deprive the state of the advantage associated with decisionmaking by geographically diverse Courts of Appeal. Additionally, the isolation of our state over time could lead to difficulties in obtaining the funding and support needed to staff the increasing appellate load associated with the heavy volume of litigation arising in

* * * * *

In sum, this Association, as well as the other bar groups who join in the attached analysis, view a divisional arrangement for this or any other Circuit as generally unacceptable, whether or not California is split among divisions. As such, we would

not favor the proposed alternative divisional configuration set forth in your March 10 letter.

We greatly appreciate your willingness to consider the views of the organized bar on the pending legislation and would be happy to discuss this issue of tremendous import to attorneys in our Circuit with you further should you have any additional questions.

Sincerely yours,

LEE SMALLEY EDMON,
President, Los Angeles County Bar Association.

[EDITOR'S NOTE: The completed material was not available at presstime.]

GOVERNOR OF THE STATE OF CALIFORNIA,
April 15, 1999.

Re: Senate Bill 253

The Honorable ORRIN HATCH,
U.S. Senate, Russell Building, Washington, DC.

DEAR ORRIN: I wish to register my opposition to Senate Bill 253, which would divide the Ninth Circuit into three regional divisions and split California in half. Unfortunately, I believe that the bill would promote forum shopping and foster confusion over the application of federal law in California, impacting litigation ranging from admiralty to the decennial redistricting of California.

I have written to you previously regarding my concerns over proposals to split the Ninth Circuit. In my view, these proposals did nothing to address the rising caseload per judge (but would merely divide the existing judges between two circuits) and amounted to no more than judicial gerrymandering: Limiting the judges from other western states who would hear California cases and vice-versa. This bill does the same, and is worse because it would divide the West Coast into not two but three segments, each with its own precedents not binding on the other regions, and would add another layer of judicial review to appellate proceedings, adding delay and expense to adjudications.

My principal objections are as follows:

1. INCREASED UNPREDICTABILITY OF THE LAW IN CALIFORNIA AND THE WEST COAST

The bill would split the Ninth Circuit into three regional divisions, splitting California in the process. Under the bill, "[t]he decisions of 1 regional division [would] not be regarded as binding precedents in the other regional divisions." (S. 253, sec. 2(b)(5).)

Thus, these three divisions—each with their separate jurisprudence—would subject the West Coast—and California—to differing interpretations of the law. For instance, a regional division's determination that a California law was unconstitutional would not bind another region that covered another part of California. This would make the law on the West Coast inconsistent and unpredictable.

2. ENCOURAGEMENT OF FORUM SHOPPING

The regional split would also encourage forum shopping, particularly in connection with constitutional challenges to state laws and statewide initiatives, as litigants searched for the appellate division that most favored their case.

3. PAROCHIALISM

While the new northern division of the Ninth Circuit would be composed of five states (Alaska, Idaho, Montana, Oregon, and Washington), the new southern division would be composed of only one and one-half states (Arizona and half of California), which would lack the balance and objectivity that geographical diversity in a multi-state circuit fosters. The Hruska Commission in 1973 concluded that a judicial circuit should be "composed of at least three states" and that "circuits should contain states with a diversity of population, legal, business and socioeconomic interests." For this reason, making California a part of a region composed of one and one-half states—or making California a single regional division—would deprive California of the objectivity that a multi-state federal circuit is designed to foster. (And amending the bill to make California a single regional division would achieve none of the purported objectives of the bill, since California accounts for over 60 percent of the Ninth Circuit's caseload.)

4. MORE DELAYS AND COSTS

The bill would create another appellate layer: a new Circuit Division composed of 13 judges, which could review any final decision rendered in any of the circuit's

divisions that “conflict on an issue of law with a decision in another division of the circuit” (S. 253, sec. 2(c)), but only if “en banc review of the decision has been sought and denied by the division.”

This adds a fifth layer to the current four levels of trial and appellate proceedings: (a) the district court adjudication; (b) the appeal before a three-judge panel; (c) the request for hearing en banc; (d) the request for review by the Circuit Division; and (e) the request for review by the United States Supreme Court.

Moreover, not only does the Circuit Division add another layer of review but its jurisdiction over “conflicting” decisions is too narrow to promote a coherent jurisprudence within Ninth Circuit: It would only review decisions which conflict another division of the court, but would not review decisions that were merely erroneous or which conflict with another circuit’s decision. And since the judicial composition of the Circuit Division will change at regular intervals, even the resolution of conflicting cases will not be given consistent treatment.

I submit that reform of the appellate courts’ *en banc* procedures (e.g., amending them to police errant decisions by permitting, but not requiring, *en banc* review of any erroneous decision) would better promote more consistent decisions within a circuit. At present, an appellate court is authorized to grant *en banc* review only to secure uniformity of its decisions or where “the proceeding involves a question of exceptional importance.” (Fed. R. App. Pro. 35)

I recognize, Orrin, that this bill seeks to implement the recommendations of the Commission of Structural Alternatives for the Federal Court of Appeals, but I note that the Commission’s recommendations is itself inconsistent with its primary conclusions, including the following:

1. The Commission states: “Having a single court interpret and apply federal law in the western United States, particularly in federal commercial and maritime laws that govern relations with the other nations on the Pacific Rim, is a strength of the circuit that should be maintained.” Yet, under the bill, the Ninth Circuit is divided into three regions, and each region’s decisions do not bind the other regions.
2. The Commission found: “Any realignment of circuits would deprive the west coast of a mechanism for obtaining a consistent body of federal appellate law, and of the practical advantages of the Ninth Circuit administrative structure.” Yet, this bill deprives the west coast of a consistent body of federal appellate law. A transaction in San Francisco will not be governed by the Appellate law in Los Angeles, and neither will be bound by the appellate law applicable to Oregon and Washington.
3. The Commission observed: “There is no persuasive evidence that the Ninth Circuit * * * is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall.” Does this absence of evidence not argue against dividing the Ninth Circuit into three autonomous regions?”
4. The Commission exclaims: There is one principle that we regard as undebatable: It is wrong to realign circuits * * * because of particular federal decisions or particular judges.” But judicial gerrymandering is what the bill would achieve.

Indeed, the bill is in direct conflict with each of these conclusions. While this bill may be motivated, in part, by concerns over certain Ninth Circuit decisions, gerrymandering the circuit to cordon off certain judges will only deprive the west coast of the benefit of the objectivity that a broader geographical diversity necessarily engenders.

It will confuse the law, harm the interest of California, and promote forum shopping. I urge you to defeat this bill.

Very truly yours,

GOVERNOR PETE WILSON.

THE STATE BAR OF CALIFORNIA,
San Francisco, CA, May 17, 1999.

Re: Senate Bill 253—Federal Ninth Circuit Reorganization Act of 1999
The Honorable DIANNE FEINSTEIN,
Hart Senate Office Building, Washington, DC.

DEAR SENATOR FEINSTEIN: On behalf of the State Bar of California, I am writing to reaffirm our opposition to the proposed restructuring of the United States Court of Appeals for the Ninth Circuit. The creation of three autonomous regional adju-

dicative divisions would not only divide California, it would impair the development of consistent circuit law, add an additional level of appeal and provoke attendant delay and expense, eliminate the present participation of all judges circuit-wide in resolving circuit law, and preclude the Ninth Circuit from effectively conducting its ongoing reevaluation and experimentation with innovations leading to greater efficiency and effectiveness.

The Commission on Structural Alternatives for the Federal Courts of Appeals rightly and strongly recommended that the Ninth Circuit not be split. However, it undermined that recommendation with an unfounded proposal for three adjudicative divisions. That proposal is opposed by lawyers throughout California, as evidenced, for example, by the letter of April 14, 1999 to you, and accompanying analysis, on behalf of the Los Angeles County Bar Association, the Bar Association of San Francisco, the San Diego County Bar Association, the Beverly Hills Bar Association, the Alameda County Bar Association, the Federal Bar Association (Northern District of California, Los Angeles, and Orange County chapters), the John M. Langston Bar Association, the Black Women Lawyers Association of Los Angeles, Inc., the Women Lawyers of Los Angeles, and The Lesbian and Gay Bar Association.

The United States Department of Justice vigorously opposed divisional restructuring and stated "that proposal would have potentially adverse repercussions for the administration of justice in the Ninth Circuit and, ultimately, across all federal courts of appeal." Similar opposition was expressed by the Federal Bar Association, the Association of the Bar of the City of New York, and the Chicago Council of Lawyers and many other organizations and individuals.

We urge your continued opposition to the Commission's misguided proposal and S. 253 and any similar rider or bill.

Sincerely,

RAYMOND C. MARSHALL,
President.

STATE CAPITAL,
Sacramento, CA, July 7, 1999.

Re: S. 253 (Federal Ninth Circuit Reorganization Act of 1999)

The Honorable DIANNE FEINSTEIN,
U.S. Senate, New Senate Office Building, Washington, DC.

DEAR SENATOR FEINSTEIN: I urge you to oppose Senate Bill 253. This proposed legislation to drastically reorganize the United States Court of Appeals for the Ninth Circuit is unwarranted, unwise and detrimental to the interest of California.

The legislation would subdivide the appellate function of the Ninth Circuit into three semi-autonomous regional divisions and split the State of California in half. The northern part of the State would be placed in one division and the southern part of the State, in another division. The courts rulings in one division would not be binding in the other division.

I find this proposal to split the State alarming. Not only is the proposal untried and unproven, it creates a separation between Northern and Southern California that is inimical to what I am attempting to accomplish as Governor. We need to bring our people together and de-emphasize our differences. Senate Bill 253 does just the opposite.

Furthermore, splitting California between two divisions would likely result in inconsistent federal rulings on important California laws—one ruling covering the north and a different ruling covering the south. As a result, businesses operating in California would be subject to conflicting state laws, making it more costly to do business in California.

The proposed legislation is also likely to foster more disputes and more litigation. For example, if a state law were found unconstitutional in the division covering Northern California, the decision would be binding only in that part of the State, leaving us with a law that is valid in the south and invalid in the north. While Senate Bill 253 creates a Circuit Division to resolve conflicts between divisions, that body is powerless to do anything until such time as an inconsistent decision is rendered by the division covering Southern California. Thus, it will be necessary to file a second suit in the Southern Division to achieve uniformity in the law.

The legislation will also promote forum shopping in the State. We can expect a litigant who operates throughout the State to bring its lawsuit in a division that is perceived to be more friendly to the litigant's interest. Similarly, if a party gets a bad result in one division, we can also foresee that the party will bring a lawsuit in the other division in an effort to get a better result.

In addition, the method proposed in the legislation to resolve conflicting rulings among the divisions is costly and burdensome and will delay the administration of justice. A litigant who is dissatisfied with a division's ruling and who believes that the ruling conflicts with a ruling in another division is required to take two additional steps. First, the litigant must request an en banc determination of the ruling by the judges in the division. Following such determination (or denial of the request for en banc hearing), the litigant must then seek a determination by the Circuit Division. Whether or not to grant a hearing is within the discretion of the Circuit Division.

At a time when litigation is altogether too expensive and time consuming for California residents and businesses, we should be seeking ways to simplify the resolution of conflicts, not add to the complexity of the process. The proposed legislation would add a burden to Californians and citizens of other states within the Ninth Circuit that is not borne by litigants in the rest of the country.

We should also be extremely cautious in changing the structure of government without compelling reasons for doing so, particularly when the structure has endured for many years. Here, the case for splitting California has not been made. Indeed, the White Commission acknowledged in its report that there is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively * * *."

I must emphasize that this is not a partisan issue. Former Governor Pete Wilson recently sent a letter to Senator Orrin Hatch registering his opposition to Senate Bill 253 because "the bill would promote forum shopping and foster confusion over the application of federal law in California, impacting litigation ranging from admiralty to the decennial redistricting of California."

Uniformity, stability and predictability of federal and state law are the foundation blocks of an orderly and healthy government and economy. The new and untested proposed structure for the Ninth Circuit would by its very design, undermine those key values and jeopardize our citizens' faith and confidence in the judicial process. I urge you to reject this legislation as not being in the best interests of the citizens of California.

Sincerely,

GRAY DAVIS.

U.S. COURT OF APPEALS NINTH CIRCUIT,
San Francisco, CA, July 21, 1999.

The Honorable CHARLES E. GRASSLEY,
Chair, Subcommittee on Administration Oversight and the Courts, U.S. Senate, Hart
Senate Office Building, Washington, DC.

DEAR SENATOR GRASSLEY: I submit this letter with the request that it be included in the record of the hearing scheduled for July 16, 1999 before the Subcommittee on Administrative Oversight and the Courts on the "Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals regarding the Ninth Circuit and S. 253, the Ninth Circuit Reorganization Act."

Chief Judge Hug will testify at the hearing and has submitted a written statement which incorporates a full and careful analysis of the White Commission Report, and hence of the problems raised by S. 253. I agree with Chief Judge Hug's analysis.

As Chief Judge Hug points out, the Commission Report strongly recommends that the Ninth Circuit not be split because there is no persuasive evidence that the Ninth Circuit is not working effectively, and restructuring the Ninth Circuit would entail substantial costs.

The Commission's second major recommendation (that the adjudicative functions of the Ninth Circuit Court of Appeals be divided among three essentially independent divisions) offers a solution to a problem that does not exist. The Commission Report repeatedly states that there is no empirical evidence and no substantial basis for a subjective opinion, that the Ninth Circuit and its Court of Appeals are not functioning effectively. The Commission nonetheless recommends the immediate and radical alteration of time-tested adjudicative procedures of the Court of Appeals with no evidence that the court is not operating effectively. The Commission's position is directly contrary to the conclusion reached in three prior surveys of the federal court system and, perhaps more significantly, to the policy adopted by the Judicial Conference of the United States only a few years ago that major restructuring should not be considered unless compelling empirical evidence demonstrates the inability of a court to operate efficiently. That policy is based upon good common sense.

The Court of Appeals for the Ninth Circuit decides approximately 1/6th of all federal appellate litigation in our country. The Commission acknowledges that there is no evidence that the size of the court or the load it carries justifies the major restructuring the Commission proposes. If nothing else is clear, it is absolutely certain that the proposed restructuring is radical, inevitably disruptive, and permanent. If the proposed, untested system does not work, the circuit will divide along the lines underlying the Commission's proposed adjudicatory divisions.

The Commission looks not to the present situation but to the future, and rests its case upon the major premise that the Court of Appeals for the Ninth Circuit will become too large and its inevitable growth will prevent it from handling efficiently the workload that will develop. The Commission sets out a pattern it hopes will provide the model for the new federal court system.

There is no evidence, none, to support the Commission's thesis.

The Commission concedes that there is no evidence that the Court of Appeals for the Ninth Circuit is not operating effectively, except in a few minor and easily corrected respects. There is no evidence that it will become "too big" to continue to do so. The truth is that no one knows the optimal number of judges for a Court of Appeals. When our court grew from 3 to 7 in 1937, critics worried "that a court of seven members with a wide range of ideological and jurisprudential viewpoints could not provide justice across the circuit's massive geographical jurisdiction." As the circuit grew from 7 to 9, 9 to 13, 13 to 23, and 23 to 28, critics assured the world that the court had exceeded its maximum practicable size *before* the new judges arrived. They were always wrong.

Professor Charles Allen Wright has written that when he clerked in the Second Circuit in 1949 and 1950, "it seemed perfectly clear that the maximum number of judges a court of appeals could have without impairing its efficiency was six" the number of judges then on the Second Circuit. As Professor Wright said later "in 1950 when we made these comments we were illustrating in striking fashion deToqueville's admonition against confusing the familiar with the necessary."

The predictions of the Judicial Conference have been no better. In 1964 the Conference adopted the position that the maximum number of judges on a court of appeals was 9. Eight years later it drew the line at 15. In 1977 Chief Justice Burger suggested, as the Conference had, that the magic number was 9—the size of his District of Columbia Court of Appeals. He stated "by any measurement of logic, reason, or standards of judicial administration, the Ninth Circuit cannot function effectively as one unit with 13 circuit judges." Today every circuit other than the First Circuit has a court of appeals of 11 or more. I predict that the Commission will turn out to be just another in this long line of unreliable prophets.

Unless and until those who propose splitting this or any other court are required to demonstrate that in fact, not simply in theory, the court has exceeded the number of judges that will permit it to operate effectively, unsound predictions of calamity and the senseless destruction of valuable institutions will persist.

It is significant but a little frightening to realize that by the Commission's own admission, one of the principal bases for its conclusion that the Court of Appeals for the Ninth Circuit is or soon will be too large is a survey of circuit judges across the country in which the majority expressed the opinion that the optimal size of a court of appeals was between 11 and 17. Nowhere does the Commission mention the fact that 2/3 of the judges and lawyers of the Ninth Circuit are satisfied that the present court of appeals is functioning well with 28 judges, and ought to be left alone.

One of the many problems with the Commission's report and the statute that would implement it, is that they impose their preferred procedure draconianly. The system they propose must be in place within 6 months of enactment, and is to be permanent—a provision to terminate the divisional system after seven years was eliminated in the final report.

The possible minor problems the Commission saw in the way in which the Court of Appeals for the Ninth Circuit is presently operating can be, should be, and are being corrected by the Court itself, in accordance with its long continued practice of periodic reexamination and improvement of its own procedures. Chief Judge Hug has appointed a committee of judges, lawyers and academics which, with our Rules committee of experienced practicing lawyers, is charged with examining possible problems and dealing with them. The first proposal, already implemented, is to recognize at least some legitimacy in the argument for regionalization by providing that an appeal to any of the three divisions of the Court will be heard by a panel that includes at least one judge from that division—if there is something in the local air or local mores that really affects the case, the panel will have the benefit of it. I will admit to some misgivings based upon my own notion that federalism is a difficult concept to maintain at best and we must be careful of any move in the direc-

tion of substituting local points of view for national law. In any event, the committee is examining regional calendaring, monitoring opinions to assure consistency with circuit law, changes in the present en banc process, reducing our backlog, and what we can do, if anything, to further reduce our reversal rate in the Supreme Court.

Finally, I would like to comment on a recent proposal to avoid the conflicts that will inevitably arise if California is divided between two or more divisions as proposed by the Commission. The new proposal is that California be made the sole state in one of the three adjudicative divisions. There is no empirical evidence justifying this suggestion, just as there is none supporting the other restructuring proposals advanced by the Commission. Virtually all of the objections to the Commission's restructuring proposals generally apply to this one as well. All the arguments previously discussed regarding the cost and disruption that would inevitably result from the Commission's plan are equally applicable. Appeals, for example, would be just as complicated, costly, time-consuming and ineffective. Even the problem of conflicts within the circuit over questions of federal law would remain. The problems are well summarized in the Los Angeles County Bar Association's letter to Senator Feinstein dated April 16, 1999, which has been submitted for inclusion in this record.

The proposed California division would also suffer from a serious imbalance between judges and cases. California as a separate unit would have half of the federal judgeships in the circuit to deal with $\frac{2}{3}$ of the circuit's appeals. In a very real sense, California is the root of the whole controversy. Much of the pressure for circuit division arises from animosity toward California based upon its size and dominance. A "bash California" attitude is common in other states—no state wants to be alone with a giant. Isolating California in a single adjudicatory division would tend to focus this negative feeling with its negative consequences on California itself. The remainder of the circuit would suffer as well; losing the perspective of California's unique position within the western region would diminish the circuit's capacity to develop and maintain national law—the federalizing function that is central to the concept of regional courts of appeals. As presently constituted, the Ninth Circuit serves that function well. Virtually all of the conflicts that tend to pull our nation apart are represented in one part of the Ninth Circuit or another. Judges drawn from all parts, sitting on common panels in the decision of cases, provide a powerful instrument for finding the accommodations that keep the national law alive and well. Moreover, I think everyone, especially the proponents, realize the suggested arrangement is almost inevitably a precursor to a division of the circuit, a result strongly opposed by the Commission itself.

I respectfully suggest S. 253 should be rejected.

Sincerely,

JAMES R. BROWNING.

CROSBY, HEAFEY, ROACH & MAY,
San Francisco, CA, July 13, 1999.

Re: S. 253 (Ninth Circuit Reorganization Act)

Hon. CHARLES E. GRASSLEY,

*Chair, Subcommittee on Administrative Oversight and the Courts, U.S. Congress,
Hart Senate Office Bldg., Washington, DC.*

DEAR SENATOR GRASSLEY: I would like to register my opposition to S. 253 (The Ninth Circuit Reorganization Act), and urge you not to restructure the Ninth Circuit Court of Appeals. I am an appellate lawyer who has handled appeals almost exclusively for the last 25 years and thus have appeared in many appellate courts, including the Ninth Circuit. I was recently elected as President-Elect of the American Academy of Appellate Lawyers and am a Past President of the California Academy of Appellate Lawyers—both of these organizations are composed of experienced appellate lawyers. I am past chair of the Ninth Circuit Advisory Committee on Rules and Internal Operating Procedures, which is responsible for recommending revisions and drafting Ninth Circuit rules and internal operating practices. I have also been a consultant to the National Center on State Courts on appellate court issues, where I looked at the procedures and performances of many states appellate courts. I am also a member of the California Appellate Process Task Force which is studying all aspects of California's intermediate appellate courts. I do not speak here for any of these organizations, and the views I am expressing below are entirely my own. However, I thought that, as you consider my opinions, you should know a little about my background.

S. 253 tracks the final report of the Commission on Structural Alternatives for the Federal Courts of Appeals. My comments therefore address that report. Perhaps the most significant of the Commission's conclusions is that there is no basis to split the Ninth or any other circuit. It is essential that Congress recognize that splitting circuits is not a viable way to deal with circuit court growth or help the circuits move forward into the next century. I applaud the Commission's conclusion on that point. On the other hand, it is disappointing that the Commission accepted the notion, by recommending the creation of autonomous divisions within the Ninth Circuit, that federal circuit courts should be perceived as local tribunals, where primarily judges who reside in that geographical area hear cases in that region.

We should be striving to make federal courts, including appellate courts, faster, cheaper and more uniform in their decisions. This bill creating semi-autonomous local courts goes in the wrong direction on all counts. The added layers of en banc review are likely to add delay and cost to the appellate process. And splintering the circuit into three rigid divisions with none of them (as well as the district courts in them) bound by the decisions of either of the other two, virtually guarantees less uniformity and greater conflict than we have now.

Why create drastic and permanent structural changes in the Court? In my view, neither the Commission nor anyone else has demonstrated serious deficiencies in the Ninth Circuit that would require the unique structural changes that S. 253 would mandate. It appears that the proposed structural changes are based on the perceptions of a few rather than on hard data that show serious problems in the current structure.

There is always room for improving any of the federal courts. My own experience, however, is that the Ninth Circuit operates about as well on all levels as any other appellate court that I have appeared before or whose operations I know about. In fact, one of the distinguishing features of this Court is its willingness to listen to constructive suggestions and make procedural changes to improve its processes. It is far and away the best appellate court I know of in that regard. I urge Congress not to mandate structural changes based on the skimpy perceptual and anecdotal feelings of a few. Those feelings are not a sufficient basis to make fundamental changes, particularly when those changes threaten to take us in the wrong direction on the important issues of delay, cost uniformity of decisions.

Sincerely,

PETER W. DAVIS.

STATE OF ALASKA,
OFFICE OF THE GOVERNOR,
Juneau, AK, July 13, 1999.

The Honorable CHARLES GRASSLEY,
Chairman, Senate Judiciary Subcommittee on Administrative Oversight and the Courts, U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR SENATOR GRASSLEY: I write this letter to voice strong support and urge approval of S. 253. I appreciate your consideration of S. 253 to adopt the recommendations of the Commission on Structural Alternatives for the Federal Courts as they affect the Ninth Circuit Court of Appeals. I also would like to reiterate the state's suggestions to modify the commission's recommendations that we submitted to the commission last year.

Alaskans have long observed that the Ninth Circuit is the largest in the nation, both in territory and population. It spans nine states and two territories, serving a population of more than 45 million Americans and spanning a land area larger in size than Western Europe. It serves 15 million more people than the next largest circuit and about 20 million more people than the average population served by other courts of appeals.

The Ninth Circuit has told the Senate Judiciary Committee it takes four months longer to complete an appeal in the Ninth Circuit as compared to the median length of time nationally. Its annual caseload has grown from 2,300 filings to more than 8,000 filings since 1973. However, Alaska's caseloads constituted only two percent of the court's caseload in 1997. Only 12 circuit judges were assigned to all the Alaska cases published in 1997.

Given the relatively few Alaska cases compared to the whole, litigants in Alaska are far less likely than litigants in the heavily populated states to draw panels with judges who are familiar with Alaska. This is aggravated by the fact that Alaska cases often involve complex federal statutes the judges do not encounter in the other 98 percent of the court's caseload, the Alaska Native Claims Settlement Act (ANCSA), and the Alaska National Interest Lands Conservation Act (ANILCA).

These statutes apply only to Alaska, so the issues they generate—which have totaled more than 100 cases in the Ninth Circuit over the past 20 years—arise only in Alaska cases. The issues these cases address have varied tremendously, from the interpretation of revenue-sharing provisions to the question of extinguishment of Indian country. Each case required an understanding of the history, purposes, and context of complex legislation. Despite the court's myriad decisions involving ANCSA and ANILCA, Alaska litigants raising claims under these statutes are highly unlikely to be assigned a panel of judges with a depth of understanding of these federal laws because of the large number of circuit, senior, and visiting judges.

The Commission on Structural Alternatives agreed that there are problems regarding the Ninth Circuit's operations and recommended that the Circuit be split into three adjudicative divisions. S. 253 implements this and other pertinent commission recommendations. We ask that the following amendments which would be beneficial to Alaska be made prior to passage of S. 253:

- *The provision for a circuit division should be eliminated.* The proposed circuit division permits non-regional judges to preponderate the northern perspective. Judges lacking adequate knowledge about an enormous area like Alaska do a disservice to the citizens of the state in applying federal law here. In general, appellate courts are regional courts, and for the overwhelming majority of cases, are the courts of last resort. For those cases from Alaska that conflict with cases from the central or southern division of the Ninth Circuit, however, the northern division will not be permitted to act as the regional court of last resort. The circuit division will step in and essentially act as a quasi-Supreme Court, with a southwestern rather than a national viewpoint. The effect would be as though one circuit stepped in to clarify the law for another. This is the job of the Supreme Court, not that of a different regional court. For the few cases that conflict with cases from another division, litigants should be able to petition the Supreme Court directly without going through the extra layer that the circuit division would create. The existence of a circuit division also seems likely to prompt forum shopping among the divisions. Litigants unhappy with the holding of a particular case will be motivated to bring subsequent cases raising the same issue in a different division, thus creating the opportunity to convince the circuit division to overrule the undesirable precedent.
- *S. 253 should require that judges reside within the division they serve.* The residency requirement for only a "majority of judges" would continue to produce some panels with a minority of the judges residing in the northern division. Therefore judges from the southwest United States still could determine the outcome of cases in the northern district. The current residential distribution of the court might necessitate that some judges sit outside the division of their residence initially, but new appointments to the circuit should be required to reside in the division with the opening. Alternatively, the bill could simply proclaim a ten-year transitional period before all judges would be required to live within their division of assignment. Presumably the non-residential judges could be reassigned to their own districts within this time, as vacancies open.

Thank you for your consideration of our views. Should you need further information, please contact John Katz in my Washington, D.C., office.

Sincerely,

TONY KNOWLES,
Governor.

U.S. DISTRICT COURT,
DISTRICT OF OREGON,
Portland, OR, July 13, 1999.

Re: S. 253 Hearing—July 16, 1999

Senator CHARLES E. GRASSLEY,
Senate Hart Office Building, Washington, DC.

DEAR SENATOR GRASSLEY: I am authorized to represent to you that a strong majority of the District Court Judges in the District of Oregon are in favor of an actual split of the Ninth Circuit.

We do agree with our Chief Procter Hug, whom we greatly admire, that the bill before you, S. 253, is flawed. As you know, it would create three "adjudicative divisions" rather than create one or more additional circuits.

The Commission's detailed report certainly justifies the creation of new circuits while the adjudicative division appears to be an interim costly compromise.

The adjudicative divisions suggested by the Commission are logical divisions for what has long been discussed as the "three way split." That is, the creation of two additional circuits.

It seems to us to be far more logical to create two additional circuits rather than "adjudicative divisions" which have drawn such criticism.

Very truly yours,

JAMES A. REDDEN.

SUNRISE RESEARCH,
Washington, DC, July 15, 1999.

The Honorable CHARLES E. GRASSLEY,
*Judiciary Subcommittee on Administrative Oversight and the Courts, U.S. Senate,
Senate Hart Office Building, Washington, DC.*

DEAR MR. CHAIRMAN: Based upon almost a half century of public service, both in the State of Oregon and in the United States Senate, I have become more and more aware of the need to bring problems down to a manageable size so that we might best serve our areas.

The current Ninth Circuit Court of Appeals is too big to perform that function. You are well aware of the population in the Ninth Circuit, its caseload, and other easily accessible details involving the demographics of that circuit. By any measure, it is too big. Because of its very bigness, it is unwieldy and inconsistent.

I, therefore, strongly support S. 253 that would divide the Ninth Circuit into three regional divisions. While I might prefer actually separate circuits, I am well aware of the opposition to that option. The divisions, therefore, that Senator Murkowski has proposed in S. 253 is a "happy compromise."

Over the years I have known many of the judges on the Ninth Circuit. Some of them I had a modest hand in appointing. Without exception, those that I have known personally have indicated to me that the current court, because of its size, simply doesn't function as well as a court should function.

I, therefore, hope that you will not only give serious consideration to S. 253, but will report it out from your subcommittee with a favorable recommendation.

Sincerely,

BOB PACKWOOD.

U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT,
Pittsburgh, PA, July 30, 1999.

Senator CHARLES E. GRASSLEY,
*U.S. Senate, Chairman, Senate Judiciary Subcommittee on Administrative Oversight
and the Courts, Senate Hart Office Building Washington, DC.*

DEAR SENATOR GRASSLEY: I have noted in news reports that the Subcommittee on Administrative Oversight and the Courts, which you chair, has begun consideration of the proposed reorganization of the Ninth Circuit. As you may recall from our meetings of the Federal Courts Study Committee, some ideas on restructuring the courts of appeals were discussed then.

The Report of the Commission on Structural Alternatives for the Federal Courts of Appeals contains some novel recommendations that are worthy of serious consideration. The suggestions for establishing divisions within the Ninth Circuit offer an unusual opportunity to test the feasibility of reorganization on a national basis.

I thought you might have some interest in comments of mine which I am submitting to the Journal of Law & Politics (University of Virginia School of Law) for their forthcoming issue devoted to the subject. I have enclosed an advance copy for your perusal.

I often think back to the interesting days when the Federal Courts Study Committee was engaged in its work. I particularly recall with pleasure associating with you and your staff members at that time. I hope you are in good health and enjoying your productive work on the Judiciary Committee. Best personal wishes.

Sincerely,

JOSEPH F. WEIS, JR.

NINE DIVIDED BY THREE: A FORMULA FOR UNIFICATION?

Joseph F. Weis, Jr.¹

The mission of the United States Courts of Appeals should be to interpret and apply federal law in a uniform and coherent manner. The present structure of the appellate system does not enhance that goal. The recommendations contained in the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals are solid steps towards improvement. Yet, they too could be improved by placing more emphasis on reducing conflicting decisions.

This essay briefly traces the development of particular problems that plague the appellate system and then outlines a workable alternative—a unified court system. Further discussion touches on the most noteworthy aspects of the Commission's recommendations, as well as their shortcomings in the area of decisional conflicts. Ultimately, the recommendations, subject to continuing study, are worthy of experimentation in the search for an appellate system equipped for the future.

I

In 1789, the speed of transportation and communication was measured in terms of horses and sailing vessels. These two factors heavily influenced the structure of the newly created federal judiciary and the circuit system that exists today.

By the time the Evarts Act was enacted in 1891, transportation and communication had improved. Railroads and steam ships supplanted buggies and schooners. The telegraph had speed but extremely limited capacity for extensive communications. The telephone was in its infancy. Despite these advances, the federal circuit system and the newly created courts of appeals could not escape the grasp of regionalization and associated problems of fragmentation.

The past 100 years, however, have witnessed dramatic technological growth. Transportation is now measured by the hour rather than by days or weeks. Electronic communications are instantaneous and, unlike the telegraph, suitable for voluminous transmissions. The constraints on transportation and communication so influential in 1789 and 1891 simply do not exist in this era of jet air travel, e-mail, fax, interactive-video transmission, electronic document filing, and automated legal research.

These profound changes should liberate thinking about the proper structure of the federal intermediate appellate courts. Today, most lawyers do not restrict their practices to geographical boundaries and are accustomed to presenting cases in courts all over the country. Similarly, it matters little whether judges fly from their home chambers in, say, Chicago for arguments in Denver, New York, New Orleans, or Jacksonville. The speed at which their draft opinions are transmitted via e-mail is the same no matter what the destination. Consequently, the regionalization that is so characteristic of, and so ingrained in, the current thinking on court structure should be drastically minimized, if not abandoned altogether.

There is another, more corrosive agent eating away at the current system that requires attention—one that cannot be overcome simply by technological improvements. Soon after the Evarts Act was enacted, the Circuit Courts of Appeals began to consider themselves separate entities maintaining what might be called “diplomatic relationships” with their counterparts. This approach was encouraged by the Supreme Court's unfortunate decision in *Mast Foss & Co. v. Stover Manufacturing Company*, in which the Court refused to apply issue preclusion when presented with two different circuit court of appeals' decisions involving the same patent.² Considering the two courts independent of one another, the Supreme Court concluded that comity between the two forums, rather than the compulsion of *stare decisis*, was the overriding factor. In retrospect, it is clear that the *Mast Foss* Court missed the opportunity to adopt the principle that the various Circuit Courts of Appeals were part of a national system and, as such, required to apply federal law on a uniform basis.

Thus began the balkanization of federal law and the establishment of the regional judicial fiefdoms that prevail in the Courts of Appeals today. The drafters of the Evarts Act envisioned the Supreme Court as the arbiter of intercircuit conflicts. At the time, that was neither an unreasonable nor unrealistic expectation. Congress, how-

¹United States Circuit Judge, United States Court of Appeals for the Third Circuit; former Chairman, Federal Courts Study Committee; former Chairman, Advisory Committee on Civil Rules; former Chairman, Federal Judicial Conference Standing Committee on Rules of Practice and Procedure. This essay is based in part on a Statement by Judge Weis before the Commission on Structural Alternatives for the Federal Courts of Appeals on April 24, 1998.

²177 U.S. 485 (1900).

ever, failed to anticipate the explosion of federal court litigation.³ At present, only a small number of the ever-increasing disparate decisions by the Courts of Appeals are reconciled by the Supreme Court. Practically speaking, this means that litigants in various parts of the country are governed by federal case law that differs from circuit to circuit.

The “law of the circuit” concept took root some years ago to combat intracircuit conflicts. This practice, in full bloom today, requires appellate panels within a particular court of appeals to follow the precedent set by earlier panels of the same court.⁴ A similar obligation is imposed on the district courts within the circuit. This “law of the circuit” approach was a step in the right direction, but paradoxically, seems to have strengthened and perhaps even legitimized the precedential independence of the various courts of appeals.⁵ The goal of national uniformity in the interpretation of federal law has unfortunately been lost in the process of encouraging circuit uniformity.

Litigants and practitioners are understandably distressed by the resulting uncertainties. Worse yet, this balkanization has fostered the birth of administrative agency non-acquiescence. Executive agencies complain that their efforts to apply policy on a national level are frustrated by inconsistent rulings among the various courts of appeals. Agencies cope by simply refusing to follow decisions with which they disagree. Thus, there exists the unseemly spectacle of government agencies openly defying the Courts of Appeals. In one notable instance, the United States Postal Service presented the same issue to twenty different courts and eight courts of appeals, losing in every instance until the Supreme Court finally ended the travesty by handing the agency the ultimate defeat.⁶

Intercircuit conflicts are a continuing and vexing problem.⁷ Despite efforts to give it an attractive face by invoking the questionable benefits of a “percolation” process, its pernicious drawbacks have not diminished. There have been some scholarly suggestions that intercircuit conflicts are actually not all that numerous. Most of those studies, however, focused on the Supreme Court’s docket, a method that fails to account for the many cases in which, for a variety of reasons, the parties cannot or opt not to seek certiorari. Much more realistic are the estimates given by Thomas C. Goldstein, Esq., author of the monthly compilation “Circuit Split Roundup,” appearing in the Legal News section of *The United States Law Weekly*. Mr. Goldstein estimates that two to three thousand such conflicts exist.⁸ They are a natural outgrowth of the hodge-podge circuit system.

In addition to their often varying articulations of federal law, the various courts of appeals also differ in terms of size. This has long been a concern. Unfortunately, the modus operandi of reformers has been to tinker with the system, applying band-aid solutions that merely perpetuate the size disparities and promote further balkanization. What is needed, and that need is ever-increasing in urgency, is a comprehensive plan for the entire system of intermediate courts.

II

The following five basic concepts may serve as guideposts to prepare a plan for the future of the federal intermediate court system:

First, the Supreme Court should retain the ultimate power to declare law in the federal system.

³See e.g., Administrative Office of the United States Courts, “Federal Judicial Caseload: A Five-Year Retrospective” (1998).

⁴See e.g., United States Court of Appeals for the Third Circuit, Internal Operating Procedure 9.1 (1994).

⁵The Court of Appeals are adamant in their adherence to this concept. See e.g., *Taylor v. Charter Medical Corp.*, 162 F.3d 827, 832 (5th Cir. 1998); *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993) (per curiam) (“until the Supreme Court speaks, the federal circuit courts are under duties to arrive at their own determination of the merits of federal questions presented to them * * * [i]f a federal court simply accepts the interpretation of another circuit without [independently] addressing the merits, it is not doing its job”); *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1175 (D.C. Cir. 1987).

⁶*Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 519 n. 12 (1984). See generally A. Leo Levin & Susan M. Leeson, “Issue Preclusion Against the United States Government,” 70 Iowa L. Rev. 113, 127–29 (1984).

⁷The evils of intercircuit conflicts are discussed in Joseph F. Weis, Jr., “Disconnecting the Overloaded Circuits: A Plug for a Unified Court of Appeals,” 39 St. Louis U.L.J. 455 (1995).

⁸Telephone Interview with Thomas C. Goldstein, Esq., author of “Circuit Split Roundup,” and Associate at Boies & Schiller, LLP (July 9, 1999). Mr. Goldstein cautions readers that “[i]t is not possible to collect each and every ‘circuit split’ because there are varying degrees of disagreements between courts, and some opinions are written so as to minimize the appearance of conflicts.”

Second, the intermediate court structure should provide uniform national interpretation and application of federal law. Construction of state law should be a secondary consideration, one that is not permitted to impair the primary goal of federal law uniformity.

Third, deliberate creation of conflicts among the federal appellate courts should be discouraged. Inadvertent conflicts should be resolved by an internal unit of the intermediate court. Aberrant rulings of various components should be subject to review, not only by the Supreme Court, but by an internal body within the intermediate appellate court itself.

Fourth, while three-judge panels are a reasonably sized unit for initial appellate review, they should operate within a larger unit. In such a system, pre-filing circulation of precedential opinions within the larger unit would reduce the likelihood of aberrant decisions while securing the benefits of broader consideration. Experience suggests that nine is a desirable size for such a unit, which for clarity's sake, will be referred to as a "division."

Judges should be appointed to a specific division and expected to serve on it during their tenure. Each division, having its own chief judge and clerk, would be assigned appeals from designated districts and administrative agencies. In some instances, a division could have its cases assigned based on subject matter jurisdiction—an approach similar to that used in the present Court of Appeals for the Federal Circuit.

Because travel and communications no longer pose burdensome limitations, the various divisions would be assigned appeals with an eye towards equalizing the workload. Although geographical contiguity or state borders could be considered, workload would become the dominant concern. Because state law issues and diversity cases should be subordinate to achieving uniformity and coherency in federal decisional law, the allocation of appeals from existing districts to a particular division need not be shackled by state boundaries. Thus, for example, depending on the case load, one division could be allocated appeals from the Middle and Eastern Districts of Pennsylvania, while another could be assigned appeals from the Western District of Pennsylvania, the Southern District of Ohio, and the Northern District of West Virginia.

Fifth, the unified Court of Appeals would be presided over by a chief judge, having general administrative supervision of the unified court. He or she would also preside over an entity we could label the Central Division. That body would resolve divisional conflicts and review asserted aberrant decisions of the various divisions.

Judges of the Central Division would be drawn from the various divisions. Seniority and experience would be considered. Central Division Judges could be selected by the chief judge of the unified court in consultation with the various divisions. Central Division members could serve in that capacity for short or lengthy terms. All judges of the unified court would receive the same salary and hold the same rank.

This, of course, is only a general outline of what would be an improved and more efficient structure designed to cope not only with today's caseload but the larger ones anticipated for the future. This is not the occasion to elaborate fully because my intent is only to offer the generalized concept of a unified court of appeals for consideration.⁹ Although the idea tends to elicit gasps of incredulity from most circuit judges, empirical evidence that such a court structure would function efficiently would temper that skepticism.

III

In December 1998, the Commission submitted a report to Congress and the President recommending that existing Court of Appeals for the Ninth Circuit be organized into "three regionally based adjudicative divisions."¹⁰ Because of its size, the Ninth Circuit,¹¹ unlike other Courts of Appeals, offers a laboratory for innovation and improvisation. The organizational concept described in the Commission's Report offers a splendid opportunity to test the practicalities of a unified court.

The Commission has boldly departed from the straight-jacket of conventional wisdom in several respects. Foremost is its recognition that the court system's adjudica-

⁹ For a more in-depth discussion, see "Disconnecting the Overloaded Circuits," *supra*.

¹⁰ Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals 40 (Dec. 18, 1998) ("Final Report").

¹¹ I will use "Ninth Circuit" to refer to the Court of Appeals although I recognize that the Commission recommends that the Ninth Circuit as a geographic entity not be split. *See id.* at 29–30.

tive and administrative functions are separable and that the organizations performing these distinct tasks need not be coterminous.¹²

Also noteworthy is the proposal that appeals from the federal district courts within California be assigned to different divisions.¹³ In taking this step, the Commission has implicitly recognized that the primary concern of the United States Courts of Appeals is federal law. Too often in the past, the concept of routing appeals from district courts in the same state to different appeals courts has been denounced as unthinkable. That attitude, however, had its origins in a by-gone era when federal law was far less pervasive and diversity jurisdiction had an importance beyond that of today.

The Commission's plan is based mainly on geographic contiguity. Because that configuration will result in some workload inequality, the size of each division's judicial component is to be flexible, falling between seven and eleven judges.¹⁴ Although there is much to be said for equality of dockets, the Commission's decision to emphasize geographical contiguity is a reasonable choice worthy of experimentation.

The Commission seeks to promote collegiality between the judges of the Court of Appeals by requiring that they periodically sit with other divisions.¹⁵ This should reduce the effect of provincialism. Notably, the Federal Courts Study Committee recommended that judges of the courts of appeals sit, on an exchange basis, on other courts as a means to promote experience in court administration.¹⁶ The current proposal, however, envisages longer exchange periods—an even better opportunity to enhance uniform adjudication as well as collegiality.

Worthy of special commendation is the retention of the administrative arms of the Ninth Circuit as they now exist.¹⁷ It is but common sense that the library, clerk's office and central staff attorneys office remain intact to serve each and every division. For the convenience of the Bar, regional sub-offices can be established without impairing the efficiency of the circuit offices. Apparently, in view of the Ninth Circuit's present practice of hearing arguments in various cities within its jurisdiction, there will be no need for additional physical structures.

For all its practical vision, however, there is one central weakness in the Commission's proposal that threatens its effectiveness. The Commission recommends that "each division would function as a semi-autonomous decisional unit" and that "decisions made in one division would not bind any other division."¹⁸ By including this principle in its plan, the Commission neglects to take advantage of one of the greatest opportunities offered in the laboratory setting of the Ninth Circuit—the chance to promote uniformity in the interpretation of federal law.

According to the Commission, "[h]aving a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with other nations on the Pacific Rim, is a strength of the circuit that should be maintained."¹⁹ It explains this "strength" by highlighting that "the Atlantic seaboard and Gulf Coast are governed by law determined by courts of appeals in six separate circuits, which gives rise to complaints about inter-circuit conflicts from practitioners in the maritime bar, who regularly bemoan the differences in interpretation of federal law in circuits from Maine to Texas."²⁰ Somewhat inconsistently, the Commission acknowledges that "the specter of inconsistent interpretations of federal law may be unattractive" but concludes that this evil "is one that exists throughout the federal system, and one that circuit splitting would not ameliorate."²¹

These statements are undoubtedly correct, but instead of resignation to an undesirable situation, one can aim for improvement. The Commission did recognize that it would be "highly undesirable if the Northern and Southern Divisions established different rules in an admiralty issue."²² Indeed, the Middle Division should have been included in that statement, and the subject matter not confined to admiralty.

¹² *Id.* at 46.

¹³ *Id.* at 43–44.

¹⁴ *Id.* at 43. This is an appropriate size which should do much to enhance coherence and consistency, one of the primary goals of the proposed restructuring. *See id.* at 47–48.

¹⁵ Final Report, at 43.

¹⁶ Report of the Federal Courts Study Committee, 155 (April 2, 1990) ("Study Committee Report").

¹⁷ Final Report, at 46.

¹⁸ *Id.* at 43.

¹⁹ *Id.* at 49–50.

²⁰ *Id.* at 50.

²¹ *Id.* at 44.

²² Final Report, at 44 n.99.

Federal law should be uniform throughout the country, not just in the “western United States.”²³

That is not to say, however, that the Commission ignored the conflicts issue. First, in a commendable step, it proposed the creation of a “Circuit Division” to resolve inter-divisional conflicts.²⁴ Second, the Report urged continuation of the staff attorneys office in its present form. With circuit-wide jurisdiction, this office would operate as an aid to maintaining doctrinal coherence. Third, the assignment of judges to serve intermittently on different divisions would also tend to encourage consistency in decisional law.

Any discussion of conflicts must recognize that they fall into two general categories—inadvertent and deliberate. The former will occur despite the best efforts of all concerned and consequently, a body akin to the proposed Circuit Division must exist even if deliberate conflicts are eliminated. One method of avoiding inadvertent conflicts is pre-filing circulation of all precedential opinions within a division. The relatively small size of the Commission’s recommended divisions makes this desirable practice feasible. As a further aid to consistency, the Court might consider designating one of its senior staff attorneys to be included in the pre-filing circulation of all divisions. That person could alert the opinion writer to existing precedents inside or outside the division that might present a conflict.

An expanded pre-filing circulation in some situations would also assuage the fear that different divisions would yield inconsistent interpretations of California law—a point raised by some opponents of splitting the Ninth Circuit. Should the proposed Middle District, for example, intend to file an opinion with significant pronouncements on California law, a draft could be circulated among the judges of the Southern Division as well. Thus, all of the judges concerned with California law would be kept abreast and given an opportunity to comment. Together, these steps could help avoid inadvertent conflicts while simultaneously minimizing some of the work in each division.

Human errors are understandable, unavoidable causes of inadvertent conflicts and, to that extent, are excusable. However, the maintenance of uniformity in federal law is a powerful—and to some, an unanswerable—argument against the creation of deliberate, inter-divisional conflicts. It is particularly unfortunate that the Commission did not recommend a prohibition against that practice.

Yet, a ban against creating deliberate conflicts need not—and probably should not—require legislative authorization. Such a practice, as was the “law of the circuit” doctrine, may be developed by the courts. Thus, the Commission’s recommendations do not preclude the divisions themselves from implementing a policy against the creation of deliberate conflicts. While an argument is often made that creating a deliberate conflict is necessary, even desirable when the pre-existing precedent is aberrant or, for substantial reasons, should no longer be followed, the remedy in such situations lies in the framework proposed by the Commission—*i.e.*, referral to the Circuit Division.

Deliberate conflicts, whether between circuits or divisions, threaten federal law uniformity. In considering the Commission’s proposal, Congress should reassess the recommendation that the divisions not be bound by each others’ case law. Failing that, the divisions themselves should act promptly to halt this pernicious practice, as it remains a formidable obstacle impeding improvement in the national appellate system.

IV

If the proposed reorganization of the Ninth Circuit takes effect and proves as workable as its advocates—including myself—expect it to be, it will open up some intriguing prospects. One would be the formation on a nationwide basis of a unified United States Court of Appeals. Another possibility, as Professor John B. Oakley mentioned in his report to the Commission, of a more incremental nature, would be the consolidation of a number of the existing circuits into larger, “jumbo circuits” with similar divisional structures.²⁵

None of these structural proposals will remove a single case from the appellate dockets. Yet, the elimination of conflicting opinions would reduce, to some extent,

²³ Particularly bothersome is the Commission’s suggestion that it “would not appear to matter whether all divisions had the same rule of law with respect to factors to be considered in granting an adjustment for abuse of trust under the Sentencing Guidelines” when the very purpose behind the Guidelines was to promote uniformity. *See id.*

²⁴ *Id.* at 45-46.

²⁵ John B. Oakley, “Memorandum on Divisional Organization of the United States Court of Appeals for the Ninth Circuit” (July 18, 1998), reproduced in Working Papers of the Commission on Structural Alternatives for the Federal Courts of Appeals, at 145-66.

the task of resolving appeals. It would also have the more important result of improving public confidence in the work of the appellate courts.

The Commission's recommendation to reorganize the Ninth Circuit into three adjudicative divisions is a progressive move that would improve the administration of justice in the federal intermediate appellate courts. Congress should adopt these recommendations as they pertain to the Ninth Circuit, and let the experimentation continue.²⁶

MUNGER, TOLLES & OLSON LLP,
Los Angeles, CA, August 19, 1999.

Re: July 16th Hearing on Ninth Circuit Reorganization

The Honorable CHARLES E. GRASSLEY,
U.S. Senate Committee on the Judiciary, Subcommittee on Administrative Oversight
and the Courts, Hart Senate Office Building, Washington, DC.

DEAR SENATOR GRASSLEY: I have recently reviewed my testimony and found it to be inaccurate in one particular. In making the point that fewer judges of the Ninth Circuit would participate in the en banc process for individual cases under the proposed reorganization, which is the case, I unintentionally overstated my argument and wish to correct it.

While it is true that under existing procedures every active judge on the Court has the opportunity to participate in the decision as to whether an individual case receives en banc review and under the proposed reorganization only the active judges assigned to one of the 3 divisions would participate, it is not true, as I stated, that only the "resident judges" (those *residing* in the division) would vote on the en banc decision. Rather, all active *division* judges, but not all active *circuit* judges, as is now the case, would participate.

I very much regret this unintentional, inaccurate overstatement found on page 55 of the transcript, from the last 3 words of line 17 to the first word on line 22.

Thank you for allowing me to correct the record.

Sincerely yours,

RONALD L. OLSON.

PREPARED STATEMENT OF HON. GORDON H. SMITH, A U.S. SENATOR FROM THE
STATE OF OREGON

Mr. Chairman, and members of the Committee, I thank you for this opportunity to provide testimony in support of S. 253, the Federal Ninth Circuit Reorganization Act of 1999. I would also like to extend my appreciation to the Honorable Judge Diarmuid F. Scannlain, United States Circuit Judge for the Ninth Circuit for his forthrightness, and willingness to provide his professional perspective on this important issue facing the Ninth Circuit.

Mr. Chairman, the Ninth Circuit, encompassing about 1.4 million square miles, faces an uncertain future in terms of its ability to serve a growing population, and ever-growing caseload. Serving more than 50 million people, the Ninth Circuit Court of Appeals handles over 8,500 filings per year—with a reversal rate of about 95 percent. By the year 2010, the Ninth Circuit population will increase in size by 43 percent—which under the current conditions, could only result in a significant increase in caseload and reversal rate. While I understand that Judge O'Scannlain and I face similar opposition from our respective colleagues with respect to our position on this issue, I believe that S. 253 is an equitable solution that will ultimately result in a more consistent and predictable Ninth Circuit Court of Appeals.

In 1997, Congress charged the Commission on Structural Alternatives for the Federal Courts of Appeals to study and make recommendations to Congress with respect to changes in the boundaries and structure of the Ninth Circuit Court of Appeals. The Commission recommended that "Congress enact a statute organizing the Ninth Circuit Court of Appeals into three regionally based adjudicative divisions—the Northern, Middle and Southern—each division with a majority of its judges resi-

²⁶The creation of larger circuits by consolidation was one of the possibilities discussed by the Federal Courts Study Committee in addition to a "unified" court, and other alternative. See Study Committee Report, *supra*, at 122–23.

The potential for mergers itself raises some interesting questions. For example, would the Fifth and the Eleventh Circuits decide that their amicable divorce a few years ago was a mistake and decide to live together once again? Having been created by a merger not long ago, would the Federal Circuit now join with the D.C. Circuit, a resident of the same city and thus, a partner with no geographical disincentives?

dent in its region, and each having exclusive jurisdiction over appeals from the judicial districts within its region." The legislation you have before today, adopts those recommendations, and does so without sacrificing the efficacy of the court.

S. 253 is a rational approach that would divide the Ninth Circuit into three regional divisions of the Northern, Middle and Southern, each having exclusive jurisdiction over cases within its region. However, the court will continue to have one administrative office, and judges will primarily remain within their regions. Importantly, Northwest cases would be decided by Northwest judges.

As my predecessor, Senator Mark O. Hatfield stated, "The Ninth Circuit's size has created serious problems: too many judges spending more time and money traveling than hearing cases, a growing backlog of cases which threaten to bury each judge, a dangerous inability to keep up with current case law, a breakdown in judicial collegiality and, most importantly, a failure to provide uniformity, stability and predictability in the development of federal law throughout the Western region. It is increasingly clear that these problems cannot be solved by the reforms already implemented by the Court."

Mr. Chairman, I commend you for your timely consideration of this important legislation and for this opportunity to testify in support of S. 253, the Ninth Circuit Reorganization Act of 1999.

PREPARED STATEMENT OF PROF. ARTHUR D. HELLMAN

Summary

1. Although the Commission states that the Ninth Circuit Court of Appeals "should continue to provide the West a single body of federal decisional law," its plan subverts that goal by abandoning circuit-wide stare decisis. This radical step would authorize, if not encourage, the creation of intracircuit conflicts.
2. The proposed "Circuit Division" would do little to preserve uniformity. The Commission's plan places substantial constraints on the Division's authority. In all likelihood, decisions of the Circuit Division would be so infrequent, and their effect on the law of the division so limited, that "the law of the circuit" would shrink to near-insignificance.
3. The Commission plan is thus not a compromise. Those who want to divide "the Ninth Circuit" have never cared about the circuit as such; what they have sought is a division of the court of appeals. And that, for all but a handful of cases, is what the Commission plan would give them.
4. The rationale for the Commission plan is that "the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals." But the arguments offered in support of the rationale do not stand up under scrutiny.
5. The Commission insists that judges on a large appellate court cannot adequately monitor other judges' decisions. The flaw is that the Commission lumps together two very different activities: keeping up with circuit law, which is something done by individual judges, and monitoring panel opinions, which is done by the court as an institution. Judges today need not keep up with circuit law in order to make use of opinions when they are relevant. Effective monitoring does not require that all judges keep up with all opinions. The evidence indicates that Ninth Circuit judges can and do monitor the opinions rendered by their colleagues.
6. The Commission argues that "large appellate units have difficulty developing and maintaining consistent and coherent law." But it disdains empirical research and relies instead on "perceptions" and its own (unspecified) experience. That is far too little to justify the radical restructuring that it proposes.

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE: I appreciate this opportunity to express my views on S. 253 and the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (White Commission). S. 253, the Ninth Circuit Reorganization Act, would implement the Commission's recommendation regarding the Ninth Circuit. The Commission's proposal would keep the Ninth Circuit intact but divide the court of appeals into three "semi-autonomous" adjudicative units.

The Commission's plan gives the appearance of compromise and moderation. But appearances are deceiving. The Commission plan is not a compromise; it gives one side almost everything it wants. And far from being moderate, it embodies a novel

approach to “the law-declaring function of appellate courts” that is flawed both in conception and in execution.

This leap into the unknown might be justified if the Commission had demonstrated the existence of a problem of serious dimensions that could not be dealt with in any other way. On the contrary, in explaining its key conclusion—that “the law-declaring function of appellate courts requires group of judges smaller than the present Ninth Circuit Court of Appeals”—the Commission offers remarkably little in the way of proof. The Commission simply does not make the case for the radical restructuring that it proposes.

Introduction

Five experiences have shaped my views on S. 253 and the White Commission report. First, from 1973 through 1975 I served as deputy executive director of the Commission on Revision of the Federal Court Appellate System (Hruska Commission). In that capacity I drafted the report that recommended that the Ninth Circuit be divided into two new circuits. (For a discussion of why that recommendation is no longer persuasive, see Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 Mont. L. Rev. 261, 264–74 (1996).)

Second, in 1978–79 I was the director of the central legal staff of the Ninth Circuit Court of Appeals. My responsibilities included devising and implementing procedures that would assist the court to do its work more effectively, and in particular to meet the new needs created by the expansion of the court from thirteen to twenty-three active judges.

Third, in the late 1980s I directed a study by fourteen legal scholars and political scientists of the structural and procedural innovations implemented by the Ninth Circuit during the period 1976–1988. The fruits of that study were published by Cornell University Press in 1990; the title of the book is “Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts.”

Fourth, as stated by the Federal Judicial Center in the report submitted to Congress on *Structural and Other Alternatives for the Federal Courts of Appeals*, I have conducted “the only systematic study of the operation of precedent in a large circuit.” This research has been published in several articles, including *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. Chi. L. Rev. 541 (1989).

Finally, earlier this year, Chief Judge Hug appointed me to a 10-member Evaluation Committee whose mission is “to examine the existing policies, practices and administrative structure of the Ninth Circuit Court of Appeals, in order to make recommendations to its judges to improve the delivery of justice in the region it serves.”

It is an honor to serve on the Evaluation Committee and to work with the Ninth Circuit Court of Appeals in seeking better ways of carrying out the processes of appellate adjudication. However, I do not speak for the court or any other institution; the views expressed here are my own.

I. THE COMMISSION’S PLAN: CONTRADICTIONS AND CONUNDRUMS

The Commission offers a plan that would retain the Ninth Circuit but divide its court of appeals into three “semi-autonomous” divisions. The plan contains four elements:

1. *Regional jurisdiction over appeals.* The present Ninth Circuit Court of Appeals would be reorganized into three “regionally based adjudicative divisions.” Each division would hear the appeals filed from that geographical area.
2. *Regional assignment of judges.* Each division would include seven to eleven court of appeals judges in active status. “A majority of [the] judges serving on each division would be residents of the districts over which that division has jurisdiction, but each division would also include some judges not residing within the division, assigned randomly or by lot for specified terms of at least three years.”
3. *Regional performance of the law-declaring function.* “Each regional division would function as a semi-autonomous decisional unit.” This entails two changes from the current arrangement. The circuit-wide en banc process would be abolished; the functions now performed by the Ninth Circuit’s en banc court would be performed by en banc courts for each division. More important, divisional decisions—whether by panels or by the en banc court—would be binding only within the division.
4. *Conflict resolution by a “Circuit Division.”* In addition to the three regional divisions, the Commission plan would establish a “Circuit Division * * * whose sole mission would be to resolve conflicting decisions between the regional divisions.”

The Circuit Division would be composed of the chief judge of the circuit and twelve active judges—four from each of the regional divisions—who would be selected by lot and who would serve for staggered three-year terms.

The Commission argues that its plan “is the most principled and effective way to resolve the debate about the Ninth Circuit and its court of appeals.” (Final Report at 57.) However, analysis of the various elements leads to a very different conclusion. The Commission may be correct in saying that its proposal “addresses the adjudicative concerns that have animated calls to split the circuit.” But its confidence that the plan “will achieve the legitimate ends of * * * those who seek to preserve [the circuit]” is sorely misplaced.

A. Abandonment of circuit-wide stare decisis

The most radical aspect of the Commission’s proposal is the abandonment of circuit-wide stare decisis. Today, the Ninth Circuit, like all of the other federal courts of appeals, follows the rule that panel decisions are binding on all subsequent panels unless overruled by the Supreme Court or by the court of appeals en banc. Under the Commission’s plan, decisions handed down in one division would be binding only within that division.

If there was any doubt about the Commission’s commitment to this element of its plan, it is eliminated by the Commission’s response to the comments by Chief Judge Hug on the preliminary draft of the Commission report. Judge Hug, speaking for a majority of the judges of his court, urged the Commission to modify its plan by making panel decisions binding throughout the circuit “unless * * * overruled by a circuit-wide en banc court.” The Commission emphatically rejected this suggestion, stating that this modification “would leave the court of appeals essentially unchanged as an adjudicative body, and would defeat the purpose of the divisional structure that we recommend.”

Abandonment of circuit-wide stare decisis would be a logical step if the Commission were recommending that the Ninth Circuit be kept intact solely for administrative purposes and that three separate courts be created within the circuit for adjudication. But that is not the Commission’s plan, nor does the Commission reject the premise that the law within the Ninth Circuit should be uniform. On the contrary, the Commission states at the outset that the Ninth Circuit Court of Appeals “should continue to provide the West a single body of federal decisional law.” (Final Report at iii.)

How, then, can the Commission propose a regime under which “[d]ecisions made in one division would not bind any other division”? The Commission gives two answers, perhaps three (with the third buried in a footnote).

First, the report contemplates that decisions of other divisions would “be accorded substantial weight as the judges endeavor to keep circuit law consistent.” As a prediction of judicial behavior, this is well grounded in experience. Circuit judges today generally respect the decisions of other circuits, and there is no reason to think that judges in a restructured Ninth Circuit would not accord similar weight to decisions of other divisions.

On the other hand, there is a difference between respecting precedent and being obliged to follow it. I have no doubt that judges today often follow precedents they do not like, simply because it is their obligation to do so. If stare decisis did not operate circuit-wide, judges would be free simply to reject precedent from another division. The Commission plan would thus authorize, if not encourage, the creation of intracircuit conflicts.

This brings us to the Commission’s second and more important response: the creation of a “Circuit Division.” The Commission insists that the Circuit Division—“a small, stable, but still representative subset of the court’s judges * * * focused on conflict resolution”—can insure the maintenance of “desirable circuit-wide uniformity.” (Final Report at 5 1.) This response raises two questions. What does the Commission mean by “desirable circuit-wide uniformity”? And how much uniformity would the Circuit Division bring? To those questions I now turn.

B. Jurisdiction and authority of the circuit division

The keystone of the Commission plan is the Circuit Division. Without the Circuit Division, there could be no pretense that the Ninth Circuit Court of Appeals remained intact in anything but name. Each of the regional divisions would be totally autonomous except for the cumbersome process of rotating judges among the regions. Thus, it is essential to understand how the Circuit Division would operate.

The first thing that stands out is the extraordinary constraints the Commission’s plan places on the authority of the Circuit Division. The jurisdiction of the Division

would be limited to resolving “square” conflicts between the regionally organized divisions. Further, the Circuit Division could not take any case on its own motion; it could act only in response to an application for review filed by a party.

1. Only “square” conflicts

What does the Commission mean by “square” conflicts? One plausible interpretation is that the Commission refers to situations in which one division explicitly refuses to follow a decision handed down in another division. Explicit rejection is the only treatment of circuit precedent now forbidden to court of appeals panels. It would be logical to say that when a panel does take advantage of the freedom conferred by the divisional arrangement, the decision would be subject to review by the Circuit Division to eliminate the disagreement.

Suppose, though, that the panel (or the regional en banc court) distinguishes a decision from another division that reached a contrary result in a similar case. The losing litigant argues that, notwithstanding the purported grounds of distinction, the panel’s resolution conflicts with the other division’s ruling. Could the Circuit Division find that a square conflict exists and accept the application for review.

If the answer is “yes,” that is an invitation to tiresome wrangling over whether two decisions really are in conflict. In this regard, it is instructive to consider the experience of the Florida Supreme Court. That court is vested with jurisdiction to review “any decision of a district court of appeal * * * that expressly and directly conflicts with a decision of another district court of appeal * * * on the same question of law.” Commentators describe the jurisdiction as “disputatious” and note that “the existence of conflict often is not so certain, meaning that a brief [seeking review] must engage in a lengthier and more convoluted argument to establish the Court’s discretion to hear the case.” See Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 *Nova L. Rev.* 1151, 1225, 1238 (1994). That is hardly a model to be emulated.

What makes the arrangement even more problematic in the Ninth Circuit context is that the judges of the Circuit Division would be questioning the good faith or competence of their own colleagues. If the Circuit Division agrees to review a decision that has distinguished an opinion handed down by another regional division, that would be tantamount to saying that the later panel has failed to recognize that the earlier opinion involved the same issue and required the same result. I suspect that the Circuit Division judges, taking into account the effect of such a declaration on collegiality within the circuit and on the legitimacy of the system, would be reluctant to take that step.

These considerations suggest that the jurisdiction of the Circuit Division would be limited to acknowledged conflicts—conflicts created by the explicit refusal of one regional division to follow the precedent established by another division. That limitation, however, would substantially undercut the effectiveness of the mechanism. Indeed, the Circuit Division would be far less able than the existing limited en banc court to maintain uniformity within the circuit—a mechanism that the White Commission finds wanting.

Under the existing arrangement, Ninth Circuit judges can and do grant rehearing en banc to resolve tensions in circuit law caused by inconsistencies in doctrines or outcomes less blatant than explicit rejection. See, e.g., *Hale v. Arizona*, 993 F.2d 1387, 1389 (9th Cir. 1993) (en banc) (“We consider these questions en banc to resolve the tension between [two panel decisions].”); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1365 (9th Cir. 1990) (en banc) (overruling panel decision, thus obviating need to maintain “unstable and awkward” distinction drawn by later case).

When the Commission issued its draft report in October 1998, it was unclear whether the narrower or broader interpretation of the Circuit Division’s jurisdiction was intended. The Final Report appears to endorse the narrower reading. In explaining how the arrangement it proposes “will ensure clearer, more consistent circuit law,” the Commission states that “conflicts * * * between divisions will be more sharply highlighted,” and that the Circuit Division will “choose between articulated conflicting points of view.” (Final Report at 49; emphasis added.) This language implies that the Circuit Division would be limited to cases in which a panel explicitly rejected the “point of view” adopted by one of the other divisions. As long as the panel found grounds of distinction—even “unstable and awkward” grounds—the Circuit Division would stay its hand.

2. Only upon litigant request

The authority of the Circuit Division would be further constrained by the Commission’s insistence that the jurisdiction of the Division could be invoked only by a party to a case—and “only after the panel decision had been reviewed by the divi-

sion en banc or a divisional en banc had been sought and denied." Here, too, the Commission plan casts aside one of the mechanisms used by the Ninth Circuit today to maintain uniformity: the sua sponte panel-initiated en banc call.

Recent decisions illustrate the utility of this procedure. In 1998, the court took a group of cases en banc sua sponte "to rethink our previous decisions" on the preemption of state tort claims by the Airline Deregulation Act. *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998). The en banc opinion explained, "Because of the need to clarify the law in this area, these cases were taken en banc after they were assigned to a three-judge panel, but prior to the panel's rendering a decision." The en banc court issued a unanimous opinion overruling two panel decisions and establishing the law for the entire circuit. This process would not have been possible under the Commission's plan. More recently, the court accepted a panel's sua sponte en banc call to resolve "an irreconcilable conflict in this circuit's case law regarding the standard of review for rulings on the prosecution's use of peremptory challenges." *Tolbert v. Gomez*,—F.3d—(9th Cir. 1999) (No. 97–55004). The court eliminated the inconsistency without waiting for a litigant's request and without waiting for the panel to issue an opinion.

C. The commission's narrow vision of uniformity

Supporters of the Commission plan are caught on the horns of a dilemma. If the Circuit Division can review decisions even when the regional panel insists that the other division's ruling is distinguishable, it opens the door to time-consuming and uncollegial disputation over whether the new case creates a "square" conflict. But if the Circuit Division is limited to hearing cases in which one division has explicitly rejected another division's precedent, it will be powerless to eliminate less blatant inconsistencies of the kind that arouse concern today.

Is there any escape from this quandary? The White Commission gives what it may regard as a partial answer. In a little-noticed footnote—not included in the October 1998 draft report—the Commission reveals that its vision of "uniformity" is a narrow one. The Commission's text refers to "conflicts on issues for which circuit-wide (or state-wide) uniformity is important." (Emphasis added.) The footnote explains:

[W]e envision that [the function of the Circuit Division] will be focused on maintaining uniformity on issues of law that matter to the entire circuit or to a state (such as California) that is in more than one division. For example, it would be highly undesirable if the Northern and Southern Divisions established different rules on an admiralty issue. On the other hand, it would not appear to matter whether all divisions had the same rule of law with respect to the factors to be considered in granting an adjustment for abuse of trust under the Sentencing Guidelines. (Final Report at 44 n.99.)

Although the Commission does not generalize from its two examples, this passage implicitly draws a distinction emphasized by the Federal Courts Study Committee in its analysis of conflicts between circuits. The Study Committee recognized that not all intercircuit conflicts are "intolerable," and it posited that one criterion for identifying "intolerable" conflicts is that they "impose economic costs or other harm to multi-circuit actors." The White Commission's examples suggest that it draws the line in the same way.

In the aftermath of the Study Committee report (and at the request of Congress), I conducted a study of unresolved conflicts between federal judicial circuits. The study concluded that, more often than not, unresolved conflicts do not pose a serious threat to the activities of multi-circuit actors. Indeed, on many issues the subject matter alone virtually forecloses any effect on multi-circuit actors. This is true of sentencing issues, as suggested by the White Commission; it is also true of most civil rights issues and most issues involving the elements of federal crimes. In disclaiming the importance of circuit-wide uniformity on these issues, the Commission is implicitly telling us that the Circuit Division need not resolve even "square" conflicts in large and important areas of federal law.

Two other aspects of the distinction also warrant mention. First, "square" conflicts on issues affecting multi-circuit actors are probably less common than "square" conflicts on issues such as the interpretation of federal criminal statutes or sentencing guidelines. Second, the concerns that underlie the desire for uniformity between divisions on matters of admiralty law and other issues affecting multi-circuit actors apply equally to uniformity between circuits. For that reason, these concerns often guide the Supreme Court in the exercise of its certiorari jurisdiction. If the Circuit Division is confined to resolving "square" conflicts on issues affecting multi-circuit

actors, it will have little to do, and that little may well be overtaken in short order by Supreme Court decisions.

D. The shriveled "law of the circuit"

In sum, there is less to the Circuit Division than meets the eye. The Circuit Division would resolve only "square" conflicts—a category apparently limited to cases in which one division has explicitly rejected another's precedent. It would act only upon the request of a party, and it would probably limit itself to issues that affect the operations of multi-circuit actors—a circumstance that is the exception rather than the rule. In all other respects, the law in each division would be left to develop separately.

One other element of the Commission plan comes into play here. The Commission contemplates that after granting review, "the Circuit Division will simply resolve *the issue in conflict*, and return the case to the regional division for such other proceedings as are necessary." (Final Report at 46; emphasis added.) This too suggests a narrow view of the Circuit Division's field of operation, and it reinforces the supposition that the Circuit Division would confine itself to discrete issues on which there is an explicit disagreement.

What would the consequences of this arrangement be? I believe that, before very long, the three divisions would be carrying out their law-declaring functions almost as separate courts. Decisions of the Circuit Division would be so infrequent, and their effect on the law of the division so limited, that "the law of the circuit" would shrink to near-insignificance.

E. Isolation of the divisions

The scenario I have described is made even more likely by the probable fate of another element of the Commission's plan, the long-term random rotation of judges among the divisions. Here is what the Commission has to say about the rotation feature in its report:

A majority of judges serving on each division would be residents of the districts over which that division has jurisdiction, but each division would also include some judges not residing within the division, assigned randomly or by lot for specified terms of at least three years. (Final Report at 43.)

The draft statute is somewhat more open-ended:

A majority of the judges assigned to each division shall reside within the judicial districts that are within the division's jurisdiction * * *; provided, however, that judges may be assigned to serve for specified, staggered terms of three years or more, in a division in which they do not reside. Such judges shall be assigned at random, by means determined by the court, in such numbers as necessary to enable the divisions to function effectively. (Final Report at 94.)

Even here, there is some ambivalence about long-term cross-division assignment of judges. (Compare "would" in the report text with "may" in the draft statute.) And when Senator Murkowski (joined by Senator Gorton) introduced the legislation implementing the Commission proposal, he offered the "strong suggestion" that the Senate Judiciary Committee eliminate the rotation requirement altogether.

I believe that if the Commission plan were to be enacted into law, the Murkowski view would prevail. I say this because there is simply no constituency for the long-term random rotation of judges among divisions. The northwestern senators—who until now have been the most ardent advocates of splitting the circuit—have already made clear their opposition to this feature. And the circuit judges, most of whom do not want any division of the circuit or the court, would be equally opposed to long-term cross-division assignment. A judge living in Alaska would hardly relish the prospect of flying to Pasadena or Phoenix for every argument calendar for three long years. A judge from Los Angeles would not want to hear all of his or her cases in the northwest.

I am not suggesting that judges would hear cases only in their own region. On the contrary, short-term cross-division assignment of judges would certainly be a feature of the arrangement, if only because caseloads will seldom be proportional to the number of judges residing in each of the regions. But that is little different from current use of, for example, district judges and senior judges from other circuits. The judges regularly sitting in each division would be the judges who reside there.

F. Conclusion: the compromise that isn't

What happens when you put all of this together? In all likelihood, the result would be something like this. In each division, cases would be adjudicated largely by a self-contained group of judges bound only by the precedents they themselves have handed down. The Circuit Division would intervene to provide circuit-wide law only on the rare occasions when a panel or en banc court in one division has explicitly rejected another division's precedent on an issue that affects multi-circuit actors. In many—perhaps most—areas of the law, each division would develop its own line of precedent. The “law of the circuit” would become almost an irrelevance.

This analysis explains why the Commission plan is not a compromise. Those who want to divide “the Ninth Circuit” have never cared about the circuit as such. It is a matter of indifference to them whether the circuit council, the Bankruptcy Appellate Panel, the circuit conference, and other circuit institutions remain as they are. What they have sought is a division of the court of appeals. And that, for all but a handful of cases, is what the Commission plan would give them.

II. THE COMMISSION'S FAULTY DIAGNOSIS

Notwithstanding its flaws and limitations, the divisional structure plan might be worth pursuing if the Commission had identified a serious problem in the Ninth Circuit Court of Appeals that could be solved only through reliance on smaller adjudicative units. But on the evidence of the Commission report, no such problem exists.

The rationale for the Commission plan is that “the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals.” This rationale rests in turn on two overlapping arguments. First, judges in a large appellate court are unable “to monitor all the decisions the entire court of appeals renders.” Second, “large appellate units have difficulty developing and maintaining consistent and coherent law.” Neither argument stands up under scrutiny.

A. Monitoring of panel opinions

Central to the Commission's vision of effective appellate adjudication is the “monitoring” of panel opinions by other judges of the court. The Commission puts it this way:

Courts of appeals rely on their judges to monitor the decisions of all panels of the court so that their own decisions are consistent with earlier decisions of the court and so that the court can identify and correct any misapplication or misstatements of the law. * * * The volume of opinions produced by the Ninth Circuit's Court of Appeals and the judges' overall workload combine to make it impossible for all the court's judges to read all the court's published opinions when they are issued. (Final Report at 47.)

For several reasons, the Commission's reliance on this theory is misplaced.

First, as Chief Judge Hug and his colleagues have aptly stated, the assumption that judges cannot keep sufficiently abreast of circuit law without reviewing opinions as they come out “is a relic of the pre-computer era.” Before computers, opinions would not appear in the advance sheets for weeks or months; digests, citators, and other research tools lagged even further behind. On a large court, the only way a judge could avoid an inadvertent conflict with another panel's decision was to read opinions as they came out, sort them into piles by subject matter, and perhaps keep a personal index of important rulings.

Today, conditions are very different. If a judge is considering a case involving NEPA or FOIA or Miranda or Noerr or any other issue, all of the court's decisions on point, no matter how recent, can be accessed in seconds through Westlaw and Lexis. In addition, the Ninth Circuit has its own computerized case inventory tools. A judge may scan newly filed opinions simply to get a sense of what is going on in the court, but to collect cases in an effort to replicate the computerized databases would be a waste of time.

Second, the Commission lumps together two very different activities: keeping up with circuit law and monitoring panel opinions. Keeping up with circuit law is something done by individual judges. As already indicated, with all circuit law now easily retrievable by computer when it is needed, there is no particular reason for individual judges to acquire familiarity with decisions that have no relevance for any of their current cases.

Monitoring panel opinions, in contrast, is something that the court does as an institution. The purpose of monitoring, as the Commission suggests, is to identify panel decisions that conflict with earlier decisions of the court or that misstate the law. But effective monitoring does not require that all judges keep up with all opinions. As long as each opinion receives some scrutiny by off-panel judges, the objectives can be met.

Third, the Commission goes off track by referring to “[t]he volume of opinions produced by the Ninth Circuit’s Court of Appeals.” (Emphasis added.) What the Commission fails to mention is that the volume of published opinions does not correlate with circuit size. In 1998, three other circuits produced a larger number of published opinions than did the Ninth Circuit.

(The analysis is limited to published opinions because only published opinions contribute to the law of the circuit. Also, I recognize that 1998 may have been aberrational for the Ninth Circuit, in that the court’s output of published opinions was probably reduced by its high vacancy rate. However, it is not uncommon for other circuits to approach or exceed the output of the Ninth Circuit.)

One would think that, other things being equal, an annual output of 800 opinions could be monitored more easily by 28 judges than by 14. Opinions are not fungible, and neither are judges. The larger the number of judges engaged in the monitoring process, the greater the likelihood that a particular error or inconsistency will catch the eye of at least one member of the court.

Finally, the evidence leaves no doubt that the judges of the Ninth Circuit Court of Appeals engage in a substantial amount of opinion monitoring. In the four-year period ending in 1997, there were more than 300 cases in which an off-panel judge initiated en banc activity. (This figure includes only cases in which the off-panel judge formally invoked the en banc procedures of the court’s General Orders. It does not include cases—perhaps quite numerous—in which the off-panel judge communicated only with the panel members.) Even when the court did not vote on an en banc call, the off-panel judge’s comments often resulted in modification of the panel opinion and sometimes in a modification of the disposition.

In this light, the Commission’s concerns about the supposed difficulties of opinion monitoring in the “large appellate unit” ring hollow. Judges today need not read opinions as they come out in order to make use of them when they are relevant. As for monitoring, the evidence indicates that the judges of the Ninth Circuit can and do monitor the opinions rendered by their colleagues.

B. Maintaining coherent and consistent law

Monitoring, of course, is not an end in itself, but a means to an end. The Commission’s principal argument is that “large appellate units have difficulty developing and maintaining consistent and coherent law.” (Final Report at 47.) The Commission thus aligns itself with those who believe that inconsistencies in panel decisions are more common in the Ninth Circuit than in other circuits.

What is the basis for this conclusion, so critical to the Commission’s recommendation? The Commission refers to “perceptions” of inconsistency and to its own “judgment, based on experience.” The “experience” is not specified or described. This is a remarkably weak foundation on which to build so substantial a structure.

The Commission acknowledges “the literature on [the] subject,” including my own empirical studies of inconsistency in the Ninth Circuit. The Commission’s only response is to say that consistency and predictability cannot be “reduce[d] * * * to statistical analysis” because the “concepts are too subtle, the decline in quality too incremental, and the effects of size too difficult to isolate, to allow evaluation in a freeze-framed moment.” (Final Report at 39–40 & n.39.)

It is the Commission’s prerogative to reject the methods or conclusions of empirical research, but it is regrettable that the Commission simply gives up and declares that the concepts are too subtle to warrant analysis. For example, what does the Commission mean by “evaluation in a freeze-framed moment”? The research I conducted, and which the Commission cites, embraced two distinct years of the Ninth Circuit’s work, and the evaluation involved decisions rendered over a much longer period of time.

Although the Commission is not willing to credit systematic empirical research, it is willing to rely on “perceptions.” The reference to “perceptions” apparently incorporates the brief account earlier in the report of the Commission’s survey of district judges and lawyers in the Ninth Circuit and nationwide. The survey is a valuable—indeed unique—source of information, and happily the Commission has made available a complete account of the findings in its Working Papers. Those findings raise some doubts about the conclusions drawn by the Commission.

Consider one of the specific points cited by the Commission in its report:

Ninth Circuit lawyers, more often than others, reported as a “large” or “grave” problem the difficulty of discerning circuit law due to conflicting precedents, and the unpredictability of appellate results until the panel’s identity is known. (Final Report at 40.)

When we look at the corresponding table in the Working Papers, we find that, indeed, Ninth Circuit lawyers were more likely than lawyers in other regional circuits to have experienced problems in “discerning circuit law due to conflicting precedents.” (Working Papers at 86, Item 20g.) But two other points also stand out:

- The Ninth Circuit lawyers who viewed the problem as “large” or “grave” constituted only one-quarter of the respondents.
- The highest proportion of lawyers giving this response came not from the Ninth Circuit, but from the Federal Circuit—a court of 12 judges, all of whom sit in the same city.

A similar pattern can be seen in the responses to the question “how big a problem is the unpredictability of results until the panel’s identity is known?” (Working Papers at 87, Item 20j.) Ninth Circuit lawyers were more likely to have experienced problems than lawyers in other regional circuits, but so were lawyers practicing before the Federal Circuit. Interestingly, one out of seven lawyers experienced a “large” or “grave” problem of unpredictability in the First Circuit, which has only six judgeships and enjoys a reputation for collegiality. (The Commission, in explaining what it means by “collegiality,” quotes at length from a book by the former chief judge of the First Circuit.)

These findings point to the need for caution in interpreting the survey results. The question is not whether particular phenomena are associated with the Ninth Circuit Court of Appeals, but whether those phenomena are causally linked to circuit size. On this score, a recent news story about the Court of Appeals for the Federal Circuit provides a useful perspective. (National Law Journal, Aug. 3, 1998, at A-1.) The story notes that some members of the intellectual property bar “accuse the specialized court of unpredictability, claiming that judges are deeply divided on basic patent doctrine, [and] that results are often panel-dependent.” The story elaborates:

This factionalism leads to a crap-shoot mentality among lawyers who say the outcome of their cases depends too heavily on who sits on a particular panel. Because the U.S. Supreme Court rarely reviews patent cases, the panels’ inconsistent rulings remain unresolved. * * * Some say the court should take more cases en banc.

To anyone who has followed the debate over dividing the Ninth Circuit, these comments will sound uncannily familiar. They are precisely the kinds of comments that give rise to the “perceptions” that the Commission relies on. Yet no one would argue that the Court of Appeals for the Federal Circuit is too large and should be divided into smaller adjudicative units.

I do not know whether the criticisms of the Federal Circuit are justified. Nor would I want the Ninth Circuit to view the survey findings with complacency. I do suggest that the “perception” evidence drawn from the survey offers little support for the Commission’s conclusion that “large appellate units have difficulty developing and maintaining consistent and coherent law.”

Finally, there is (to borrow a favorite allusion of Chief Justice Rehnquist) the evidence of the dog that did not bark in the night-time. If inconsistency is as much of a problem as the Commission believes it is, examples should be easy to find. The Commission compiled a voluminous record of testimony and statements dealing with the Ninth Circuit, yet not a single witness came forward with examples—systematic or even anecdotal—of conflicts between Ninth Circuit panel decisions. It is not even clear what kinds of conflicts the Commission has in mind—whether it believes that panels are ignoring relevant precedents, or that panels are drawing unpersuasive distinctions, or some combination of the two.

The absence of examples and the lack of specificity are emblematic of the flimsy evidentiary support that underlies the Commission’s plan. At most, the Commission has shown that there is some dissatisfaction with the Ninth Circuit Court of Appeals’ performance of its law-declaring function. The Commission has not demonstrated the existence of problems that would be cured by dividing the court into three largely autonomous decisional units.

III. CONCLUSION

The Commission’s proposal for regionally based adjudicative divisions reflects a conscientious attempt to respond to criticisms of the Ninth Circuit Court of Appeals

“while preserving [an] administrative structure that no one has seriously challenged.” Unfortunately, the plan is flawed both in conception and in execution. It is unlikely to accomplish its goals, and it has the capacity to produce much mischief. I urge the Committee to reject the proposal and to allow the Ninth Circuit Court of Appeals to continue its course of productive experimentation “to improve the delivery of justice in the region it serves.”

PREPARED STATEMENT OF DANIEL J. MEADOR, JAMES MONROE PROFESSOR OF LAW
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MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE: This subcommittee is to be highly commended for setting in motion a process that will lead, I fervently hope, to enactment of the essential provisions of S. 253. That bill embodies the recommendations contained in the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals (the Commission), submitted to the Congress and the President on December 18, 1998. It was my privilege to serve as Executive Director of the Commission, and I am pleased to respond to the invitation to submit a statement to the subcommittee.

Before my work with the commission this past year, I had spent more than a quarter-century studying federal and state appellate courts and working with judges, the Department of Justice, other organizations, and Congressional committees to improve those courts. So I present this statement not solely from the standpoint of my service as the Commission's Executive Director—indeed I do not speak here for the Commission—but as one who has labored long in the appellate vineyards, always, to borrow from Lord Macaulay, to reform them in order to preserve them—to preserve them as vital organs of government under law in the face of continued docket growth and changing circumstances.

Pursuant to its Congressional mandate, the Commission spent ten months of intensive study of the courts of appeals, resulting in the most thorough and in-depth examination of the federal appellate system since the Hruska Commission report of 1973 (Commission on Revision of the Federal Court Appellate System). While no proposals for structuring the courts and adjusting their processes is perfect—there are always advantages and disadvantages to be weighed—it is doubtful that any other body can or will devote the time and resources to developing a better set of proposals. Having looked to this Commission for guidance—and the Commission having done what it was directed to do—Congress would do well, after hearings and due deliberation, to enact into law its recommendations. If this opportunity to ‘fix’ the federal appellate courts for the next century is not taken, the thirty-five year old controversy over the Ninth Circuit will continue to fester, with its dysfunctional and debilitating consequences and with its damage to the status of the federal courts in the public mind. Moreover, an opportunity will have been lost to equip all the courts of appeals with the means of coping with future growth.

Inasmuch as the Commission's report gives particular attention, as the statute directed, to the Ninth Circuit, I devote the bulk of my statement to that subject.

THE NINTH CIRCUIT AND ITS COURT OF APPEALS

The commission's report provides an important insight that has not heretofore been appreciated, namely, that there is a significant distinction between a judicial circuit and a court of appeals. A circuit is purely an administrative entity, organized on a territorial basis, and should be evaluated as such. A court of appeals, by contrast, is an adjudicative body, charged solely with deciding appeals. Informal discourse among lawyers and judges tends to equate the two. For example, when one hears that “Judge X is on the Ninth Circuit,” it is understood as meaning that Judge X is a member of the court of appeals for the Ninth Circuit. The statement that “the Ninth Circuit held that * * *” is understood to mean that the Ninth Circuit Court of Appeals made such a holding. While this may be useful as shorthand, it has the unfortunate consequence of leading persons to think that the circuit and its court of appeals are indistinguishable. This leads to the assumption that the only way to address problems of an overgrown court of appeals and to create more manageable appellate units is to split the circuit. The Commission's report rejects that premise and makes it plain that circuit splitting is not the only way to deal with problems of growth in a court of appeals.

The commission's enunciation of this distinction between circuit and court provides a valuable premise not only for dealing with the Ninth Circuit, but also for the consideration of the nationwide circuit structure for many years to come. It is hoped that Congress will accept and act upon this premise.

After close examination of the Ninth Circuit, the Commission concluded that the problems agitating much of the bench, bar, and public officialdom relate only to the court of appeals and not to the circuit. Believing that the remedy should be tailored to the problems, the Commission recommended that the circuit be left to function intact administratively, but that the difficulties of the huge, 28-judge court of appeals—a court certain to grow larger in the years ahead—which purports to function as a single decisional unit, be addressed by restructuring the court into regional adjudicative divisions, thereby creating smaller, more manageable appellate forums.

The benefits and advantages of the recommended divisional structure are these:

1. Heightened uniformity in circuit court law

An argument that has been heard against the divisional structure is that it will increase intra-circuit conflicts, as the decisions rendered in one division need not be regarded as binding precedents in other divisions. But the opposite is true; uniformity will be increased by a divisional structure. Currently, the court of appeals functions through dozens and dozens of ever-shifting panels. In practice, the court uses more than 40 judges annually (district judges and visiting circuit judges, in addition to its own judges). Those panels decide thousands of cases annually. In theory, a decision by any one of those panels is considered to be a precedent binding on all judges and panels of the court. But according to many participants and observers, the vast body of case law generated by this multitude of panels is in many instances unharmonious, ranging from direct conflicts to near-conflicts to divergences in tone and reasoning. Those who assert that this is not the situation appear not to acknowledge the realities as seen by many others. In theory, the court's existing en banc process irons out all conflicts. But again, theory does not accord with reality. According to many participants and observers, the court's limited en banc procedure is inadequate and ineffective to monitor and conform those thousands of decisions.

By contrast, the divisional structure would provide an effective means for maintaining uniformity within each division because its seven to 11 judges could monitor all divisional decisions and could sit in a true en banc whenever necessary to resolve conflicting panel decisions. There would thus be only three decisional units (the three regional divisions) among which conflict could arise instead of the many dozens or hundreds of panels, as at present. When an interdivisional conflict did arise, it could be resolved far more-quickly and inexpensively through the Circuit Division than is possible with the current en banc process.

2. Reduced judicial burdens, increased coherence in settling circuit law

A key here is the recommended Circuit Division. It would be a continuously functioning body, with a stable, though gradually rotating, membership, drawn from throughout the circuit, available at all times to resolve inter-divisional conflicts quickly. There would be no administrative hassle in having to assemble a fresh group of judges for each case, as is done in present practice. The Circuit Division's resolution of such conflicts would require no elaborate additional process, such as en banc rehearings presently involve. It would resolve the conflict on the papers filed in the regional division, without any additional briefing or oral argument. Its sole mission would be to decide whether position A or position B should be adopted. It would be, as some have said, a "tie-breaker." Because it would be a stable, on-going body, its judges would become accustomed to working together and could thus dispose of business more efficiently. The present Ninth Circuit limited en banc functions through judges who are unlikely to have worked together before in deciding cases and will never do so again—hardly the picture of an appellate court, as such is understood in the Anglo-American legal world.

The Circuit Division should not be confused with the en banc procedure long familiar in the federal courts of appeals. It would be a quite different entity. In addition to being a stable on-going body, a key difference is that it would not be involved in the difficult and controversial business of deciding important or unsettled legal issues, where there is no inter-divisional conflict. It would act only when such a conflict is presented. The Circuit Division would, of course, need to decide when a conflict existed so as to act, but this would not involve any additional litigation. The judges would examine the assertion of a conflict and decide for themselves, as a matter of unreviewable discretion, whether there is indeed the kind of conflict that needs circuit-wide resolution.

The divisional plan would make each judge a more effective monitor of the court's output and would enable each to play a meaningful role in shaping uniform case law. Presently, no Ninth Circuit appellate judge can possibly read or even cursorily glance at all of the thousands of decisions the court as a whole produces annually. As a member of a division of from 7 to 11 judges, he or she could do so. Now each judge must consider and respond to en banc calls from each of the other judges—

27 when the court is at full strength. That takes time away from the routine business of deciding appeals and writing opinions. Under the divisional plan, each judge would need to consider en banc calls from only six to ten other judges. Moreover, when an en banc is held, every judge of the decisional unit—the division—can fully participate, something that is impossible on the court of appeals as it is presently organized.

The Circuit Division is, of course, another tier in the judicial system, but it is a minimal tier, not, as just explained, one that involves the full panoply of briefing and argument. It could act expeditiously on existing papers with minimal expense to litigants. Moreover, some additional tiers in the system are probably inevitable, as the volume of appeals and number of judges grow. Indeed, Justice Bryer, in a letter to the Commission, suggested “tiering” in the judicial hierarchy as a promising approach to anticipated growth.

3. *Restored relationship between the appellate forum and the people and territory it serves; appropriate accommodation of Federal and regional interests*

The federal appellate structure nationwide is built on the concept of regionalism, balanced with concern for the federalizing function of the appellate courts—a concept endorsed by the Judicial Conference in its Long Range Plan. The larger the circuit’s territory, the more attenuated the regional relationship becomes. The Ninth Circuit is the extreme, and it is the sense of many judges, lawyers, and observers that this relationship is there stretched too thin. Compare the Ninth Circuit, embracing nine large states, with most of the other circuits: 1st (four states), 2nd (three states), 3rd (three states), 4th (five states), 5th (three states), 6th (four states), 7th (three states), 11th (three states). To assert that the entire Ninth Circuit, stretching from Arizona to Alaska and from Montana to Hawaii, is a single region, in the sense relevant here, taxes credulity. One can reasonably ask why the lawyers, litigants, and citizens in the territory of the Ninth Circuit should be denied the benefits of regionalism enjoyed in those other circuits.

Regionally based divisions would bring the regional interest back into balance in the Ninth Circuit, and would do so without splitting the circuit. The federalizing function would continue to be served because each division would include the territory of more than one state, and judges from more than one state would sit on each division.

In my view, this consideration alone is sufficient to call for enactment of the divisional plan, even if one does not accept the other arguments that support it.

4. *An appellate court preserved*

The commission’s report embodies a traditional conception of appellate courts derived from two centuries of experience. This traditional conception is that of a relatively small group of judges working regularly together in considering and deciding appeals, collaborating in arriving at commonly agreed reasoning and result in each case. Whether one agrees with the recommendations for a divisional plan for a court as large as the Ninth Circuit Court of Appeals depends to a considerable extent on whether one shares that view of an appellate court. Those who oppose the divisional plan appear not to do so; acceptance of their view would work a radical alteration in the nature of appellate courts. Thus, the federal appellate courts are at a crossroads, presenting Congress with the necessity of deciding the nature of those judicial bodies for generations to come. This decision involves a fundamental matter of value judgment, one not determined by empirical studies or statistics or conflicting factual assertions over whether there is this or that degree of inter-circuit conflict. Rather, it involves belief rooted in experience about the nature of an institution.

Appellate judges do not act alone, as trial judges do. They must function as a team, a team whose members are constantly interacting in the decisional process. This conception is often summed up in the word “collegiality.” One of the best statements of this quality in an appellate court—what he called “judiciality”—comes from Judge Frank Coffin, former chief judge of the U.S. Court of Appeals for the First Circuit. He says that it involves “the deliberately cultivated attitude among judges of equal status working in intimate, continuing, open, and noncompetitive relationship with each other * * *”

It takes little imagination to understand that 28 judges, or any very large number, cannot work in an “intimate, continuing” relationship. In the Ninth Circuit, each judge is unlikely to serve on a panel with any other judge of the court more than once every three years. The judges may be acquainted with each other and cordial in their relationships, but they do not constantly function together in adjudicative work.

Under the traditional conception, an appellate court is a special kind of body, basically different from a legislative body or any other entity. Those who do not share

this conception place little or no value on the kind of collegiality described by Judge Coffin, and they see no problem in an appellate court of near infinite size. At the Commission's public hearings, some of those who defended the present organization of the Ninth Circuit Court of Appeals were unwilling to say that a court of even forty or fifty judges, attempting to function as a single decisional entity, presented a problem. Apparently to those holding that view, a random threesome of strangers brought together every three years is sufficient to satisfy the appellate process in the American legal order. The Commission's report implicitly rejects that view, and I urge Congress to do so.

The divisional plan would preserve the traditional conception of an appellate court by establishing decisional units of from seven to 11 judges each. The plan would permit an indefinite number of judges to be added to the court to meet increased business without eroding the essential nature of an appellate forum, as additional divisions of this size could be created. Without such a plan, we will lose institutions that have served the law well and will have in their place ever-growing Towers of Babel, increasingly unknown courts composed of a vast number of semi-strangers.

THE COURTS OF APPEALS GENERALLY

As charged by statute, the Commission examined the structure and alignment of the federal appellate system as a whole, and it did so with an eye to the future. It reached these conclusions: (1) There will be continuing growth in the volume of appeals in the years ahead. (2) The rapidity and magnitude of growth will vary among the circuits and among types of cases. (3) It is impossible to predict with confidence any of these future developments beyond the assertions just made. Given the difficulty of predicting the rate, amount, and type of growth in each circuit, the Commission concluded that it is not prudent to prescribe by legislation at this time a single set of structures and procedures for all courts of appeals. Rather, the commission recommended that each circuit and court of appeals be authorized in its discretion to employ any one of three defined and circumscribed options to meet its particular docket situation.

1. The divisional concept as long-range solution to growth in the nationwide appellate system

The beauty of the divisional concept is that it not only deals effectively with the present Ninth circuit situation, but it also provides a means of enabling courts of appeals in other circuits to continue to function effectively as they grow larger, without splitting the circuit. If we adhere to the proposition that no circuit should consist of fewer than three states—endorsed by the Hruska Commission and re-endorsed by this Commission—there are now eight circuits that cannot be split. Yet their courts of appeals are almost certain to grow. It is not difficult to imagine several of those courts with 20 or more judges within the next 10 to 15 years, a growth that will be necessary in order to cope with their dockets. They will increasingly encounter the same problems that the Ninth Circuit now encounters. A divisional plan of organization will enable those courts to function effectively in a situation where circuit-splitting is not an option.

While the Commission was clear that the Ninth Circuit Court of Appeals is at a point where a divisional structure is required, it was hesitant to say exactly where that point is reached short of 28 judgeships. Thus, it concluded that the wise course of action is to authorize any court of appeals with more than 15 judgeships to organize itself into divisions, in its discretion. This gives each court the ability to assess its distinctive situation and design an appropriate internal structure.

2. Two-Judge panels

Because the courts of appeals now decide many appeals through a summary process, typically using staff attorneys, the Commission concluded that as to cases of that type, each court of appeals should be authorized, in its discretion, to assign them to panels of two judges instead of three judges. The report explains this option in detail.

3. District court appellate panels

Shifting a portion of the appellate work to the trial level has long been advocated. The Commission concluded that the idea is sufficiently promising that each Circuit Judicial Council should have discretionary authority to establish district court appellate panels and assign designated categories of cases to those panels, each consisting of two district judges and one circuit judge.

In all of these options, the Federal Judicial Center would be charged with monitoring the procedure and reporting on the experience to the Judicial Conference of the United States, which, in turn, would communicate its views to the Congress.

1. In Section 2(c)(1) of the bill, I suggest that the following sentence be added at the end: "A judge selected for service on the Circuit Division shall continue to perform regular judicial duties as a member of a regional division." The reason for this provision is to make it clear that selection for the Circuit Division does not relieve a judge from his or her regional divisional duties. Service on the Circuit Division is simply an additional duty, as service on an en banc now is.

2. In Sections 2(e), 3(c), and 4(c), The Federal Judicial center is required to report within three years after the date of enactment of the Act. This is much too short a period of time within which to obtain a meaningful study and evaluation of these procedures. After enactment of this bill, it is likely to take any court several months to put the new structures or procedures in place and begin to function under them. After collecting and evaluating data, it is likely to take the Federal Judicial Center a substantial time to write a report. The upshot is that there would be less than two years of experience on which a report could be based. That is hardly even one appellate cycle. While the eight years recommended by the Commission may be considered too long, three years seems clearly too short. I suggest that the bill be amended to specify five years within which the FJC report must be submitted.

As is always the case with proposals for change, opponents can raise an array of hypothetical questions and imagined difficulties in their operation. And so it is here. Having heard many, and maybe all, of them, I am satisfied that no one of them amounts to a reason for rejecting the Commission's recommendations. Some of the imagined situations will never occur, and others will be worked out in practice. It must be remembered that any new judicial structure, jurisdiction, or procedure will go through an initial "shakedown" period after its adoption, during which kinks are ironed out and uncertainties are clarified. It should also be borne in mind that much of the opposition voiced to the commission's recommendations comes, as members of Congress no doubt understand, from the instinctive objection to change by some judges and lawyers.

The relatively modest, evolutionary changes to the century-old federal appellate system recommended by this Congressionally created Commission are needed to preserve the appellate courts as we have known them in the face of unprecedented growth. After three decades of debates, conferences, committee hearings, studies, and reports, I respectfully submit that it is time for Congress to act.

PREPARED STATEMENT OF JOSEPH T. SNEED, III

INTRODUCTORY REMARKS

I shall devote the initial Portion of this presentation to what the entire federal judicial system should resemble fifty years hence. I do this because whatever happens to the Ninth Circuit in the near future should anticipate that future to the extent possible.

Certain assumptions about future developments are quite reasonable. These include the increasing dominance of federal law over state law and continuing increases in the number of lawyers. In short, all signs point to a continuing increase in federal litigation and a corresponding increase in the number of federal judges serving the nation. Unfortunately, no other assumption appears reasonable.

This means this Commission, in my opinion, must base its recommendations on that assumption. When so based I submit that the commission must proceed in one of two basic directions. The first would be to preserve the existing Ninth Circuit as a model for the future, and recommend the eventual consolidation of the remaining circuits into Eastern, Midwestern, Southern, and Southwestern circuits. This, or something resembling it, is the "Mega-Circuit" vision. Within such circuits there would very likely develop specialized circuit agencies, such as the present bankruptcy appellate panels, functioning between the district court and the Mega-Circuit court.

The second assumption upon which this commission might proceed is that the number of circuits should be increased as the caseload drives the need for additional judges power in a given circuit above a range between, I would say, 17 to 21 circuit judges. In due course this will create the need for the creation of a court to serve as an auxiliary to the Supreme Court. It is on the basis of this second assumption that my written remarks are based.

My remarks are addressed to the present geographic configuration of the Ninth Circuit Court of Appeals. My position is that it should be divided. This conclusion is based on the following considerations.

The case filings in this Circuit have increased 63 percent in the past ten years. They were 5,490 in 1987, and 8,692 in 1997. Also, the number of motions filed in this circuit have increased. They were approximately 8,643 in 1987, and 12,028 in 1997. Our en banc hearings in 1987 were 15, and those in 1997 were only 8. The total number of habeas corpus cases was 786, which include 37 death penalty cases. The total number of prisoner petitions was 2,151. The total number of pro se appeals was 3,424. In the past several years our active judge power has substantially declined (for which Congress is largely responsible) and this further hampered the Circuit's ability to keep abreast with case filings and en banc calls.

I. SOME CONSEQUENCES OF SIZE

A. Collegiality

In many respects the consequences of these facts are more important than the facts themselves. The size of the Circuit dictates that active and some senior judges spend an inordinate amount of time in travel. While much work is done without the necessity of travel by means of the telephone and e-mail, it remains true that rarely is the full court assembled in one location. The annual symposium of three or four days provides one of the few opportunities for such assembly. The Judicial Conference is too large and concerned with matters not always relevant to circuit business.

There are inescapable consequences that flow from these conditions. One is the increasing inability to disagree respectfully. Too frequently a disagreement on the law leads to sharp verbal thrusts that on occasion become infected with distinct hostility. Another is that the formal court meeting must be devoted to reporting to those judges present the activities of the Chief judge, the Executive Committee, and various other committees of the court.

To some extent the conditions I have mentioned also exist in smaller circuits. My point is that they are made more intense by the large number of judges in the present Ninth Circuit and their vast geographic dispersal. This heightened intensity slowly undermines the obligations of collegiality and subtly excuses one's failure to perform them. Those obligations are more easily met, or perhaps one should say induced, in smaller circuits. Frequent encounters, a lunch, or an exchange of social events softens the edge of legitimate judicial differences.

It is true that to some degree appellate judges *must* be reasonably courteous to one another. However, when this obligation is burdened with unspoken hostility, courtesy is marked by reserve and restraint.

It is undeniable that without regard to the size of the court judges will differ in their approach to the nature of their duties. Usually this difference reveals itself in the manner in which a judge utilizes precedents. All precedents can be squeezed or stretched. Every judge sometimes resorts to both. These practices, unchecked by frequent personal encounters with each of one's colleagues, tend to generate en banc calls which can lead to intemperate remarks that further strain the obligations of courtesy.

In my opinion, a court smaller than the present Ninth Circuit will better impose a curb on these tendencies. The increasing frequency of the necessity of justifying such tendencies to a relatively small group of colleagues gradually produces a movement of all toward the center more or less satisfactory to most. 33.

The en banc process

The reduced force of this pressure toward the center in courts the size of the Ninth circuit increases the likelihood of resort to the en banc process. This was recognized when the Ninth circuit was increased in size to twenty-three active judges. However, an en banc court of twenty-three judges is not practical. Then-Chief Judge Browning designed and secured approval from the Court and Congress of a limited en banc process whereby a case voted by a majority of the active judges would be placed before a panel of eleven active judges chosen by lot from among all active judges.

The element of chance in this process, while tolerable with a court of twenty-three active judges, becomes, I submit, increasingly capricious as the authorized strength of the Ninth circuit increases. A similar en banc process of a court of forty-one, for example, very likely will not be tolerated. What then is the proper size? Certainly the en banc court should be larger than the present eleven. But how much larger? What is the proper balance between representational fairness and operational efficiency of the en banc panel? Today it would be possible to recommend that the en banc court be increased by small increments as the authorized-strength of the court grows. I strongly suggest that this is an inappropriate course for this Commission to endorse.

C. *Other ameliorative possibilities*

No doubt there are procedures available now or relatively soon that would, or could, ameliorate the disadvantages of the enormous geographic area embraced by the Ninth Circuit. For example, e-mail has reduced the delays in inter-chambers communication enormously. Video conferencing would permit intra-panel conferencing as well as possibly oral arguments heard and seen by all participants without leaving their chambers or law offices. The number of appeals entitled to full scale oral argument also could be substantially reduced by practice or legislation. Indeed, in this circuit during my tenure this has been done by practice and without too much protest. Progress in this direction could be formalized by creating at the circuit level an equivalent of the Supreme Court's certiorari process. In such a system, much of the screening process would be done by staff lawyers rather than elbow clerks.

D. *The legitimacy concern*

No doubt other measures aimed at increasing our disposition capacity will be suggested in presentations to this Commission. While I cannot be dogmatic, I must suggest that many of these techniques will reduce the legitimacy of a key part of the federal judiciary—the Circuit Courts of Appeals. That legitimacy ought not to be eroded. It contributes enormously to permitting the Supreme Court to limit its grants of certiorari to very important cases secure in the knowledge that all cases from the district courts have been carefully screened for error by the circuit courts. We should not erode the legitimacy of the security on which the Supreme Court relies.

II. A PROPOSED SOLUTION

I suggest that an appropriate and relatively long-term solution is the enactment of a law dividing the Ninth Circuit and thereby creating a Twelfth Circuit consisting of the northwest states of Oregon, Washington, Idaho, Montana, and Alaska. This is not a new idea; it has been discussed at least since the 1930's. Indeed in the early 1950's then-Chief Judge Denman briefly promoted the idea for which at that time there was some support among the circuit judges from the northwestern states.

A. *The Northwest as a "bloodbank" for California*

The late Chief Judge Chambers, then only recently appointed to the Ninth Circuit, opposed the idea at least in part because it was his firm belief that only by including the northwestern states in the circuit would sufficient judges be nominated and confirmed by the Senate of the United States to enable the Ninth Circuit to handle with dispatch the appeals that were filed by and on behalf of Californians. In his inimitable style Chief Judge Chambers put it this way: "The Northwest is the bloodbank for California."

An issue before this Commission is whether that belief remains valid. I would argue that it does not. In 1950 the population of the then existing states of the northwest was approximately 5,366,000. Today the population of those states, plus the State of Alaska, is approximately 10,826,000. The combined populations of California, Arizona, Nevada and Hawaii is now 38,524,016. cases filed in the Ninth Circuit in 1952 originating in the northwestern states numbered 142. In 1997 the number of cases originating in those states reached 1,973. I submit that a Twelfth circuit is justified by these numbers. It remains true that the filings originating in California and the states of Nevada, Arizona and Hawaii in 1997 are greater than those of the northwestern states. In that year they were 6,646.¹

These numbers clearly indicate that the case filings in the suggested Twelfth circuit are sufficient to justify its existence. Obviously the same is true of the reconfigured Ninth circuit. The only serious issue is whether the late Chief Judge Chambers, "bloodbank" strategy remains necessary to secure enough circuit Judges in the southwest four-state circuit to dispose in a timely fashion of the appeals originating in California.

I submit that the political power of California, one of the giants of the Union of States, is sufficient to provide that protection. While it has only two senators, the Arizona-Nevada-Hawaii-California Circuit would have a comfortable eight plus many congressmen to assist in protecting California's interest in securing the needed judges. The west is no longer that "area beyond the Rocky Mountains" but an area rivaling the eastern seaboard in national influence.

¹ While these combined figures do not correspond to the total number of case filings in 1997, such discrepancy can be explained by the omission of case filings from Guam (61) and the Northern Mariana Islands (12).

B. An alternative approach

Moreover, there exists a method by which Congress could eliminate, or substantially reduce, California's reliance on the northwest "blood bank." This Commission should press Congress to enact, contemporaneously with the creation of a northwest circuit, a provision requiring that a certain percentage of the judges of the resulting southwest Ninth Circuit be from the State of California. Under the present figures, roughly 75k of the cases filed in the Ninth Circuit, which have their source in the four states of California, Nevada, Arizona, and Hawaii, are California cases. Thus, it would be quite reasonable to provide that three out of five (60 percent) of the appointments should involve residents of California. No doubt were such a requirement written into the law, the Senators of these states would devise an orderly process of rotation of making their recommendations to the President. Moreover, it is likely that the percentage assigned to California would be subject to negotiation. The minimum percentage assigned to California should never be permitted to fall below one-half of the total active judge strength of the southwest circuit.

I cannot predict whether legislation structured along these lines is politically feasible. On the other hand, to release the northwest from the Ninth Circuit and simultaneously to assure California of a respectable share of Ninth Circuit appointments has considerable appeal to both the northwestern states as well as to California. Moreover, it should not antagonize Nevada, Arizona, or Hawaii.

C. A California split between two circuits

It was suggested some years ago that a portion of California remain in the Ninth Circuit and the remainder be assigned to a northwestern circuit. The inevitable differences in the interpretation of California law and the application thereto of federal statutory and constitutional law would make necessary either the creation of ponderous procedures to harmonize these conflicts or the imposition of that duty on the Supreme Court. Moreover, I would suppose that California practitioners and their clients would not welcome such a structure.

I do not favor this partitioning of California.

III. THE FUTURE OF CIRCUIT COURTS OF APPEAL

I have not to this point chosen to address directly the larger questions of whether, how, and, if so, when the existing structure of the Circuit Courts of Appeal should be altered. My focus on the Ninth Circuit is responsive to a significant portion of the mandate given by Congress to this Commission. Nonetheless, it is obvious that there is a link between what is proper for the Ninth Circuit and the future of Circuit Courts of Appeal in general.

It is clear that I do not support the creation of what have been called mega-circuits. In such circuits judges become mere overseers of a large staff, both within and without the chambers, in which an increasing number of cases are decided without a judge, or his or her elbow clerk, having examined the record with care. I do not argue that such practices frequently result in disaster. That would not be true. I do argue that the citizens of the United States, properly informed, would not believe that such a system amounts to equal justice to all? To forfeit the faith that equal justice exists is not a risk that should be encountered lightly.

I recognize that to downsize the geographical limits of circuits, as case filings exceed the limits of direct personal involvement of individual circuit judges, could lead to a substantial increase in the number of circuits. This in turn creates pressures for the creation of one or more judicial bodies to assist the Supreme Court in administering and establishing the law of the United States.

I regard this possibility more remote in time than the existence of mega-circuits. Therefore, at this point the downsizing of circuits to stabilize and maintain the direct involvement of circuit judges in a substantial portion of the case filings is the cautious and proper course to follow.

CONCLUSION

I close my remarks by observing that the geographic reach of the Ninth Circuit is enormous, embracing that remnant of manifest destiny. Guam, as once it did the treaty port portion of Shanghai. This enormity has an undeniable appeal to many, not excluding the judges who sit thereon. Our fascination with size is one shared by most Americans without regard to their station in life. It is part of our sense of identity.

Nonetheless, it is out of place as a factor in determining whether the Ninth Circuit should be split. Our goal should be to design an appellate structure that will most satisfactorily serve the citizens of the states of Alaska, Washington, Idaho, Montana, Oregon, California, Nevada, Arizona, Hawaii, and the Commonwealth of

the Northern Marianas, and the Island of Guam. It is by that standard that the work of this Commission, as it relates to the Ninth Circuit Court of Appeals, should be judged. In that process the many virtues of the Ninth circuit's past should not be controlling.

PREPARED STATEMENT OF CIRCUIT JUDGE DAVID R. THOMPSON

SUMMARY

The Ninth Circuit Court of Appeals has established an Evaluation Committee which Judge Thompson chairs. The Committee is evaluating the processes of the Circuit Court. To date, the Committee has considered issues within the categories of Consistency of Decisions, Regional Sensitivity, Collegiality, Productivity and the Court's En Banc Process.

To identify cases perceived to create conflicts, the Committee will use its staff attorneys to review opinions; it also intends to implement a process to permit district judges and the bar to bring potential conflicts to the Court's attention. The Court is experimenting with the regional assignment of judges, and is examining the issue of "collegiality" in the context of how it may impact the work of the Court. To increase productivity, the Committee is considering an "assault" on pending cases, and making changes in the Court's calendaring procedures. With regard to the en banc process, the Committee intends to make recommendations for increasing the number of judges on the en banc court and decreasing the voting number necessary to take a case en banc.

The work of the Committee is ongoing. The Ninth Circuit can experiment with changes to respond to perceived concerns with far less disruption, and at far less cost, than a whole new divisional structure.

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE: My name is David Thompson. I am a Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit. My chambers are located in San Diego, California. I am also Chairman of the Ninth Circuit Court of Appeals' Evaluation Committee, and it is in that capacity that I appear before you today.

Thank you for the opportunity to present these remarks with regard to your review of the Report of the Commission on Structural Alternatives for the Federal Courts of Appeals regarding the Ninth Circuit and Senate Bill 253, the Ninth Circuit Reorganization Act.

The Evaluation Committee was created by the Ninth Circuit in response to perceived concerns raised by the White Commission Report. The Committee's task however, is part of the Ninth Circuit's ongoing annual reevaluation of its practices and procedures pursuant to its Long Range Plan. The White Commission Report simply focused the task of the Committee.

It is not the task of the Committee to quibble with the White Commission Report. The strengths and deficiencies of that report have been pointed out and analyzed by others. The task of the Evaluation Committee is to accept the perceived concerns expressed in the White Commission Report and by others and to respond to those concerns.

The Committee's mission statement was developed at its first meeting on March 23, 1999. That mission is,

To examine the existing policies, practices and administrative structure of the Ninth Circuit Court of Appeals, in order to make recommendations to its judges to improve the delivery of justice in the region it serves.

The Committee—consisting of Ninth Circuit judges from different regions within the Circuit, as well as a representative from the district court bench, a prominent scholar of the federal appellate courts, and an experienced appellate practitioner—has met on a number of occasions over the past months. The Committee has considered a wide variety of issues within the following categories of subjects:

- Consistency of Decisions
- Regional Sensitivity and Outreach
- Collegiality
- Productivity
- The En Banc Process

The work of the Committee is ongoing. None of the foregoing subjects has been exhausted, although the Committee has considered and given varying degrees of study and evaluation to each.

CONSISTENCY OF DECISIONS

There is no objective evidence—none whatsoever—that decisions rendered by the Ninth Circuit Court of Appeals are infected with inconsistency to a degree greater than any other circuit. Because of the Ninth Circuit's size, however, the perception is that there must be inconsistencies in its decisions. How could there not be with so many panels issuing so many opinions? The answer is that there is not a significant number of inconsistencies in decisions and any conflicts that have occurred have been resolved by the Circuit's en banc process. The task of the Committee, however, is to increase the Circuit's ability to recognize potential or perceived conflicts early on and deal with them immediately. To do this the Committee is considering methods that will enable judges of the district courts and practitioners to bring perceived conflicts to the Court's attention. These methods include establishing an "electronic mailbox" to receive such communications, and participating in outreach programs to contact the bench and bar throughout the Circuit through meetings and focus group encounters.

In addition to increasing the Court's awareness of any potential conflicts in *filed* decisions, the Committee is experimenting with gathering data from all opinions *before* they are filed. To do this, the Committee will draw upon the expertise of the Ninth Circuit's staff attorneys. These attorneys are divided into areas of expertise—criminal law, environmental law, immigration law, to name a few. The staff examines all opinions sent to the clerk's office for filing—before the opinions are filed. The staff has been asked to identify any case that (a) expressly distinguishes one or more Ninth Circuit precedents; (b) expressly rejects one or more precedents of other circuits; (c) has a dissent; (d) holds a federal statute unconstitutional; (e) holds a state statute or initiative measure unconstitutional; or (f) holds invalid a published regulation of any agency or department of the federal government. The idea is to give the staff attorneys objective criteria with which to spot potential conflicts and sensitive decisions and call those to the court's attention. Members of the Evaluation Committee, on an individual judge volunteer basis, will examine reports from the staff to determine whether a conflict appears to be real or more likely falls within those classes of cases in which a panel typically points out differences between existing authority and the present case.

Currently, judges of the Court review opinions when they are first published in slip opinion form. Conflicts may be discovered by this process. It is anticipated, however, that the specialized work of the staff attorneys applying objective criteria will increase the Circuit's ability to identify any conflicts.

REGIONAL SENSITIVITY AND OUTREACH

Responding to regional sensitivity, the Committee is experimenting with the regional assignment of judges. Under this process, at least one judge from the three administrative units in the Circuit—southern, middle and northern—will sit on a three-judge panel hearing cases that arise within that judge's "home" administrative region. Whether such a regional assignment of judges will prove to be a good or a bad idea we do not know. Those who think it's a good idea argue that it is important to have a judge from the area where a case arises sit on a panel that decides the case. Those who think it's a bad idea argue the concept of regional assignment violates the principle of random selection of judges, and that the law federal judges are called upon to apply is uniform national law.

Regional sensitivity also covers outreach to the communities served by the Ninth Circuit. For years, the Court has, on occasion, sat in various cities throughout the Circuit where the Court ordinarily does not sit. Those sittings, however, because of a lack of facilities and the difficulty in gathering enough cases from a particular region to fill a week's argument calendar, have not occurred as often as they might have. The Court is currently experimenting with holding more Court sittings in more cities. The intention is to combine these sittings with bench-bar activities to develop communication with all areas of the circuit and find out if there are problems which the Court should confront.

COLLEGIALITY

In addressing the subject of collegiality, the first task is to define what we mean by that term. If the meaning is derived from the usual comment made of a large circuit that there are too many judges to permit the growth of a warm and fuzzy feeling among them, that, to put it bluntly, is ridiculous. To the contrary, judges

in a larger circuit are not thrown together as often as in smaller circuits, thus reducing occasions for potential tension between differing and strong personalities.

If we mean by “collegiality” the ability of judges to enjoy each other’s company at social gatherings, that is a non-problem because even the most ardent opponents can hit it off with one another for a limited time when they are not called upon to come to grips with issues of substance that divide them.

More aptly, I believe the issue of collegiality can be defined as the ability of judges to hammer out opinions, with knowledge of the idiosyncracies of each other enhanced by having sat together frequently. I believe this is the concept of collegiality expressed in the White Commission Report. It assumes that the law of a circuit will be more consistent (either consistently right or consistently wrong) if the judges of that court over a period of time come to some common understanding of what it will take to get at least two of three judges on a panel to agree to an opinion. This seems to be the aspect of collegiality that we, as a Committee, should be studying. In any event, we are proceeding with defining the term (which the White Commission referred to as “elusive”) and determining how we should respond to the concern that collegiality, whatever it means, is lacking in a large circuit, and if it is, whether it impacts the delivery of justice to any significant degree.

PRODUCTIVITY

The distinguished Senator who chairs the Subcommittee on Administrative Oversight and the Courts has remarked that to accomplish a big job doesn’t necessarily require more people to do the work; it requires people to work smarter. The Ninth Circuit has taken this view to heart as it has coped with extreme vacancies in the number of its active judges. For a good portion of the past few years, the Court has operated with two-thirds or less of its full, active judge complement. The Court has 28 active judgeship slots, and only 21 are currently filled. Regardless of where the blame lies for this failure to provide the Ninth Circuit with the judges it needs to do its work, the Court has held its own. Are the Ninth Circuit judges working hard? You bet they are! The Ninth Circuit is among the fastest, if not *the* fastest, in filing decisions following oral argument. The challenge, however, is to work smarter.

The Evaluation Committee has under consideration the possibility of mounting an “assault” on the volume of pending cases. To do this, the Circuit would assemble panels of judges to attack certain batches of cases, those with similar issues or at least those falling within the same category of law. Panels would decide one after another of these cases as quickly as possible, perhaps hearing oral argument in combined cases which raise common issues. The Court is already doing this to some extent in its calendaring process, but the assault would involve a major effort by all judges of the Court, senior and active alike. The obvious downside of this is that to move judges from what they are currently doing to a new task may not result in any net gain. This proposal is currently under consideration.

Using some features of the “assault” concept, the Committee is currently experimenting with increasing the identification of cases with similar issues and assigning a lead case or cases to a particular panel, notifying the parties in all of the following cases that a decision affecting their case will be made by the lead case. We anticipate lawyers for parties in following cases may participate in sharpening the briefing and argument in the lead case. The lead-case concept concentrates the decisional process in one three-judge panel, rather than defusing it among a number of judges on different panels. Once a decision in the lead case is made, the following cases should settle, or at least they could be disposed of without extensive disposition time.

Increased productivity has already been achieved in the Ninth Circuit by the use of the Court’s motions and screening calendars. Each month, a special screening panel of three judges sits in San Francisco. These special panels are deciding an average of 340 motions, and disposing of 140 appeals on the merits, every month. This is in addition to the Court’s regular work. If the Court had more judges, it could increase this output. Without more judges the Court seems to be at its limit in this area, but the Committee is nonetheless trying to figure out some way to increase this aspect of the Court’s productivity.

THE EN BANC PROCESS

As you know, the Ninth Circuit has a limited en banc. When a case is taken en banc, 11 judges of the Court sit as the en banc court. With the current active judge complement of 21 judges, this represents a majority of the active judges of the Court. But it does not include all of the active judges. A perceived concern is that because all of the active judges do not sit on the en banc court, the en banc decision does not reflect the views of all judges.

In considering this perceived concern, the Committee enlisted the assistance of academic experts. These experts were drawn from a variety of disciplines. They are: Professor Linda Cohen, Department of Economics, University of California, Irvine; Professor John Ferejohn, Hoover Institute, Stanford, California; Professor Lewis Kornhauser, New York University School of Law; Professor Matt McCubbins, Department of Political Science, University of California, San Diego; and Professor Roger Noll, Department of Economics, Stanford University, California. We provided this distinguished group of scholars with copies of the White Commission Report, together with the rules, procedures and statistics relating to the Ninth Circuit's en banc court process. The findings of this group were that the Court could achieve approximately 93 percent representation of the views of all judges of the court if the limited en banc Court consisted of 7, yes seven judges. Increasing that number to 11 achieved a representative percentage of approximately 95 percent, and increasing the number to 13 increased the percentage to about 96 percent. This scientific report indicates there would be little to gain from the standpoint of statistical reliability by increasing the number of judges on the en banc court.

Nevertheless, the Evaluation Committee recognizes that the perception of justice is as important as justice itself. If the perception is that there should be more judges on the en banc court, increasing the number of judges on the en banc court is something the Court should consider and act upon. The Committee intends to make a recommendation to the Court on this subject at the Court's next meeting on July 27, 1999.

Another facet of the en banc process is the ease, or lack thereof, by which a case is taken en banc. Justice O'Connor has suggested that the Ninth Circuit should take more cases en banc. One way to achieve this would be to decrease the number of judges required to vote for en banc. Currently, to take a case en banc requires the affirmative vote of at least a majority of the active judges of the Court. By contrast, in the Supreme Court, certiorari is granted on the vote of four of the nine justices. Question: Should the Ninth Circuit consider adopting a formula by which four-ninths (roughly 45 percent) of the votes of its active judges would be enough to take a case en banc? This would require a statutory change, but the Committee is considering something along this line. As we consider the issue, however, we have in mind that increasing the number of cases taken en banc as well as increasing the number of judges on the en banc court will most assuredly increase the judges' workload—on a Court already operating one-third below its authorized strength. This increased workload might be offset to some extent by choosing judges to sit on an en banc court to hear several cases at one time, rather than choosing judges to sit on separate en banc courts for each en banc case. To this end, the Court has adopted a procedure, on an experimental basis, for the en banc court to sit approximately quarterly throughout the year, hearing a number of cases, rather than having a different en banc court selected to hear each en banc case.

CONCLUSION

There is no "conclusion" to this statement. As stated at the outset, the work of the Evaluation Committee is ongoing. The Ninth Circuit has always been willing to re-evaluate itself, its performance, and to experiment with innovations that would lead to greater efficiency and effectiveness. The annual evaluation of the Ninth Circuit Long Range Plan is specifically designed to do so. Concerns that have surfaced in the Final Report of the Commission can be addressed with far less disruption than a whole new divisional structure.

The Ninth Circuit, through its Evaluation Committee, is in the midst of reevaluating itself, its performance and experimenting with innovations to lead to greater efficiency and effectiveness. The Ninth Circuit Court of Appeals can accomplish these goals, and address the Commission's concerns, with far less cost and far less disruption than a whole new divisional structure.

Respectfully submitted,

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