COMMENTARY

The Commission on Structural Alternatives for the Federal Court of Appeals' Final Report: An Analysis of the Commission's Recommendations for the Ninth Circuit

Chief Judge Procter Hug, Jr., Ninth Circuit Court of Appeals

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INTRODUCTION

In 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals (the "Commission") in response to the most recent controversy over the size of the Ninth Circuit.[1] Congress directed the Commission to study the present circuit configuration, as well as the structure and alignment of the courts of appeals across the nation, with particular reference to the Ninth Circuit.[2] On December 18, 1998, the Commission presented the President and Congress with its Final Report.[3] The report made recommendations that pertained to the circuit structure nationwide and the Ninth Circuit in particular. Draft legislation was attached in an appendix to implement those recommendations. In order to alleviate some of the caseload in the circuit courts of appeal, the Commission recommended that all circuits be permitted to experiment to allow some appeals to be heard by District Court Appellate Panels or by two-judge panels of circuit judges. In this Commentary I will focus primarily on the Commission's recommendations as they pertain to the Ninth Circuit.

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.[4] In reaching this conclusion, the Commission emphasized the importance of having one court of appeals interpret the law within the western United States. 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.[5]

[1] Pub. L. No. 105-119, Nov. 26, 1997, Dept. of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1998, Sec. 305.

[2] *Id.*

[3] *See Commission on Structural Alternatives for the Federal Courts of Appeals*, Final Report (Dec. 18, 1998) [hereinafter *Commission Report*].

[4] *See id.* at 52-57.

[5] *Id.* at 49.

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However, the Commission also recommended structural changes to the Ninth Circuit Court of Appeals.[6] It proposed that the Court of Appeals be divided into three semiautonomous adjudicative divisions, with the State of California divided into two separate divisions. Panel decisions from one division would not serve as binding precedent in either of the other divisions. Moreover, each division would have an independent en banc procedure that would not have precedential effect in the other two divisions.[7]

Given the significance of these recommendations, the critical question is whether the structural changes proposed by the Commission better serve the Commission's stated objective of having consistent federal law throughout the Ninth Circuit.

When a whole new concept of operation for 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. However, the Commission could not say that the statistical data tipped decisively in one direction or the other.[8] 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.[9]

In considering the subjective data, the Commission noted that Ninth Circuit district judges do not find the circuit's case law so unclear that it fails to give them guidance in their decisions, any more often than their counterparts in other circuits.[10] Nonetheless, Ninth Circuit district judges do more frequently report inconsistencies between published and unpublished opinions than their counterparts in other circuits.[11] The Commission then noted that the lawyers of the Ninth Circuit found it "*somewhat*" more difficult to discern circuit law and predict outcomes of appeals than lawyers elsewhere.[12] However, the Commission stated, "But when all is said and done, neither we nor, we believe, anyone else, can reduce con-

[6] *See id.* at 40.
[7] *See id.* at 43.
[8] *See id.* at 39.
[9] *See id.*
[10] *See id.*
[11] *See id.*
[12] *See id.* at 39-40.

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sistency 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."[13]

The Commission acknowledged that the conclusion that a major structural change in the Ninth Circuit Court of Appeals is needed is not based upon any objective findings. Furthermore, the subjective findings are based upon rather minor differences expressed by the Ninth Circuit judges and lawyers, and the Commission's belief that a smaller decisional unit just works best. I discuss these responses to the Commission's Draft Report in opposition to the divisional structure in detail in Part I.

The present structure of the Court of Appeals is a viable mechanism that maintains the consistency of law throughout the 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 can participate in the en banc process through a variety of different procedures including: 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 in order to clarify the circuit law, resolve conflicts, or consider questions of exceptional importance to establish the law of the circuit. Unlike the proposed divisional approach, the current process does not result in an additional level of appeal. In addition, the current structure does not require the parties to litigate the issue of whether an opinion reflects a direct conflict between divisions or merely distinguishes cases involved, as there would be with the divisional approach.

The stated advantages asserted for the divisional approach are heavily outweighed by the disadvantages, as I will point out in detail. For example, 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 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 divi-

[13] *Id.* at 40.

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sional approach.[14]

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 the circuit 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.

I. BACKGROUND

A. *The Commission*

Since 1891, there have been numerous attempts to split the Ninth and other circuits. The most recent effort to divide the Ninth Circuit began in 1989 when eight senators introduced a bill to create a new Twelfth Circuit, which would include Alaska, Hawaii, Idaho, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands.[15] For the next few years similar proposals were made, but none were adopted.[16] However, in 1995, senators introduced Senate Bill 956, the Ninth Circuit Court of Appeals Reorganization Act (the "Act"), which called for division of the Ninth Circuit.[17] In 1997, the Senate approved the Act, voting to split the Ninth Circuit. However, the House of Representatives,

[14] *See* Letter from Chief Judges Harry T. Edwards, Juan R. Torruella, Ralph K. Winter, Edward R. Becker, J. Harvie Wilkinson, III, Richard A. Posner, and Pasco M. Bowman, II, U.S. Court of Appeals, to Members of the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 10, 1998) (available at <http://app.comm.uscourts.gov/report/comments/Becker.pdf>); Letter from Henry A. Politz, Chief Judge, U.S. Court of Appeals for the Fifth Circuit, to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals (Oct. 29, 1998) (available at <http://app.comm.uscourts.gov/report/comments/Politz.pdf>); Letter from Ralph K. Winter, Chief Judge, U.S. Court of Appeals for the Second Circuit, to Justice White and the Members of the Commission (Nov. 5, 1998) (available at <http://app.comm.uscourts.gov/report/comments/Winter.pdf>).

[15] *See* S. 948, 101st Cong., 1st Sess. (1989).

[16] *See Commission Report*, *supra* note 3, at 33-34.

[17] Ninth Circuit Court of Appeals Reorganization Act, S. 956, 104th Cong., 1st Sess. (1995).

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which favored studying the issue, reached a compromise with the Senate to create the Commission on Structural Alternatives for the Federal Courts of Appeals.[18] The primary purpose of the Commission was to study the present circuit configuration as well as the court of appeals structure, with particular attention to the Ninth Circuit.[19] Congress directed the Commission to submit recommendations to the President and Congress regarding appropriate changes in circuit boundaries or structure to expedite and maximize efficiency in appellate caseload disposition.[20]

In December 1997, pursuant to the statute's directive, Chief Justice William H. Rehnquist appointed five members to the Commission, including Retired Supreme Court Justice Byron R. White, Judge Gilbert S. Merritt of the U.S. Court of Appeals for the Sixth Circuit, Judge Pamela Ann Rymer of the U.S. Court of Appeals for the Ninth Circuit, Judge William D. Browning of the District of Arizona, and N. Lee Cooper, Esq., a member of the Alabama Bar and past president of the American Bar Association. The Commission elected Justice White as chair and Mr. Cooper as vice chair. The Commission appointed Professor Daniel J. Meador as executive director.[21]

In carrying out its statutory duty, the Commission reviewed previous studies of the federal appellate system, workload information prepared by the Federal Judicial Center and other statistical information provided by the Administrative Office of the U.S. Courts. In addition, the Commission conducted a series of public hearings and invited anyone that testified to submit written statements. The Commission also employed the help of the Federal Judicial Center to conduct surveys of district and circuit judges, as well as a national sample of more than 5600 lawyers who had handled federal appeals in the preceding twelve months. The Commission received responses from 207 circuit judges (85% response rate), 726 district judges (81% response rate), and 3017 lawyers (54% response rate).[22]

From the information gathered, the Commission circulated a Draft Report[23] and invited comments in order to receive public

[18] *See* Pub. L. No. 105-119, § 305(a), 111 Stat. 2491 (1997).
[19] *See id.* § 305(a)(1)(B)(i)-(ii).
[20] *See id.* § 305(a)(1)(B)(iii).
[21] *See Commission Report, supra* note 3, at 1-2.
[22] *See id.* at 4.
[23] *See id.*

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review before submitting its recommendations to Congress and the President.[24] The Commission received seventy-six comments from interested parties concerned about the issues addressed in the Draft Report.[25] The overwhelming majority of those responding agreed with the Commission's recommendation to leave the Ninth Circuit intact, but were critical of the proposed divisional structure.[26]

B. Changes from the Draft Report to the Final Report

The Final Report retains basically the same recommendations as the Draft Report. Most importantly, the Final Report retains the recommendation that the Ninth Circuit should not be split.[27] Moreover, like the Draft Report, the Final Report proposed 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.[28] Both reports also proposed a separate Circuit Division to resolve conflicts between decisions in the three adjudicative divisions.[29] Similarly, the proposed legislation in the Final Report, like the Draft Report, would authorize (though no longer require) other circuits to utilize the adjudicative divisional approach once the number of judges in each Court of Appeals increases beyond fifteen.[30] This legislation also permits circuits to experiment with two-judge panels and district court appellate panels.[31] Finally, like the Draft Report, the Final Report urges 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.[32] However, the specific legislation the Commission recommended regarding direct appeals, with utilization of the Bankruptcy Appellate Panels, was eliminated from the appendices of the Final Report.

The Commission also made some changes from the Draft Report to the Final Report. The major change was that for circuits other

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[24] *See id.*
[25] *See id.*
[26] *See id.* at ix.
[27] *See id.*
[28] *See id.* at 40, 43, 45.
[29] *See id.*
[30] *See id.* at 61.
[31] *See id.* at 62, 64.
[32] *See id.* at 67.

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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 seventeen.[33] Thus, for other circuits, the adjudicative divisional approach would be optional.[34]

Other changes from the Draft Report to the Final Report include:

(1) The composition of the Circuit Division and method by which Circuit Division judges would be selected was changed from the seven-judge court originally proposed, to a thirteen-judge court, composed of the chief judge and twelve other judges in active status chosen by lot in equal numbers from each regional division. The twelve judges would serve nonrenewable three-year terms.[35]

(2) 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.[36]

(3) 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.[37]

(4) The seven-year sunset provision for the proposed divisional structure was eliminated. Thus, the concept of the divisional approach as an "experiment" with a termination period is no longer the case.[38]

II. MAJOR CONCLUSIONS OF THE FINAL REPORT

After considering the comments on the Draft Report, the Commission submitted its Final Report, largely unchanged, to the President and Congress on December 18, 1998.[39] Following a one-year study, the Commission reached two major conclusions regard-

[33] *Compare id.* at 61 *with Commission on Structural Alternatives for the Federal Courts of Appeals*, Tentative Draft Report 83 (Oct. 1998) [hereinafter *Draft Report*].

[34] *See Commission Report, supra* note 3, at 61-62.

[35] *Compare id.* at 45 *with Draft Report, supra* note 33, at 83.

[36] *See Commission Report, supra* note 3, at 43.

[37] *See id.* at 84.

[38] *See id.* at 86.

[39] *See id.* at ix, 4.

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ing the Ninth Circuit: (1) the circuit should not be split, and (2) the circuit should be divided into intracircuit adjudicative divisions.

A. *No Split of the Ninth Circuit*

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.[40]
>
> . . .
>
> 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.[41]
>
> . . .
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> 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.[42]
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> . . .
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> 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 adminis-

[40] *See id.* at 29.
[41] *See id.* at 6.
[42] *See id.* at 52.

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trative structure.[43]

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:

(1) Twenty out of the twenty-five persons testifying at the Seattle Hearing of the Commission.
(2) Thirty-seven out of thirty-eight of the persons testifying at the San Francisco Hearing of the Commission.
(3) The Governors of the States of Washington, Oregon, California, and Nevada.
(4) The American Bar Association.
(5) The Federal Bar Association.
(6) The United States Department of Justice and the U.S. Attorneys within the Ninth Circuit.
(7) All of the Public Defenders within the Ninth Circuit.
(8) Respected scholars Charles Alan Wright, Arthur Hellman, Anthony Amsterdam, Erwin Chemerinsky, Judy Resnik, Jessie Choper, and Margaret Johns.
(9) The past Director of the Federal Judicial Center, Judge William Schwartzer.
(10) The Chairman of Long-Range Planning for the U.S. Federal Courts, Judge Otto Skopil.

B. *Proposal for Adjudicative Divisions*

Having strongly opposed the division of the Ninth Circuit Court of Appeals, the Commission proceeded to recommend a revised method of operation for the Ninth Circuit through intracircuit adjudicative divisions. In evaluating this recommendation, the essential question is whether the proposed system of operation accomplishes the acknowledged goal of having a single court interpret and apply the federal law in the nine western states and the Island Territories in an efficient and effective manner. The Ninth Circuit's position, that the current circuit structure is working well

[43] *See id.*

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and that a great majority of judges and lawyers in the Ninth Circuit are opposed to a split, was expressed to the Commission. The position of the Ninth Circuit was confirmed by the Commission's survey of Ninth Circuit judges, in which over two-thirds of the judges that responded expressed the above opinion.

The Commission has proposed that the Ninth Circuit Court of Appeals be divided into three semiautonomous adjudicative divisions, with the State of California split between two separate divisions.[44] 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.[45] The Commission, in its Final Report, stated that the nonbinding effect of the opinions of one division on the other divisions is essential to its conception of the operation of the divisions.[46] Comments recommending changes to this aspect of the proposal were rejected as antithetical to the proposed divisional structure.

III. EVALUATION OF MAJOR CONCLUSIONS OF THE FINAL REPORT

A. *Discussion of the Recommendation to Not Split the Ninth Circuit*

In reaching its conclusion that the Ninth Circuit should not be split, the Commission honored the "undebatable" principle that courts should not be realigned or restructured based on the outcomes of particular judicial decisions, thus preserving the independent nature of the judiciary.[47] After examining the evidence, the Commission accurately recognized that the current administration of the Ninth Circuit is "at least on par" with other circuits and "innovative in many respects."[48] Moreover, the Commission correctly identified that there was "no persuasive evidence that the Ninth Circuit is not working effectively."[49]

Notably, the Commission warned of the "substantial cost of administrative disruption [and] monetary costs of creating a new circuit."[50] Moreover, after examining more than a dozen problematic

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[44] *See id.* at 41.
[45] *See id.* at 43.
[46] *See id.* at 51.
[47] *See id.* at 6.
[48] *See id.* at ix.
[49] *See id.* at 29.
[50] *See id.*

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proposals to split the circuit, the Commission warned Congress of the "daunting" challenge that would result if Congress rejected the Commission's strong recommendation not to split the circuit.[51] As I have noted, this 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 others who submitted written statements or gave oral testimony before the Commission. As the Commission accurately concluded, maintaining the Ninth Circuit as a single adjudicative body is essential to maintaining uniformity in the law, respecting the character of the western region, and retaining the practical advantages of the current Ninth Circuit administrative structure.

B. *Critique of the Proposal for Adjudicative Divisions*

Having strongly opposed the division of the Ninth Circuit, the Commission proceeded to recommend a revised method of operation for the Ninth Circuit Court of Appeals through intracircuit adjudicative divisions.[52] In evaluating this recommendation, one must consider whether the suggested revision of the operation of the Court of Appeals is better than the present system in accomplishing the acknowledged goal of having a single court interpret and apply the federal law in the nine western states and the Island Territories.

As stated previously, 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 following subsections examine the findings that the Commission relied upon to support the divisional structure and the concerns raised by those who submitted written comments to the Commission in opposition to the divisional structure.

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[51] *See id.* at 53.
[52] *See id.* at 41.

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1. Findings in Support of Divisional Structure

It is important to assess the evidence that persuaded the Commission to conclude that a change in the operation of the Ninth Circuit Court of Appeals is required. 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 efficient 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.[53]

The Final Report then considered the subjective opinions of the district judges and lawyers in the Ninth Circuit. As the Final Report notes, the district judges in the Ninth Circuit do not find the circuit's case law so unclear that it fails to give them guidance in their decisions, anymore often than their counterparts in other circuits. Yet the Final Report also states that the Ninth Circuit district judges more frequently report that difficulties stem from inconsistencies between published and unpublished opinions.[54]

With regard to the lawyers in the Ninth Circuit, the Final Report indicates that Ninth Circuit lawyers found it somewhat more difficult to discern circuit law and predict the outcome of appeals than lawyers elsewhere. However, the Commission stated that "when all is said and done, neither we, nor anyone else, can reduce consistency and predictability to statistical analysis. 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."[55]

Moreover, the reaction of lawyers is a concern that the Ninth Circuit can address within its current structure by exploring whether there really is a problem, and if so, the source of the prob-

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[53] *Id.* at 39.
[54] *See id.*
[55] *Id.* at 40.

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lem and what reasonable steps can be taken to remedy the situation.[56] However, the fact that there is just somewhat more difficulty in the Ninth Circuit as opposed to other circuits does not justify a major change in the structure of the Ninth Circuit Court of Appeals.

Thus, it would appear that the Commission's conclusion that a the major structural change in the Ninth Circuit Court of Appeals is necessary is not based upon any objective findings. Furthermore, the Commission's 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.

2. Responses in Opposition to Divisional Structure

There were many responses to the Commission in opposition to this divisional structure, as the structure 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 evaluated the Commission's recommendations from the perspective of a litigant that has participated in over forty 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 administra-

[56] In response to these concerns, the Ninth Circuit has created a Ninth Circuit Court of Appeals Evaluation Committee, as part of the circuit's long range planning process, to address the concerns raised in the Final Report of the Commission. Among other issues, the committee intends to specifically address whether there is a problem with consistency among Ninth Circuit opinions and if so, ways to better monitor panel opinions throughout the circuit.

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tion of justice in the Ninth Circuit and ultimately across all federal courts of appeals."[57]

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."[58]

Governor Pete Wilson, then Governor of the State of California, stated 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.[59]

[57] Comments of the United States Department of Justice on the Tentative Comments of the Commission on Structural Alternatives for the Federal Courts of Appeals 1 (Nov. 17, 1998) (available at <http://app.comm.uscourts.gov/report/comments/DOJ.htm>).

[58] Letter from Dianne Feinstein, U.S. Senator, to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals 1-2 (Dec. 3, 1998) (on file with author).

[59] Letter from Daniel M. Kolkey, Counsel to the Governor and Legal Affairs Secretary,

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The Ninth Circuit Court of Appeals, the Ninth Circuit Judicial Council, and the Ninth Circuit District Judges Association all voiced opposition to the divisional approach.[60]

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."[61]

The Earthjustice Defense Fund called the proposed divisional structure "a solution in search of a problem with little evidence to support the need for such changes." They cited 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.[62]

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

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to Members of the Commission on Structural Alternatives for the Federal Courts of Appeals 1 (Nov. 6, 1998) (available at <http://app.comm.uscourts.gov/report/comments/Kolkey.htm>).

[60] See Letter from Proctor Hug, Jr., Chief Judge, U.S. Court of Appeals for the Ninth Circuit, to Justice Byron R. White and Members of the Commission (Oct. 29, 1998) (available at <http://app.comm.uscourts.gov/report/comments/HUG-Letter.html>); Letter from Proctor Hug, Jr., Chief Judge, U.S. Court of Appeals for the Ninth Circuit, to Justice Byron R. White and Members of the Commission (Oct. 29, 1998) (available at <http://app.comm.uscourts.gov/report/comments/JUDCNCL.htm>); Letter from Judge Judith N. Keep, President, Ninth Circuit District Judges Association, to Justice Byron R. White and Members of the Commission (Nov. 2, 1998) (available at <http://app.comm.uscourts.gov/report/comments/Keep.pdf>).

[61] Letter from Adrienne A. Berry, National President, Federal Bar Association, to Justice Bryon R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals 2 (Nov. 5, 1998) (available at <http://app.comm.uscourts.gov/report/comments/FBA.htm>).

[62] *See* Letter from Todd D. True, Earthjustice Legal Defense Fund, to Members of the Commission on Structural Alternatives for the Federal Courts of Appeals 1-2 (Nov. 6, 1998) (available at <http://app.comm.uscourts.gov/report/comments/EarthJustice.pdf>); *Draft Report*, *supra* note 33, at 36.

> 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.' We believe this same concern applies with equal force to the proposed division of any state." In addition, the Los Angeles County Bar Association also noted the following new problems that the proposed divisional arrangement would create: added inconvenience and cost to both the courts and litigants, inconsistent interpretation of California state law, increased forum shopping and delay tactics, and increased confusion for litigants.[63]

The Commission's Draft Report had proposed that all circuits should consider adopting the adjudicative division structure when the number of circuit judges exceeds thirteen, and that it be mandatory when the number exceeds seventeen. This evoked a firestorm of opposition from the other circuits. The following are some of the comments submitted to the Commission.

> 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."[64]

> 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

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[63] Letter from Lee Smalley Edmon, President, Los Angeles County Bar Association, to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals 2-3 (Nov. 3, 1998) (available at <http://app.comm.uscourts.gov/report/comments/ninth.html>).

[64] Letter from Chief Judges Harry T. Edwards, Juan R. Torruella, Ralph K. Winter, Edward R. Becker, J. Harvie Wilkinson, III, Richard A. Posner, and Pasco M. Bowman, II, U.S. Court of Appeals, to Members of the Commission on Structural Alternatives for the Federal Courts of Appeals 1 (Nov. 10, 1998) (available at <http://app.comm.uscourts.gov/report/comments/Becker.pdf>).

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is hardly working so badly that mandatory resort to a very different and untested form of organization 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."[65]

Judge Politz, the Chief Judge of the Fifth Circuit, stated that the judges on his court are very concerned and voiced considerable reservations about the proposal for mandatory divisions for circuits with eighteen or more active judges.[66] 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."[67]

The New York City Bar Association opposed the recommendation that the federal courts of appeals be required to split themselves into divisions. They recognized that such division is "very nearly the functional equivalent of splitting it into separate circuits." They concluded that this should only be done in extreme circumstances.[68]

The Federal Bar Council's Committee on the Second Circuit Courts opposed divisions and argued that the divisional system

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[65] Letter from Ralph K. Winter, Chief Judge, U.S. Court of Appeals for the Second Circuit, to Justice White and the Members of the Commission 1-2 (Nov. 5, 1998) (available at <http://app.comm.uscourts.gov/report/comments/Winter.pdf>).

[66] *See* Letter from Henry A. Politz, Chief Judge, U.S. Court of Appeals for the Fifth Circuit, to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals 1 (Oct. 29, 1998) (available at <http://app.comm.uscourts.gov/report/comments/Politz.pdf>).

[67] Letter from Edith H. Jones, Judge, U.S. Court of Appeals for the Fifth Circuit, to Justice Byron R. White, Chair, Commission on Structural Alternatives for the Federal Courts of Appeals 4 (Nov. 6, 1998) (available at <http://app.comm.uscourts.gov/report/comments/Jones.htm>).

[68] Comments of the Association of the Bar of the City of New York on the Tentative Draft Report of the Commission on Structural Alternatives for the Federal Courts of Appeals 1 (Oct. 26, 1998) (available at <http://app.comm.uscourts.gov/report/comments/NYBar.htm>).

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would lead to greater disharmony in circuit law and would add an additional layer of review.[69]

The Chicago Council of Lawyers opposed the divisional organization of the Court of Appeals, and stated that "[T]his is another bad solution to a 'not proven' problem." They stated 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 did not concede that either of these are genuine concerns. It did point out, however, that the divisional approach will "if anything increase uncertainty and hinder collegiality."[70]

Perhaps as a result of such comments, the Final Report proposed legislation that made the divisional organization optional for the other circuits, though it remains mandatory for the Ninth Circuit.

C. *Comparison of Circuit Divisions Proposal to Current Operation of the Ninth Circuit*

This subsection examines 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.

1. Present Operation of the Court

Under the present operation of the Ninth Circuit, as with other circuits, panel decisions are binding throughout the circuit and other panels are obligated to follow that precedent unless it is overruled en banc.[71] The Ninth Circuit has developed innovative,

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[69] *See* Comments of the Federal Bar Council's Committee on Second Circuit Courts on the Tentative Draft Report of the Commission on Structural Alternatives for the Federal Courts of Appeals 2-3 (Nov. 6, 1998) (available at <http://app.comm.uscourts.gov/report/comments/FBC.pdf>).

[70] Letter from Thomas R. Meites, Chicago Council of Lawyers, to Daniel J. Meador, Executive Director, Commission on Structural Alternatives for the Federal Courts of Appeals 3-4 (Nov. 5, 1998) (available at <http://app.comm.uscourts.gov/report/comments/CCL.pdf>).

[71] *See* FED. R. APP. P. 40; Ninth Circuit Rules 35-1 to 35-3; Ninth Circuit General Order chapter V.

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efficient, and effective ways to ensure consistency among panel opinions. The circuit utilizes a sophisticated issue-coding procedure that notifies all panels when the same issue is before two or more panels.[72] The first panel to address the issue has priority to resolve the issue. However, there is frequently contact between panels that have cases involving the same issue, and one panel will often consider another panel's view. In addition to the issue-coding system, the Ninth Circuit has recently adopted a procedure to closely monitor the effect of recent opinions on cases that are pending before three-judge panels. Prior to publication of an opinion, a prepublication report is circulated that informs the entire court of the panel's decision and cases which are pending that may be affected by that decision. Both the issue-coding system and the prepublication reports allow the Ninth Circuit to function effectively as a large court while maintaining consistency in opinions. Although there are suggestions that Ninth Circuit law is inconsistent, there is no empirical evidence that the conflict between panels of the Ninth Circuit is any greater than any other circuit.

Once a panel decision is filed, the Ninth Circuit employs a limited en banc process that operates effectively and involves the entire court. Any circuit judge, including a senior judge, can call for a "stop clock" — an informal procedure utilized when a judge wants the panel to consider an objection to a part of the decision.[73] Any judge, including a senior judge, can call for en banc and write memos supporting the en banc call or commenting on the en banc call of another judge.[74] Generally, many insightful memos are circulated. After the exchange of memos among the entire court, all active judges vote on whether to take a case en banc.[75] This 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.[76] If the case is not taken en banc, this is a decision of the full court that the panel opinion should stand. If the case is taken en banc, the eleven-judge en banc court is composed of the chief judge and ten judges randomly drawn from all active

[72] *See* Ninth Circuit General Order chapter 4.1.

[73] *See* Ninth Circuit Rule 35; Ninth Circuit General Orders chapter V, 5.1(a)(3), (7), 5.4.

[74] *See* Ninth Circuit General Order 5.1(b)(1).

[75] *See id.*

[76] *See id.*

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judges.[77] Any active judges who have not been randomly selected three successive times are automatically placed on the next en banc court to ensure that all active judges participate in at least every fourth en banc decision.[78] The limited en banc decisions are fully accepted by the court as being the final decision of the court as a whole.

Once the limited en banc decision is final, a majority of the active judges can have the decision reviewed by the full court.[79] 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.[80] From 1980 to 1997, there have been 173 cases heard by the limited en banc court.[81] Thirty-three percent of the decisions were unanimous and seventy-five percent of the decisions were rendered by a majority vote of eight-to-three or greater. This is a strong indication that a full court en banc would not have reached a different decision. In the calendar year 1996, there were twenty-five calls for en banc that were voted on by the full court and twelve of the cases were taken en banc. In calendar year 1997, there were thirty-nine calls for en banc that were voted on by the full court and nineteen of the cases were taken en banc. Finally, in calendar year 1998, there were forty-five calls for en banc that were voted on by the full court and sixteen 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 also by those cases that were called for en banc, upon which the full court voted. The full court participates not only in cases which are actually taken en banc, but in every case in which a judge has called for en banc.

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.[82] However, these are minor adjustments

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[77] *See id.* at 5.1(a)(4)

[78] *See id.* at 5.0.

[79] *See id.* at 5.1(b)(1).

[80] *See id.*

[81] *See id.*

[82] The Ninth Circuit Court of Appeals Evaluation Committee intends to reevaluate the limited en banc procedure to address concerns raised in the Commission's report and some of the responses. Questions the committee will examine include (1) whether the en banc court should be compromised of more judges, (2) whether en banc hearings should be held more often, (3) whether the selection and composition of the en banc court should be modified, and (4) whether Ninth Circuit opinions that create inter-circuit conflict should be given special consideration in the en banc process.

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that could be made while retaining the function of resolving circuit-wide precedent both as to conflicts and as to questions of exceptional importance.

2. Divisional Operation

The basic structure of the proposed divisional approach is set out in Part II.B. Under the proposed divisional structure, 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 would only resolve conflicts between panels in different divisions. Unless there is a conflict with a decision from another division, the law of each division would not be reviewed within the circuit, which would leave questions of exceptional importance unreviewed by the Ninth Circuit. A very significant difference between the divisional approach and the present system is the lack of participation by all judges in the development of circuit-wide law. A judge in one division would not be able to call for en banc in another division. More importantly, a judge in one division could not participate in the development of circuit law in another division through the stop clock or en banc procedure, or by circulating memos in support of or opposition to en banc consideration.

In addition to the lack of full court participation at the divisional level, there are also problems with the composition and procedure of the proposed Circuit Division. The makeup of the Circuit Division would represent the court as a whole numerically, as opposed to proportionately. The Circuit Division would be composed of the chief judge and four judges from each division.[83] Despite substantial differences in caseload among the divisions, all three divisions would be represented on the Circuit Division by an equal number of judges. For example, the Northern Division has only twenty-two percent of the caseload, while the Southern Division has forty-seven percent of the caseload.[84] Accordingly, one might expect the Southern District to have proportionally greater representation on the Circuit Division court than the Northern Division. However, the two divisions would be equally represented.

Moreover, the Commission's proposal does not include a

[83] *See Commission Report*, *supra* note 3, at 45.

[84] *See id.*

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mechanism that allows judges to request that the Circuit Division hear a particular case. The proposed statute specifies that only a party to a case can make such a request.[85] Furthermore, if a party requests review, the Circuit Division would have discretion to decide whether to take the case. For example, the Circuit Division could decide that a particular case does not conflict with existing precedent, regardless of the majority opinion of the circuit judges as a whole. Thus, the Circuit Division, could, within its discretion, choose not to resolve conflicting precedent among the divisions. Finally, the Circuit Division presents an additional level of appeal for litigants before they achieve finality.

3. Relative Advantages of the Two Structures

Under 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 all the circuit judges in the development of circuit law. The panel decisions of all the circuit 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 circuit 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. Furthermore, 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 present circuit court structure also utilizes the advantage of diversity in the background, experience, and geographical identity of a large number of judges. This diversity facilitates the generation of important insights into the application and development of federal law throughout the nine western states and Island Territories.

The asserted advantages of the divisional approach, as detailed

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[85] *See id.* at 95.

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in the Final Report, seem to be based primarily upon the Commission's opinion that a smaller court works better. The Commission asserts that smaller decisional units would promote consistency and predictability because the judges in the smaller units would 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. The 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. The question is whether these advantages really exist and, if so, whether they are outweighed by the disadvantages of the divisional approach.

Under the divisional approach, all judges would not be able to participate in resolving circuit law, as at present. The only participation would be from within the division. Moreover, as proposed in the Final Report, resident judges within a division that are assigned to another division, would, for the duration of their three-year assignment, 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, the judge would have no say in the en banc process of the Northern Division. The 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 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 and resolve such conflicts without the participation of any other judges in the circuit. The Circuit Division procedure could only be initiated by a party, not a judge, and the Circuit Division could, by a vote of those Super Judges, elect not to consider a case.

There are also statutory problems lurking in the new procedure, some of which we may not realize until the procedure is implemented. My analysis of the proposed statute reveals two problems as currently drafted. First, for the Circuit Division to resolve conflicts there would have to be two contemporaneous conflicting decisions. If a case in the Northern Division conflicts with a case de-

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cided in the Middle Division two years prior, the Circuit Division could only affirm, reverse, or modify the Northern Division case. It could not modify the Middle Division case. The statute does not provide for the Circuit Division decision to become the law of the circuit.[86] The decision of the Circuit Division would only affect the decision of the Northern Division.

Second, the Final Report states that existing circuit law would remain in effect until overruled by a division.[87] However, the statute does not include language to implement this provision.[88] As proposed, the statute would create real problems in determining circuit law. Assuming, however, that existing circuit law would remain in effect as the Final Report states, and the statute is so amended, a significant problem still exists. 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 could be modified. The existing precedent would remain in effect in the other divisions.

In addition to the procedural problems I have identified, there could be others within the statute that may not become apparent until the statute is in effect. This potential for problems illustrates why it is advantageous to allow the issues and concerns raised in the Commission's Final Report to be addressed by the Ninth Circuit. It is preferable to allow the circuit to deal with these issues rather than implement a whole new adjudicative structure that will inevitably be disruptive to the court and litigants.

D. *Problems with How the Adjudicative Divisions Would Work on a Practical Level*

In addition to the overall disadvantages of the divisional approach and the problems under the proposed statute, there are significant issues regarding how the divisional structure will operate on a practical level. 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 inter-

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[86] *See id.* at 94-95.
[87] *See id.*
[88] *See id.* at 95.

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> mediate 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.[89]

The Commission also indicated that the divisions should be composed so as to equalize the per judge caseload, with each division having a maximum of eleven judges and a minimum of seven. As I will demonstrate, an equal division of the caseload would dictate that the divisions will consist of six judges in the Northern Division, nine in the Middle Division, and thirteen in the Southern Division.

The caseload for the Ninth Circuit Court of Appeals for the fiscal year that ended September 30, 1998, was 9070. The appeals originating from each of the divisions was as follows:

Northern Division	1988	22%
Middle Division	2831	31%
Southern Division	4251	47%
Total:	9070	100%

Thus, the average caseload for the twenty-eight judges authorized for the Ninth Circuit Court of Appeals would be 324 appeals per judge.[90] Accordingly, the number of judges to be fairly allocated to each Division would be:

Northern Division	1988 divided by 324 = 6
Middle Division	2831 divided by 324 = 9
Southern Division	4251 divided by 324 = 13
Total:	28[91]

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[89] *Id.* at 49.

[90] 9070 divided by 28

[91] 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 1061 per panel, as opposed to 284 cases per judge or 852 per panel in the Northern Division. Since the judges sit in panels of three, 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 Divi-

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Following the formulation provided by the Final Report, that the majority of the judges be residents of the division,[92] with other division judges being assigned to that division, the result would be as shown on the following chart:

Divison	Present Authorized Judgeships in Division	Judges Allocated by Caseload	Majority of Allocated Judges	To be Assigned from Other Divisions	To be Assigned to Other 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 fifty 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 or the en banc court of the division in which the judge resides. Furthermore, the judge would not be expected to keep abreast of 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 also presents an interesting scenario. Under the proposed statute, the presiding judge would be selected in accordance with the same age and time limitations as a chief judge. If more than one judge satisfies this criteria, then the presiding judge would be selected in accordance seniority, provided that only judges resident in and assigned to the division are eligible.[93] The process would operate as follows: The presiding judge of the Northern Division would be the active judge under age sixty-five with the most seniority, unless, of course, the judge is one of the five judges randomly assigned to another division. In that case, the next judge in seniority that was not assigned to another division would become the presiding judge. 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, the only judge eligible under the statute to be the presiding judge is the newest judge, who began work in February of 1999, unless, of course, he is assigned to

sion having six judges.

[92] *See Commission Report*, *supra* note 3, at 43.

[93] *See id.* at 94.

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another division. In that event, one of the new judges, yet to be appointed and confirmed, would take the position. In the Southern Division, the active judge under age sixty-five with the most seniority would be the presiding judge, unless, of course, the judge 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-, two-, and three-year terms.

The composition of the Circuit Division that resolves circuit conflicts also presents some interesting questions. The thirteen-judge court is composed of the chief judge and four active judges chosen by lot from each division.[94] The Northern Division, which has less than twenty-two percent of the caseload and six judges allocated, would have representation on the Circuit Division court equal to the Southern Division, which has forty-seven percent of the caseload and thirteen 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 result is that the Circuit Division court is much less representative of the full court then our present limited en banc court. 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 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. As demonstrated, the proposed divisional structure creates some serious practical problems as compared to the present operation of the Ninth Circuit.

CONCLUSION

In sum, the Commission has not shown that the proposed divisional structure will better serve the parties, lawyers, judges, and citizens of the Ninth Circuit than the current structure and procedures. The disadvantages of the divisional structure far outweigh its advantages. First, under the proposed structure, all judges could not participate in resolving the circuit law as at present. The

[94] *See id.* at 45.

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only participation would be within the division. Second, resident judges within a division that are assigned to another division would not participate in panels within their resident division for a three-year period and would, for that period, have no say in the en banc consideration of panel decisions within their resident division. Third, the proposed Circuit Division would create an additional level of appeal before finality. Fourth, conflicts would be resolved by a Circuit Division court comprised of thirteen judges. This Circuit Division court would be neither representative of the full court nor proportionately representative of the divisions. The proposed Circuit Division creates a category of what, in effect, would be Super Circuit Judges, for three-year terms with greater power in determining the law of the circuit. Fifth, the proposed structure does not permit judges throughout the circuit to participate in the decisions of the Circuit Division with regard to whether it should take a case or let a panel decision stand. Sixth, the statutory provisions as proposed by the Commission have procedural problems, including whether conflicts would be resolved by the Circuit Division only when there are contemporaneous conflicting decisions and the role of existing circuit precedent. Finally, there are a number of practical problems with the divisional approach regarding the manner in which judges would be designated and assigned among the divisions, and the manner in which the Circuit Division would operate.

The work of the Commission has been valuable in placing in historical prospective 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

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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 Commission's Final Report can be addressed with far less disruption than a whole new divisional structure.

The Commission indicated that the Ninth Circuit experience is supposed to serve as an experimental model for how a large circuit can best operate. Allowing the Ninth Circuit to work out the objectives of the Commission with flexibility, rather than imposing a rigid and defective statutory divisional structure, would provide the best model for the future.

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