

Comparative Analysis of Alternative Plans for the Divisional Organization of the Ninth Circuit

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INTRODUCTION

This symposium necessarily implicates the work of the Commission on Structural Alternatives for the Federal Courts of Appeals ("The Commission"), which was created by statute on November 26, 1997, and submitted its Final Report to the President and the Congress on December 18, 1998. The Commission grew out of a debate over proposed legislation that would split the Ninth Circuit into two smaller circuits. Part of its charge was to "study the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit," and to recommend "such changes in circuit boundaries or structure as may be appropriate"¹

The Commission recommended against splitting the Ninth Circuit, and recommended instead that the Ninth Circuit be reorganized into three regional divisions with independent adjudicative responsibilities for their respective regions, with a fourth division created solely to resolve decisional conflicts among the divisions. This innovative and somewhat unexpected recommendation was first advanced in the Commission's Draft Report, and was vigorously reaffirmed in the Commission's Final Report. I will refer to this recommendation as the "Commission's Plan." A majority of the judges of the Ninth Circuit in regular active service have opposed this recommendation, and it has not drawn applause from commentators.

I write as one of the progenitors of the concept of divisional organization of large circuits. I seek to defend the merit of the idea, and to draw attention to the little-noticed fact that the Commission's plan differs significantly from several alternative plans for the divisional organization of the Ninth Circuit that were proposed to the Commission. I do not think that the Commission's Plan is the best implementation of divisional organization of large circuits. I want to contrast the Commission's Plan with two of the alternatives that it rejected, and to advocate that Congress pay serious attention to one of these alternatives.

I trust readers will not be shocked that my preferred alternative is the plan that I proposed to the Commission as its consultant on divisional organization of the Ninth Circuit. I will refer to this as the "Oakley Plan." The other alternative plan that I wish to publicize and discuss is that of Chief Judge Proctor Hug of the Ninth Circuit. On October 7, 1998, the

¹ Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 2 [hereinafter Final Report]. Citations to Final Report can be found at <http://app.comm.uscourts.gov> (last visited Oct. 25, 2000). Hard copies of all cited Final Report documents are on file with the UC Davis Law Review.

Commission published its Draft Report and invited written comments. Among those responding to the Draft Report's recommendation of the divisional organization of the Ninth Circuit was Chief Judge Hug. Speaking for a majority of the circuit's judges, Chief Judge Hug defended the status quo of the Ninth Circuit's organization and administration. Recognizing that the Commission was likely to persist in recommending some form of divisional organization of his circuit, Chief Judge Hug presented to the Commission an alternative plan for such a divisional structure. I will refer to this as the "Hug Plan." To make them more readily accessible to interested parties, I reprint as appendices to this paper excerpts from the Commission's Final Report setting forth the Commission's Plan,² as well as the documents in which the Oakley Plan³ and the Hug Plan⁴ were proposed to the Commission.

I. BACKGROUND

The Final Report of the Commission notes that early in its history the Commission met with a small group of academicians interested in judicial administration. That meeting was held in Washington, D.C., in March 1998, almost exactly two years before this symposium. With the exception of Professor Paul Carrington, the entire academic cohort is here reunited: Professors Baker, Hellman, Robel, Tobias, and myself. This circumstance gives new meaning to the catch-phrase from *Casablanca*: "Round up the usual suspects."

During the March 1998 colloquy between the Commissioners and the usual suspects, I advocated the divisional organization of the larger circuits as a structural alternative to either circuit-splitting or the accommodation of existing organizational structures to circuits of ever larger size. I was joined in this advocacy by one of the Commissioners, Judge Pamela Rymer of the Ninth Circuit. The Commission later requested me to prepare a memorandum studying the whole range of divisional schemes that might be found presently in place among state intermediate courts of appeals, that had been tried in the past by federal courts of appeals, or that had otherwise been recommended by various parties for consideration by the Commission. I was charged as well with evaluating several proposals for divisional operation of the courts of appeals that third parties had submitted to the Commission, and with

² See *infra* Appendix A.

³ See *infra* Appendix B.

⁴ See *infra* Appendix C.

recommending my own preferred plan for the divisional organization of the Ninth Circuit. On July 18, 1998, I submitted to the Commission the memorandum that is reprinted as Appendix B.

II. THE STATUS QUO

A brief description of the present administrative and adjudicatory structure of the Ninth Circuit provides a useful benchmark for studying the alternative plans for divisional organization of the circuit.⁵

The Ninth Circuit is authorized to have twenty-eight circuit judges in regular active service. Of these twenty-eight judgeships, twenty-four had been filled as of the date of this symposium.⁶ In addition, there are currently twenty senior circuit judges of the Ninth Circuit.

The administrative headquarters of the circuit is located in San Francisco. There are three regional "administrative units."

- The Northern Unit is based in Seattle, and is headed by Judge Sidney Thomas, whose chambers are in Billings, Montana. It

⁵ This description was prepared for presentation at this symposium on March 24, 2000. There are three generally accessible sources of information on the structure and operations of the Ninth Circuit. First, the Circuit Rules and the "Introduction—Court Structure and Procedures" added to them when the Circuit Rules were revised and restructured effective January 1, 1997. See *Federal Rules of Appellate Procedure with Ninth Circuit Rules and Circuit Committee Advisory Notes* in WEST'S CALIFORNIA RULES OF COURT FEDERAL 1, 10 (2000). Second, the Circuit Executive for the Ninth Circuit maintains a "Ninth Circuit Homepage" which includes a list of active and senior judges. See *United States Courts for the Ninth Circuit*, at <<http://www.ce9.uscourts.gov/>> (visited Sept. 21, 2000). The Ninth Circuit Homepage also has a link to a second website which is maintained by the Clerk of the Ninth Circuit. See *United States Court of Appeals for the Ninth Circuit*, at <http://www.ca9.uscourts.gov/> (visited Sept. 21, 2000). Third, the Annual Report of the Director of the Administrative Office of the United States Courts contains an array of circuit-specific case-processing data. Since 1997 these reports, still published as paperbound books, have also been published electronically. They may be viewed and downloaded in Adobe Acrobat format at <http://www.uscourts.gov/judbus1999/index.html> (visited Sept. 21, 2000). Some of the details and statistics presented in this overview of the Ninth Circuit's current structure and operations were obtained in by the author in a telephone interview with Cathy Catterson, Clerk of the Ninth Circuit. See Telephone Interview with Cathy Catterson, Clerk of the Ninth Circuit Court of Appeals (Mar. 23, 2000).

⁶ As of September 21, 2000, the Ninth Circuit had 25 judges in regular active positions. Two new judges were appointed on May 25 and July 26, 2000. The Ninth Circuit's website lists these two new judges but does not yet reflect the move of Judge James R. Browning from active to senior status as of September 1, 2000. See <http://www.ce9.uscourts.gov/>, link to "Court of Appeals Active and Senior Judges" (visited Sept. 21, 2000). Judge Browning's change in status is posted on the national website for the federal court system. See *Vacancies in the Federal Judiciary*, at <http://www.uscourts.gov/vacancies/judgevacancy.htm#ninth> (visited Sept. 21, 2000).

consists of the federal districts located in the states of Alaska, Idaho, Montana, Oregon, and Washington (both the Eastern and Western Districts). Oral argument in cases arising within these districts is normally heard in either Seattle or Portland.

- The Middle Unit is based in San Francisco, and is headed by Judge Mary Schroeder, whose chambers are in Phoenix. It consists of the federal districts located in the states of Arizona, Nevada, and Hawaii, as well as the Eastern and Northern Districts of California, and the districts of Guam and the Northern Mariana Islands. Oral argument in cases arising within these districts is normally heard in San Francisco.
- The Southern Unit is based in Pasadena, and is headed by Judge Pamela Rymer, whose chambers are in Pasadena, California. It consists solely of the Central and Southern Districts of California. Oral arguments in cases arising from these districts is normally heard in Pasadena.

Panels sit regularly in Honolulu (twice annually) and Anchorage (once annually) as well as San Francisco, Seattle, Portland and Pasadena. Each of the regular active judges sits on seven or eight panels per year, with thirty-two to thirty-six cases per panel. Each of the regular active judges also sits once or twice a year on a screening panel of three judges that meets in San Francisco for three to five days and decides 150-170 cases without oral argument based on the briefs and oral presentations by central-staff attorneys; any of the three judges can unilaterally redirect a case from the screening track to the oral-argument track. All of these panels are composed of randomly selected groups of three judges who travel throughout the circuit to wherever a particular month's calendar of cases is to be heard. The great majority of these panels consist entirely of active or senior circuit judges of the Ninth Circuit, with only minimal use of judges of other courts. In 1999, just over a quarter (27.1 %) of the cases decided on the merits, either with or without oral argument, were decided by panels that included one of the Ninth Circuit's own senior circuit judges. Fewer than a tenth (8.6 %) of the cases decided on the merits, were decided by a panel that included a district judge or a visiting judge from another circuit.

Published panel decisions are the law of the circuit. Such precedents may be overruled only upon a rehearing en banc, which may be ordered by majority vote of all circuit judges in regular active service. Cases are

reheard by a "limited en banc court" consisting of the Chief Judge and 10 additional regular active judges selected by lot. Any eligible judge not drawn by lot on three successive occasions is automatically seated on the next limited en banc court. If the Chief Judge does not serve, an 11th regular active judge is selected by lot, and the most senior judge presides over the limited en banc court. By majority vote of all circuit judges in regular active service it is possible for the limited en banc court's decision itself to be reheard by the full court, but such a plenary rehearing has never been ordered since the limited en banc procedure took effect in 1980.

III. THE COMMISSION'S PLAN

The Commission's Plan can be read in full as reprinted in Appendix A. The Commission would retain the circuit as an administrative unit only. All adjudicatory functions would be vested in three regional divisions, with an additional "circuit division" intervening only to resolve interdivisional conflicts. The Northern Division would exercise appellate authority over the district courts for Alaska, Idaho, Montana, Oregon, and Washington. The Middle Division would embrace the Eastern and Northern Districts of California as well as the districts of Guam, Hawaii, Nevada, and the Northern Mariana Islands. The Southern Division would be responsible for the district courts for Arizona and the Central and Southern Districts of California. The Circuit Division would consist of the Chief Judge and 12 other judges, four from each division, selected by lot for staggered three-year terms.

The regional divisions would be established by the circuit with between seven and 11 active circuit judges in each division, subject to a requirement that a majority of active circuit judges assigned to each division be residents of that division. Judges resident in other divisions may be randomly assigned elsewhere (for staggered terms of three or more years) to equalize workload. Senior judges may be assigned to divisions as the circuit sees fit. Any judge assigned to one division may be sent on temporary duty to another division by order of the Chief Judge of the circuit.

All appeals from district courts or other entities (such as the tax court and administrative agencies) within a regional division would be taken to that division, and would be heard at a place within the division designated by a majority of the judges of the division. Each regional division would otherwise operate according to circuit-wide rules and internal operating procedures, which would include procedures for divisional en banc review.

Decisions of regional divisions would not be the law of the circuit, but only the law of the division. The circuit division may review a decision of a regional division only on the ground that it is in conflict with the decision of another regional division, and only after review en banc by the regional division or after such review has been denied. Except in extraordinary circumstances the circuit division would review questions of law on the briefs and record of the court below, without additional briefing or oral argument.

Within eight years of the effective date of legislation authorizing such a divisional organization of the Ninth Circuit, the Federal Judicial Center would be required to report to the Judicial Conference of the United States, summarizing the activities of the divisions and evaluating the effectiveness and efficiency of the divisional structure. The Judicial Conference must then make recommendations to Congress concerning the divisional structure and whether it should be continued with or without modifications.

The key features of the Commission's Plan are:

- Essentially autonomous operation of the regional adjudicative divisions. No division would be bound by the law of another regional division. Only the decisions of the circuit division would be the law of the circuit.
- The circuit division may make law for the circuit only to resolve conflicts not resolved by divisional en banc review. A controversial decision by one region cannot be reviewed by the circuit division simply because a majority of the judges of the circuit, or the circuit division, believe it may be wrong.
- Except for ad hoc assignments by the Chief Judge, there is no calendar-by-calendar rotation of regular active judges among the regional divisions. A majority of the regular active judges of each regional division must reside in that region. To equalize workload, nonresident regular active judges may be randomly assigned to sit in a regional division for a term of at least three years. This promotes collegiality among each regional division's cohort of judges, but also makes it likely that different divisions will be perceived to have distinct "personalities" that may promote interdivisional forum shopping.

- The circuit division's judges, other than the Chief Judge, are not selected ad hoc but rather for three-year terms, randomly but with equal representation of each regional division. A regional division that votes en banc to affirm or (by denying review) to let stand a conflict among the divisions will know in advance the membership of the circuit division that may review the conflict.
- The circuit division may function in a "certiorari-like" fashion, discretionarily denying review or exercising review in most cases on the papers alone, without argument or rebriefing and potentially without a face-to-face conference of the judges.
- Pending review by the circuit division, different district courts in the same state (California) may be bound by different constructions of the same state or federal law. But the circuit division's procedures permit quite expeditious review and resolution of the conflict by summary affirmance or reversal of the decision of a regional division creating the conflict.
- There is no affirmative "sunset" provision. After eight years the operation of the divisional organization is subject only to review, without automatic termination absent new legislation.

IV. THE OAKLEY PLAN

My antecedent proposal can be read in full in Appendix B. It is similar to the Commission's Plan in calling for the creation of regional divisions of between seven and 11 judges⁷ hearing regionally calendared cases, and in vesting these divisions with distinct adjudicatory responsibilities that go far beyond the regional calendaring already in place under the circuit's current system of regional administrative units. But where the Commission's plan would adjudicatively segregate the regions from each other, with the law of the circuit preserved only by the occasional intervention of the circuit division as interdivisional umpire, the Oakley Plan strives to integrate the regional divisions into the continued adjudicative functioning of the circuit as a whole.

⁷ My present view is that divisions could range in size from six to perhaps fifteen or seventeen judges. See *infra* note 8.

- Divisional decisions would be the law of the circuit, subject to the safety valve of the en banc procedures discussed below.
- The divisional panels would consist of two intradivisional judges (including resident district judges and senior judges), and one interdivisional judge (or a visiting judge from another circuit). Unlike the Commission's Plan for long-term assignments of interdivisional judges, this scheme of panel assignment would maintain continuing contact between all of the circuit's judges and all of the circuit's divisions. But because only a minority of interdivisional judges would sit on divisional panels, divisions would have regionalized adjudicative significance. The semi-autonomous status of the regional divisions would be enhanced by divisional en banc review in which only intradivisional judges would participate.
- The presiding judges of the divisions would be determined by the same criteria presently used to determine the chief judge of the circuit. This would result in the chief judge of the circuit also being the presiding judge of one of the divisions.

The key to maintaining adjudicative integration of the circuit while nonetheless vesting semi-autonomous adjudicative responsibility in the regional divisions is an effective means of circuit-wide en banc review. The Oakley Plan proposed that the principal means of tempering panel independence be divisional en banc review. The size of the divisions would be small enough to allow conventional rehearing procedures by the entire division's complement of judges in regular active service, with argument to and decision by the full divisional en banc court. Every circuit judge in regular active service would also participate in circuit-wide en banc procedures, since this second level of review could function with the sort of "certiorari-style" procedures that the Commission endorsed for the decision-making of its circuit division. On issues already twice briefed and argued, a circuit of 28 or even more judges could choose between the views of conflicting divisions without the cumbersome need of a face-to-face conference of all the judges, or alternatively could choose to refer a case to limited en banc review, heard in conventional fashion by a panel of nine judges consisting of the presiding judges of each division and additional judges drawn proportionately from each division in order of seniority. This would ensure that the entire complement of the circuit's judges would know in

advance the composition of the limited en banc panel, and could take this knowledge into account in deciding which mode of circuit-wide review to employ.

This revised system of en banc review would ensure that the definitive law of the circuit would not be produced by an ad hoc, limited en banc panel of unknown and possibly unrepresentative membership. But there remains the problem that, if the decision of any panel of any division on a question of first impression is to be the *prima facie* law of the circuit, just two out of more than two dozen judges might impose on the circuit as a whole a decision of questionable soundness. Vigorous and conscientious exercise of the power of divisional en banc review would serve as one check on "outlying" panel decisions. The risk of serious idiosyncrasy in the decision-making of divisional panels is further reduced by the requirement that every divisional panel include one judge from outside that division. As a final check, the Oakley Plan proposed a certification procedure that would allow one division, acting en banc, to question the authority of the precedent of another division. While the dissenting division could not itself repudiate the precedent, it could refer it to the circuit-wide en banc procedure.

The Oakley Plan did not address the assignment of particular districts to particular divisions. But it offers considerable flexibility in how the divisions are constituted. Either three or four divisions would be required in the Ninth Circuit; it could be implemented with only two divisions in other circuits of between fifteen and twenty-two judges.⁸

The Oakley Plan was proposed as a genuinely experimental innovation in the structure of appellate decision-making. It called for the

⁸ In retrospect, I believe the requirement of an odd number of judges is unnecessary, and the upper limit on divisional size of eleven judges is unduly rigid. The range I would set now is between six and seventeen judges. *See supra* note 7.

The only reason to insist on an odd number of judges in regular active service resident in each region is to permit effective divisional en banc review. A division with an even number of resident judges in regular active service could function perfectly well for en banc purposes by adding to the divisional en banc panel the resident senior judge who most recently retired from regular active service. For the reasons set forth in my appended memorandum, *see infra* at 531, six judges would be sufficient for the sound judicial administration of a division.

The collegiality of a division is inversely proportional to its size, but it might be wiser to have a division of more than eleven judges than to split a state such as California between two divisions. There is clearly an upper limit to the size of a division that is to function effectively for purposes of divisional en banc review, in view of the old Fifth Circuit's experience as a court of twenty-four judges that is discussed in my appended memorandum, *see infra* at 522. But aside from the First Circuit (six judges), only two of the current circuits have as few as eleven judges (the Seventh and Eighth), and the Fifth and Sixth Circuits are currently functioning with seventeen and sixteen judges respectively.

divisional organization of the Ninth Circuit to be subject to a specified sunset period, rather than a review-and-report mandate that would permit the experiment to continue indefinitely absent new legislation.

V. THE HUG PLAN

Chief Judge Hug's plan was proposed on behalf of a majority of the circuit's judges in regular active service as a fallback provision. These judges stated a preference for the status quo, but after consideration of both the Commission's Plan⁹ and the Oakley Plan¹⁰ proposed a minimalist experiment in divisional organization. The Hug Plan can be read in full as reprinted in Appendix C.

The Hug Plan would create three regional divisions composed exclusively of the circuit judges in regular active service resident in each division. Appeals would be heard in their division of origin by mixed panels of two intradivisional judges and one interdivisional judge. Panel divisions would stand as the law of the entire circuit unless overruled en banc. In these respects the Hug Plan follows the basic features of the Oakley Plan.

It differs substantially from the Oakley Plan, however, in its procedures for en banc review. The net effect is to use the regional divisions primarily as a calendaring device with no independent adjudicative responsibilities. It differs from the present system of administrative units only by its requirement that the divisional panels have a majority of judges resident in the division, and by slight changes in circuit en banc procedures.

The Hug Plan makes no provision for divisional en banc review. It would modify circuit en banc procedures by increasing the size of the limited en banc panel from to thirteen or fifteen judges, instead of the present eleven, composed of the Chief Judge and an equal number of judges from each division. It retains the present system permitting en banc rehearing of any panel decision to be ordered by a majority of the circuit's regular active judges. It thus permits essentially a circuit-wide veto of a panel decision (subject to the veto being overridden by the limited en banc panel) based on unease or disagreement with the merits of the panel decision. There is no condition precedent that the panel

⁹ Chief Judge Hug presented the Hug Plan in response to the Commission's Draft Report of October 1998. *See infra* Appendix C (evaluating "The Commission Report" recommendation not to split Ninth Circuit).

¹⁰ Chief Judge Hug had been provided a copy of the memorandum to the Commission setting forth the Oakley Plan.

decision create an apparent conflict in the law of the circuit.

CONCLUSION

My preference for my own plan is based on more than pride of authorship. It reflects my commitment to two foundational principles. First, there is a finite limit both to the number of circuits that the federal appellate system can accommodate without fundamental change, and to the number of judges that is feasible for a single circuit as presently conceived. Too many circuits will strain the capacity of the Supreme Court to maintain the national uniformity of federal law without the creation of some new appellate tribunal inferior to the Supreme Court but superior to the system of circuit courts of appeals that is in place today. The creation of some such national court of appeals poses so many problems that it should be considered only as a last resort. The temptation will be simply to keep adding more and more judges to ever larger circuits without due regard for the difference between the seminar room and the lecture hall. Judges who barely know one another, let alone interact closely on a reasonably collegial basis, cannot but approach the task of decision in a way that is foreign to our traditional conception of the internal dynamics of decision by panels supposed to act in the name of, and on the authority of, the circuit as a whole. There is a pressing need to explore alternatives to the traditional structure of our federal courts of appeals that preserve some measure of collegiality without defaulting to the creation of additional circuits.

Second, an experiment with a structural alternative to the splitting of our largest circuit should be a genuine experiment, crafted with the hope of success. It should not be conceived with an acquiescent expectation or acceptance of likely failure, as a transitional palliative that serves merely as a precursor to the split it ostensibly seeks to forestall.

These principles inspired me to try to conceive of a plan of divisional organization that could be widely adapted as other circuits grow to the present dimensions of the Ninth Circuit, but that would not serve merely as an anesthetic to prepare the Ninth Circuit for a split sure to occur but postponed in implementation. In my memorandum to the Commission I described a mental device that I deployed to assist me in elaborating such a conception. I called it "reverse engineering."

Suppose, I imagined, we were resolved not to split a circuit but to combine two of the smaller circuits. This is not an unreasonable thought to contemplate, at least in the abstract environs of an ivory tower freed of the sorts of parochial commitments we expect of a Congress structured to protect the interests of smaller states vis-à-vis larger states. We do

have some relatively small circuits, and were we to combine some of them, we could split a larger circuit such as the Ninth Circuit without complicating the role of the Supreme Court as the umpire of conflicts among the law of the several circuits. If one were committed to the union of two presently distinct circuits, it would certainly be an appropriate step, either transitionally or for the long term, to set up the new supercircuit on a divisional basis, with each of the formerly autonomous circuits as one of the divisions. But the governing idea would be to promote *e pluribus unum*. Such a divisional system would not be the precursor to a circuit split, but a means of fostering a union of parts into a whole. What would such a divisional system look like, I asked myself? And I sought to replicate that sort of divisional system in my plan for a divisional organization of the Ninth Circuit.

If we are genuinely engaged in a search for an alternative, divisional structure for our present courts of appeal that is intended to work, that is intended to forestall the need for further splitting of circuits, I think my "reverse engineering" approach is essential. The Commission's plan of divisional organization does not, in my opinion, feature enough centripetal force to resist the inherently centrifugal forces of the decisionally autonomous divisions it would create. Chief Judge Hug's alternative, on the other hand, I think falls short of the degree of innovative experimentation that is called for before we default to a business-as-usual splitting of the circuit that will merely postpone our engagement with the underlying issue of how many circuits the present system can tolerate. In my view, the Oakley Plan is the best means to accommodate growth in the size and caseload of the federal appellate judiciary without resorting to the creation of additional circuits. It is offered as an experiment, and as an experiment it is deserving of serious consideration by the Congress.

APPENDIX A

THE COMMISSION'S PLAN: A DIVISIONAL ARRANGEMENT FOR THE NINTH
CIRCUIT COURT OF APPEALS*

Having considered all of the arguments, evidence, the many helpful statements that were submitted to us, and our own experience, we recommend that Congress and the President by statute restructure the Court of Appeals for the Ninth Circuit into three regionally based adjudicative divisions and, in addition, create a Circuit Division for conflict correction to resolve any conflicts that arise from different decisions of the three regional divisions. Our recommendation reflects not only our assessment of the needs of the Ninth Circuit Court of [41]Appeals today, but our assessment of the needs of this and other growing federal appellate courts in the future.

1. The recommendation for a divisional arrangement**A. Regional divisions for the Ninth Circuit Court of Appeals: their composition and operation**

We propose that the Ninth Circuit Court of Appeals be organized into the three regionally based adjudicative divisions shown below, which would hear and decide all appeals from the district courts in the respective divisions:

Northern Division — Districts of Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington

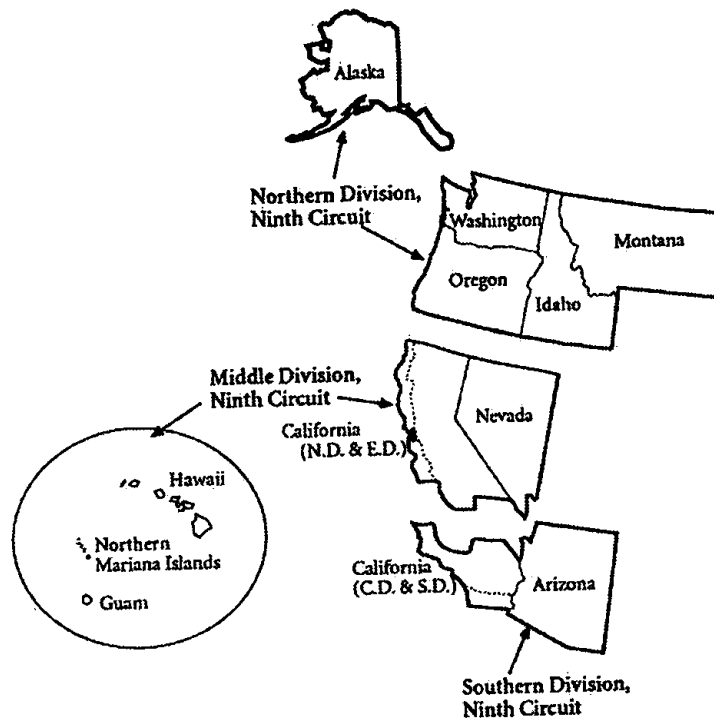
Middle Division — Districts of Northern and Eastern California, Guam, Hawaii, Nevada, and the Northern Mariana Islands

Southern Division — Districts of Arizona and Central and Southern California⁹⁶

* Appendix A is reprinted verbatim, except as indicated by brackets, from pages 40-52 and 93-96 of the Final Report of the Commission on Structural Alternatives of the Federal Courts of Appeals. See *Commission on Structural Alternatives for the Federal Courts of Appeals*, Final Report (Dec. 18, 1998) [hereinafter *Commission Final Report*], available at <<http://app.comm.uscourts.gov/final/appstruc.pdf>> (visited Sept. 16, 2000). The relevant portions were reformatted as a WordPerfect document for inclusion in this article. Appendix A of this article consists of all of Part D of Chapter 3 of the Final Report, together with the proposed statute set forth separately as Appendix C-1 of the Final Report. For ease of reference and citation, the pagination of the Final Report is indicated by bracketed page numbers inserted wherever page breaks occur in the original, and the footnotes have the same numbers (beginning with 96) as they do in the Final Report.

⁹⁶ 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, but we note that a near-equal distribution could be achieved with this divisional arrangement if Arizona were

[42]Figure 3-A
Boundaries of Proposed Ninth Circuit Divisions



Matters arising from sources other than the district courts (e.g., tax court decisions, review and enforcement of administrative agency matters that bypass the district courts) should be taken to the court of appeals and assigned to the division that would have jurisdiction over the matter if the division were a separate court of appeals. The circuit's current Bankruptcy Appellate Panel Service should remain in place, unaffected by the divisional structure.⁹⁷ Appeals from a decision of a

moved from the Ninth Circuit to the Tenth Circuit, or if Arizona were placed in the Northern Division instead of the Southern. However, both possibilities are problematic for reasons unrelated to caseload; therefore we do not recommend either option.

We also recognize that California contributes disproportionately to the capital caseload of the circuit's court of appeals, and so may burden the Middle and Southern Divisions more than the Northern. Yet, again, there is no rational way to equalize the burden, whether the circuit is split, or the court of appeals is restructured, as we recommend.

⁹⁷ In some instances, the bankruptcy appellate panel (BAP) may have to take account of conflicting divisional decisions in bankruptcy matters. We expect those instances will be rare and resolvable by the Circuit Division, but in any event the benefits of a circuit-wide

bankruptcy appellate panel would be taken to the division to which the appeal would be taken in the absence of a bankruptcy appellate panel.

If Congress imposes a specific divisional structure on the Ninth Circuit's Court of Appeals, the judges and lawyers of the circuit should of course be heard in the crafting of the statutory provisions. Nevertheless, we provide a draft bill to implement our recommendations, set out in Appendix C-1.⁹⁸ Our [43]draft bill includes a provision under which the Federal Judicial Center would study the effectiveness of the divisional structure and report its findings to the Judicial Conference, which can in turn advise Congress of the views of the judicial branch on this important subject. The Ninth Circuit experience, and the study of that experience, will also provide valuable assistance to the other courts of appeals in designing their own divisional structures pursuant to our recommendation in Chapter 4.

Under the proposed statute, each active circuit judge would be assigned to a particular regional division; each division would consist of at least seven circuit judges in active status, with the actual number of judges to be determined according to caseload needs. 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. Circuit judges in senior

BAP far exceed the drawbacks of this occasional hardship, and we do not believe a division-based BAP would be practical under current rules precluding a bankruptcy appellate panel from including a judge from the district from which the appeal arises. In the divisional structure we foresee, this would seriously impede, if not destroy, the effectiveness of the BAP system in the Ninth Circuit.

⁹⁸ Although the draft bill we provide would implement the specific three-division structure we propose here, this is not the only plausible arrangement. One advantage of the divisional approach is that it allows different or additional divisions to be created as necessary, if the number of appellate judgeships grows, without requiring a disruptive circuit split. For example, an alternative to the three particular regional divisions we propose might take account of the patterns of population and caseload growth in the circuit by creating four divisions immediately. One possible four-division arrangement would organize the circuit into one division with the Northwest states and the Pacific islands, one with the Eastern and Northern Districts of California, one with the Central District of California alone, and one with Arizona, Nevada, and the Southern District of California. A variation on this organization would place the Central and Southern Districts of California in the same division, leaving Arizona and Nevada in their own division. At present, the number and distribution of judges on the court make these arrangements impractical, if not unworkable. Given those conditions, we do not propose these alternatives, but note that if Congress provides the judgeships the court has requested, a request the Judicial Conference has endorsed, the four-division alternatives have some attributes (e.g., geographical integrity and a reasonable distribution of caseloads) that would make them more attractive alternatives to accommodate future growth.

status would be assigned to divisions in accordance with policies adopted by the court of appeals. Each division would have a presiding judge, determined from among the active judges of the division in the same manner that the chief judge of the circuit is determined. As now, the court of appeals (and thus the circuit) as a whole would have a chief circuit judge, but that chief circuit judge could not simultaneously serve as the presiding judge of a division.

Each regional division would function as a semi-autonomous decisional unit. Its judges would decide appeals through panels and would sit en banc to perform for the division the functions now assigned by statute to a regular court of appeals en banc. Upon the creation of divisions, present Ninth Circuit precedent would continue to be the governing law throughout the circuit. Existing Ninth Circuit precedents, and divisional decisions, could be overruled within a division only by the divisional en banc process. Decisions made in one division would not bind any other division, but they should be accorded substantial weight as the judges of the circuit endeavor to keep circuit law consistent.

We recognize that putting parts of California in different divisions will prompt concerns about forum shopping and subjecting Californians and others to possibly diverging lines of federal authority. However, we believe that our proposal will not create notably more federal forum shopping than occurs now, [44]and that our Circuit Division proposal provides a more expeditious way to resolve conflicts that forum shopping may produce. Current venue provisions are such that even today, litigants in California are often free to choose among federal districts in the state, such as the Northern or Central District. They may base their forum choices on multiple factors, such as their assessments of likelihood of success before the trial judges in the districts, or their beliefs about local juries. We assume they would continue to do so if those two districts were put in different appellate divisions.

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. But the Circuit Division we propose should ensure that conflicts on issues for which circuit-wide (or state-wide) uniformity is important will not survive long.⁹⁹ In any event,

⁹⁹ The court of appeals will develop the rules and practices by which the Circuit Division will operate. But we envision that its function 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

federal judges may certify important questions on which state law is not settled to the California Supreme Court. On federal law questions, conflicts can be resolved by the Circuit Division more readily and efficiently than is possible under the current en banc process, and certiorari from "incorrect" decisions or decisions that conflict with other circuits can be sought in the U.S. Supreme Court. The specter of inconsistent interpretations of federal law may be unattractive, but it is one that exists throughout the federal system, and one that circuit splitting would not ameliorate. Moreover, in the California state appellate courts, where the intermediate appellate system is organized into geographical districts, the decisions of one court of appeal are not binding on the court of appeal of another district. Thus, differences between the Middle and Southern Divisions under the system we propose would not create a situation that does not already exist in state practice.

Some have suggested that all California appeals should be decided in the same division. Given population and caseload trends, the number of judges needed simply to handle California appeals could in the relatively near future exceed the number we have already concluded is the upper limit for a decisional unit.¹⁰⁰ Therefore, we do not recommend such an arrangement. However, that point has not yet been reached, and if putting parts of California in different divisions is perceived to be too great a problem, another possible divisional arrangement would be to make California a single division (Middle Division), [45]with Arizona and Nevada in another division (Western Division), and the remaining states and territories comprising a third (Northern) division. While this configuration has the disadvantage of creating divisions with disproportionate caseloads,¹⁰¹ it has the advantage of avoiding a single state's being served by separate divisions and retains other desirable aspects of the regional division scheme.

b. Circuit Division to resolve interdivisional conflicts

In addition to the regional divisions, our proposed statute would create a Circuit Division for conflict correction, whose sole mission

with respect to the factors to be considered in granting an adjustment for abuse of trust under the Sentencing Guidelines.

¹⁰⁰ Approximately 4,000 of the court's annual filings arise from California. Annual filings from California alone exceed annual filings in many other regional courts of appeals.

¹⁰¹ The California, or Middle, Division would retain about 60% of the circuit's appellate caseload, with the Northern Division carrying about 26% of it and the Western Division only about 14%.

would be to resolve conflicting decisions between the regional divisions. It would be composed of thirteen judges, including the chief judge of the circuit and twelve active circuit judges selected by lot in equal numbers from each of the regional divisions.¹⁰² Assignment to the Circuit Division would be in addition to a judge's regular work in the regional division to which he or she is assigned. Once the Circuit Division is fully established, service on it would be for a term of three years, with judges' terms staggered to provide for continuity of membership, along with gradual rotation.

The Circuit Division's jurisdiction would be discretionary and could be invoked by a party to a case after a decision in a regional division. However, a panel decision in one division asserted to conflict with a decision in another division could be reviewed by the Circuit Division only after the panel decision had been reviewed by the division en banc or a divisional en banc had been sought and denied. The Circuit Division would not have jurisdiction to review a decision by a regional division on the ground that it is considered to be incorrect or unsound; its only authority would be to resolve square interdivisional conflicts. A regional division's decision that is claimed to be in error but does not create a conflict between divisions would be subject to review only by the regional division sitting en banc or by the Supreme Court. The circuit-wide en banc process would be abolished, and it follows that the authorization for courts with more than fifteen active judges to convene limited en banc panels would no longer apply in the Ninth Circuit.¹⁰³

[46]The work of the Circuit Division should occur as quickly as possible after the regional division's decision is final, and be concluded as quickly as feasible in order to expedite finality and minimize expense to parties. The court of appeals should adopt rules to expedite the Circuit Division's conflict resolution process. For example, those rules could provide that if a party alleges that a panel's resolution of an issue conflicts with a decision in another division, that party should be required to make that assertion first within the division. If the division

¹⁰² While we believe that seven would be an adequate number for the task of determining circuit law when issues resolved by decisions in different divisions are in conflict, we have heard suggestions that seven is too small a number to speak for the circuit even given the limited nature of the Circuit Division's assignment. Thirteen is a viable option. Seven is a less cumbersome panel, and has advantages of greater efficiency and lower cost. Yet thirteen may be seen as better able to "break a tie" between divisions authoritatively.

¹⁰³ That is, the provision of Sec. 6 of Pub. L. 95-486, 92 Stat. 1633 (1978), allowing the court to perform its en banc functions with a number of judges specified by the court of appeals (rather than all active judges) would no longer apply in the Ninth Circuit.

does not order a rehearing en banc, the division should immediately transmit the petition to the Circuit Division with appropriate notice of the issue on which conflict is alleged, along with the necessary papers (e.g., the briefs and record in the case, together with a copy of the allegedly conflicting opinions). The Circuit Division should treat the party's conflict allegation as an application for review, analogous to a petition for certiorari in the Supreme Court, and determine whether additional briefing or argument will be necessary. The Circuit Division should determine whether to accept the conflict for resolution and, if so, decide the issue of law based on the materials transmitted, unless it orders additional steps. Where a party whose case has been reheard en banc within a division asserts that the en banc decision conflicts with another division's decision on the same issue, the party may file an application for review of the issue in the Circuit Division. In either case, 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.

c. Appellate procedure and administration

The regional divisions would operate under the Federal Rules of Appellate Procedure and under such local rules and internal operating procedures as the court of appeals as a whole might adopt.¹⁰⁴ The Circuit Division would function under rules specified by the court of appeals. The regional divisions would not be authorized to adopt their own separate local rules or internal operating procedures. As now, the court of appeals would decide whether and how to establish any regional appellate clerks' offices, as well as how to arrange central staff attorneys, libraries, and other resources. Although the court should be free to organize these resources as it sees fit, we see no reason that organizing the court into adjudicative units would require its central administrative staff to be dispersed any more than has been required for its organization into administrative units. Indeed, the court's central staff and its case-inventory process can play a critical role in maintaining the consistency of circuit law. We believe the court's administration is fully capable of making any adaptations necessary to [47] allow the central

¹⁰⁴ Depending on the specific statute enacted, some changes in the Federal Rules of Appellate Procedure will probably be necessary. Enactment of our proposal, for example, as embodied in the statute in Appendix C-1, would obviously require changes to Rule 35, concerning en banc hearings, to recognize the different statutory provisions governing the Ninth Circuit Court of Appeals. We believe such changes are best left to the rule-making process.

staff to continue to serve its current functions for all the divisions.

2. *Reasons for the divisional arrangement*

Our judgment that the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals leads us to recommend a divisional arrangement that we believe will capitalize on the benefits of smaller decisional units without sacrificing the benefits of a large circuit.

a. *Smaller decisional units will promote consistency and predictability*

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. Over time, coherence and consistency suffer when judges are unable to monitor the law of their entire decisional unit or correct misstatements of the court's decisional 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.¹⁰⁵

The inability of judges to monitor all the decisions the entire court of appeals renders, along with perceptions of greater inconsistency in the Ninth Circuit than in most other circuits, confirms our own judgment, based on experience, that large appellate units have difficulty developing and maintaining consistent and coherent law. We believe that judges operating in the smaller decisional units we propose the regional divisions will find it easier to monitor the law in their respective divisions and that those smaller decisional units will thus promote greater consistency.

One reason judges in larger decisional units have difficulty maintaining consistent law is that as the size of the unit increases, the opportunities the court's judges have to sit together decrease. In a court of twenty-eight judges, given a typical sitting schedule such as that used in the Ninth Circuit Court of Appeals, it would be rare for a judge to sit with every other judge of the court more than once or twice in a three-

¹⁰⁵ On our survey, we asked judges whether they read all or most of the published opinions of the court of appeals as they are issued. A lower percentage of Ninth Circuit judges than judges in other circuits reported that they read all or most of the court's published opinions - 57% of the circuit judges and 64% of the district judges, compared to 86% of circuit judges and 78% of district judges in other circuits.

year period.¹⁰⁶ It is true that the court has been operating with far fewer than twenty-eight judges for much of the last [48]several years, but the effect is the same, because senior and visiting judges must be used to fill out the panels to keep up with the heavy docket. Thus, even though the court has effectively been a court of only about eighteen active judges, the opportunities for interaction have been less frequent than on a court whose caseload only warrants eighteen judgeships.

Decisions should also become more predictable because a divisional arrangement that creates smaller, more stable groups of reviewers will allow district judges to know better who will be reviewing their decisions, and lawyers to know better the judges who will be deciding their cases. The court, as seen by those who live under it and litigate before it, would become much more of a "known bench," fostering judicial accountability and public confidence. Likewise, the circuit judges will know better the district judges and lawyers within their jurisdiction.

b. Effective regional en banc procedures and the Circuit Division will ensure clearer, more consistent circuit law

By several accounts, the Ninth Circuit's limited en banc worked well in its early years, perhaps in part because the eleven-judge panels represented a larger proportion of the court's judges. Dissatisfaction has arisen more recently with regard to both the infrequency of the Ninth Circuit en banc rehearings, relative to the perceived need for them, and the size and composition of the en banc court. Responses to our survey reflect this dissatisfaction. The proportion of circuit judges who characterize their court's performance of several en banc functions as "good" is about the same in the Ninth Circuit as in the other circuits as a whole, and for some functions higher, but the proportion describing it as "inadequate" is substantially higher in the Ninth Circuit.¹⁰⁷ Similarly, more Ninth Circuit judges both circuit and district than judges in most

¹⁰⁶ In practice, constraints on the assignment schedules of the court's judges have meant that some judges do not sit with every other judge even once in a three-year period. The Commission is aware that there are other opportunities for interaction, such as en banc proceedings, court symposia, and committee work, but some of these are not case-deciding functions and most do not provide the kind of interaction necessary to promote consistency and predictability of the law.

¹⁰⁷ Between a quarter and a third of the Ninth Circuit judges described as "inadequate" the court's use of the en banc process to provide guidance to trial judges and lawyers, correct "wrong" panel decisions, resolve conflicts in the circuit's law, and prevent intercircuit conflicts. But the Ninth Circuit does not stand alone in this regard - similar or higher levels of dissatisfaction were reported by judges in several other circuits, not all of them "large."

other circuits report dissatisfaction with the frequency with which the court takes cases en banc.¹⁰⁸

The divisional arrangement we propose would create groups that can function effectively en banc, thus giving each division a way to ensure that the decisions it issues are correct and reasonably uniform. It would relieve each judge of having to cope with the decisional output of the entire Ninth Circuit [49]Court of Appeals and reduce the burden of en banc calls to a more manageable level. We believe that the bulk of the work now done by the limited en banc will be done by the divisional en bancs, using the full complement of the division's eligible judges. In the last ten years, less than 10% of the cases reheard by the court en banc were reheard because the three-judge panel decision created or revealed an intracircuit conflict. Indeed, we think the divisional en bancs, collectively, may do more work than the limited en banc does now, because they will be less cumbersome to convene. However, in time, en banc rehearings may be needed within divisions less frequently because division judges will develop more collegial relationships and be better able to avoid issuing incorrect or inconsistent judgments.

Our proposed divisional scheme concentrates in the divisions the en banc functions of rectifying incorrect panel decisions and deciding questions of exceptional importance, because the entire body of judges for whom an en banc opinion speaks should have a voice in that opinion. With an effective divisional en banc process, there should be a higher degree of uniformity within regional divisions than now exists within the Ninth Circuit Court of Appeals as a whole. Additionally, with clearer statements of the law within regional divisions, conflicts that may develop between divisions will be more sharply highlighted. The Circuit Division, using judges from throughout the circuit but with its mission restricted solely to resolving interdivisional, intracircuit inconsistencies, can act effectively to choose between articulated conflicting points of view and quickly settle the law of the circuit.

c. The proposed divisional structure will rationalize the regionalizing and federalizing functions of appellate courts

By constituting divisions with both resident and nonresident judges, the divisional structure respects and heightens the regional character

¹⁰⁸ For each en banc function we identified, Ninth Circuit judges were more likely than circuit judges nationwide to say their court went en banc less often than necessary, although for each function there was at least one other court in which a similar or higher percentage of judges felt likewise.

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. As a practical matter, it avoids the problem of presidential appointment that would be encountered if all judges were to be assigned strictly to the divisions in their geographic area. Instead, the President will continue to appoint circuit judges to the Ninth Circuit, not to a particular division, subject, however, to the informal norms that have developed to link geography to appellate court appointments.

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 [50]nations on the Pacific Rim, is a strength of the circuit that should be maintained. 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 intercircuit conflicts from practitioners in the maritime bar, who regularly bemoan the differences in interpretation of federal law in circuits from Maine to Texas.

Moreover, federal appellate practice in the Western states will be less fragmented under a divisional arrangement than under two or more separate circuits because the divisional arrangement contemplates a single set of local circuit rules, continued administrative supervision of the entire circuit by the chief judge and judicial council, a single circuit judicial conference, and a conflict-correction mechanism within the same judicial circuit.

3. Key differences between this proposal and regional calendaring systems

Our proposal differs fundamentally from the regional calendaring divisions that the Ninth Circuit tried for five months starting in September 1978, and from the proposal made by Chief Judge Hug, on behalf of a majority of the court's judges, in response to our *Tentative Draft Report*.

a. The regional calendaring experience of the 1970s

In the 1978-1979 experiment, the judicial council created three regional

divisions, one with three active and one senior judge, the other two with five active and two senior judges.¹⁰⁹

Circuit records suggest that the judges thought that the regional calendaring system decreased circuit-wide collegiality and threatened the overall coherence of the circuit's substantive law, encouraging forum shopping. Some also doubted that the program substantially reduced judges' travel time, largely because northern and middle division judges had to travel to assist the more heavily burdened southern division. Perhaps most important, judges accustomed to sitting with a larger and more diverse group of judges experienced "panel fever" when they sat most of their time with a much smaller group.

Our proposal overcomes each of these problems. First, it ensures at least some mix of judges throughout the circuit to maintain circuit identity and collegiality. Second, the Circuit Division can maintain uniformity in the circuit's law. Finally, a court of twenty-eight circuit judgeships or more will allow divisions to be created that are large enough to avoid the too-close associations experienced when the much smaller court last tried a divisional approach.

[51]b. The 1998 regional/divisional calendaring proposal in response to the Commission's Tentative Draft Report

In response to our request for comments, Chief Judge Hug wrote for a majority of the Court of Appeals for the Ninth Circuit, suggesting modifications of our proposed divisional organization that in his view would accomplish the principal objectives of our recommendation.¹¹⁰ Chief Judge Hug would establish three divisions, composed solely of judges resident in the division. Those divisions would have no distinct adjudicative role. Their function would be to channel the calendaring process: appeals from district courts in each regional division would be heard by panels comprising two judges of the division and one judge from outside the division. The judges of the regional divisions would not sit en banc, as we propose. The decisions of the panels would be binding circuit-wide, unless overruled by a limited en banc court of the circuit, which Chief Judge Hug would retain to rehear any case, not just cases involving conflicts. The limited en banc could be expanded to thirteen or fifteen judges representative of the divisions.

¹⁰⁹ Today, the Ninth Circuit has twenty-eight authorized judgeships, with twenty-two active judges and seventeen senior judges.

¹¹⁰ Chief Judge Hug submitted a five-page letter dated October 27, 1998, to which he attached a twelve-page "Analysis of the Commission Report." Both are available on the Commission's website (<http://app.comm.uscourts.gov>).

We have carefully considered the Chief Judge's response and analysis, but we do not agree that his modifications are consistent with our proposed divisional structure. Indeed, they are antithetical to it. The heart of the divisional structure that we recommend is a regionally based, *adjudicative* unit that is small enough, stable enough, and autonomous enough to function effectively as an appellate decisional body responsible for the law applicable in the region. This cannot be accomplished through divisions with regional calendaring and a circuit-wide en banc, as the Chief Judge suggests.

Giving each panel decision *stare decisis* effect unless it is overruled by a circuit-wide en banc court would leave the court of appeals essentially unchanged as an adjudicative body, and would defeat the purpose of the divisional structure that we recommend. District judges and lawyers, as well as all circuit judges, would still have to keep abreast of all panel decisions throughout the circuit. All circuit judges would still be required to make or respond to en banc calls to rehear issues of exceptional importance arising anywhere in the circuit a task our proposed divisional structure deliberately eliminates because we believe that a smaller decisional unit can more effectively maintain the coherence and correctness of the law of that unit. Under our proposed structure a circuit-wide en banc process, or en banc court, is not necessary to maintain desirable circuit-wide uniformity; instead, a small, stable, but still representative subset of the court's judges (the Circuit Division) focused on conflict resolution can ensure it. Further, under our proposed structure, issues of exceptional importance will be determined by all the judges for whom the decision speaks. This is not possible [52]with a limited en banc even if expanded as Chief Judge Hug suggests but can only be accomplished by a system of adjudicative divisions, each of which truly convenes en banc.¹¹¹

Chief Judge Hug's suggestion about panel composition would give both too much and too little weight to the value of regional connection. It gives it too much weight by requiring that every panel in the circuit have a majority of judges from the region that generates the appeal, implying that only judges from the region can get the law right. We do not agree

¹¹¹ Some, including the Department of Justice, have suggested that it would be helpful for the Ninth Circuit's court of appeals to take more matters en banc and that it might facilitate that process if the vote of less than a majority of active judges were required. We express no opinion on this, but we do note that there is no way to ensure that the active judges on any court will vote to rehear any particular matter en banc. This suggestion, like expanding the number of judges on any particular limited en banc court, is not structural and would not accomplish the objectives our divisional structure is intended to achieve.

with that implication. Moreover, the proposal could dilute the salutary goals of random assignment of judges and cases to panels, which we do not believe should be changed. The suggested modification to our proposal gives too little weight to the value of regional connection by having a *regionally composed* panel's decision subject to *circuit-wide* rehearing en banc. That arrangement does not further either the regionalizing or federalizing functions that our recommended structure seeks to reconcile. Both these functions, we believe, are better served by a randomly drawn panel within a regionally based, but circuit-balanced, division each division having a majority of its judges resident within its region.

* * * * *

[93]Statute for Divisional Organization of the Court of Appeals for the Ninth Circuit

Sec. 1. Six months after the date of enactment of this Act, the United States Court of Appeals for the Ninth Circuit shall be organized into three regional divisions designated as the Northern Division, the Middle Division, and the Southern Division, and a non-regional division designated as the Circuit Division.

Sec. 2. The provisions of section 1294 of title 28, United States Code, shall not apply to the Ninth Circuit Court of Appeals during the effective period of this Act. Instead, review of district court decisions shall be governed as provided herein.

a. Except as provided in sections 1292(c), 1292(d), and 1295 of title 28, United States Code, once the court is organized into divisions, appeals from reviewable decisions of the district and territorial courts located within the Ninth Circuit shall be taken to the regional divisions of the Ninth Circuit Court of Appeals as follows:

(1) appeals from the districts of Alaska, Idaho, Montana, Oregon, Eastern Washington and Western Washington shall be taken to the Northern Division;

(2) appeals from the districts of Eastern California, Northern California, Guam, Hawaii, Nevada, and Northern Mariana Islands shall be taken to the Middle Division;

(3) appeals from the districts of Arizona, Central California, and Southern California shall be taken to the Southern Division; and

(4) appeals from the Tax Court, petitions to enforce the orders of administrative agencies, and other proceedings within the court of appeals' jurisdiction that do not involve review of district court ac[94]tions shall be filed in the court of appeals and assigned to the

division that would have jurisdiction over the matter if the division were a separate court of appeals.

b. Each regional division shall include from seven to eleven judges of the court of appeals in active status. A majority of the judges assigned to each division shall reside within the judicial districts that are within the division's jurisdiction as specified above; 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. Judges in senior status may be assigned to regional divisions in accordance with policies adopted by the court of appeals. Any judge assigned to one division may be assigned by the chief judge of the circuit for temporary duty in another division as necessary to enable the divisions to function effectively.

c. The provisions of section 45 of title 28, United States Code, shall govern the designation of the presiding judge of each regional division as though the division were a court of appeals; provided, however, that the judge serving as chief judge of the circuit may not at the same time serve as presiding judge of a regional division, and that only judges resident within, and assigned to, the division shall be eligible to serve as presiding judge of that division.

d. Panels of a division may sit to hear and decide cases at any place within the judicial districts of the division, as specified by a majority of the judges of the division. The divisions shall be governed by the Federal Rules of Appellate Procedure and by local rules and internal operating procedures adopted by the court of appeals. The divisions may not adopt their own local rules or internal operating procedures. The decisions of one regional division shall not be regarded as binding precedents in the other regional divisions.

Sec. 3.

a. In addition to the three regional divisions specified above, the Ninth Circuit Court of Appeals shall establish a Circuit Division composed of the chief judge of the circuit and twelve other circuit judges in active status, chosen by lot in equal numbers from each regional division. Except for the chief judge of the circuit, who shall serve ex officio, judges on the Circuit Division shall serve nonrenewable, staggered terms of three years each. One-third of the judges initially selected by lot shall serve terms of one year each, one-third shall serve terms of two years each, and one-third shall serve terms of three years each; thereafter all judges shall serve terms of three years each. In the

event a judge on the Circuit [95]Division is disqualified or otherwise unable to serve in a particular case, the presiding judge of the regional division to which that judge is assigned shall randomly select a judge from the division to serve in the place of the unavailable judge.

b. The Circuit Division shall have jurisdiction to review, and to affirm, reverse, or modify any final decision rendered in any of the court's divisions that conflicts on an issue of law with a decision in another division of the court. The exercise of such jurisdiction shall be within the discretion of the Circuit Division and may be invoked by application for review by a party to the case, setting forth succinctly the issue of law as to which there is a conflict in the decisions of two or more divisions. The Circuit Division may review the decision of a panel within a division only if en banc review of the decision has been sought and denied by the division.

c. The Circuit Division shall consider and decide cases through procedures adopted by the court of appeals for the expeditious and inexpensive conduct of the Division's business; the Division shall not function through panels. The Division shall decide issues of law on the basis of the opinions, briefs, and records in the conflicting decisions under review, unless the Division determines that special circumstances make additional briefing or oral argument necessary.

d. The provisions of section 46 of title 28, United States Code, shall apply to each regional division of the Ninth Circuit Court of Appeals as though the division were the court of appeals. The provisions of subsection 46(c), authorizing hearings or rehearings en banc, shall be applicable only to the regional divisions of the court and not to the court of appeals as a whole. After a divisional plan is in effect, the court of appeals shall not order any hearing or rehearing en banc, and the authorization for a limited en banc procedure contained in Sec. 6 of Pub. L. 95-486, 92 Stat. 1633 (Oct. 20, 1978), shall not apply to the Ninth Circuit. However, an en banc proceeding ordered before the divisional plan is in effect may be heard and determined in accordance with applicable rules of appellate procedure.

Sec. 4. The provisions of section 711 of title 28, United States Code, shall apply to the Ninth Circuit Court of Appeals during the effective period of this Act; provided, however, that the clerk of the Ninth Circuit Court of Appeals may maintain an office or offices in each regional division of the court to provide services of the clerk's office for that division.

Sec. 5. The Federal Judicial Center shall conduct a study of the effectiveness and efficiency of the divisions in the Ninth Circuit Court of

Appeals, and, within eight years after the effective date of this Act, submit to the Judicial Conference of the United States a report summarizing the activities of the divisions, includ[96]ing the Circuit Division, and evaluating the effectiveness and efficiency of the divisional structure. The Judicial Conference shall thereupon submit recommendations to the Congress concerning the divisional structure and whether it should be continued with or without modification.

APPENDIX B

THE OAKLEY PLAN: MEMORANDUM ON DIVISIONAL ORGANIZATION OF THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT^{*}

**TO: COMMISSION ON STRUCTURAL ALTERNATIVES FOR
THE FEDERAL COURTS OF APPEALS**

**FROM: JOHN B. OAKLEY
PROFESSOR OF LAW
UNIVERSITY OF CALIFORNIA AT DAVIS**

DATE: JULY 18, 1998

Introduction

I have been asked to discuss the concept of a divisional organization of the Ninth Circuit, analyzing the pros and cons of the various forms such a structural alternative might take, and referring as useful to the range of divisional structures in place among the intermediate appellate courts of the states. I have agreed to this request upon the understanding that the limited time available and the press of other work foreclose my preparation of an exhaustive study of this interesting concept and its important ramifications for the federal judicial system. My response must of necessity be briefer than I would undertake to provide in ideal circumstances.

The Ninth Circuit already has in place, and has had for nearly twenty years, a quasi-divisional system of "three regional administrative units to assist the chief judge of the circuit to discharge his administrative responsibilities," consisting of "the Northern, Middle and Southern units."¹ My understanding of the Commission's request is that I am to discuss alternatives for the divisional organization of the Ninth Circuit that would go beyond the present system of regional administration to create divisions vested with at least partially independent adjudicative responsibilities.

^{*} Reprinted as submitted to the Commission except for typographical and other formal corrections. The original document is published in *Commission on Structural Alternatives for the Federal Courts of Appeals, Working Papers 145-166 (1999)*. For ease of reference, the footnote numbers correlate with the numbers in the original document.

¹ *Local Rules of the Ninth Circuit, Introduction—Court Structures and Procedures*, ¶C(1), reprinted in *California Rules of Court—Federal* at 10 (West 1998). As discussed below in Part II.A., the administrative units were established in 1979.

In Part I, I briefly review the various divisional schemes that are may be found among the intermediate appellate courts of the states. Although I have prepared and append detailed tables that summarize the array of organizational features to be found in such courts, I conclude that this material does not reveal any structure worthy of emulation. It does, however, underscore the importance of incorporating effective en banc procedures into any provision for divisional organization of a federal court of appeals. I also comment in this part on what I have learned as a participant in an ongoing study of California's intermediate appellate court system.

In Part II, I discuss the two instances in which for brief periods a federal court of appeals has undertaken to disperse its core functions by creating and operating regionally organized adjudicative divisions.

In Part III, I compare and evaluate the three proposals for regional adjudicative divisions that have been recommended to the Commission by Judge Weis, Mr. Svetcov, and Professor Meador.

I conclude by proposing in Part IV my own outline for the establishment and operation of regional adjudicative divisions of the Ninth Circuit, comparing and contrasting it to the other alternatives previously discussed.

I. Organization of State Intermediate Appellate Courts

A. Types of Intermediate Courts

Forty of the 50 states have intermediate appellate court systems, Mississippi being the latest state to join the list, in 1993.² These intermediate appellate courts have for the most part been developed under local plans responsive to local conditions, and thus vary considerably in structure. Two distinct organizational patterns predominate, as summarized in appended Tables A and B.

In one pattern, typical of the older intermediate courts and a few of the more recently created ones, the state is divided into geographical districts, and an essentially separate court is set up for each district.³ The independence of the districts is similar to that of the circuits in the federal system. In most of these 13 states, nearly all of the busier districts are split into divisions and cases are usually heard by three-judge panels. Panels are typically rotated or chosen randomly. Normally, there are mechanisms for the harmonization of decisions within districts (such as prefiling circulation of proposed opinions) and in two states (Florida and

² See MISS. CODE ANN. § 9-4-1 (Supp. 1997).

³ See Table A.

Texas), there are provisions for district en bancs. No en banc sittings are held for the state as a whole.⁴ As in the federal appellate system, review in the court of last resort is the only method for preventing conflicting decisions between districts.

The other, more recent structure is the unitary intermediate appellate court featured in 27 states.⁵ Typically these courts exist in smaller states, in terms of population and caseload. As a consequence such unitary courts are generally smaller than those of states with regional divisions. Michigan's unitary court of 28 judges is a notable exception.⁶ Otherwise, the number of judges on unitary courts ranges from three to fourteen. In most such states, appeals are decided by rotating three-judge panels.⁷ A bare majority of states with unitary courts (14 out of 27) provide those courts with en banc procedures, the remainder reserving all discretionary review of intermediate appellate decisions to their courts of last resort.

B. Subject-Matter Jurisdiction

There are six states with intermediate courts of appeals that have specialized subject-matter jurisdiction. There are two basic patterns for these specialized courts. The most common pattern is to create two intermediate courts with mutually exclusive appellate jurisdiction in civil and criminal cases. Appeals from these courts are handled by a single court of last resort. This subject-matter organization is seen in three states — Alabama, New York, and Tennessee. Indiana and Pennsylvania's structures are similar in form but not in the nature of the jurisdictional distinction between their two intermediate appellate courts. Pennsylvania has a specialized intermediate appellate court, the Commonwealth Court, for civil cases involving state interests. Indiana vests its separate intermediate court with exclusive jurisdiction of tax appeals.

⁴ Tennessee is an exception. It has two geographically divided intermediate courts of appeals that deal separately with civil and criminal cases. Both courts have statewide en banc procedures. *See* Tables A and C.

⁵ *See* Table B.

⁶ While judges are elected to the Michigan Court of Appeals from four geographic districts, appeals are adjudicated through a central docket and assigned to judges without regard to geographic origin. The court achieves consistency of decision by prefiling circulation of every opinion to every judge.

⁷ An exception is New Jersey, which uses a two-judge panel within each four-judge "part," or division. If the two judges cannot agree on a decision or agree that another judge or the whole part should hear the case, the appeal is heard by a third judge or the whole part.

Another variation of subject-matter specialization at the appellate level is seen in Oklahoma and Texas. Both states have two courts of last resort with different subject-matter jurisdiction. Each has a supreme court with largely civil jurisdiction and a court of last resort that handles criminal appeals exclusively. The two states differ in that Oklahoma has no intermediate court of criminal appeals while the Texas Courts of Appeals handle both civil and criminal cases.

C. En Banc Proceedings

The conduct of the court's business en banc occurs for a number of different reasons and circumstances among the various intermediate state appellate courts. My discussion of state-court procedures for en banc decision will be confined to the form that they take and the mechanisms used to decide when they should be employed, as summarized in appended Table C. This information is suggestive of what each court sees as the purpose served by its proceeding en banc — a topic worthy of further study but not one that can be developed here.

Form of En Banc Panels

Use of en banc procedures is far more common in the unitary courts than in those divided along geographical lines.⁸ Of those courts that are geographically divided, Tennessee is the only state whose intermediate courts conduct en bancs constituting the entire court.⁹ Other geographically divided courts make use of the district en banc, in varying forms. Two states (Florida and Texas) use a full en banc panel while two states (Louisiana and Missouri) use limited en bancs. Districts of the Louisiana Circuit Court hold en bancs of up to five judges while districts in Missouri hold en bancs that vary from limited en banc of six judges to a plenary en banc of all 12 judges.

Of the 27 states with unitary intermediate courts, 15 courts from 14 states¹⁰ have en banc procedures. Of these fifteen, nine have a full-court en banc, five use a limited en banc, and one court allows for either (Georgia). The Virginia Court of Appeals allows the court to sit en banc with eight of the 10 total judges. New Jersey is particularly idiosyncratic, allowing its intermediate appellate "parts" (four judges each) to sit together when two or three judges cannot agree or the majority thinks

⁸ See Table C.

⁹ While the Tennessee Court of Appeals (with jurisdiction over civil cases) conducts en banc hearings with the entire court (twelve judges), the presiding judge of the Court of Criminal Appeals has the authority to call five-, seven-, or nine-judge en bancs.

¹⁰ Pennsylvania has two unitary courts with differentiated intermediate appellate jurisdiction.

the appeal is of the requisite importance. Another variation of a limited en banc procedure, used in Arkansas, has the original panel joined by a second panel upon rehearing of the case. Georgia has a similar procedure, but adds a seventh judge to create an odd number of judges participating in the rehearing.

En Banc Triggering Mechanism

How the intermediate courts decide to hear or rehear an appeal en banc varies greatly from court to court.¹¹ One generalization can be made — in almost every state the decision is left to the discretion of some number of the judges on the court. The most typical pattern, yet one followed in only four courts, is for an en banc to be convened by majority vote of all judges of the court.¹² Otherwise, the authority to convene an en banc rehearing takes many forms involving widely varying numbers of judges — which range from the entire court to the chief judge acting alone.

Only three states statutorily require en bancs or something similar in particular circumstances. New Jersey, as mentioned previously, requires a third or fourth judge to hear a case when the original panel of two or three judges cannot agree. Alabama rigidly requires a full en banc when any panel member dissents, while Georgia requires some form of an en banc when a panel member dissents. Kentucky also varies the formula slightly by allowing the Chief Judge to order an en banc only when the proposed panel decision is in conflict with a prior decision.

D. Relevance of State-Court Organization

The great variety of organizational schemes at play among state intermediate appellate courts is interesting, but seems to me of little relevance to the divisional organization of a large federal circuit. The tolerance of haphazard structures and impoverished en banc procedures bespeaks the play of local politics and greater capacity to enforce consistency of decision by state supreme courts than exists at the national level. There is a negative lesson to be learned, however. The divisional organization of a federal court of appeals must be sensitive to the need for consistency of decision in a system in which the proportion of intermediate appellate judges to judges of the court of last resort is far higher than in most state systems. A prime desideratum is a divisional organization that is tailored to effective en banc procedures for determining the law of the circuit.

¹¹ See Table C.

¹² Kansas, Maryland, Massachusetts, and Mississippi.

E. California Observations

For the past year I have served as a member of the California Judicial Council's Appellate Process Task Force. Our charge is to recommend improvements in the structure and operations of California's intermediate appellate courts. The California courts of appeal are oddly structured, even by state standards. It is divided into six districts, three of which have no divisions and range in size from six to ten judges, and three of which have between three and seven divisions each with between four and ten judges. Several of the divisions are geographically separated from the other divisions of the same district, so that there are courts in nine locations. As chair of the Task Force's Subcommittee on Court Operations, I have recently visited most of those locations.

Like most geographically divided state intermediate appellate courts, the California courts of appeal (each district is formally a separate court, called the Court of Appeal for Nth District) have no en banc mechanism. Statewide uniformity of decision is maintained primarily by the Supreme Court of California, which has discretionary power to review cases from the courts of appeal. There is no practice of stare decisis by which different districts, or even different divisions within a district (whether or not sitting in the same location) defer to the decisions by other units of the courts of appeal.

Within divisions, however, there is typically an informal practice of striving for consistency of decision. Approximately 90 percent of the opinions of the courts of appeal are unpublished, but most divisions keep libraries of their unpublished decisions which the judges and staff attorneys consult for guidance when similar cases arise. Discussion of pending cases and circulation of proposed opinions and recently filed, noteworthy opinions, is common within divisions but not among the multiple divisions of the same district. The larger divisions unanimously cherish the diversity of the three-judge panels that are randomly assembled from among the judges of the division. Judges of the smaller divisions have generally made their peace with their colleagues, and are opposed to the amalgamation of divisions. My view, shared by judges of the larger divisions, is that the risk of "one-judge" decisionmaking is significantly increased within smaller divisions, where judges fall into habits of expecting virtually automatic concurrence in opinions they have authored for panels that perpetually consist of two out of the same three or four colleagues.

When I began my visits to the various locations of the California courts of appeal, I saw little to recommend the fragmented structure of these

courts. But I have been impressed with the regional identity and sense of accountability of the undivided districts, and of those divisions that similarly serve discrete locations. These districts and divisions tend to have lively channels of communication with the bench and bar that they serve. Appellate-court staff frequently have experience in the trial courts served by that court of appeal, trial judges serve by appointment on the local court of appeal, and local lawyers participate frequently in settlement programs and other activities of the local court of appeal.

The major problems seem to be associated with the highly fragmented, multi-division courts that sit in the major urban centers of Los Angeles and San Francisco. Litigants in these communities face a lottery by which their appeals are routed to one of several divisions of widely disparate demeanor, and since no litigant is assured that the same division will be responsible for his or her next appeal, there is a diminished sense among litigants of the accountability as well as predictability of the appellate process. I suspect this is also true of trial judges whose rulings are subject to review by any of a number of divisions that function essentially as separate courts. In the aftermath of my visits I have a much greater appreciation of the value of routing appeals to a regionally organized court with rotating panels drawn from a group of six to ten judges who talk to each other, and a much great awareness of the undesirability of having appeals decided by an arbitrary process of assignment to faceless judges detached from the communities they serve, and unchecked by the need to justify their decisions to a reasonable variety of different panel members.

II. Past Divisional Operation of Federal Courts of Appeals

A. The Ninth Circuit's Regional Calendaring Experiment of 1978-79

The Ninth Circuit's formal use of its present administrative units began on December 18, 1979,¹³ by which time it had the requisite 16 judges to put its Administrative Units Plan into effect under the authority granted to the Court by Section 6 of the Omnibus Judgeship Act of 1978.¹⁴ But as detailed in the loose-leafed set of materials on the Ninth Circuit's administrative innovations of 1978-80 assembled last

¹³ See Memorandum of June 17, 1998, from Cathy Catterson to Chief Judge Hug, Judge Browning, and Judge Wallace entitled "Chronology of Court's Regional Calendaring Experiment; Adoption of the Administrative Units Plan; and the Limited En Banc Rule, 1978-1980" (hereafter cited as Ninth Circuit Chronology), at 8 & Tab 11. See generally THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 78-79* (1994).

¹⁴ Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629.

month by Ninth Circuit Clerk Cathy Catterson,¹⁵ the precursor to the Administrative Units Plan was a short-lived "Regional Calendaring Experiment" proposed by Chief Judge Browning in February 1978. As preliminarily approved for a six-month trial by the circuit council in April 1978,¹⁶ and formally approved when presented in refined form to the circuit council in May 1978,¹⁷ it was set to begin in August 1978 and to continue through January 1979. The adjudicative divisions used for the regional calendaring experiment were, with the exception of the reallocation of the District of Arizona, identical to the administrative divisions that have remained in place to this day.¹⁸

By the time of the June 1978 meeting of the circuit council, calendar assignment lists had been proposed for the first five months of August through December, but an alternative set of calendars for September through November was approved instead.¹⁹ This shifted the six-month span of the experiment to September 1978 through February 1979. The plan called for the judges of each region to hear all appeals originating within that region, and to travel to other regions to hear cases there as required to equalize the workload of the judges assigned to each region. The plan as approved in May 1978 did not extend to motion panels, which apparently were still drawn from the court as a whole.²⁰

On October 3, 1978, after only one full month of experience with regional calendars, the experiment was foreshortened. The judges of the court, apparently acting independently of the circuit council, voted to end the experiment after five months instead of six, upon completion of

¹⁵ Memorandum of June 17, 1998, from Cathy Catterson to Chief Judge Hug, Judge Browning, and Judge Wallace entitled "Chronology of Court's Regional Calendaring Experiment; Adoption of the Administrative Units Plan; and the Limited En Banc Rule, 1978-1980" (hereafter cited as Ninth Circuit Chronology), at 2 & Tab 1.

¹⁶ Ninth Circuit Chronology at 2 & Tab 2.

¹⁷ Ninth Circuit Chronology at 3 & Tab 3.

¹⁸ The regional calendaring plan created a Northern region consisting of the Districts of Alaska, Idaho, Montana, Oregon, and the Eastern and Western Districts of Washington; a Middle region consisting of the Eastern and Northern Districts of California and the Districts of Hawaii, Nevada, Guam, and the Northern Mariana Islands; and a Southern region consisting of the District of Arizona and the Central and Southern Districts of California. At its inception the Administrative Units Plan used the same geographic scheme, except that the District of Nevada was split internally so that appeals from Reno were assigned to the Middle Unit and appeals from Las Vegas were assigned to the Southern District. Ninth Circuit Chronology, Tab 11 at 2. At present the entirety of the District of Nevada is assigned to the Middle Unit, as is the District of Arizona, leaving only the Central and Southern Districts of California in the Southern Unit. West's Ninth Circuit Rules at 10.

¹⁹ Ninth Circuit Chronology at 3 & Tab 4 at 3.

²⁰ Ninth Circuit Chronology, Tab 3 at 1.

the January 1979 calendars.²¹

At the time of the regional calendaring experiment, the Ninth Circuit had only 13 active judges, plus five senior circuit judges.²² Three active judges and one senior judge were assigned to the Northern region, while five active judges and two senior judges were assigned to the other two regions.²³ The small size of the pool of judges from which regional panels were composed appears to have been a significant factor in the early withdrawal from the experiment, together with regional disparities in the proportion of judges to caseloads and the lack of any structural guarantee that all judges would continue to have the opportunity to sit on panels with judges assigned to the other regions.

The plan called for judges to sit outside their assigned regions only as required to deal with the court's backlog. Since the backlog was greatest in the Southern region and least in the Northern region, the judges quickly observed from their calendars, set several months in advance, that this greatly affected the likelihood of particular judges sitting on the same panel. Judges in the Southern region were destined to hear only cases from that region, assisted only by judges traveling down from the Northern region. Judges in the Middle region were entirely isolated from their counterparts elsewhere in the circuit, with a backlog that would

²¹ Ninth Circuit Chronology at 4 & Tab 5. In addition to the budding concerns mentioned below, a contributing factor to the early termination of the regional calendaring experiment may have been that, by October 3, 1978, it had served its strategic purpose of forestalling a circuit split as a condition of Congress creating the additional judgeships needed by the court. On September 28, 1978, it was formally announced that a House-Senate Conference Committee had agreed to recommend enactment of the Omnibus Judgeship Act of 1978 (which added ten judges to the Ninth Circuit) without splitting either the Fifth or the Ninth Circuits — advocates of a split having been appeased for the moment by the newly crafted provisions of Section 6 that would permit these circuits formally to set up administrative units and employ limited en banc procedures. See H.Rep. No. 95-1643, Sep. 28, 1978 (95th Cong., 2d Sess.)(Conf. Comm.). See generally BARROW & WALKER at 210-218. All that remained was the formality of both chambers' assent to the substitute bill jointly proposed by the House and Senate conferees. The House voted accordingly on October 4th, the Senate concurred occurred on October 7th, and the bill thus passed by both chambers was signed into law on October 20th. See Note on Legislative History, Act of Oct. 20, 1978, Pub. L. No. 95-486, 96 Stat. 1629, 1634. Memoranda dated September 27-29 evaluating the Ninth Circuit's nascent regional calendaring experiment were distributed to the court on September 29th for reference during the court's meeting of October 3rd. See Ninth Circuit Chronology, Tab 5.

²² Ten more judgeships were added to the circuit by the Omnibus Judgeship Act of 1978, but it was not until late 1979 that the court actually had a sixteenth judge in regular active service, and thus could take advantage of the authority to implement administrative units and limited en-banc procedures granted by Section 6 of the 1978 Act to courts of appeals with more than fifteen active judges.

²³ Ninth Circuit Chronology, Tab 3 at Table I.

keep them from traveling to other regions, and with the yet greater backlog in the Southern region entirely occupying the available judge-time of both other regions. In addition to the sense of isolation and of a loss of circuit-wide collegiality that arose as the panel assignments took shape, there developed a heightened awareness that despite the assignment of judges from the Northern region to hear cases in the Southern region, the local priority that was intrinsic to the regional calendaring system would prevent circuit-wide equalization of backlog. The distribution of judge-power was such that litigants in the Northern region, and to a lesser extent litigants in the Central region, would for the foreseeable future enjoy substantially shorter delays from the filing to the calendaring of their appeals than would be the case in the Southern region.²⁴

B. The Old Fifth Circuit's Pre-Split Divisional Units

In May 1980, after much congressional and judicial debate, the judges of the old Fifth Circuit petitioned Congress to split the circuit into two new courts.²⁵ This decision followed the passage of the Omnibus Judgeship Act of 1978, which created new judgeships for the circuit and allowed any circuit with more than 15 active judges to divide into administrative units.²⁶ Although the Court was authorized to grow to 26 judges, of which 22 were seated by September 1979, at that month's meeting of the circuit's judicial council the judges could not agree on how to implement Section 6 of the 1978 Act by creating administrative divisions and instituting limited en banc procedures for maintaining the law of the circuit. After initially postponing action for a year, the circuit reversed course in May 1980. At that time it invoked Section 6 to create two regional divisions, Unit A (Louisiana, Mississippi, and Texas) and Unit B (Alabama, Florida, and Georgia), for both adjudicative and administrative purposes.²⁷

The decisive factor was the court's disastrous experience in January 1980 when the entire court (24 judges participating) sought to rehear 12 cases en banc. This convinced even the court's holdouts that a split of the circuit was inevitable. Regional adjudicative units, formerly feared by the holdouts as a Trojan horse, were now welcomed as a means of

²⁴ See generally the materials evaluating the regional calendaring experiment collected at Tabs 5 and 7 of the Ninth Circuit Chronology.

²⁵ See Thomas M. Reavley, *The Split of the Fifth Circuit: Update and Finis*, 12 TEX. TECH L. R. 1, 7 (1981).

²⁶ Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 Stat. 1629 (1976).

²⁷ See generally BAKER at 62-64; BARROW & WALKER at 230-37.

facilitating the split deemed necessary by all.²⁸ The form the court took at this time of transition, however, was in no sense inspired by an effort to make internal divisions work within the framework of a larger court continuing to operate as one whole. Instead, the court adopted a divisional structure that made it resemble a cell on the verge of division — still sharing the same membrane and internal processes while undergoing mitosis.

The two administrative units became effective on July 1, 1980, three months before the realignment statute was passed by Congress and fifteen months before the effective date of the split. Judges were assigned to the units based on their state of residence and cases were assigned to the units based on the states from which they originated. During the transition period all judges retained their authority throughout the entire circuit, and the circuit continued to have one body of law, one judicial council, and one judicial conference for the entire circuit. Unit B's headquarters were placed in Atlanta, however, in anticipation that this would be the headquarters for the emerging Eleventh Circuit.²⁹

In the leading study of the splitting of the Fifth Circuit, the authors conclude that the unit system was adopted "only as a precursor to the split . . ." and ". . . was not intended to be used as a permanent solution to the circuit's problems . . ."³⁰ The evidence of this reality was the simple form the division initially took. While there was to be one law of the circuit applicable in both units, the only procedure in place to ensure this was an en banc rehearing by every active judge of the circuit. The Court exercised this plenary en banc function at least once under the temporary Administrative Unit, rehearing an Alabama case that had been decided by a panel prior to the divisional reorganization of the court.³¹

While limited en bancs had been proposed earlier by some members of the Fifth Circuit,³² such a procedure was not adopted until January 1, 1981, after legislation formally splitting the circuit had been enacted on October 14, 1980.³³ The circuit's judicial council adopted an interim local

²⁸ See BARROW & WALKER at 242.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Shores v. Sklar*, 647 F.2d 462 (5th Cir. 1981) (en banc). Two judges were disqualified from participation, and 22 of the court's 23 remaining active judges participated in the 12-10 decision.

³² See BARROW & WALKER at 227.

³³ Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. 96-452, 94 Stat. 1994. The split of the Fifth Circuit formally took effect on October 1, 1981, but the "former Fifth Circuit" and its unit system remained a juristic entity for cases under submission or eligible for rehearing as of that date, until this shadow court passed out of existence on July

rule which allowed each unit to sit en banc independently of the other³⁴ In an interesting twist, the circuit's practice was that the precedent of either unit's en banc decision was binding upon panels of the other unit, but could be overruled by the other unit acting en banc. Thus in principle a decision of a panel in Unit A was binding on Unit B until overruled by Unit B en banc, at which time Unit B's en banc decision would be binding on panels of Unit A until overruled by Unit A en banc, and the Unit A decision would then be binding on Unit B until overruled (again) by Unit B en banc.³⁵ Clearly this was not a divisional system designed for the long term.

III. Recent Proposals for Divisional Organization of the Ninth Circuit

A. The Weis Proposal

Summary

Judge Weis of the Third Circuit proposed to the Commission a plan for the divisional organization of the Ninth Circuit that would address problems of circuit-court administration which he deems to be national in scope. Although his divisions would probably be regionally defined, this would be a byproduct of the geographic definition of the district courts. Workload rather than geography would be the controlling factor, so that different districts within a single state might be assigned to different divisions. Judge Weis does not rule out the creation of divisions within a circuit to which cases might be assigned on the basis of their subject matter rather than the location of the district court whose judgment would be reviewed.

The focus of Judge Weis's concern is the undue fragmentation of national law by unresolved conflicts between those circuits that currently exist. As applied nationally, his proposed scheme of divisional organization is distinctive in that conflicts among divisions would not be resolved by any conventional form of circuit en banc procedure, but rather by a distinct "Central Division" headed by the Chief Judge and with supervisory jurisdiction over the other adjudicative divisions. This

1, 1984. BAKER at 67-68.

³⁴ See Thomas E. Baker, *A Postscript On Precedent in the Divided Fifth Circuit*, 36 SW. L.J. 725, 728 n.17 (1982). The order specified that appeals that were submitted to a panel of either unit would be heard en banc by that unit at the request of a majority of the unit judges. If a decision was not specifically designated as made by an Administrative Unit, it would be governed by ordinary en banc procedures.

³⁵ See Albert Tate, Jr., *The Last Year of the "Old" Fifth (1891-1981)*, 27 LOY. L. REV. 689, 692 (1981).

would resemble a limited en banc court in that its judges would be drawn from the other divisions. But they would not be selected ad hoc, and would sit for prescribed terms. Ultimately, Judge Weis would prefer that the current system of autonomous circuits be replaced by a system of larger circuits, fewer in number and not necessarily regionally oriented, organized divisionally in units of no more than nine judges.

As applied experimentally to the Ninth Circuit, his proposal is somewhat less radical. He advocates regional divisions defined by the districts within each, and constituted so as to equalize workload and restrict divisional size to no more than nine judges. This size restriction would promote consistency of decision within such divisions by facilitating the mandatory prefiling circulation of panel decisions and the rehearing of cases by divisional en banc courts. Each division would be bound by "precedent set by other divisions,"³⁶ but it is unclear whether this refers to precedent at the panel level or only precedent set by divisional en banc decisions. Also left unclear are the details of the circuit en banc mechanism to resolve divisional conflicts, other than a requirement that all divisions be represented.³⁷

Although regionally defined, his divisions would not necessarily be regionally located. Instead they could use existing facilities outside of the region served as convenience dictates. Districts within a particular state might be assigned to different divisions, and present judges could choose the divisions to which they would be assigned.

Evaluation

The strong points of the Weis proposal are the creation of divisions small enough to foster collegiality, the requirement of prefiling circulation of proposed panel decisions to the other judges of the relevant division, and the provision for divisional en banc procedures. While I share the view that a divisional system coupled with effective procedures for resolving conflicts between divisions would allow different districts of a large state to be assigned to different divisions, such procedures are not adequately spelled out by the Weis proposal. I also disagree with the proposal insofar as it depreciates the importance of a regional division having a visible presence within the geographic area that it serves. In my view a divisional court should not be a brooding omnipresence of judges who may live and work somewhere

³⁶ Statement to the Commission of Hon. Joseph F. Weis, Jr., April 24, 1998, at 11. See also Joseph F. Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 St. Louis U.L.J. 455 (1995).

³⁷ This implies the use of a limited en banc procedure, since all divisions would necessarily be represented were the full circuit to rehear a case en banc.

else, and who may or may not hear local cases locally, such that from time to time the faceless judges of an invisible court may mail in from afar decisions that govern the lives of communities in which they have no assured stake.

Among the existing federal circuits, the Federal Circuit stands apart as a court whose appellate jurisdiction extends only to cases of certain types from the district courts, as well as to cases from other trial-level tribunals that themselves are constituted as courts of limited and specialized subject-matter jurisdiction.³⁸ The other twelve circuits, including the Ninth Circuit, exercise a general appellate jurisdiction on a regional basis. The Federal Circuit's exercise of its specialized rather than regional jurisdiction seems to be working out to the satisfaction of most, but it has not been without its complications when close cases have arisen as to the proper circuit to which to appeal a particular decision of a district court.³⁹

I am skeptical about the feasibility or desirability of reorganizing a regionally defined circuit such as the Ninth Circuit into multiple divisions distinguished by the subject-matter of the appeals assigned to them for adjudication. There is only one clearly demarcated line by which present cases might be divided with a minimum of jurisdictional doubt — into civil and criminal cases — and even this seemingly simple jurisdictional divide is transcended by ostensibly civil proceedings for relief in the nature of habeas corpus. Although some states have divided the work of their appellate courts between civil and criminal cases, this does not seem a feasible alternative to explore as an option for the experimental reorganization of an existing regional circuit. Among many other practical difficulties, I suspect the assignment of judges to such a subject-matter-specific divisional system would be nearly impossible without a whip and a chair.

B. The Svetcov Proposal

Summary

Sanford Svetcov of San Francisco proposed to the Commission that the Ninth Circuit be maintained as single circuit but that its adjudicative

³⁸ See 28 U.S.C. § 1295. See generally U.S. JUDICIAL CONF. COMM. ON THE BICENTENNIAL OF THE CONSTITUTION, THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT: A HISTORY 1982-1990 (1991).

³⁹ See, e.g., *Christianson v. Colt Operating Industries*, 486 U.S. 800 (1988). For a recent discussion of the jurisdictional problems presented by *Christianson*, and criticism of the analysis there prescribed by a unanimous Court, see John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?*, 76 Tex. L. Rev. 1829, 1846-61 (1998).

functions be experimentally divided between two divisions, Northern and Southern, around the axis of California. The Northern and Eastern Districts of California would be assigned to the Northern Division, along with all of the states to their north. The Central and Southern Districts of California would be assigned to the Southern Division, along with Arizona, Nevada, Hawaii, Guam, and the Northern Mariana Islands. He calculates that divisions so constituted would be of roughly size in terms of judges and cases.

Divisional conflicts would be resolved by a limited en banc of 11 judges. This limited en banc court, composed of ten judges and the Chief Judge, would apparently be indistinguishable from that stipulated by current Circuit Rule 35-3 except that half of the ten judges selected by lot would be drawn from each of the two divisions. Mr. Svetcov expresses concern that the Ninth Circuit's present procedures for resolving inconsistency through rehearing by a limited en banc court are being used too sparingly, and speculates that this may reflect concerns by judges who would otherwise vote for rehearing en banc that the limited en banc panel will not be representative of the views of the circuit as a whole. While he suggests that this could be remediated by altering the procedure by which judges are selected by lot to ensure that a majority of six judges on the panel had voted to rehear the case, he does not integrate this suggestion with his requirement that, under his divisional system, half of the judges picked by lot must come from each division.⁴⁰

Mr. Svetcov agrees with Judge Weis that districts within California could feasibly be assigned to different divisions. He argues that the problems that would arise were a single state split between two circuits are substantially mitigated when the split is merely between the regional divisions of a single circuit. This turns, of course, on the effectiveness of the internal en banc procedures for resolving disputes about state law.

Evaluation

I agree that, in principle, conflicting decisions about the law of single state could be much more easily and quickly resolved by internal en banc procedures within a single large circuit than by awaiting the Supreme Court's resolution of a formal split in authority between different circuits. I question, however, whether the limited en banc

⁴⁰ It is surely conceivable that, in voting whether to rehear en banc a case from one division that is ostensibly in conflict with a precedent from the other division, none of the judges from the division whose precedent might be overruled would vote to rehear the case from the other division, or, vice versa, that none of the judges from the division whose case would be reheard would agree that the ostensible conflict was a sufficient ground to rehear the case from their division.

procedure outlined in the Svetcov proposal would be adequate to the this need for quick resolution of apparent conflicts between divisions about the law of a single state — or, for that matter, about other conflicts between the divisions. A fortiori, I question whether such an en banc procedure — dependent upon a vote of the circuit at large — would be adequate to resolve conflicts between panel decisions with a single division.

In my view the divisions contemplated by Mr. Svetcov are too large to justify a divisional experiment. Since he contemplates that roughly one half of the circuit's existing judgeships would be assigned to each division, assuming the circuit was at full strength each of his divisions would, *ab initio*, have between 13 and 15 judges — a number thought, not long ago, to be at the outer limit for the reasonably collegial functioning of single circuit, let alone a division within a circuit.

The most attractive feature of the Svetcov proposal is the requirement that panels within divisions consist of two divisional judges and one judge from another division. I think such a rule is essential to maintaining circuit-wide collegiality and the integrity of the circuit as a juristic entity during a divisional experiment.

C. The Meador Proposal

Summary

Professor Meador's proposed statute would organize the Ninth Circuit into three divisions identical to the regions employed in 1978-79 during the circuit's Regional Calendaring Experiment, described above in Part II.A. The Northern Division would hear appeals from Alaska, Washington, Oregon, Idaho, and Montana. The Central Division would include the Northern and Eastern Districts of California as well as Nevada, Hawaii, Guam, and the Northern Mariana Islands. Finally, Arizona and the Central and Southern Districts of California would compose the Southern District. The judges of each division would be required to live within it, and the division could sit anywhere it chose within its territory. Interdivisional assignments would be left to the discretion of the Chief Judge.

Each division would have a presiding judge determined by the same statutory criteria as the chief judge of a circuit, and with similar intradivisional duties, except that the Chief Judge of the Ninth Circuit could not simultaneously serve as a divisional presiding judge of a division. In lieu of a circuit-wide en banc procedure, a "circuit division" composed of the Chief Judge of the circuit, the presiding judges of the divisions, and five other judges selected as the circuit shall provide —

but for prescribed and nonrenewable (hence rotating) terms of three years — would have discretionary appellate jurisdiction to review final decisions of the regional divisions in order to maintain consistency and uniformity in the law of the circuit.

Finally, the statute directs the Federal Judicial Center to conduct a study of the Ninth Circuit's divisions, paying special attention to how well uniformity is maintained in the law of the circuit. The Center would report to Congress within four years. Accompanying notes support the feasibility of creating a fourth division consisting of Arizona and Nevada and suggest that a five-year sunset provision would assure that, as initially adopted, the divisional organization would be experimental in nature but would remain in effect for at least one year after the submission to the Congress of the Federal Judicial Center.

In notes accompanying the proposed statute, Professor Meador it is pointed out that Nevada and Arizona could compose a "Western Division." The author also notes that Congress could give the Act a five-year "sunset clause," which would give it a year after the Report to decide whether or not to renew the divisions.

Evaluation

I am attracted to many of the details of the Meador proposal. In the aggregate, however, it creates divisions that are too autonomous, and thus might facilitate — indeed, encourage — a the circuit split that I think should be avoided. Once the experiment has run its course, the stage is set for cutting loose the Northern Division as a new circuit, whether or not the divisional system is retained for the rest of the old Ninth Circuit. All that would need to be done is to end the powers of the Chief Judge and the Circuit Division with respect to the Northern Division. Because the remaining divisions (in the three-division version) would bifurcate California, neither of them would be as susceptible to reformulation as freestanding circuits. This tilt in favor of a delayed circuit split would infect the integrity of the entire experiment.

IV. Concluding Proposal

My proposal for the divisional organization of the Ninth Circuit has been constructed on the basis of the following initial premises.

1. There is no need for experimentation to develop a template for divisional organization as means of facilitating a circuit split, in the administrative sense of that term. The old Fifth Circuit's use of regional divisions as a transitional device was successful, and could easily be replicated.

2. I agree with Judge Weis that the number of circuits should not be

increased. Creating additional circuits creates additional circuit splits, in the jurisprudential sense of that term. National law as applied by the federal courts of appeals is fragmented enough, and the ability of the Supreme Court to reconcile those splits is sorely challenged.

3. In general, I share the perception of the majority of the judges of the Ninth Circuit that a large circuit of 20 or more judges can maintain a reasonable degree of collegiality and consistency of decision, and that the Ninth Circuit has to date been a successful experiment in the cohesive operation of such a large circuit. But I am skeptical that there is no outer limit to the practicable size of single circuit, and that this outer limit, whatever it may be, is indifferent to whether a circuit's adjudicative functions are divisionally organized.

4. Absent a proven alternative of divisional organization of adjudicative functions that is not merely a prelude to a circuit split, other circuits anxious to avoid the growth in number of judges that will invite the splitting of the circuit have been encouraged to permit caseloads per judge to rise to levels that exceed any judge's capacity for reasoned, personalized decisionmaking. This creates an unacceptable risk of gradual descent into a process of staff-driven, bureaucratic adjudication.

To facilitate thinking about how a circuit might be divisionally structured so as to avoid rather than to engender its being split into separate circuits, I propose a mental exercise in reverse engineering. Let us suppose that at some future date, if not at present, the number of circuits is deemed impracticable and the decision is made to combine two existing circuits into one new circuit. The policies that would be served by such a combination, and the resulting choices to be made in its implementation, are useful guides to conducting the actual experiment that I propose.

The most important desideratum of such an amalgamated circuit would be that it function genuinely as a circuit, as a whole that is more than the sum of its parts. This points to the *en banc* procedure of the new circuit as its most crucial attribute, for the new circuit would be taking over from the Supreme Court the function of integrating the law of the former circuits that had become its component parts. If this procedure were effective, the judges of the former circuits of which it is composed could continue to hear cases from the districts for which they were, formerly, exclusively responsible. The old circuits could become distinct divisions of the new circuit, retaining their judges, staffs, headquarters, clerks' offices, and other subsidiary characteristics of their former identities, provided that the divisions did not diverge as to the law each applied.

Of course divisional conflict could be resolved by rehearings en banc, case by case, but it could not so easily be tamed in an enduring and systematic way. Since this is a thought experiment, it is appropriate to imagine a worst-case scenario, in which the combined circuits were of equal size, and the judges tended to vote along "party" lines according to their former circuit affiliation, resulting in a series of affirmances on rehearing by equally divided votes. To safeguard against this possibility, it would not suffice to give one division or another a tie-breaking vote. Far more effective would be a scheme of divisional organization that would promote genuine integration of the circuit by creating panels in which judges from both divisions sat together, as Mr. Svetcov contemplates. Also effective would be a system under which the decision of a panel from either division would bind the new circuit as a whole unless the circuit en banc ruled otherwise.

Other measures would promote even greater integration, of course. Simply combining the former circuits for all purposes, without divisions, would obviously promote integration. But as a practical and political matter this might not be feasible, given the size and history of the formerly separate circuits. The point of the mental exercise is that integration of adjudication could be attained without complete administrative integration. Divisional adjudication and the retention of a local presence, with the accompanying visibility and perceived accountability of the regional divisions, would be possible without sacrificing the goal of an integrated circuit as a matter of law.

I propose that the Ninth Circuit be divided (temporarily and experimentally) into regional units of between seven and 11 judges. The divisions need not be equal in size, but should consist of an odd number of judges to promote effective decisionmaking upon divisional rehearing en banc. The permissible range in size from seven to 11 judges is roughly congruent in that dimension to the divisional structure of the Weis proposal. In my view, 11 judges is the upper limit to permit collegial operation enhanced by prefiling circulation of opinions as a matter of routine if not mandate. Based on my California observations, six judges is the lower limit for an adjudicative division in which there will be a healthy diversity in the rotating panel assignments of the judges of that division, and the odd number required for an effective divisional en banc procedure requires that the minimum size of a division be raised to seven.

To maintain circuit integration, panels deciding appeals from the districts within a given division should be composed of two judges from that division, and a third from another division or by assignment of the

Chief Justice from another circuit. Intracircuit assignments to sit as the third judge of particular panels should be determined by some random formula and not left to the discretion of the Chief Judge, as in the Meador proposal. All administrative functions apart from the processing of cases for decision by the regional divisions should remain centralized on a circuit-wide basis, with a single judicial council and judicial conference. To this extent the circuit would be an umbrella organization both for multiple trial courts within the several districts, and for multiple appellate courts within the several divisions. Ultimately, however, through its centralized administration and circuit en banc procedures, the circuit would both operate and speak as a single, unified entity.

The decision of any division within the circuit, regardless of division, should constitute the law of the circuit, subject to divisional rehearing en banc. Given the size of the divisions, divisional rehearing en banc should proceed in conventional fashion with oral argument at the option of the en banc divisional court, and conference of the full complement of the division's circuit judges in regular active service. If the divisional en banc court determines that the precedent of another division is unsound, the divisional en banc court should be able to certify the question whether the precedent in question should be the law of the circuit to the circuit en banc. The entire complement of the circuit's circuit judges in regular active service should be eligible to vote in deciding the certified question, with the power to refer the case in question for rehearing by a circuit-wide limited en banc court.

Divisional en bancs should be composed of all active circuit judges of the division. Each division should have a presiding judge chosen by the same criteria as the chief judge. As a consequence, the chief judge would always be one of the presiding judges. If upon the certification of a question of the law of the circuit by a divisional en banc court the majority of active judges of the circuit vote to refer the case for rehearing by a limited en banc court on behalf of the entire circuit, the limited en banc panel should consist of nine judges, consisting of the presiding judge of each division and an equal number of additional judges from each division determined by seniority from among those judges not yet eligible for senior status, with the addition to the panel of the next most senior judge in the circuit not yet eligible for senior status if necessary to have for the panel to consist of an odd number of judges.

In a circuit of two divisions, the panel would consist of four judges from each division plus the tiebreaking judge. In a circuit of three divisions, the panel would consist of three judges from each division. In a circuit of four divisions, the panel would consist of two judges from

each division plus the tiebreaking judge.

As stated in my evaluation of the Svetcov proposal, I do not think two divisions would be an adequate number for the Ninth Circuit. Depending on relative caseload and judicial availability, either of Professor Meador's options would be preferable, creating three or four divisions. For experimental purposes, at least, a divisional scheme that assigned some districts within California to different divisions should be welcomed rather than resisted.

I do not think it is necessary to expand this model to embrace a five-division circuit. There are currently 167 authorized active judges for the 12 regional courts of appeal. If these 12 circuits each were organized into four divisions with the suggested maximum of 11 judges per division, it would accommodate a total of 528 circuit judges — more than triple the present number without expansion in the number of circuits.

Of course, this maximum use of the proposed divisional organization without increase in the number of circuits may be stymied by the significant differences in the size of the existing circuits, both in present numbers of judges and, more significantly, in relation to the national distribution of population and volume of federal appeals. Were the proposed divisional organization of the Ninth Circuit to prove successful, however, it would facilitate just the sort of circuit realignment — the amalgamation rather than the splitting of circuits — that served hypothetically to inspire such a divisional organization. Such amalgamation need not be complete. It may be desirable to reassign certain districts from one circuit to another, as some have proposed that Arizona and Nevada be shifted from the present Ninth to the present Tenth Circuit. The soundest means to accomplish such a realignment might well be to create divisions embracing the old and new districts within the expanded circuit. Thus a reverse-engineered plan for creation of divisions within an existing circuit, if successful when tried experimentally within the Ninth Circuit, might itself be reversed in its later application.

**TABLES ON STATE INTERMEDIATE APPELLATE COURT
STRUCTURE**

Table A. Geographically Divided Courts

State	Judges	Division Structure	Panel Size	Panel Selection	Mechanism for Resolution of Precedent Conflict
Arizona	22	(2) Geographic Divisions with 3 judge subdivisions ¹	3	Permanent	Court of Last Resort
California	88	(6) Geographic Districts w/ Internal and Geographic Divisions	3	Rotating within divisions	Court of Last Resort
Florida	61	(5) District Courts Divided by Geography	3	Chief Judge	District En Banc
Illinois	46	5 Judicial Districts w/ varying # of Judges (4-18)	≥3	Court of Last Resort	Court of Last Resort
Indiana	15	(5) Geographic Districts w/ 3 Judges Each & Tax Court	3	Geographic	Court of Last Resort
Louisiana	54	(5) Geographic Districts w/ Varying # of Judges	3	Rotating	District En Banc
Missouri	28	(3) Geographic Districts w/ Varying # of Judges	≥3	Chief Judge	En Banc

¹ Division 1 consists of the chief judge of the court of appeals, and fifteen other judges sitting in five three-judge departments; Division 2 has six judges sitting in two three-judge departments. At the discretion of the chief judge, judges may sit in other departments of either division.

State	Judges	Division Structure	Panel Size	Panel Selection	Mechanism for Resolution of Precedent Conflict
New York	24	(4) Geographic Judicial Departments w/ Varying # of Judges	4-5	Chief Administrator of the Courts	Court of Last Resort
Ohio	66	(12) Geographic Districts w/ Varying # of Judges	3	District Chief Judge	Court of Last Resort
Tennessee	12	Court of Appeals: (3) Geographic Divisions ²	3	Presiding Judge	En Banc
	12	Court of Criminal Appeals: (3) Geographic Divisions	3	Presiding Judge	En Banc
Texas	80	14 Courts of Appeals: Geographically Divided w/ Varying # of Judges	≥3	Rotating	District En Banc
Washington	13	(3) Geographic Divisions w/ Varying # of Judges	3	Chief Judge - Divisional Transfer Allowed	Court of Last Resort

² The presiding judge over the entire Court of Appeals has the authority to equalize dockets between districts; the judges may be assigned outside their own districts, and all nine judges may sit en banc.

State	Judges	Division Structure	Panel Size	Panel Selection	Mechanism for Resolution of Precedent Conflict
Wisconsin	16	(4) Geographic Districts w/ Varying # of Judges	3	Random	Court of Last Resort

Table B. Unitary Courts

State	Judges	Division Structure	Panel Size	Panel Selection	Mechanism for Resolution of Precedent Conflict
Alabama	5/Court	2 Courts: Criminal & Civil	3	Random	En Banc
Alaska	3	Undivided	n/a	n/a	Court of Last Resort
Arkansas	12	Single Court: (4) Divisions of 3 Judge Panels	3	Biannual Rotation	2 Division En Banc
Colorado	16	Single Court	3	Assigned by Chief Judge to divisions (panels) changed "from time to time"	Court of Last Resort
Connecticut	9	Undivided	3	Chief Judge	En Banc
Georgia	10	Single Court	3	Chief Judge	En Banc
Hawaii	4	Single Court	3-4	Chief Judge	Court of Last Resort
Idaho	3	Single Court	3	n/a	Court of Last Resort

State	Judges	Division Structure	Panel Size	Panel Selection	Mechanism for Resolution of Precedent Conflict
Iowa	6	Single Court	≥3	Rotating	En Banc
Kansas	10	Single Court	≥3	Chief Judge	En Banc
Kentucky	14	Single Court	≥3	Rotating	En banc
Maryland	13	Single Court	≥3	Chief Judge	En Banc
Massachusetts	14	Single Court	≥3	Rotating	En Banc
Michigan	28	Single Court	≥3	Rotating	Court of Last Resort
Minnesota	12	Single Court	≥3	Rotating	Court of Last Resort
Mississippi	5-10 ³	Single Court	≥3	Rotating	Court of Last Resort
Nebraska	6	Single Court	3	Rotating	Court of Last Resort
New Jersey	32	Single Court w/ 4 Divisions ⁴	2-3	Presiding "Part" Judge	1 Judge added to panel
New Mexico	10	Single Court	3	Rotating	Court of Last Resort
North Carolina	12	Single Court	3	Rotating	Court of Last Resort
North Dakota ⁵	3	Single Court	n/a	n/a	Court of Last Resort

³ From and after the date Laws, 1994, ch. 564 § 97 is effectuated under Section 5 of the Voting Rights Act of 1965, the section will read as providing for 10 judges. Miss. Code Ann. § 9-4-1(1)-(2) (Law. Coop. Supp. 1997).

⁴ Referred to as "parts."

⁵ The North Dakota Court of Appeals was established as a temporary measure to relieve the backlog of the Supreme Court. Its statutory mandate runs until 2000. N.D. Cent. Code § 27-02.1-01,02 (Michie Supp. 1997).

State	Judges	Division Structure	Panel Size	Panel Selection	Mechanism for Resolution of Precedent Conflict
Oklahoma	12	Single Court of Civil Appeals w/ 4 Permanent Divisions ⁶	3	Permanent Divisions	Court of Last Resort
Oregon	10	Single Court	3	Chief Judge	En Banc
Pennsylvania Commonwealth Court	9	Single Court	3	Rotating	7 Judge En Banc
Pennsylvania Superior Court	15	Single Court	3	President Judge	Maximum of 9 Judge En Banc
South Carolina	9	Single Court	3	Rotating	En Banc
Utah	7	Single Court	3	Rotation	Court of Last Resort
Virginia	10	Single Court	≥3	Rotating	En Banc

Table C. En Banc Mechanisms

Court	Panel Size	En Banc Triggering Mechanism	Form of En Banc Panel
Alabama Courts of Criminal and Civil Appeals	3	En Banc Required by Statute When Any Panel Member Dissents	Entire Court (5 Judges)
Arkansas Court of Appeals	3	Petition of Losing Party	Original Panel Plus Another Panel (6 Judges)

⁶ Oklahoma has no intermediate court for criminal appeals.

Court	Panel Size	En Banc Triggering Mechanism	Form of En Banc Panel
Connecticut Appellate Court	3	Order of Chief Judge or Whole Court ⁷	Entire Court (9 Judges)
Florida District Courts of Appeal	3	Majority of Panel ⁸	Entire District ⁹ (9 to 15 Judges)
Georgia Court of Appeals	3	Panel Member Dissent or Majority of 2 Panels and 7 th Judge ¹⁰	Two Panels and One Judge (7 Judges) or Entire Court (10 Judges)
Iowa Court of Appeals	≥3	Request of Chief Judge or 2 Other Judges ¹¹	Entire Court (6 Judges)
Kansas Court of Appeals	≥3	Order of Majority of Entire Court	Entire Court (10 Judges)
Kentucky Court of Appeals	≥3	Order of Chief Judge if Proposed Decision is in Conflict With Prior Decision	Entire Court (14 Judges)
Louisiana Circuit Courts of Appeals	3	If a District Court Judgment is to be Modified or Reversed and One Judge Dissents ¹²	≥5 Judges of the Circuit Court (9-12 Judges)
Maryland Court of Special Appeals	≥3	Order by Majority of Judges	Entire Court (13 Judges)
Massachusetts Appeals Court	≥3	Order by Majority of Justices	Entire Court (14 Justices)

⁷ Before a case is assigned for oral argument, the chief judge may order, on motion of a party or suo motu, that a case be heard en banc. After argument but before decision, the entire court may order that the case be considered en banc. After decision, the entire court may order, on the motion of a party or suo motu, that argument be reheard en banc. Conn. Rules of Appellate Procedure § 4112 (West 1998).

⁸ Hearings en banc can only be ordered sua sponte (by a majority of participating judges), while a party can petition for a rehearing en banc. Florida Rules of Appellate Procedure 9.331 (a), (d)(1) (West 1998).

⁹ If a court chooses to sit in subject matter divisions, en banc determinations are limited to active judges within the division to which the case was assigned unless the chief judge determines that the case deserves the attention of all active judges within the district. Florida Rules of Appellate Procedure 9.331 (b) (West 1998).

¹⁰ If there is a dissent in the original panel, the original and a second panel plus an assigned seventh judge determine the appeal. The original panel or the two panels plus one judge can decide by majority vote for the appeal to be heard by the entire court, subject to the approval of a majority of the entire court. Ga. Code Ann. § 15-3-1 (Harrison Supp. 1997).

¹¹ Any three judges of the court of appeals may mandate an oral hearing on a case to be considered en banc. Iowa Supreme Court Rule 3.4 (West 1998).

¹² En banc is allowed only in civil matters.

Court	Panel Size	En Banc Triggering Mechanism	Form of En Banc Panel
Missouri Court of Appeals	≥3	Panel Size Determined by Judges of Each District	Up to Entire District Court (6-12 Judges)
New Jersey Appellate Division of the Superior Court	2	Order by Presiding Part ¹³ Judge; Panel Cannot Agree	Up to Entire Part (3 to 4 Judges)
Oregon Court of Appeals	3	By Order of the Chief Judge or a Majority of Regularly Elected Judges	Entire Court (10 Judges)
Pennsylvania Commonwealth Court	3	By Special Order of the Commonwealth Court	7 Judges (Entire Court Consists of 9 Judges)
Pennsylvania Superior Court	3	By Special Order of the Superior Court	Not More than 9 Judges (Entire Court Consists of 15 Judges)
South Carolina Court of Appeals	3	Six Judge Approval of Court Motion or Party Petition	Entire Court (9 Judges)
Tennessee Court of Appeals	3	Certification by Majority of Judges of Deciding Panel	Entire Court (12 Judges)
Tennessee Court of Criminal Appeals	3	Discretion of Presiding Judge	5, 7 or 9 Judges - At the Discretion of the Presiding Judge (Entire Court Consists of 12 Judges)
Texas Court of Appeals	≥3	By Vote of Court; By Discretion of District Chief Justice	District En Banc (Each District Consists of 3-13 Judges)
Virginia Court of Appeals	≥3	(i) dissent in panel and losing party requests and 2 judges vote for en banc, (ii) one judge in panel certifies a conflict with a prior decision of the Court, or (iii) on a motion of the majority of the Court	Between 8 and 10 Judges (Entire Court Consists of 10 Judges)

¹³ There are 32 judges who sit in four judge "parts." Each part has a presiding judge. The presiding judge's determination may be made where the appeal presents a question of public importance, of special difficulty, of precedential value, or for such other special reason as determined by the presiding judge. New Jersey Rules of Court 2:13-2 (b) (West 1998).

APPENDIX C

THE HUG PLAN: ANALYSIS OF THE COMMISSION REPORT

*By Chief Judge Procter Hug, Jr.**

I now have had an opportunity to carefully study the Report and to receive memoranda and comments from many of the judges and lawyers, and I thought it would be helpful to give my evaluation of the Report. The Report recommends that the Ninth Circuit not be split and does acknowledge some important goals and objectives.

Some conclusions by the Commission are particularly important:

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.

Any realignment of the 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.

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 other nations on the Pacific Rim, is a strength of the circuit that should be maintained.

The Commission also recommends some experimental innovations that could reduce the burden on the courts of appeals, such as district court appellate panels, two-judge circuit court of appeals panels, possible discretionary review of certain cases, and the possible transfer of certain appeals to the Federal Circuit. The Commission also pointed out the additional burden on the courts of appeals if the Bankruptcy Commission's recommendation for direct appeals from the bankruptcy courts to the courts of appeals were adopted, and recommended legislation to preserve the participation of the Bankruptcy Appellate Panels (BAP).

The difficulty I find is with the recommendation that Congress enact a statute requiring the Ninth Circuit to adopt very specific adjudicatory

* The text of this appendix was downloaded directly from the Commission's website, <http://app.com.uscourts.gov/report/comments/ANALYSIS.htm> (visited Sept. 16, 2000). See Final Report at 51, n. 111, reprinted above as Appendix A (referring to Chief Judge Hug's analysis as posted on Commission's website, and listing website's address).

divisions, composed in very specific ways, with significant changes in *stare decisis* rules and en banc functions, rather than letting the circuit have the flexibility to achieve the objectives identified by the Commission in less disruptive ways. The Ninth Circuit has always been willing to reexamine its procedures and to experiment in working out better methods of operation. The Commission has identified the Ninth Circuit 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 a rigid statutory divisional structure, would provide the best model for the future. It also would not saddle the Ninth Circuit during the seven-year experimental period with a structure that gives up a proven successful process for intangible benefits that could be better achieved in less disruptive ways.

Although the Commission does not recommend a split of the Ninth Circuit for administrative purposes, its draft recommendation goes very far in splitting the more-vital adjudicative functions to be performed within the circuit. The present recommendation is that Congress enact a statute, organizing the Ninth Circuit Court of Appeals into three regionally based adjudicative divisions, each division with a majority of its judges resident in its region but providing that judges from other regions will be assigned into the regional division. Each division is to have its exclusive jurisdiction over appeals from judicial districts within that division. Each division would function as a virtually autonomous decisional unit. There is no unifying circuit-wide en banc structure to maintain uniformity of the circuit decisions or to resolve questions of exceptional importance, as has been the traditional function of an en banc court under Rule 35 of the Federal Rules of Appellate Procedure. Instead, there are divisional en bancs, which will finally resolve for the division, all issues that do not conflict with another division's cases. Any further review of those determinations would be by the United States Supreme Court. The unifying adjudicative structure is designated as the Circuit Division, which is designed to resolve only conflicts between divisions. This Circuit Division panel is composed of seven judges, the Chief Judge, the presiding judge from each division, and one other judge from each division. Thus, the traditional unifying function of an en banc court does not take place unless a conflict has been generated between the divisions. This unnecessarily complicates the adjudicative process, significantly deters the rational development of circuit law, and presents particular problems for the State of California, which is divided into two divisions.

The motivation for this adjudicative structure seems to be to accomplish three major objectives:

1. To have a greater territorial connection between the judges deciding the appeals in the territory from which the appeals come.
2. To allow for a smaller group of judges to work together as a court in developing the law applicable to a particular area of the country.
3. To have more careful monitoring of the opinions of panels within the division, particularly to adopt the pre-filing review procedures that are used in some of the smaller circuits around the country.

In my view, these objectives could be accomplished, to a large extent, in much less intrusive ways, which would not impinge upon the development and maintenance of a consistent body of law throughout the circuit, and without creating another tier of review with the attendant delay and expense that would be involved.

This virtually autonomous divisional structure was adopted despite the overwhelming support of the judges and lawyers within our Ninth Circuit for the adjudicative structure that we have in place. This approval is confirmed by the survey of the judges of our court with 70% of the circuit judges and 68% of the district judges opposing restructuring of the circuit. There was virtually no advocacy for divisions within the Ninth Circuit, although suggestions were made by Chief District Judge Terry Hatter and attorney Sanford Svetcov about possible divisions. Neither of their suggestions would operate at all in the fashion suggested by the Commission Report.

One might ask how the Commission arrived at this particular division of the circuit into these virtually autonomous divisional units. I think it is instructive to review the report of Professor John Oakley, who was asked to prepare a paper on this subject for the Commission. It discusses the California and other state appellate systems. Sections III and IV of that report discuss recent proposals for divisional organization of the Ninth Circuit. The paper discusses the proposals of Judge Weis, Sanford Svetcov, Professor Meador, and Professor Oakley.

These proposals differ significantly from the one adopted by the Commission, as I later discuss. The major differences are: they propose a circuit-wide *stare decisis*, an en banc process that deals with both conflict and error correction, and assignment of out-of-division judges to division panels, rather than long-term assignments as members of the division.

I think it is important to note that Professor Oakley, after reviewing the other proposals, states in his Concluding Proposal the following:

3. In general, I share the perception of the majority of the judges of

the Ninth Circuit that a large circuit of 20 or more judges can maintain a reasonable degree of collegiality and consistency of decision, and that the Ninth Circuit has to date been a successful experiment in the cohesive operation of such a large circuit. But I am skeptical that there is no outer limit to the practicable size of a single circuit, and that this outer limit, whatever it may be, is indifferent to whether a circuit's adjudicative functions are divisionally organized.

Thus, in Professor Oakley's view, this divisional structure of the court of appeals is not necessary because of any deficiency in the operation of the Ninth Circuit, but rather is a experimental model that could be tried by the Ninth Circuit as a possible structure for it and other circuits to try as the case load and need for other judges grow. He also expresses the view that this might encourage other circuits that are taking unacceptable case loads per judge to avoid their fear of asking for additional judges because the court would be too large.

From my viewpoint, the Ninth Circuit has been conducting an experiment with a large court, which Professor Oakley acknowledges has been successful, with the use of the limited en banc process. The Ninth Circuit has never been adverse to new ideas or new approaches to more effective case management or to special concerns with its operational procedures. Our view and the view of a great majority of the judges and lawyers in our circuit is that the experiment, as we have developed it, has worked very successfully. However, because of the criticisms and perceived problems that are sought to be remedied by this divisional approach, I think that, we as the Ninth Circuit, should attempt to address the Commission's suggested improvements. If we are to be an experimental model for the country, we should be allowed much greater flexibility in determining how best a large circuit can operate. Major motivations for this divisional approach are as follows and their objectives could be accommodated as I indicate.

1. **Appeals from a Particular Region to be Heard Principally by Judges from that Region.** This could be accommodated by panels in a division being constituted with two judges from the region and one judge from without. This would involve the great majority of the decisions that affect the area. The small percentage of cases that are taken en banc, as I later propose, would be before a limited en*banc panel that would have equal representation on the panel from the divisions.

2. **More Careful Monitoring of Panel Decisions, Perhaps Before They are Filed.** This could easily be accomplished by having judges of a particular division entrusted with the special responsibility of

monitoring more carefully the decisions in their own division. However, I propose that any judge from any division would be able to call for a circuit-wide en banc. The Automation Committee of our circuit has developed a particular technology that will permit judges to have a Pre-circulation Report of decisions that have been sent for filing before they are actually filed. If it is deemed desirable, the five-day period between the opinion being sent to the Clerk for filing and the ultimate filing date of the opinion could be extended by a few days.

3. **Improvement of the Limited En Banc Process.** There has been expression that the number of judges on our limited en banc court is too small. This number could be increased to 13 or 15 judges. If it were to be 13 judges, it could be 4 judges from each division, with the Chief Judge presiding. If it were to be 15 judges, it could be 5 judges from each division, with the presiding officer to be the senior active judge. Other suggestions have been made for improving the en banc process that could be adopted. For example, some judges have suggested frustration with having been the judge that did a great deal of work in calling for the en banc, but not being selected on the en banc court. Judge Hawkins suggests that the author of the panel opinion and the person calling for the en banc automatically be included on the panel. One of the criticisms has been that we do not have enough en bancs. I question whether this is a legitimate criticism, in that proportionately, we have as many en bancs as other circuits. In 1996-97, we had 19 en bancs and 40 calls for en banc on which we took votes. However, we might want to consider adopting the Justice Department's proposal that we have a requirement for less than a majority of the court to require an en banc review for cases where we are creating or there exists an intercircuit split. Perhaps there should be less than a majority for other types of situations.

As I indicate later, I would recommend to the court that we commence implementing these suggestions now.

Strengths And Weaknesses Of The Commission Report

I think that the Commission has proposed the experimentation with some ideas that could work very well. The Commission recommends that the circuits experiment with some innovations:

1. To decide some selected cases with two-judge panels.
2. To authorize the Judicial Council to establish district court appellate panels to provide the first-level review of the designated categories of cases with discretionary review to the court of appeals.
3. Also, the Commission made a very important recommendation that the direct appeal of bankruptcy cases to the circuit courts, as proposed by the National Bankruptcy Commission, not be adopted

without more careful consideration. It proposes three methods by which our Bankruptcy Appellate Panels (BAP) would still be involved in the appellate process. This is vitally important because if the direct appeal were adopted without the involvement of the BAP, we would have an additional 1,000 cases in our court of appeals because that number of cases were finally resolved by either the district courts or the BAP decisions.

The major problems that I see with the specific proposal of the divisional adjudicative structure of the Ninth Circuit Court of Appeals are as follows:

1. Under the Commission proposal, the decisions of a panel or an en banc panel in a division are not of *stare decisis* value to panels in other divisions or to the district courts in other divisions. This means that a decision of the Northern Division has exactly the same standing before the Southern Division as does a decision from the Second Circuit. This differs from Professor Oakley's proposal, Judge Weis's proposal, and Sanford Svetcov's proposal, and does not contribute to the development of circuit law. *Stare decisis* among panels of a court is essential to the maintenance and development of the law of a circuit.

2. There is no circuit-wide en banc process that can be invoked unless there is a conflict between the divisions. Thus, unless there is a conflict with another division, the en banc decision of the division would be reviewed only by *certiorari* to the United States Supreme Court. This would be a particular problem between the Middle and Southern Divisions, which divide the State of California. An example would be one of the many ballot issues that the State of California passes. If Proposition 200 were declared to be unconstitutional by the Middle Division and if *certiorari* were denied by the United States Supreme Court, that would be the rule for the Northern Division of California. Unless a conflict were to arise in the Southern Division by a separate lawsuit being brought, that ruling of the Middle Division would remain intact for the Middle Division, but not for the Southern Division. If there were a conflict, this would be resolved, not between the two divisions that divide California, but by a seven-judge court with a very limited representation from the full circuit.

3. The Commission draws a bright-line between error correction and circuit conflict. This could lead to considerable litigation as to whether it is a true conflict or merely error correction. None of the proposals submitted to the Commission by Judge Weis, Sanford Svetcov, Professor Meador, or Professor Oakley made this distinction between error correction and conflict. I consider it crucial that there be a circuit-wide en

banc court, although it could be revised in composition and its procedures could be changed. However, it is essential that the en banc court maintain the law of the circuit whether it is considered a conflict or error correction. (I have difficulty with the concept of error correction because it seems to me that a panel decision interpreting a rule of law or a fact situation may not necessarily be error just because a higher court interprets the facts or the law in a different manner. It is just that the rule of the higher court is the final rule.)

4. The composition of the divisional units, with the majority of the judges being resident judges but other judges, not from that division, being assigned to the division for at least a year causes unnecessary problems without any real benefit. For example, Judge Thomas and Judge Kleinfeld could be assigned to the Southern Division, and Judge Fernandez and Judge Reinhardt could be assigned to the Northern Division because the designation is by lot or by random. Under the Commission proposal, the out-of-division judges would be precluded from taking part in the en banc processes in their own residential area. A better way to accomplish the objective of having judges from throughout the circuit sit in the various divisions would be through panel assignments, not through more permanent assignments. The territorial aspect would be accommodated by the fact that a majority of the panel would be from the division; the monitoring aspect would be accommodated by the fact that the judges within the division would have the particular responsibility to look to the panel decisions within their division.

5. In my view, the divisional en bancs should be eliminated. They create the prospect of additional cost to litigants and additional delay for an ultimate decision. Even if the divisional en bancs are retained, the circuit-wide en banc process should be the method of further review and should be undertaken in accordance with Rule 35 of the Federal Rules of Appellate Procedure. Although judges of a division would have the special responsibility to review with care the panel decisions within their division, any judge within the circuit should be able to call for an en banc. The composition of the en banc court could be changed as above-indicated and the voting requirements in order to take a case en banc could also be changed as indicated in my Summary below. The important aspect of this matter, however, is that the en banc court should speak for the entire circuit and any review to the United States Supreme Court should be from the en banc court or from a panel decision where en*banc review has been denied.

Summary Of Analysis

1. The Commission has rendered a valuable service in determining that the Ninth Circuit should not be split for administrative purposes. However, the proposal, without revision, would effectively divide the Ninth Circuit for adjudicative purposes. The Commission has recommended a number of valuable suggestions for experimentation by the circuits throughout the country but has not allowed sufficient latitude for experimentation with the divisional approach suggested.

2. The Ninth Circuit has, more than any other circuit, been willing to experiment with new approaches and innovative concepts. The Ninth Circuit has been a laboratory of experimentation with a large circuit, the results of which have been well accepted by the great majority of the lawyers and judges within the circuit. We should recommend to the Commission that the Report, and the legislation it proposes, be revised to authorize and direct the Ninth Circuit to continue to experiment in order to find the best ways to address the particular problems the Commission perceives, without the rigid statutory confines of the suggested divisional approach.

In my opinion, a viable experiment that could be tried, even at the present time, would be as follows:

1. That we establish the three divisions with resident judges.
2. That oral argument panels in each division be composed of two resident judges, and the third judge being from another division.
3. That there be a circuit-wide en banc composed of 13 or 15 judges as I indicated above.
4. That the death penalty cases be handled in the manner we have established—to be on the regular argument calendars.
5. That the motions and screening process be handled circuit-wide in the manner in which it is currently done, rather than trying to separate out those cases that pertain to particular divisions. We may, however, wish to revise the action that could be taken by motion and screening panels on cases of particular importance so that those would be referred to the divisional argument panels.