

# The Federal Appeals Courts at Century's End

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## INTRODUCTION

The Commission on Structural Alternatives for the Federal Courts of Appeals ("The Commission") submitted its report and suggestions to the United States Congress and the President in December 1998.<sup>1</sup> The Commission, which Congress authorized during November 1997, spent ten months studying the "structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit," and two months developing "recommendations for such changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process."<sup>2</sup> The centerpiece of the Commission's proposal is the suggestion that Congress require the United States Court of Appeals for the Ninth Circuit to implement three regionally-based adjudicatory divisions and authorize the remaining appellate courts to institute divisional arrangements as they increase in size. Lawmakers intended that the Commission craft recommendations which would help Congress resolve the controversial, ongoing debate over the Ninth Circuit and to address the dramatic caseload expansion that has transformed the appeals courts from the institutions which they were a generation ago. Indeed, the Commission's report and proposals could well chart the destiny of the appellate courts for the twenty-first century.

It should not be surprising, therefore, that the suggestions proffered by the Commission have received great attention. Many federal court observers, including members of the judicial and legislative branches, have expended much energy analyzing and responding to the recommendations. For example, Procter Hug, Jr., the Chief Judge of the United States Courts for the Ninth Circuit, which figured prominently in the Commission's study and proposals, authored a cogent critique of the suggestions.<sup>3</sup> Numerous legal scholars have evaluated the recommendations and reached positive and negative conclusions.<sup>4</sup>

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<sup>1</sup> See Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 29 [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.

<sup>2</sup> Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, § 305, 111 Stat. 2491 (1997).

<sup>3</sup> See Procter Hug, Jr., *The Commission on Structural Alternatives for the Federal Courts of Appeals' Final Report: An Analysis of the Commission's Recommendations for the Ninth Circuit*, 32 U.C. DAVIS L. REV. 887 (1999).

<sup>4</sup> See, e.g., Arthur D. Hellman, *The Unkindest Cut: The White Commission's Proposal to*

Several senators, who represent Pacific Northwest states and who have been ardent proponents of splitting the Ninth Circuit into two appeals courts, introduced proposed legislation that adopted almost verbatim the statutory reforms suggested by the Commission a month after their issuance.<sup>5</sup>

Virtually all of the examination which evaluators have devoted to the Commission's work shares one salient characteristic, however. In the commentators' apparent haste to praise or criticize the Commission's recommendations, they have essentially ignored the elaborate descriptive account of the appellate courts that the commissioners compiled. For instance, observers have neglected the Working Papers of the Commission on Structural Alternatives for the Federal Courts of Appeals.<sup>6</sup> This 348-page volume includes a number of studies which the Commission authorized and much information which it collected. The commissioners seemed to consult these materials closely in fashioning the report and proposals.

The dearth of attention that commentators have accorded the Commission's description is remarkable. The Commission appeared to depend heavily on the descriptive account when drafting its report and suggestions. Change which is as drastic as the commissioners recommended in institutions that are as critical as the appeals courts should correspondingly have clear, substantial empirical support. The Commission also painted a rather detailed portrait of the appellate system or at least took numerous snapshots of the appeals courts, which yield instructive insights on them at the turn of the century and could inform their future reform and investigation. Indeed, the commissioners may well have constructed one of the richest modern accounts of those courts, thereby making the absence of scrutiny afforded the description even more striking.

The above propositions mean that the descriptive account which the Commission on Structural Alternatives for the Federal Courts of Appeals compiled warrants analysis. This article undertakes that effort. The first section evaluates the origins and development of the Commission and briefly describes its work. The second section selectively assesses the

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*Restructure the Ninth Circuit*, 73 S. CAL. L. REV. 377 (2000); Jennifer E. Spreng, *Three Divisions In One Circuit?*, 35 IDAHO L. REV. 551 (1999); Carl Tobias, *A Federal Appellate System for the Twenty-First Century*, 74 WASH. L. REV. 275 (1999).

<sup>5</sup> Compare S. 253, 106th Cong. (1999) with Final Report, *supra* note 1, at 93. In March 2000, senators introduced a circuit-splitting bill. See S. 2184, 106th Cong. (2000).

<sup>6</sup> See Commission on Structural Alternatives for the Federal Courts of Appeals, Working Papers i-ii (1998) [hereinafter Working Papers].

Commission's description and attempts to derive from the account useful perspectives on the twelve, specific regional circuits and the appellate system as well as additional, helpful lessons respecting the Commission's endeavors. Most significant, particular appeals courts appear to operate less efficaciously than they might. However, the empirical evidence which the Commission adduced appears insufficient to support definitive conclusions regarding the circuits' present condition, much less modifications that seem as dramatic as those which the commissioners proposed. The final section, therefore, suggests that Congress reject the Commission's recommendations and authorize further study, which should permit more conclusive determinations about the courts, or experimentation with promising measures.

#### I. ORIGINS AND DEVELOPMENT OF THE COMMISSION AND THE COMMISSION'S WORK

The historical events which led senators and representatives to authorize the Commission on Structural Alternatives for the Federal Courts of Appeals, as well as the commissioners' efforts, deserve comparatively limited consideration in this paper because they have received relatively thorough analysis elsewhere.<sup>7</sup> Nonetheless, some treatment of the Commission's origins, development and work is justified. This type of examination can enhance appreciation of the Commission's descriptive account. For instance, it is important to understand that the commissioners completed the fourth significant evaluation of the federal courts in the last decade and that they built upon the three prior assessments.<sup>8</sup>

##### A. Authorization of the Commission

The immediate impetus for Congress to create the Commission was the continuing controversy which has involved the United States Court of Appeals for the Ninth Circuit. The great size of the court has

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<sup>7</sup> See, e.g., Hellman, *supra* note 4; Hug, *supra* note 3; Spreng, *supra* note 4; Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189 (1997).

<sup>8</sup> See JUDITH MCKENNA, FEDERAL JUDICIAL CENTER, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS (1993); JUDICIAL CONFERENCE COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) [hereinafter FEDERAL COURTS STUDY REPORT]; JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (December 1995) [hereinafter LONG RANGE PLAN]; see also COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS, H.R. REP. NO. 105-26, at 2 (1997) (suggesting that Commission would build on Federal Courts Study Committee's work) [hereinafter HOUSE REPORT].

prompted efforts to restructure the Ninth Circuit virtually since lawmakers established the federal appellate system during 1891.<sup>9</sup> The notion of magnitude encompasses the large complement of twenty-eight active appellate judges that Congress has authorized for the court, the circuit's substantial docket of nearly 9000 annual cases and the court's enormous geographic expanse of almost 1,350,000 square miles, which have allegedly promoted inconsistent, inefficient and incorrect decision making.<sup>10</sup> Recent, serious efforts to bifurcate the Ninth Circuit began a decade and a half ago, while members of Congress who favor division have attempted to split the court on numerous occasions.<sup>11</sup>

Republican Senators, who primarily represent states which are located in the Pacific Northwest, commenced the latest campaign to realign the Ninth Circuit during May 1995 by introducing a proposal that would have modified the appellate court.<sup>12</sup> In the first session of the 104th Congress, the United States Senate Committee on the Judiciary adopted a bill which would have restructured the Ninth Circuit.<sup>13</sup> The measure's advocates lacked sufficient support to secure full Senate approval and, therefore, developed a compromise that would have authorized a national commission to analyze all of the appeals courts.<sup>14</sup> The United States House of Representatives did not enact substantive legislation which would have created a commission; however, the House appropriated \$500,000 for an evaluation.<sup>15</sup>

During the initial session of the 105th Congress, senators and representatives introduced bills that would have split the Ninth Circuit or which would have instituted a study of the federal appellate system.<sup>16</sup>

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<sup>9</sup> See Final Report, *supra* note 1, at 33; see generally NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995, S. REP. NO. 104-197 (1995) [hereinafter SENATE REPORT].

<sup>10</sup> See Final Report, *supra* note 1, at 34-36.

<sup>11</sup> See *id.* at 33-34. See generally Tobias, *supra* note 7, at 196-214.

<sup>12</sup> See S. 956, 104th Cong. (1995). See generally Diarmuid F. O'Scannlain, *A Ninth Circuit Split Study Commission: Now What ?*, 57 MONT. L. REV. 313, 313-15 (1996); Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L. J. 1357 (1995).

<sup>13</sup> See S. 956; SENATE JUDICIARY COMMITTEE, Markup of S. 956 (Dec. 7, 1995). See generally SENATE REPORT, *supra* note 9; Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 887 (1998).

<sup>14</sup> See 142 CONG. REC. S254 (daily ed. Mar. 20, 1996) (statement of Sen. Murkowski). See generally Carl Tobias, *A Proposal to Study the Federal Appellate System*, 167 F.R.D. 275, 279 (1996).

<sup>15</sup> See 142 CONG. REC. H11,848, H11,859 (daily ed. Sept. 28, 1996). See generally Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and the Congress*, 77 OR. L. REV. 405, 409 (1998).

<sup>16</sup> See, e.g., S. 431, 105th Cong. (1997); S. 248, 105th Cong. (1997); H.R. 908, 105th Cong. (1997); see also Tobias, *supra* note 7, at 205-14 (analyzing developments in 105th Congress).

In June 1997, the House of Representatives unanimously approved a measure that would have implemented an assessment of the appeals courts.<sup>17</sup> The next month, senators who championed Ninth Circuit division persuaded the upper chamber to adopt an appropriations rider which would have reconfigured the appellate court.<sup>18</sup> However, members of the House - including the entire delegation from the state of California and Representative Henry Hyde (R-Ill.), Chair of the House Judiciary Committee - opposed bifurcation. Congress eventually agreed to a compromise that authorized a national evaluation.<sup>19</sup> The legislation empowered the Chief Justice of the United States to name the Commission's five members no later than thirty days from the date of statutory passage.<sup>20</sup> The measure accorded the commissioners ten months to "study the structure and alignment of the Federal Court of Appeals system, with particular reference to the Ninth Circuit," and two months to draft a report with recommendations for such "changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process."<sup>21</sup>

Chief Justice William H. Rehnquist selected as Commission members retired United States Supreme Court Associate Justice Byron R. White, Sixth Circuit Judge Gilbert S. Merritt, Ninth Circuit Judge Pamela Ann Rymer, District Judge William D. Browning of Arizona and immediate past American Bar Association President N. Lee Cooper.<sup>22</sup> Lawmakers wisely appropriated generous resources of \$900,000 that ostensibly could have permitted the Commission to perform a thoroughgoing analysis.<sup>23</sup> However, Congress assigned the relatively small number of commissioners a potentially gigantic task and accorded the five individuals a truncated period for completing all of the work entailed.<sup>24</sup> For instance, the Commission had less time to evaluate the appellate

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<sup>17</sup> See H.R. 908, 105th Cong. (1997); 143 CONG. REC. H3223 (daily ed. June 3, 1997) (statement of Rep. Coble).

<sup>18</sup> See S. 1022, 105th Cong., § 305 (1997); 143 CONG. REC. S8041 (daily ed. July 24, 1997) (statement of Sen. Feinstein).

<sup>19</sup> See Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, § 305, 111 Stat. 2491 (1997).

<sup>20</sup> See Department of Justice Appropriation Act §§ 305(a)(2)(A)-(B).

<sup>21</sup> Department of Justice Appropriation Act § 305(a)(1)(B); see also Tobias, *supra* note 7, at 206-11 (analyzing measure).

<sup>22</sup> See Final Report, *supra* note 1, at 1, 92.

<sup>23</sup> See Department of Justice Appropriation Act § 305(b).

<sup>24</sup> See Department of Justice Appropriation Act § 305(a)(6).

courts than most of the circuits need for deciding appeals<sup>25</sup> and a shorter period and fewer members<sup>26</sup> than similar, earlier entities, including the Commission on Revision of the Federal Court Appellate System ("Hruska Commission"), the Federal Courts Study Committee and the Long Range Planning Committee of the Judicial Conference of the United States.<sup>26</sup> This situation may have seriously compromised what the Commission could achieve.

### B. The Commission's Efforts

The commissioners seemed to discharge faithfully the substantial statutory responsibilities that Congress assigned the Commission.<sup>27</sup> Throughout 1998, the Commission attempted to solicit considerable public input. During the spring, the entity conducted six public hearings at which eighty-nine witnesses testified in metropolitan areas across the country: Atlanta, Dallas, Chicago, New York, Seattle and San Francisco.<sup>28</sup> Five of these cities currently serve as the headquarters for regional circuits, while Seattle would apparently be the headquarters of any new Twelfth Circuit that Congress might create from the current Ninth Circuit.

The Commission worked closely with the Federal Judicial Center (FJC) and the Administrative Office of the United States Courts, the primary research and administrative arms of the federal courts, which lawmakers astutely authorized the commissioners to consult.<sup>29</sup> Some FJC staff, who served as expert advisors for the commissioners, had been actively involved in prior studies of the federal judicial system. Two experienced FJC employees assumed major responsibility for designing surveys that the Commission circulated to appeals and district court judges and appellate attorneys, which sought their perspectives on the regional circuits' operations. Moreover, one FJC employee and several other FJC

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<sup>25</sup> See Working Papers, *supra* note 6, at 95 tbl.7; U.S. Courts of Appeals, Median Time Intervals in Cases Terminated After Hearing or Submission, By Circuit During the Twelve-Month Period Ending Dec. 31, 1999.

<sup>26</sup> See Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223 (1973) [hereinafter *Hruska Commission*]; LONG RANGE PLAN, *supra* note 8, FEDERAL COURTS STUDY REPORT, *supra* note 8.

<sup>27</sup> See Final Report, *supra* note 1, at 1-6.

<sup>28</sup> See *id.* at 2-3.

<sup>29</sup> See *id.* at 3-4; see also Department of Justice Appropriation Act § 305(a)(4)(D) (authorizing Commission to secure research services from FJC and administrative services from Administrative Office of U.S. Courts); 28 U.S.C. § 620 et seq. (1994) (authorizing FJC); 28 U.S.C. § 601 et seq. (1994) (authorizing Administrative Office).

staff members undertook numerous analyses of the courts at the entity's behest.<sup>30</sup>

The Commission also assembled statistical material related to the functioning of the regional circuits. For example, the entity collected information on the percentage of cases that the appellate courts accord oral arguments and written dispositions, on the time which the tribunals require to decide appeals, and on the measures that circuits have used to address the steadily rising dockets which have substantially altered the appellate courts since the 1970s.<sup>31</sup>

The Commission members analyzed all of the input that they had gathered or had received. On October 7, 1998, the Commission published a tentative draft report and recommendations on which the Commission sought public comment during a thirty-day period.<sup>32</sup> Some people and interests that the Commission draft determinations and recommendations would affect responded favorably. However, more observers submitted comments which criticized those findings and suggestions. Individuals and entities with quite diverse views evinced considerable dissatisfaction.<sup>33</sup> Once the commissioners examined the public comments, they made minor changes in the tentative draft report and published a final report on December 18.<sup>34</sup>

In short, the Commission on Structural Alternatives for the Federal Courts of Appeals attempted to fulfill conscientiously the burdensome duties that Congress imposed in the limited time provided by senators and representatives. The Commission members assembled relevant material on the intermediate appeals courts, widely sought public input, pinpointed the most troubling problems which the circuits apparently encounter and fashioned remedies for these complications that the commissioners seemingly thought would be effective. Despite the Commission's efforts, the Commission failed to adduce persuasive

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<sup>30</sup> See Final Report, *supra* note 1, at 4; Working Papers, *supra* note 6, at ii.

<sup>31</sup> See Final Report, *supra* note 1, at 21-25, 39; see also FEDERAL COURTS STUDY REPORT, *supra* note 8, at 109 (stating that caseload increases have transformed Circuits).

<sup>32</sup> See Commission on Structural Alternatives for the Federal Courts of Appeals, Tentative Draft Report (Oct. 7, 1998) [hereinafter Draft Report]; see also Hug, *supra* note 3, at 894-95 (comparing tentative draft report and final report).

<sup>33</sup> See, e.g., American Bar Association, Comments to the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 6, 1998); U.S. Dept. of Justice, Comments to the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 6, 1998); Todd D. True, Earthjustice Legal Defense Fund, Comments to the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 6, 1998); Harry Edwards et al., Comments to the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 10, 1998).

<sup>34</sup> See Final Report, *supra* note 1.



empirical evidence that clearly demonstrates that the courts now experience complications which are problematic enough to deserve treatment. This is particularly true with measures that appear as potentially inefficacious as the divisional arrangement proposed. Nevertheless, the commissioners did compile a helpful description of the regional circuits at the close of the twentieth century.

## II. ANALYSIS OF THE COMMISSION DESCRIPTIVE ACCOUNT

This section selectively evaluates the Commission's descriptive account and attempts to extract from this description informative insights on individual appeals courts and the whole appellate system as well as additional instructive ideas. The section also discusses how particular circuits may be functioning less effectively than they could. Finally, this section argues that the empirical data and remaining material, which the Commission collected and assessed, cannot support definitive conclusions respecting the current circumstances of the courts or major reform.

### A. Specific Appeals Courts

#### 1. An Introductory Word

The Commission accumulated, analyzed and synthesized considerable empirical evidence and other applicable information on the twelve, specific circuits, much pertaining to the 1997 fiscal year, the most recent period for which the material was available.<sup>35</sup> The objective information implicates numerous parameters, including the time from case filing to disposition, that are "routinely used in court administration to measure the performance and efficiency of the federal appellate courts."<sup>36</sup> The commissioners correspondingly consulted "subjective criteria, such as consistency and predictability of [circuit law, which] are obviously more difficult to evaluate but are widely regarded as a high priority" for these

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<sup>35</sup> The Commission did compile some historical data. References to annual data in this article are for the 1997 fiscal year, unless otherwise indicated. See Working Papers, *supra* note 6.

<sup>36</sup> Final Report, *supra* note 1, at 39. "These include the number of appeals a court disposes of ('dispositions') or ('terminations') relative to the number of cases filed, how many cases are orally argued and how many are decided on the briefs, how many dispositions result in published opinions and how many in unpublished memoranda or summary orders, the time from filing to disposition, and how often the court relies on visiting judges from outside the circuit." *Id.*

tribunals, primarily by conducting surveys of appeals and district court judges as well as appellate attorneys.<sup>37</sup>

When this material is considered together for each circuit, the information forms a composite picture or profile. Indeed, the comparison of every court's performance with the national average and with the efforts compiled by the remaining eleven circuits suggests how well individual courts work, subject to appropriate caveats, regarding, for instance, relevance and reliability. As a general matter, objective numerical data will be highly relevant and dependable. Specific examples are the percentages of oral arguments and published opinions which circuits afford. That statistical material has considerable applicability, because it can reflect how substantially courts honor important process values involving access to justice, while the information is more reliable than survey responses, which are subjective and can be self-interested.

Although objective numerical data are generally dependable, they often must be refined, contextualized or elaborated. One helpful illustration is the number of appeals that a circuit terminates compared to the quantity of filings that the court receives.<sup>38</sup> This comparison and, indeed, both figures have little meaning, unless augmented by material on caseload composition, such as the appeals' complexity. The percentages of oral arguments and published opinions are equally unpersuasive without analogous supplementation. Similarly instructive is the commissioners' decision to exclude senior appellate judges of the particular circuit from "visiting judges" when counting how many three-judge panels included at least one visitor.<sup>39</sup> That determination should enhance accuracy because senior appellate judges of the specific court generally have greater familiarity with the circuit's law, traditions and members, and more closely resemble its active judges, than panel participants who have not served as active judges of the court. Another example is much objective information which the Commission gathered on the Ninth Circuit during the 1997 fiscal year.<sup>40</sup> The actual importance of this material can be precisely calculated only by allowing for the fact that the court functioned throughout the relevant period absent nearly one-quarter of its active judges.<sup>41</sup>

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<sup>37</sup> *Id.*; see also Working Papers, *supra* note 6, at 3-91.

<sup>38</sup> See *supra* note 36 and accompanying text.

<sup>39</sup> See Working Papers, *supra* note 6, at 108 tbl.6a.

<sup>40</sup> See *id.* at 93-99, 100-13.

<sup>41</sup> See Final Report, *supra* note 1, at 30. See generally Carl Tobias, *Filling The Federal Appellate Openings on the Ninth Circuit*, 19 REV. LITIG. 233 (2000).

Were these problems amenable to remediation or amelioration, certain difficult, and perhaps intractable, complications would remain. Illustrative are the complexities entailed in defining and measuring the related, rather esoteric ideas of appellate justice, effective appeals court operation and the appellate ideal. The exercise may therefore implicate normative value judgments. A useful definition of appellate justice, and possibly of efficacious performance, which derives from Federal Rule of Civil Procedure 1, is the prompt, inexpensive and equitable resolution of cases.<sup>42</sup>

There is concomitantly some consensus that the appellate ideal means merits-based disposition of each appeal after thorough briefing and oral argument, close consultation among a panel comprising three active appellate judges of the circuit, and the issuance of a published opinion which comprehensively explains the conclusion reached.<sup>43</sup> This article emphasizes appellate justice and effective operation because all three concepts are inextricably intertwined. The first two concepts can felicitously and fairly serve as surrogates for the appellate ideal, which is more difficult to define and calculate. Federal Rule 1 specifically helps give meaning to appellate justice, and a few of that construct's constituents should accommodate objective measurement. The commissioners correspondingly appeared to employ as a standard efficacious functioning, a notion which they seemed to consider comparatively lenient and which is rather easily defined.<sup>44</sup>

Even if the three concepts could be assigned clearer meaning, they are relative terms whose application may depend on context and exacting calibration, partly because burgeoning caseloads and finite resources have transformed the courts and frustrated their efforts to deliver appellate justice, to operate effectively and to realize the appellate ideal.<sup>45</sup> In comparing the circuits, therefore, evaluators must remember that courts can deploy their limited funding differently to treat escalating appeals and that these diverse ways of proceeding could be equally

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<sup>42</sup> See FED. R. CIV. P. 1; see also Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U.L. REV. 1325 (1995); Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1286 n.90 (1996).

<sup>43</sup> See, THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL - THE PROBLEMS OF THE U.S. COURTS OF APPEALS 14-30 (1994); MCKENNA, *supra* note 8, at 9-11; FEDERAL COURTS STUDY REPORT, *supra* note 8, at 109.

<sup>44</sup> See, e.g., Final Report, *supra* note 1, at ix-xi, 29-30; see also *infra*. note 146.

<sup>45</sup> See BAKER, *supra* note 43, at 14-30, 287-302; Martha Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts of Appeals*, 1996 WIS. L. REV. 1; Carl Tobias, *Dear Justice White*, 30 ARIZ. ST. L. J. 1127 (1998).

acceptable. For instance, one circuit's judges may believe that they perform best by affording some written explanation, however brief, although the court publishes a relatively small percentage of opinions or rather infrequently grants oral arguments.<sup>46</sup> The members of another circuit might concomitantly think that they can work most efficaciously by issuing comparatively few published opinions but hearing oral arguments in a substantial percentage of cases.<sup>47</sup> Thus, these, and numerous additional, approaches to the resolution of increasing dockets with relatively restricted resources may be satisfactory.

The Commission apparently recognized certain problems with the objective and subjective criteria. For example, the commissioners were not able to say that the objective "statistical criteria tip decisively in one direction or the other. While there are differences among the courts of appeals, differences in judicial vacancy rates, caseload mix, and operating procedures make it impossible to attribute them to any single factor such as size."<sup>48</sup> The Commission members also candidly admitted: "In the time allotted, we could not possibly have undertaken a statistically meaningful analysis of opinions as well as unpublished dispositions, dissents, and petitions for rehearing en banc to make our own objective determination of how the Ninth Circuit Court of Appeals measures up to others."<sup>49</sup> The commissioners ultimately concluded that "neither we nor, we believe, anyone else, can reduce consistency and predictability to statistical analysis. These concepts are too subtle, the decline in quality too incremental, and the effects of size too difficult to isolate, to allow evaluation in a freeze-framed moment."<sup>50</sup> The Commission did assert that "consistency and predictability have to do with the coherence of the law declared over time" and that the appellate process places a "premium on collegial deliberation," even as the entity conceded that the idea of collegiality cannot be quantified or measured.<sup>51</sup> However, the commissioners offered their essentially unsupported

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<sup>46</sup> This apparently is the tradition in the Ninth Circuit. See Interview with Judge Procter Hug, Jr., Chief Judge, Ninth Circuit Court of Appeals, in Las Vegas, Nev. (May 7, 1999) [hereinafter Hug Interview]; Interview with Judge Pamela Ann Rymer, Judge, Ninth Circuit Court of Appeals, in D.C. (Mar. 20, 1998) [hereinafter Rymer Interview]; see also Working Papers, *supra* note 6, at 93 tbl.3.

<sup>47</sup> This apparently is the tradition in the Second Circuit. See Interview with Judge Jose Cabranes, Judge, Second Circuit of Appeals, in Las Vegas, Nev. (Jan. 21, 1999); see also Working Papers, *supra* note 6, at 93 tbl.2.

<sup>48</sup> Final Report, *supra* note 1, at 39.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 40.

<sup>51</sup> *Id.*

"judgment that the consistent, predictable, coherent development of the law over time is best fostered in a decisional unit that is small enough for the kind of close, continual, collaborative decision making that 'seeks the objective of as much excellence in a group's decision as its combined talents, experience and energy permit."<sup>52</sup>

Despite the complications delineated above, it is possible to compare specific courts' operation in terms of the indicia on which the Commission collected material and by providing for the difficulties identified. The next subsection assesses how the First Circuit functioned vis-a-vis the parameters for which the commissioners assembled applicable, objective information by contrasting the court's efforts with the national average and with the performance of other circuits. This exercise is a useful illustration, although relatively little additional benefit would be derived from reproducing similar raw data for all twelve courts.<sup>53</sup> The analysis then affords a comparative snapshot of those circuits, emphasizing the courts that appear to operate most and least efficaciously, and offers additional insights on the individual circuits.

## 2. The First Circuit as an Illustration of Specific Courts

The United States Court of Appeals for the First Circuit is the smallest appellate court, apart from the United States Court of Appeals for the District of Columbia Circuit, in terms of many applicable considerations. Except for the D.C. Circuit, the First Circuit serves the smallest population base (13.3 million individuals), exercises jurisdiction over the tiniest land base (52,000 square miles), includes the fewest federal districts (five), has the smallest number of active appellate (six) and district (twenty-nine) judges, each year receives the least cases (1450) and annually resolves the fewest appeals (1370).<sup>54</sup> In the 1997 fiscal year,

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<sup>52</sup> *Id.* (quoting FRANK COFFIN, ON APPEAL 215 (1994)); see also *infra* notes 148-49 and accompanying text.

<sup>53</sup> These data are rather readily accessible in the Final Report and Working Papers. See, e.g., Final Report, *supra* note 1, at 14, 22, 24, 27; Working Papers, *supra* note 6, at 93-99. I tersely treat the subjective material. See *infra* note 69. Much of it comprises personal opinions and even that related to the Ninth Circuit is not very instructive. See *infra* note 120 and accompanying text.

<sup>54</sup> See Final Report, *supra* note 1, at 27 tbl.2-9; see also *id.* (affording data for D.C. Circuit). The D.C. Circuit is peculiar in several respects, especially the many appeals from agency decisions that it hears. See CHRISTOPHER P. BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT (1999); Colloquy, *The Contributions of the D.C. Circuit to Administrative Law*, 40 ADMIN. L. REV. 507 (1988); Spottswood W. Robinson, III, *The D.C. Circuit: An Era of Change*, 55 GEO. WASH. L. REV. 715 (1987).

members of the First Circuit decided 696 cases on the merits, which was the lowest figure nationwide.<sup>55</sup> The court concomitantly terminated 116 appeals per authorized active judgeship on the merits as compared to the national average of 155.<sup>56</sup> Only the Tenth Circuit with 115 and the D.C. Circuit with sixty-one resolved fewer cases per authorized judgeship.<sup>57</sup>

During the 1997 fiscal year, judges of the First Circuit conducted oral arguments in 61 percent of the appeals that the court decided on the merits.<sup>58</sup> This statistic was substantially higher than the nationwide average of 40 percent. It was eclipsed only in the Second Circuit and was more than twice the percentage compiled by the Third, Fourth, Tenth and Eleventh Circuits, which granted oral arguments in only 30 percent of those courts' cases.<sup>59</sup>

For the 1997 fiscal year, members of the First Circuit issued published opinions in 51 percent of the appeals that the court resolved on the merits.<sup>60</sup> This figure was more than two times the national average of 23 percent and was greater than thrice the percentages which the Third, Fourth and Eleventh Circuits compiled.<sup>61</sup> In the 1997 fiscal year, members of the First Circuit correspondingly terminated 32 percent of the cases on the merits after oral argument.<sup>62</sup> This number was ten percent larger than the system-wide average and double that of the Third Circuit.<sup>63</sup>

During the 1997 fiscal year, 25 percent of three-judge panels which resolved cases after oral argument in the First Circuit included at least one visiting appellate or district court judge.<sup>64</sup> This record was eight percentage points below the national average, while 64 percent of panels constituted by the Eleventh Circuit had a participant who was not an active judge of the court.<sup>65</sup>

Between the 1995 and 1997 fiscal years in the First Circuit, the median time interval in counseled civil, non-prisoner cases that the court terminated after hearing or submission was 8.9 months from the notice

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<sup>55</sup> See Working Papers, *supra* note 6, at 93 tbl.1.

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*; see also *supra* note 54 and accompanying text (suggesting that D.C. Circuit's docket may partially explain small number of cases that it terminated).

<sup>58</sup> See Working Papers, *supra* note 6, at 93 tbl.2.

<sup>59</sup> See *id.*

<sup>60</sup> See *id.* at 93 tbl.3.

<sup>61</sup> See *id.*

<sup>62</sup> See *id.* at 94 tbl.5.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.* at 108 tbl.6a.

<sup>65</sup> See *id.*

of appeal to final disposition.<sup>66</sup> The system-wide average during this period was 12.4 months, and the Ninth Circuit required 18.2 months, although the First Circuit was slower than the national average in three of the five parameters, which the Commission employed in evaluating time to disposition.<sup>67</sup>

Examination of all the material above suggests that the First Circuit functions rather well. Illustrative is the large percentage of cases which the court accords oral arguments and published opinions. Those are important measures of appellate justice and effective operation. The First Circuit substantially surpassed the national average in each area and compiled percentages that were twice as high as some courts for oral arguments and three times greater than other tribunals for published opinions.<sup>68</sup> These statistics, which seemingly reflect the considerable attention that the First Circuit devotes to most cases, may explain why the court resolved so few appeals on the merits and decided a comparatively small number of cases per authorized judgeship.<sup>69</sup> The First Circuit also performed better than the national average for most of the remaining categories. In short, the First Circuit appears to be working relatively well.

### 3. Conclusions Regarding Specific Appeals Courts

#### a. A Comparison of How Specific Courts Perform

The discussion at the outset of this subsection assessed several significant problems which complicate attempts to posit particularly definitive conclusions respecting the operation of specific appellate courts.<sup>70</sup> For example, the information that the Commission compiled seemingly lacks certain qualities, such as sufficient comprehensiveness, refinement, applicability and contextualization to support very certain determinations. Notwithstanding those difficulties, the circuits' functioning can be examined vis-a-vis the parameters for which the commissioners collected material and by allowing for the concerns

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<sup>66</sup> See *id.* at 95 tbl.7.

<sup>67</sup> See *id.* Appeals and district court judges of the First Circuit as well as appellate attorneys who responded to the Commission survey seemed relatively satisfied with the consistency and predictability of circuit law as well as with the court's overall performance. See, e.g., *id.* at 19-21, 23-24, 47.

<sup>68</sup> See *supra* notes 58-63 and accompanying text.

<sup>69</sup> See *supra* notes 55-56 and accompanying text.

<sup>70</sup> See *supra* notes 35-56 and accompanying text.

expressed earlier.

This comparison indicates that the First and Seventh Circuits apparently performed best during the 1997 fiscal year. The First Circuit terminated the largest percentage of appeals on the merits in which oral argument was conducted and that resulted in published opinions,<sup>71</sup> while the Seventh Circuit compiled the third and second highest percentages respectively for these measures.<sup>72</sup> Indeed, the two courts issued published opinions in more than twice the percentage of cases as the national average and exceeded virtually all of the remaining courts.<sup>73</sup> The First Circuit also decided cases most quickly from the notice of appeal to final disposition,<sup>74</sup> and a minuscule 1 percent of the panels which the Seventh Circuit constituted included visiting participants.<sup>75</sup> Those are multiple, significant measures of whether courts dispense appellate justice, operate efficaciously and realize the appellate ideal.

However, the two tribunals did not compile strong records in every area on which the Commission gathered information. For instance, only the D.C. and Tenth Circuits resolved fewer cases on the merits per authorized judgeship than the First Circuit,<sup>76</sup> and the Seventh Circuit concluded appeals rather slowly in terms of several factors.<sup>77</sup> The figures may explain how the two courts were able to afford so many published opinions and why the First Circuit treated filings so expeditiously.

The comparison suggests that the Third, Fourth and Eleventh Circuits seemingly performed least well during the 1997 fiscal year. The three tribunals were among the four circuits deciding the smallest percentages of cases on the merits in which there was oral argument<sup>78</sup> and hearing the biggest percentages of appeals in which at least one visiting judge participated,<sup>79</sup> while the three courts wrote the lowest percentages of published opinions.<sup>80</sup> In fact, the Third and Eleventh Circuits issued fewer than one third the percentage of published opinions as the First

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<sup>71</sup> See Working Papers, *supra* note 6, at 93-94 tbls.2 & 5; see also *supra* notes 58-63 and accompanying text.

<sup>72</sup> See Working Papers, *supra* note 6, at 93-94 tbls.2 & 5; see also Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673 (1994) (evaluating organization, principles, and judges of Seventh Circuit).

<sup>73</sup> See *id.* at 93 tbl.2.

<sup>74</sup> See *id.* at 95 tbl.7; see also *supra* text accompanying note 66.

<sup>75</sup> See Working Papers, *supra* note 6, at 108 tbl.6a.

<sup>76</sup> See *id.* at 93 tbl.1; see also *supra* text accompanying note 56.

<sup>77</sup> See Working Papers, *supra* note 6, at 95 tbl.7.

<sup>78</sup> See *id.* at 93 tbl.2; see also *id.* (showing that Tenth Circuit was fourth court).

<sup>79</sup> See *id.* at 108 tbl. 6a; see also *id.* (showing that Ninth Circuit was fourth court).

<sup>80</sup> See *id.* at 93 tbl.3.



Circuit.<sup>81</sup> The Fourth Circuit published less than one-quarter of that court's percentage, while the Eleventh Circuit employed visitors at a rate which was essentially double the nationwide average.<sup>82</sup> The indicia are important yardsticks for ascertaining whether courts deliver appellate justice, function effectively and achieve the appellate ideal.

The three tribunals did operate rather efficaciously vis-a-vis certain parameters. For example, the Third and Fourth Circuits were among the courts that most promptly resolved cases in terms of a few factors.<sup>83</sup> The low percentages of oral arguments and published opinions as well as the large number of visiting participants reported above might explain how the tribunals were able to terminate appeals with relative expedition. The Eleventh Circuit also concluded substantially more cases on the merits per authorized judgeship than all eleven of the courts: its figure was 275, the Fifth Circuit was second with 202 and the national average was 155.<sup>84</sup> However, the Eleventh Circuit statistic could mean that these appeals received relatively little attention from appellate judges of the court. The Eleventh Circuit staffs panels with the highest percentage of visiting participants - 64, a figure which nearly doubles the system-wide average and which is 21 percentage points greater than the next closest court - and has the second biggest complement of staff attorneys.<sup>85</sup>

It is ironic that a majority of the active members on the Third, Fourth and Eleventh Circuits have publicly urged Congress *not* to authorize additional judgeships for the courts.<sup>86</sup> The jurists have so importuned lawmakers, even though the measures, involving conservative estimates of appellate caseloads and judicial resources, which the Judicial Conference employs to recommend judgeships for the circuits, may show that these courts need more judges.<sup>87</sup>

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<sup>81</sup> See *id.*; see also *supra* text accompanying note 60.

<sup>82</sup> See Working Papers, *supra* note 6, at 108 tbl.6a.

<sup>83</sup> See *id.* at 95 tbl.7.

<sup>84</sup> See *id.* at 93 tbl.1; see also *supra* notes 58-59 (showing courts with fewest terminations).

<sup>85</sup> See Working Papers, *supra* note 6, at 108 tbl.6a; Final Report, *supra* note 1, at 24 tbl.2-8. A high percentage of pro se cases could also explain the statistic; however, a few other circuits receive larger percentages and absolute numbers of pro se appeals. See Working Papers, *supra* note 6, at 93 tbl.1.

<sup>86</sup> See Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 23 HASTINGS CONST. L. Q. 741, 749 (1997); Tobias, *supra* note 12, at 1362.

<sup>87</sup> See Tobias, *supra* note 86, at 753. But see Charles E. Grassley, *Chairman's Report on the Appropriate Allocation of Judgeships in the United States Courts of Appeals 2-7* (1999); J. Harvie Wilkinson, III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L. J. 1147, 1161-63 (1994); but cf. Appointment of Additional Federal Circuit and District Judges, S.1145, 106th Cong. (1999) (proposing no new positions for three courts).

The comparison indicates that the Ninth and Tenth Circuits apparently performed second worst. For instance, the Ninth Circuit issued the fourth smallest percentage of published opinions,<sup>88</sup> decided cases most slowly from notice of appeal to final disposition<sup>89</sup> and resolved the second highest percentage of cases with visiting judges.<sup>90</sup> The Tenth Circuit correspondingly tied the Third, Fourth and Eleventh Circuits for the lowest percentage of appeals terminated on the merits after oral argument<sup>91</sup> as well as the Fourth and Fifth Circuits for the second smallest percentage of cases concluded on the merits with oral argument,<sup>92</sup> while the court was second only to the D.C. Circuit in least appeals decided on the merits per authorized judgeship.<sup>93</sup> Nonetheless, each court worked rather well in other respects. The Ninth Circuit was one of the quicker courts in terms of two factors which calculate time to disposition.<sup>94</sup>

Even when all of the information that the commissioners accumulated is considered together, it remains very difficult to conclude definitively whether specific circuits deliver appellate justice, function efficaciously or attain the appellate ideal, much less to identify measures which would clearly improve the courts. Although it may be impossible to determine with certainty that any regional circuit is not dispensing appellate justice, performing effectively or realizing the appellate ideal, the material above suggests that some courts seemingly work better than others and can support tentative recommendations regarding approaches which might enhance circuit operations. For example, an infusion of resources would apparently benefit those appeals courts that the comparison indicates do not function well. More specifically, the authorization of several additional judgeships for the Third, Fourth, Ninth and Eleventh Circuits should enable each court to provide higher percentages of oral arguments and published opinions, to resolve cases more promptly, and to depend less substantially on visiting judges.<sup>95</sup>

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<sup>88</sup> See Working Papers, *supra* note 6, at 93 tbl.3.

<sup>89</sup> See *id.* at 95 tbl.7.

<sup>90</sup> See *id.* at 108 tbl.6a; see also Final Report, *supra* note 1, at 30 (suggesting that court may only have been able to operate this well because of contributions made by senior judges).

<sup>91</sup> See Working Papers, *supra* note 6, at 93 tbl.2.

<sup>92</sup> See *id.* at 94 tbl.5.

<sup>93</sup> See *id.* at 93 tbl.1.

<sup>94</sup> See *id.* at 95 tbl.7.

<sup>95</sup> See *supra* notes 78-94 and accompanying text; *infra* notes 128-29, 160-61 and accompanying text. The resources should increase litigants' procedural opportunities and the justice delivered. Reduced reliance on visitors might address concerns about decreased

#### 4. Other Insights on Specific Courts

The information which the Commission gathered also affords instructive insights on particular appeals courts at the millennium. Much of this material confirms, reinforces or clarifies ideas that prior studies had elucidated. For instance, one informative analysis which the Commission authorized validated findings in the 1993 assessment performed by the Federal Judicial Center, even as the new examination did challenge some widely held views about appellate caseloads.<sup>96</sup> The evaluation determined that more filings in a few case types, rather than "broad increases in the willingness to appeal" have driven considerable docket growth, while the study found that upward drift, not a steep rise, characterized the trend in appeal rates and that there was no evident association between these rates and circuit size.<sup>97</sup>

The Commission description correspondingly enhances comprehension of the appellate courts by reaffirming certain conventional wisdom related to the tribunals. For example, practically all of the circuits continue experiencing the caseload expansion which has transformed them over the last generation, employing diverse approaches when attempting to resolve appeals with insufficient resources and furnishing diminished procedural opportunities.<sup>98</sup> Some variation does exist among the appellate courts, nonetheless. For instance, there are differences in terms of cases' complexity and the concomitant percentages of pro se filings; the rates at which dockets increase in the circuits; and the numbers of judges and administrative personnel as well as the facilities and related support that the courts have.<sup>99</sup>

One clear impression which emerges from consulting the information that the Commission compiled is the diverse, and frequently creative, responses which the regional circuits have invoked to decide mounting appeals with comparatively scarce resources. Almost every court

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intracircuit consistency and collegiality that the Commission implicitly ascribed to Ninth Circuit dependence on visitors. See Final Report, *supra* note 1, at 39-40, 47-48.

<sup>96</sup> See Working Papers, *supra* note 6, at 127; see also MCKENNA, *supra* note 8 (affording earlier assessment).

<sup>97</sup> See Working Papers, *supra* note 6, at 133; see also *id.* at ii (listing other studies that Commission on Structural Alternatives commissioned, most of which are less relevant to this article). See generally CAROL KRAFKA ET AL., *STALKING THE INCREASE IN THE RATE OF CIVIL APPEALS* (Fed. Jud. Ctr. 1993).

<sup>98</sup> See *supra* note 31 and accompanying text.

<sup>99</sup> See, e.g., MCKENNA, *supra* note 8, at 31-32; Final Report, *supra* note 1, at 16 tbls.2-4 & 2-5; at 24 tbl.2-8; at 27 tbl.2-9; Carl Tobias, *Some Cautions About Structural Overhaul of the Federal Courts*, 51 U. MIAMI L. REV. 389, 395 (1997).

addresses docket growth by relying on visiting judges and circuit staff, reducing the percentages of oral arguments and published opinions provided, using appellate management techniques and by employing a broad spectrum of other mechanisms.<sup>100</sup> Yet, most of the appeals courts differ, often significantly, in their deployment of these measures.

For example, in the 1997 fiscal year, 64 percent of Eleventh Circuit three-judge panels included at least one visiting participant, while the D.C. Circuit so comprised no panels.<sup>101</sup> During this period, the Second Circuit heard oral arguments in 65 percent of the court's cases, even as the Third, Fourth, Tenth and Eleventh Circuits entertained oral arguments in only 30 percent of their appeals.<sup>102</sup> Moreover, the First Circuit published opinions in one-half of the court's cases, but the Fourth Circuit wrote published opinions for a mere 11 percent of its appeals and four other tribunals did so in fewer than 19 percent.<sup>103</sup>

Appellate courts also differ widely in terms of the criteria that they apply in deciding whether to issue a published opinion, the weight which the tribunals accord published and unpublished determinations and the requirements that govern litigants' citation to unpublished dispositions.<sup>104</sup> The circuits correspondingly invoke a plethora of measures in managing cases. For example, every court screens filings, principally to ascertain appeals' relative complexity and the concomitant procedural treatment which the cases will receive.<sup>105</sup> In three circuits, judges undertake this duty, and the remaining courts assign central staff, employees in the clerk's office or the Circuit Executive the screening function.<sup>106</sup> All of the courts correspondingly rely on various alternatives to dispute resolution ("ADR"), but the options assume diverse forms. More circuits employ mediation or conference programs and a few courts use arbitration, while circuit staff have primary responsibility for

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<sup>100</sup> See Final Report, *supra* note 1, at 21-25. See generally MCKENNA, *supra* note 8, at 38-53; Grassley, *supra* note 87, at 8-10.

<sup>101</sup> See Working Papers, *supra* note 6, at 108 tbl.6a; see also Final Report, *supra* note 1, at 24 tbl.2-8 (showing disparities in circuit reliance on staff).

<sup>102</sup> See Working Papers, *supra* note 6, at 93 tbl.2.

<sup>103</sup> See *id.* at tbl.3. The Third, Sixth, Ninth and Eleventh Circuits published opinions for fewer than 19 percent of their appeals. See *id.*

<sup>104</sup> See *id.* at 110-16; see also Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L. J. 177 (1999) (affording thorough exposition of these differences).

<sup>105</sup> See Working Papers, *supra* note 6, at 102-04). See generally MCKENNA, *supra* note 8, at 40-42; UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, CIVIL APPEALS MANAGEMENT PLAN (1999).

<sup>106</sup> See Working Papers, *supra* note 6, at 104 tbl.2); see generally BAKER, *supra* note 43, at 135-47; Tobias, *supra* note 7, at 230.

the administration of these alternatives in most courts.<sup>107</sup>

### B. Additional Lessons

Numerous, other helpful lessons can be derived from the descriptive account that the Commission developed in compiling its report and suggestions. This section initially emphasizes a number of perspectives on the commissioners' work, and then explores several additional ideas, which may be gleaned from the description.

#### 1. Lessons From the Commission Work

Certain observations below are implicitly mentioned throughout my earlier examination. The Commission probably achieved all that could be expected during the exceedingly short time that Congress prescribed. Lawmakers provided the entity twelve months for studying the entire appellate system and for writing its report and recommendations.<sup>108</sup> One year was an extremely brief time-frame to complete an enormous assignment. For instance, some appeals courts require a longer period to resolve cases than the commissioners had for assessing the circuits.<sup>109</sup> The compressed time frame essentially precluded the systematic collection, analysis and synthesis of considerable empirical data on how the courts address specific appeals from filing to disposition.

This temporal constraint might indicate why the information which the commissioners did assemble cannot support particularly definitive conclusions respecting individual circuits or the appellate system. Most of that material, especially the information which ostensibly underlies the Commission decision making, seemingly lacks important attributes, namely the requisite comprehensiveness, refinement or

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<sup>107</sup> See Working Papers, *supra* note 6, at 102. See generally JAMES B. EAGLIN, THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS: AN EVALUATION (Fed. Jud. Ctr. 1990); ROBERT NIEMIC, MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS (Fed. Jud. Ctr. 1997). Some circuit-specific empirical and other relevant material included in the Commission description might apply to the appellate system. However, the description's implications for that system warrant minimal analysis here principally because much systemic information lacks applicable measures for comparison that are analogous to those used in contrasting circuit-specific objective data. Little of that data or certain subjective Commission information were, or can be, computed systemically. Examples are the national averages. Even this material must be compared with previously assembled information, much of which is unrelated to the Commission study.

<sup>108</sup> See Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, § 305(a)(1)(B), 111 Stat. 2491 (1997).

<sup>109</sup> See *supra* notes 24-26 and accompanying text.

contextualization, that would permit very conclusive determinations.

The above ideas may explain the fundamental deficiencies in the Commission's work. Those problems are the failure to identify the exact aspects of Ninth Circuit operations, which prompted the Commission's recommendation of the divisional arrangement, and how this approach would constitute improvement. More specifically, the Commission members did not answer with clarity three questions. First, the Commission did not answer how a court must perform to be working inefficaciously and, thus, warrant remediation. Second, the Commission did not explicate precisely why it found that the Ninth Circuit so functions. Third, the Commission did not show expressly how the solution proposed would rectify any inadequacies detected and enhance the court's operations. Despite these complications, lessons can be extracted from the commissioners' effort by examining what they actually said, by drawing reasonable inferences from the material which the Commission gathered and the suggestions which it proffered. It is also informative to assume that the Commission collected sufficient empirical data, which demonstrates that the Ninth Circuit operates ineffectively enough to justify treatment and that the reform prescribed would be responsive.

The commissioners apparently relied on several perceptions for their central recommendations that Congress require the Ninth Circuit to institute a divisional organization and authorize the remaining appeals courts to adopt divisional structures when they exceed a particular size. The Commission seemingly believed that appellate courts, which have more than fifteen active judges, experience difficulty maintaining uniform, coherent and predictable circuit law as well as judicial collegiality.<sup>110</sup> The commissioners apparently thought that these circumstances prevail in the Ninth Circuit, which has twenty-eight active members; that the tribunal's limited en banc mechanism undermines consistency, coherence and predictability; and that the court's gigantic geographic magnitude erodes the positive features of regionalism.<sup>111</sup>

However, the Commission did not clearly articulate those ideas. Most of what it explicitly stated, especially regarding the existence of the phenomena above, lacked sufficient empirical verification, and the entity provided few specific findings about the Ninth Circuit's condition. For example, the commissioners frankly admitted that they had

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<sup>110</sup> See Final Report, *supra* note 1, at iii, ix-xi, 29-30, 47-49; see also *supra* text accompanying note 49. See generally Hellman, *supra* note 4, at 393-401.

<sup>111</sup> See Final Report, *supra* note 1, at 30-31, 35-41, 50-53.

inadequate time for conducting a statistically meaningful analysis of Ninth Circuit decision making to reach an objective determination of how the court compares with others. The commissioners eventually concluded that uniformity and predictability defy statistical evaluation.<sup>112</sup> Nonetheless, the commissioners essentially depended on their unsubstantiated, personal judgments for the critical proposition that the "consistent, predictable, coherent development of the law over time is best fostered in a decisional unit that is small enough" to be collegial.<sup>113</sup> The commissioners acknowledged that this notion "cannot be quantified or measured."<sup>114</sup> The Commission concomitantly asserted that the divisional concept would promote uniform, coherent and predictable circuit law, judicial collegiality and regional linkages,<sup>115</sup> but those contentions were almost exclusively justificatory and were nearly devoid of empirical support. Indeed, there was no showing that the divisional proposal, which appeals courts have never applied, would improve the situations of the Ninth Circuit or the remaining courts. Insofar as these perceptions actually animated the divisional scheme, the ideas on which the commissioners seemingly depended the most received the least empirical substantiation.

The Commission report and working papers included additional material which undercut, and even contravened, the Commission's recommendations. The commissioners explicitly observed that they found none of the circuits functions inefficaciously, much less fails to deliver justice.<sup>116</sup> After canvassing "all of the available objective data routinely used in court administration to measure [circuit] performance and efficiency," the Commission could not say that these "statistical criteria tip decisively in one direction or the other."<sup>117</sup> The Commission stated that "while there are differences among the courts of appeals, differences in judicial vacancy rates, caseload mix, and operating procedures make it impossible to attribute them to any single factor such as size."<sup>118</sup> Indeed, several important indicia - the percentages of oral arguments and published opinions afforded as well as the number of dispositions per authorized judgeship - on which the commissioners

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<sup>112</sup> See *id.* at 39; see also *supra* text accompanying notes 49-50.

<sup>113</sup> Final Report, *supra* note 1, at 40.

<sup>114</sup> *Id.* (stating that commissioners made "no attempt to do so" for any circuit); see *supra* text accompanying notes 50-51 (elaborating textual ideas).

<sup>115</sup> See Final Report, *supra* note 1, at iii, 47-50.

<sup>116</sup> See *id.* at 29; see also *supra* notes 42-46 and accompanying text.

<sup>117</sup> Final Report, *supra* note 1, at 39

<sup>118</sup> *Id.*; see also *supra* notes 36, 48 and accompanying text.

collected objective, empirical data specifically suggest that the Ninth Circuit performs better than numerous other courts.<sup>119</sup> However, the Commission apparently ignored these figures, as witnessed by the minimal discussion accorded them in the Commission's report. A few admissions related to the subjective information which the commissioners consulted are practically as revealing. Most crucial was the Commission members' candid acknowledgement: "when all is said and done [no one] can reduce consistency and predictability to statistical analysis. These concepts are too subtle, the decline in quality too incremental, and the effects of size too difficult to isolate, to allow evaluation in a freeze-framed moment."<sup>120</sup> The survey conducted by the Commission correspondingly showed that Ninth Circuit district judges "report finding the law insufficiently clear to give them confidence in their decisions on questions of law about as often as their counterparts in other circuits."<sup>121</sup>

In short, the Commission assembled some objective, empirical data and relatively little subjective material. However, the Commission did not designate exactly how an appellate court must operate to function ineffectively and, therefore, deserve remediation. The commissioners also delineated with little clarity why they decided that the Ninth Circuit performs so inefficaciously as to require treatment, and how the divisional approach would improve any deficiencies found. Vague, unsupported generalizations, subjective perceptions and personal opinions cannot replace empirical data that have been systematically gathered, assessed and synthesized.

In fairness, the severe time restraints under which the Commission labored may explain the Commission's collection of minimal empirical information and its substantial reliance on subjective material. The serious time restraints might concomitantly indicate why the Commission report includes several, significant findings that seem to contradict the entity's recommendations. For example, the commissioners' conclusion that all appeals courts operate effectively and their corresponding rejection of circuit-splitting for any of the courts,<sup>122</sup> contradicts the commissioners' apparent belief that the Ninth Circuit

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<sup>119</sup> See Working Papers, *supra* note 6, at 93 tbls.1-3.

<sup>120</sup> Final Report, *supra* note 1, at 40; see also *supra* text accompanying note 50.

<sup>121</sup> See Final Report, *supra* note 1, at 39-40. The judges do have certain problems with "inconsistencies between published and unpublished opinions," while "lawyers in the Ninth Circuit report somewhat more difficulty discerning circuit law and predicting outcomes" than attorneys elsewhere. *Id.*

<sup>122</sup> See *id.* at iii, ix-xi, 29.



works less efficaciously than the court could because the commissioners proposed a solution which would essentially divide the circuit.

Certain determinations discussed previously also are difficult to make and may well resist particularly precise empirical verification. For instance, assembling empirical data on the divisional arrangement, let alone demonstrating its effectiveness, would have been virtually impossible because no appellate court has implemented the concept. Nearly as problematic are the efforts to define, detect and measure the inconsistency, incoherence, and unpredictability of circuit law, the lack of judicial collegiality and, if any of the attributes exists, ascertaining definitively whether judicial collegiality correlates with a court's size.

Equally vexing is the concomitant attempt to pinpoint confidently the optimal number of active judgeships for a regional circuit. That inquiry, which seemed integral to the Commission's suggestions,<sup>123</sup> implicates a diverse mix of comparatively abstract phenomena that can vary among the courts and across time. These factors include the aforementioned uniformity, coherence, predictability and judicial collegiality; local legal culture, traditions and practices; judicial reliance on circuit staff; as well as the meaning of appellate justice and opinions about how best to deliver justice. Indeed, the judges of the appeals courts vociferously disagree over this issue and have participated in vigorous, ongoing debate related to size.<sup>124</sup> For example, most current members of the Ninth Circuit believe that the court performs efficaciously with twenty-eight active judges, and some even declare publicly that it would function as well having a larger judicial complement.<sup>125</sup> In sharp contrast, a majority of active members on the Third, Fourth and Eleventh Circuits has officially urged Congress to authorize no additional judgeships for their courts.<sup>126</sup> Finally, it is important to remember the mid-1970s recommendation by the Hruska Commission, which conducted a comprehensive study of the circuits, and the Judicial Conference, the policymaking arm of the federal courts, that nine be the

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<sup>123</sup> See *supra* notes 110-111, 114 and accompanying text.

<sup>124</sup> Compare Jon O. Newman, *1000 Judges-The Limit for an Effective Judiciary*, 76 JUDICATURE 187 (1993) with Stephen Reinhardt, *Too Few Judges, Too Many Cases: A Plea to Save the Federal Courts*, A.B.A. J., Jan. 1993, at 52. See generally GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS (Fed. Jud. Ctr. 1993), available at <http://www.fjc.gov/JUDJUDACT/impomora/impomora.pdf>.

<sup>125</sup> See Tobias, *supra* note 7, at 1364; Reinhardt, *supra* note 124; Hug Interview, *supra* note 46.

<sup>126</sup> See *supra* note 86 and accompanying text; see also LONG RANGE PLAN, *supra* note 8, at 44.

maximum number for a circuit.<sup>127</sup> The suggestion is a trenchant reminder of how dramatically the increase in caseloads has altered modern thinking about the appellate courts and transformed them because today eleven of the twelve regional circuits have at least twelve active judges.<sup>128</sup>

The complexity of these determinations are not underestimated. Despite the significant complications entailed, evaluators could secure considerably better data than the Commission accumulated and correspondingly posit more definitive conclusions about whether and, if so, why any appeals court operates ineffectively enough to warrant remediation as well as identify responsive solutions.<sup>129</sup> Professor Arthur Hellman's careful, decade-long work which involves intracircuit consistency typifies the type of meticulous effort that evaluators might undertake.<sup>130</sup> A recent study by Professor Tracey George of three appellate courts' reliance on the en banc device concomitantly shows how to analyze use of this measure in other tribunals and indicates how to evaluate Ninth Circuit employment of the limited en banc technique.<sup>131</sup> The examinations of the appellate system which the Federal Judicial Center finished during 1993 and that the Hruska Commission completed a quarter century ago illustrate the kind of comprehensive, refined assessment which I envision.<sup>132</sup>

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<sup>127</sup> See *Hruska Commission*, *supra* note 26, at 231-32; JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 48 (1974). In fairness, the courts began experiencing the docket growth that transformed them in the 1970s. See *supra* text accompanying note 30.

<sup>128</sup> See Final Report, *supra* note 1, at 27 tbl.2-9.

<sup>129</sup> It is important to appreciate that even some commission material, such as raw data on dockets, which is useful, would benefit from refinement and specificity, while evaluators will need to collect, analyze and synthesize much supplemental or new empirical data. See *infra* notes 143-45 and accompanying text.

<sup>130</sup> See, e.g., Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in RESTRUCTURING JUSTICE 55-90 (Arthur D. Hellman ed., 1990); Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915 (1991) [hereinafter Hellman, *Breaking the Banc*]; Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989) [hereinafter Hellman, *Jumboism*]. The book RESTRUCTURING JUSTICE is essentially a study. See *infra* note 134.

<sup>131</sup> See Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213 (1999). See generally Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 GEO. WASH. L. REV. 1008 (1991); Michael Solimine, *Ideology and En Banc Review*, 67 N.C.L. REV. 29 (1988). There are two recent, similar studies of the Fourth Circuit. See J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1111 (2000); Phil Zarone, *Agenda Setting on the Courts of Appeals: The Effect of Ideology on En Banc Rehearings*, 2 J. APP. PRACT. & PROC. 157 (2000).

<sup>132</sup> See MCKENNA, *supra* note 8; *Hruska Commission*, *supra* note 26. Even the FJC study

Finally, the Commission's endeavors demonstrate that those who perform future analyses of the circuits must have adequate resources, especially temporal ones, if the work is to support conclusive determinations respecting the appeals courts and important public policymaking which significantly affects the tribunals. The commissioners' efforts suggest that they had insufficient time to complete the substantial assignment, even though Congress budgeted ample monetary resources. This paper does not criticize the Commission, which apparently achieved as much as is reasonable to expect in the limited period available. However, the Commission might have expended the generous financial resources which Congress provided differently. For instance, the Commission could have deployed legal scholars to conduct empirical evaluations that involved uniformity, coherence, predictability, collegiality and regionalism.

a. Miscellany of Lessons

Additional lessons which implicate the commissioners' work somewhat less directly can be derived from the Commission's descriptive account of the twelve regional circuits. This description enhances understanding of individual appellate courts. The Commission's descriptive account simultaneously teaches how little even astute federal courts observers actually understand, and how much more lawmakers, the federal judiciary and the nation need to know, about particular circuits and the courts as a whole at the century's end. This is true, although the Commission's study is the fourth important assessment that encompassed the circuits during the last decade, and there have been approximately fifteen analyses of these courts since the 1970s.

One valuable means by which the commissioners' description improves appreciation is confirming the conventional wisdom related to the circuits.<sup>133</sup> For example, the Commission's descriptive account reaffirms that the appellate courts continue to have rather scarce resources for confronting increased appeals, which they resolve in myriad ways. The circuits specifically apply numerous, innovative measures when attempting to deliver justice, to function efficaciously

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was rather narrow, albeit broader than the other two major analyses in the last decade because they did not emphasize the circuits. See FEDERAL COURTS STUDY REPORT, *supra* note 8; LONG RANGE PLAN, *supra* note 8; see also *infra* note 141 and accompanying text (mentioning thorough, refined study of federal districts).

<sup>133</sup> See *supra* text accompanying note 98.

and to attain the appellate ideal. However, the courts accord lawyers and litigants fewer procedural opportunities, especially in the form of oral arguments and published opinions.

The Commission's description enhances comprehension of local legal culture, a construct which evaluators have heretofore employed principally in scrutinizing criminal law and trial courts.<sup>134</sup> For instance, the descriptive account indicates that individual circuits follow certain practices and traditions, particularly to address multiplying dockets promptly, inexpensively and fairly with deficient funding. More specifically, those courts, such as the Ninth and Eleventh Circuits, which have larger caseloads, rely substantially on visiting judges and on non-judicial court personnel. Other circuits, namely the D.C and Seventh Circuits, practically never depend on visiting judges and may employ staff less.<sup>135</sup> The Second Circuit correspondingly hears oral arguments in a high percentage of appeals, including many cases which pro se litigants pursue, while the First and Seventh Circuits write published opinions in a significant percentage of appeals.<sup>136</sup> These propositions might mean that the notion of local legal culture has greater applicability to the appellate courts than some observers previously thought.

Certain aspects of the Commission's descriptive account show that the idea of the regional circuit could have declining relevance, although the commissioners partially premised the divisional recommendation on their concern that the Ninth Circuit maintains inadequate linkages with the geographic areas which it serves.<sup>137</sup> For example, manifestations of the regional circuit's decreasing applicability are expanding internationalization, increasing reliance on computerization by every appeals court and on visiting appellate and district judges by most tribunals, as well as growing tensions between the notions of regionalism and federalization - the circuit duty to reconcile federal law with local policies.<sup>138</sup>

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<sup>134</sup> See Paul D. Carrington, *A New Confederacy: Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 945-47 (1996); Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 614 (1989); Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 527, 602-03. See generally THOMAS W. CHURCH ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978).

<sup>135</sup> See Final Report, *supra* note 1, at 24 tbl.2-8; Working Papers, *supra* note 6, at 108 tbl.6a; see also *supra* note 101 and accompanying text.

<sup>136</sup> See Working Papers, *supra* note 6, at 93 tbl.2 (dealing with oral arguments), tbl.3 (dealing with published opinions); *supra* notes 46,47,74-75, 102, 106 and accompanying text; see also George, *supra* note 131 (suggesting how circuits use en banc measure).

<sup>137</sup> See Final Report, *supra* note 1, at 36, 49-50; see also Spreng, *supra* note 4, at 571-76.

<sup>138</sup> See CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS 10-13 (5th ed. 1994); John

In sum, the above analysis of the Commission's description indicates that particular courts may be operating less effectively than they could. However, the empirical data which the Commission collected cannot support definitive conclusions respecting the circuits' present circumstances or the Commission's proposals, most importantly the divisional concept. The last section, accordingly, offers suggestions for the future that members of Congress and the federal appellate judiciary should carefully evaluate.

### III. SUGGESTIONS FOR THE FUTURE

There are several reasons why the recommendations which lawmakers and judges ought to consider deserve relatively little examination in this article. First and foremost, the evidence adduced by the commissioners does not permit very conclusive determinations about individual courts and, thus, precise suggestions for future action. Second, even if the information that the Commission elicited might yield more certain findings related to specific circuits, numerous recommendations have been rather comprehensively explored elsewhere.<sup>139</sup> Nevertheless, the material which the commissioners assembled - especially together with insights derived from prior assessments, such as the three major efforts during the last decade<sup>140</sup> - can allow some suggestions that complement or elaborate the recommendations proffered earlier. The prescriptions below implicate additional study, which could provide more definitive conclusions about the appeals courts, continuing and new experimentation with mechanisms that have been, or may prove, efficacious, and a miscellany of other suggestions which might improve the circuits.

The analysis throughout this article demonstrates that Congress should not adopt the centerpiece of the Commission recommendations. The commissioners produced insufficient empirical data which clearly show that the current condition of any appellate court is troubling enough to deserve remediation, particularly with a solution which could be as disruptive as the untested divisional arrangement appears. Indeed, the Commission frankly admitted that it found that all of the circuits perform effectively.

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Minor Wisdom, *Requiem for a Great Court*, 26 LOY. L. REV. 787, 788 (1980).

<sup>139</sup> See, e.g., Hug, *supra* note 3, at 908-09; Spreng, *supra* note 4, at 586-98; Tobias, *supra* note 4, at 313-18.

<sup>140</sup> See sources cited *supra* note 8.

These propositions might lead Congress and the appeals courts to exercise caution, but the ideas do not necessarily mean that legislators or appellate judges must avoid all action. For instance, consideration of the Commission information, in combination with previously gathered material, may enable lawmakers to prescribe greater study; experimentation with salutary measures, including some Commission proposals; and additional constructive approaches. The courts' consultation of the information in the sentence above, closer examination of their own situations, and increased exploration of the remaining courts' circumstances, especially efficacious responses by tribunals to docket growth, could concomitantly enhance circuit operations. For example, appeals courts might modify the practices which they presently follow, test or implement potentially effective mechanisms. In the end, Congress and the appellate judiciary may simply lack the knowledge that they need to institute action which is more ambitious than continued study and selective experimentation.

#### *A. Additional Study*

##### 1. An Introductory Word

There will never be perfect information on the federal intermediate appeals courts. Nonetheless, evaluators could collect, scrutinize and synthesize empirical data that are superior to the material which the Commission accumulated. Superior data should permit more certain determinations regarding the regional circuits. However, evaluators must have adequate resources, particularly time, to perform rigorous analysis by carefully structuring study and by assembling, examining and synthesizing the requisite empirical data which will yield sufficiently definitive conclusions. Evaluators should also consult and capitalize upon the Commission's contributions and prior endeavors, especially the ones that the commissioners essentially continued. These prior efforts afford considerable, helpful information and numerous, instructive perspectives on the appellate courts and on the conduct of future work. An expert, independent entity, such as the RAND Corporation, which recently completed a comprehensive assessment of expense and delay reduction procedures in 94 federal districts,<sup>141</sup> should

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<sup>141</sup> See, e.g., JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS (1996); JAMES S. KAKALIK ET AL., IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND

have primary responsibility for this activity. All twelve circuits might correspondingly undertake introspection while drawing upon the experiences in other appeals courts. For instance, Chief Judge Hug appointed a Ninth Circuit Evaluation Committee to reconsider numerous dimensions of the court's performance in light of the Commission report and proposals and to develop constructive suggestions for improvement.<sup>142</sup>

## 2. Specific Suggestions

Evaluators must carefully gather, analyze and synthesize the maximum empirical data which will permit them to ascertain as conclusively as possible whether any circuit does not deliver appellate justice, operate efficaciously or attain the appellate ideal.<sup>143</sup> Of course, evaluators should allow for the possibility that every appeals courts now works effectively, a finding which the commissioners expressly made, even though the commissioners prescribed a divisional arrangement for the Ninth Circuit. If the evaluators definitively determine that a court is deficient, they must attempt to identify exactly why this situation came about and to designate the best approaches for rectifying or ameliorating the problems detected. In short, evaluators should essentially finish the ongoing inquiry which the commissioners continued.

The Commission endeavor might serve as a starting point. However, evaluators must institute numerous, additional efforts if they are to complete the project that the Commission started. Most of the empirical data which the commissioners systematically collected, examined and synthesized will be helpful, but evaluators should scrutinize some of this data and additional material. Insofar as evaluators find that the information is insufficient, evaluators will need to particularize or refine it, or assemble, analyze and synthesize supplemental or new empirical data.

The raw numerical material on dockets is a general example of information which may require refinement. The total number of cases

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COMPARISON COURTS (1996); see also Tobias, *supra* note 134 at 602.

<sup>142</sup> See *Oversight Hearings on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals Before the House Judiciary Subcommittee on Courts and Intellectual Property* (July 22, 1999) (statement of Judge David Thompson, Judge, Ninth Circuit Court of Appeals) [hereinafter *Oversight Hearings*]; *Ninth Circuit Evaluation Committee, Interim Report* (Mar. 2000) [hereinafter *Interim Report*].

<sup>143</sup> I emphasize appellate justice and efficacious operation for the reasons stated *supra* notes 42-44 and accompanying text. These suggestions are primarily meant for expert, independent evaluators, but specific courts can also apply them.

that each regional circuit receives and processes is somewhat useful. However, it would be instructive to know more about the filings' relative complexity, beyond how many appeals pro se litigants pursue.<sup>144</sup> Evaluators could concomitantly augment the material which the commissioners collected on the absolute quantity of cases that every appellate court accords en banc rehearing by. For instance, ascertaining reconsideration's frequency and whether it suffices to maintain consistency, coherence and predictability.<sup>145</sup> Evaluators might also develop new empirical data on collegiality and regionalism with, for example, interviews of judges.<sup>146</sup>

Evaluators must determine as conclusively as possible whether any of the regional circuits fails to provide appellate justice or to operate efficaciously. Evaluators, accordingly, should delineate precisely how a court must function by examining specified indicia to determine with confidence that the circuit performs in an unsatisfactory manner, thereby triggering remediation. This is a polycentric problem which will require a carefully calibrated qualitative and quantitative analysis as well as the exercise of discerning judgment.

The objective criteria can be treated rather felicitously because the raw numerical data offer a readily available standard of comparison. For instance, relevant information on every court could be considered with reference to the national average and the operations of the remaining circuits. However, these efforts must be contextualized. They will only be valuable, to the extent that evaluators similarly calculate the numerical material by identifying, isolating and allowing for applicable variables. Illustrative are the percentages of oral arguments and published opinions afforded as well as disposition times, which resist meaningful comparison absent provision for case complexity.

Once evaluators have placed this information in context, they must confront additional, difficult issues. For example, exactly how small a percentage of oral arguments or published opinions is too few and precisely how long an appeals process is too inexpeditious? Evaluators might answer these questions by comparing a particular appeals court's

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<sup>144</sup> See Working Papers, *supra* note 6, at 93 tbl.1; *supra* text accompanying note 38. It would also be beneficial to know more precisely which types of cases receive oral arguments and published opinions and how courts deploy staff, manage appeals and use ADR. See *supra* notes 105-107 and accompanying text.

<sup>145</sup> See Working Papers, *supra* note 6, at 94 tbl.6. For more analysis of these ideas, see *infra* notes 156-57 and accompanying text.

<sup>146</sup> For more analysis of these ideas, see *infra* notes 148-49, 158 and accompanying text. They as well might develop supplemental or new data on consistency, coherence and predictability. See *infra* notes 147, 153-57 and accompanying text.



record with the national average and the endeavors of the other eleven circuits. The system-wide average could serve as a benchmark or threshold for closer analysis, while a performance that is substantially less than the national average or that is in the bottom quartile of appellate courts might necessitate further inquiry.

At this juncture, evaluators should ask two questions: 1) exactly how should a circuit function; and (2) what number of which types of parameters would enable assessors' to ascertain confidently whether a circuit is deficient. These determinations will require finely tuned qualitative and quantitative consideration of relevant indicia as well as identification of the reasons for any inadequacies found. The qualitative aspect of the exercise would involve, for instance, how a court works with reference to the remaining circuits and the relative significance of individual criteria. More specifically, a court which compiles numerical records that are much lower than most circuits in terms of factors, such as the percentages of oral arguments or published opinions, which are important to appellate justice, will deserve additional scrutiny. The quantitative dimension would implicate, for example, the way that a court operates compared to the other circuits in terms of certain factors. More particularly, a court whose numbers are strikingly worse than a majority of circuits for numerous factors will warrant closer examination.

In definitively deciding whether a performance which appeared insufficient actually was, evaluators must also attempt to delineate precisely why the court functions as it does. For instance, a circuit that needs much time to resolve appeals, because it furnishes a high percentage of oral arguments and published opinions, could be operating satisfactorily. If slow case treatment can be explained by the provision of many oral arguments and published opinions, these large figures should be permitted to offset inexpeditious resolution, while diverse approaches to appellate disposition, especially ones which promote court access, might also be acceptable.

Evaluators should similarly address the subjective criteria. That inquiry is much more complex, as the indicia are rather amorphous and evaluators will essentially lack the type of raw numerical data which facilitate comparison of objective information. However, evaluators might ask, and attempt to answer, analogous questions. These include whether any court produces disuniform, incoherent or unpredictable circuit law, whether the court's judges are uncollegial and if so, why, and what amount of each attribute together or alone would mean that a circuit is deficient. Evaluators could generally monitor the court's appeals from filing to disposition in particular areas of law over a period

of time. Professor Hellman's detailed examination of consistency and its possible correlation with circuit magnitude specifically shows how evaluators might proceed.<sup>147</sup> The endeavors of numerous appellate judges have correspondingly enhanced comprehension of collegiality,<sup>148</sup> although evaluators must undertake considerably more work. For example, evaluators could personally interview appeals court judges or closely study circuit operations, such as how the courts constitute panels and assign administrative duties to active circuit judges.<sup>149</sup>

After evaluators have thoroughly reviewed the relevant objective and subjective material, evaluators must consider the information in reaching overall determinations whether a court does not dispense appellate justice or function effectively and, therefore, warrants treatment. Evaluators should carefully differentiate the two judgments and recognize that a circuit which clearly delivers appellate justice may not necessarily operate efficaciously. For instance, a court that performs at a level which is substantially below the national average, absent adequate justification, even as to one parameter, could be working ineffectively. If evaluators entertain doubts about any circuit's circumstances at this point, evaluators might want to explore the advisability of further study and fruitful means of conducting that analysis, perhaps in conjunction with experimentation and the miscellany of ideas discussed below.<sup>150</sup> Should evaluators conclusively find that a circuit functions in an unsatisfactory way, evaluators must designate with precision why. Answering the question of why a court functions unsatisfactorily will foster the narrow tailoring of remedies to the specific problems identified. Evaluators could then formulate the finest solutions. Those will be measures which respond most efficaciously to the difficulties delineated while imposing the fewest disadvantages.

Several examples should clarify the approach contemplated. A circuit that works well, or convincingly explains any failure to so operate, vis-a-vis all of the applicable objective and subjective parameters, obviously affords appellate justice and performs effectively and, therefore, will

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<sup>147</sup> See *supra* note 130 and accompanying text; see also *supra* note 131; *infra* note 157 and accompanying text (suggesting that Professor George's recent study of en banc measure shows how to analyze its possible effect on consistency, coherence and predictability).

<sup>148</sup> See, e.g., FRANK COFFIN, ON APPEAL 215 (1994); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358-62 (1998); Deanell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO ST. L. J. 585 (1995).

<sup>149</sup> I realize that the Commission did ask the judges about collegiality. See Working Papers, *supra* note 6, at 15-35; *supra* note 110 and accompanying text. I envision more intensive scrutiny.

<sup>150</sup> See *infra* notes 162-79 and accompanying text.

require no remediation. In contrast, a court which functions badly, without sufficient reason, in terms of numerous, important objective indicia, such as the percentages of oral arguments furnished and time to disposition, or subjective criteria, namely inconsistent and incoherent circuit law, may not dispense justice and, therefore, does work inefficaciously. It, thus, might deserve comparatively drastic solutions, perhaps including structural reforms like the divisional arrangement, or at least correctives for ineffective performance. Evaluators will probably find that most courts operate between these polar opposites. For example, a circuit which functions rather poorly, while offering somewhat persuasive justifications based on several objective factors, such as percentages of published opinions produced or of visiting judges employed, but works relatively well in terms of many subjective parameters, namely predictability and collegiality, could provide justice, yet perform inefficaciously. The court, therefore, may need modest changes, including the authorization of a few additional judgeships.

I can also illustrate the inquiry envisioned by applying the approach to the Ninth Circuit, the only appeals court that Congress instructed the commissioners to emphasize and that the Commission apparently decided was operating ineffectively enough to warrant treatment. Evaluators must determine as definitively as feasible whether the Ninth Circuit does not deliver appellate justice or function efficaciously. Evaluators might initially want to examine the raw data and other information that the Commission accumulated, although as the analysis in the second section suggests, this material alone will not suffice. Evaluators could specifically consider objective data, namely the percentages of oral arguments and published opinions which the Ninth Circuit affords and its time to disposition. However, evaluators must refine and contextualize the numerical information that the Commission collected. For instance, the percentages and disposition times might be calibrated with case complexity, while all of these statistics should allow for the large number of judicial vacancies on the court since 1995.<sup>151</sup> Indeed, one critical question which must be answered is whether Ninth Circuit operation absent one-fourth of its active judges contributed to any deficiencies that the Commission seemingly found. Moreover, evaluators could gather, analyze and synthesize supplemental or new empirical material, such as information on the uniformity, coherence and predictability of circuit law as well as on judicial collegiality.

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<sup>151</sup> See *supra* notes 38, 40-41, 144 and accompanying text.

Evaluators may also attempt to ascertain the accuracy of the perceptions on which the commissioners apparently premised their decision making, as well as additional subjective criteria related to the Ninth Circuit, even though the above discussion detailed the problems in detecting exactly how the Commission reached its judgments and in applying subjective factors.<sup>152</sup> Notwithstanding these complications, evaluators may institute some efforts. For example, evaluators ought to determine as conclusively as possible whether circuit law is actually inconsistent, incoherent or unpredictable and whether the court's judges are uncollegial. If any of these phenomena exist, evaluators should assess whether they can be ascribed to circuit magnitude. Evaluators should consult, and build upon, earlier, reliable endeavors. Illustrative is a well-respected, scholarly study of uniformity which found that the pattern of multiple relevant precedents "exemplified by high visibility issues . . . is not characteristic of Ninth Circuit jurisprudence generally. Nor is intracircuit conflict."<sup>153</sup> During 1993, a Federal Judicial Center analysis similarly found "little evidence that intracircuit inconsistency is a significant problem [or] that whatever intracircuit conflict exists is strongly correlated with circuit size."<sup>154</sup> Similarly, the Appellate Practice Committee of the American Bar Association Litigation Section detected "no evidence that a larger circuit necessarily causes significantly more intracircuit conflicts than a circuit of ten to fifteen judges."<sup>155</sup>

Evaluators could correspondingly scrutinize the Ninth Circuit's limited en banc procedure to ascertain whether it affects uniformity, coherence or predictability, and if so, precisely how. Evaluators might specifically attempt to verify some commentators' contention that the rather infrequent invocation of this mechanism has failed to preserve consistency and coherence.<sup>156</sup> Professor George's recent work suggests how evaluators could analyze the court's use of the limited en banc

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<sup>152</sup> See *supra* notes 110-15, 120-121 and accompanying text.

<sup>153</sup> See Arthur D. Hellman, *Introduction: Adjudication: Efficiency without Depersonalization*, in *RESTRUCTURING JUSTICE*, *supra* note 130, at 86; see also MCKENNA, *supra* note 8, at 94 (characterizing scholarly study as "only systematic study of precedent in a large circuit").

<sup>154</sup> See MCKENNA, *supra* note 8, at 94.

<sup>155</sup> See *id.*; SUBCOMM. TO STUDY CIRCUIT SIZE, A.B.A., *REPORT ON FEDERAL CIRCUIT SIZE* (1993); see also *supra* note 149 and accompanying text (discussing how to analyze collegiality).

<sup>156</sup> See *supra* note 110 and accompanying text; *Oversight Hearings*, *supra* note 142 (statements of Ass't Atty. Gen. Eleanor Dean Acheson & Sen. Dianne Feinstein); see also Interim Report, *supra* note 142, at 5-6 (finding "apparent change in the court's en banc culture" leading to more en banc cases and quarterly hearings to facilitate them); *infra* note 159 and accompanying text.

process.<sup>157</sup> Evaluators also might examine whether Ninth Circuit magnitude has eroded regionalism and, if so, whether the concept retains modern salience, especially given increasing globalization, computerization and tensions between regionalism and the court's responsibility for federalization.<sup>158</sup>

Once evaluators have collected, analyzed and synthesized the maximum, relevant empirical data and additional applicable material, the evaluators must decide as definitively as possible whether the Ninth Circuit fails to provide appellate justice or perform effectively. Should evaluators remain uncertain at this juncture, evaluators could consider more study of the court, perhaps together with experimentation and the other ideas which are explored below. If evaluators conclusively determine that the Ninth Circuit fails to deliver justice or function efficaciously, they must comprehensively identify why either occurs and match solutions with the problems delineated. Respecting the provision of justice, should evaluators clearly ascertain that the court's size fosters disuniform, incoherent and unpredictable circuit law, which the limited en banc device exacerbates, absent justification, these findings' gravity may indicate dramatic or structural measures, including the divisional scheme. As to ineffective operation, if evaluators confidently conclude that the limited en banc technique does not promote consistency, coherence and predictability, adjustments, such as enlarging the en banc membership, might be warranted.<sup>159</sup>

Evaluators could apply a similar approach to appeals courts apart from the Ninth Circuit. Should resource limitations preclude replicating the inquiry for all of the circuits, evaluators might focus on those courts which the Commission report suggests experience the most difficulty. For example, the Third, Fourth and Eleventh Circuits perform least well in terms of certain, important objective parameters, namely the percentages of oral arguments and published opinions provided as well

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<sup>157</sup> See George, *supra* note 131; see also Hellman, *RESTRUCUTING JUSTICE*, *supra* note 130 at 62-78 (analyzing Ninth Circuit's use of limited en banc process); Hug, *supra* note 3, at 907-09.

<sup>158</sup> See *supra* note 138 and accompanying text. Evaluators might correlate panel assignments with the regions where judges are stationed and appeals arise, but the court's recent decision to authorize experimentation with panels that include one resident judge from the region producing the appeal may obviate the need for this exercise. See *infra* note 166 and accompanying text.

<sup>159</sup> See S. 1043, 106th Cong. (1999); see also *supra* notes 156-57 and accompanying text. Of course, the court's actual condition and possible need for treatment may differ from the two examples.

as the number of visiting judges deployed.<sup>160</sup> Evaluators must attempt to determine with certainty whether and, if so, why any of the courts actually do not afford appellate justice or work efficaciously and, thus, needs remediation.<sup>161</sup>

## B. Experimentation

### 1. An Introductory Word

There are several reasons why recommendations for experimentation deserve comparatively limited exploration in this article. First, the analysis above indicates that it is preferable to undertake additional study, because studies of the circuits should permit more definitive conclusions related to the appeals courts and facilitate future testing and reform. Second, numerous suggestions have been rather comprehensively examined elsewhere,<sup>162</sup> while recommendations could be derived from the Ninth Circuit or the other courts that have participated in experimentation. For example, the Ninth Circuit has been the acknowledged national leader in employing many, creative measures to address docket expansion with rather scarce resources. Nonetheless, certain prescriptions can be proffered, as sufficient information currently exists to structure productive testing, which might proceed at the same time as further study. Moreover, the circuits could always experiment with promising approaches and ought to continue applying effective concepts, such as varied alternatives to dispute resolution and diverse forms of appeals management.<sup>163</sup> This activity would promote better court administration, increase comprehension of the tribunals and foster the exchange of beneficial ideas.

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<sup>160</sup> See Working Papers, *supra* note 6, at 93 tbls.2 & 3, 108 tbl.6a; see also *supra* notes 78-82 and accompanying text.

<sup>161</sup> When conducting this exercise, evaluators might also ascertain whether suggestions for improvement can be derived from studying circuits which appear to function rather well or ineffectively. For example, it would be valuable to know exactly how the First Circuit writes such a high percentage of published opinions, how the Seventh Circuit relies so little on visiting judges, and how the Eleventh Circuit terminates such a large number of appeals per authorized judgeship. In contrast, why do the Third, Fourth and Eleventh Circuits generate the smallest percentages of published opinions and why are they among the four courts providing the lowest percentages of oral arguments and constituting the largest percentages of panels with visitors? See Working Papers, *supra* note 6, at 93 tbls.2 & 3, 101 tbl.1, 108 tbl.6a.

<sup>162</sup> See, e.g., *Oversight Hearings*, *supra* note 142; Interim Report, *supra* note 142; Hug, *supra* note 3, at 908-09; Tobias, *supra* note 4, at 314-15.

<sup>163</sup> See *supra* notes 105-07 and accompanying text.

## 2. Specific Suggestions

All of the circuits should canvass their individual circumstances, while the specific appellate courts might attempt to identify areas that require improvement and test efficacious measures which would rectify or ameliorate any difficulties detected. The Ninth Circuit Evaluation Committee affords an instructive model for the type of effort that I propose. Every appellate court could also examine the information collected by the Commission to delineate ways in which each circuit seems to function less effectively than other courts.

Once the circuits have completed this exercise in introspection and designated aspects of their operations that might be enhanced, the appellate courts should specify approaches which warrant experimentation. One valuable source will be the mechanisms that the remaining eleven circuits have permanently applied or tested to treat growing caseloads with relatively restricted resources. The measures taken by other circuits can be examined three ways: (1) through the identification of appeals courts which performed comparatively well in terms of the parameters for which the commissioners assembled objective empirical data; (2) through intercircuit communication regarding constructive techniques and; (3) through the Federal Judicial Center and the Administrative Office of the United States Courts that serve as national clearinghouses for similar information about the appellate courts. The circuits could concomitantly consult the Commission suggestions, apart from the divisional recommendation. For instance, appeals courts, such as the Fifth Circuit, which experience burgeoning caseloads, might consider experimentation with two-judge, and district court appellate panels, while those circuits that have not employed bankruptcy appellate panels may want to evaluate their institution.<sup>164</sup> The appeals courts then should carefully implement concepts which promise to address any deficiencies found.

The Ninth Circuit must continue deploying the innovative approaches that have permitted the tribunal to resolve rather expeditiously, inexpensively, fairly and consistently the largest appellate court docket. These mechanisms include an executive committee which has important responsibilities for circuit governance, procedures for identifying

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<sup>164</sup> See MCKENNA, *supra* note 8, at 127-33; LONG RANGE PLAN, *supra* note 8, at 131-32; Final Report, *supra* note 1, at 31, 62-66, 68; Gordon Bermant & Judy Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 ARIZ. ST. L.J. 181 (1989). Congress should authorize testing of two-judge, and district court appellate, panels under a statute like that the Commission proposed.

appeals that present similar issues, bankruptcy appellate panels and special screening groups comprised of three judges which each month resolve 140 cases previously designated by the court's staff as less complex.<sup>165</sup> The Ninth Circuit also ought to test new approaches, such as a requirement that every three-judge panel have one member whose chambers are located in the region from which the appeal arises.<sup>166</sup> The court might derive those ideas from studying the other circuits or from the work that its Evaluation Committee is performing.

The experimentation which the appellate courts undertake must receive rigorous analysis.<sup>167</sup> This means that testing should proceed for enough time in sufficiently diverse contexts to ascertain, with confidence, the efficacy of the concepts which circuits apply. An expert, independent entity must scrutinize that experimentation by systematically assembling, evaluating and synthesizing the greatest practicable quantity of reliable empirical material. Once appeals courts have conducted the testing and it has received close assessment, Congress and appellate judges should be able to determine more conclusively whether individual circuits do not deliver justice or operate effectively and, if so, why. Congress and appellate judges must also designate the most efficacious remedies for any problems delineated.

### C. A Miscellany of Additional Ideas

The analysis above suggests that additional study, perhaps combined with further experimentation, would be the best course of action. Nevertheless, some members of Congress or the appeals court bench could find that the condition of a specific circuit or the entire system is dire enough to reject more evaluation and testing. Other senators and representatives or appellate judges may believe that the appeals courts have received adequate analysis, particularly after the recent Commission effort, or that it is now time to act.

If these circumstances exist, lawmakers and the appellate judiciary must remember that the efficacious performance of a century-old institution is at stake and that they should proceed cautiously.

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<sup>165</sup> See Final Report, *supra* note 1, at 31; *supra* note 164 and accompanying text; see also Hellman, RESTRUCTURING JUSTICE, *supra* note 130 (analyzing these and other measures); Tobias, *supra* note 7, at 240.

<sup>166</sup> The court recently instituted experimentation with this requirement. See *Oversight Hearings*, *supra* note 142; Interim Report, *supra* note 142, at 12-13.

<sup>167</sup> See BAKER, *supra* note 43, at 287-301; Tobias, *supra* note 4, at 314-15; Tobias, *supra* note 42, at 1283-88.



Legislators and judges, therefore, might want to consider a miscellany of possibilities. One valuable contribution which the commissioners made was to confirm certain conventional wisdom regarding the circuits. Most important is the idea that virtually all of the appeals courts have confronted docket increases with comparatively few resources and will probably face analogous situations in the future.<sup>168</sup> This determination means that there are two major ways of proceeding. The first is to decrease the quantity of cases, essentially by restricting federal civil or criminal jurisdiction, an idea which Commissioners Justice White and Judge Merritt proffered in their "Additional Views."<sup>169</sup> However, that option has little promise, because senators and representatives are apparently unwilling to limit jurisdiction.<sup>170</sup> The second alternative, therefore, is addressing directly the inexorable rise in appeals which lawyers and litigants bring.

A somewhat controversial means of frontally treating docket growth is to enlarge the judicial and other resources of individual circuits that experience difficulties resolving substantial caseloads. For example, an infusion of judgeships could enable the courts to provide more oral arguments and published opinions while relying less on visiting judges. A readily available source for the precise number of judges who might be needed is the Judicial Conference recommendations for Congress, which are premised on relatively conservative estimates of appellate dockets and judicial workloads.<sup>171</sup> The Conference suggestions are embodied in a proposed measure that senators have introduced.<sup>172</sup> Much controversy attends the questions whether additional judgeships are advisable and, if so, precisely how many.

This approach, thus, may be impractical, especially given congressional refusal to expand the federal bench's size in the last decade and considerable legislative and judicial opposition to creating new positions for the system and specific courts.<sup>173</sup> If the idea is too controversial or lawmakers remain uncertain, temporary judgeships

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<sup>168</sup> See Final Report, *supra* note 1, at ix; *supra* note 30 and accompanying text.

<sup>169</sup> See Final Report, *supra* note 1, at 77-88. See generally MCKENNA, *supra* note 8, at 141-53; LONG RANGE PLAN, *supra* note 8, at 134.

<sup>170</sup> See, e.g., Stephen G. Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK U. L. REV. 29, 34-37 (1990); Dragich, *supra* note 45, at 16-17; William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 722-25 (1995). I emphasize the role of Congress in the remainder of this subsection because it must authorize most of the actions proposed.

<sup>171</sup> See *supra* note 86 and accompanying text.

<sup>172</sup> See S.1145, 106th Cong. (1999).

<sup>173</sup> See *supra* notes 87, 124-28 and accompanying text. See generally Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L. J. 527 (1998).

could be a pragmatic compromise that essentially permits experimentation. Congress might concomitantly appropriate greater resources for circuit staff. However, these increases may further bureaucratize appeals courts which some observers believe are already too bureaucratic.<sup>174</sup>

Legislators and circuit judges should also carefully consider numerous structural and non-structural measures for addressing caseload growth that federal court observers have advanced over the last half-century. The Commission canvassed a number of these approaches and recommended some. Senators and representatives may want to scrutinize those possibilities, such as two-judge, and district court appellate panels, which the Commission suggested, and decide whether they warrant experimentation or deserve permanent implementation.

Lawmakers and judges should correspondingly evaluate other concepts that the commissioners examined but did not prescribe or minimally explored in their report. These encompass a plethora of alternatives which federal courts observers, including individuals and entities that conducted prior studies, have thoroughly surveyed.<sup>175</sup> The options range along a broad spectrum from abolition of the regional circuits, to radical reconfiguration of the existing system, to modest reforms in particular courts, to tinkering with present appellate procedures.

A constructive action which the Senate should implement for all of the circuits that now have judicial vacancies is expeditiously filling the empty seats. This is important because delayed confirmation of judges for these openings can disrupt smooth court administration.<sup>176</sup> This is especially true for the Ninth Circuit, which has operated for much of the time since 1995 absent one-fourth of its active members.<sup>177</sup> Senators might promptly approve nominees for the three present vacancies on the Ninth Circuit and ascertain whether this solution rectifies or ameliorates perceived problems in the Ninth Circuit. For example, if the court were functioning with all 28 active judges authorized by Congress, the circuit

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<sup>174</sup> See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 26-28 (1985); CHRISTOPHER E. SMITH, *JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION* 94-125 (1995); see also Final Report, *supra* note 1, at 23-25; MCKENNA, *supra* note 8, at 49-55.

<sup>175</sup> See, e.g., BAKER, *supra* note 43, at 106-286; sources cited *supra* note 8.

<sup>176</sup> See LONG RANGE PLAN, *supra* note 8, at 102-05; see also Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 *MISS. C. L. REV.* 319, 327 (1994); Tobias, *supra* note 173, at 539-40, 550-51.

<sup>177</sup> See Tobias, *supra* note 42.

could afford higher percentages of oral arguments and published opinions, employ fewer visiting judges and resolve appeals faster.

Legislators and the appellate judiciary as well might scrutinize the efforts of those appeals courts which work particularly well in order to ascertain whether approaches that they follow could be applied in other tribunals.<sup>178</sup> For instance, the circuits which decide cases rather slowly might derive helpful suggestions by examining appellate courts which expeditiously conclude appeals. The tribunals must concomitantly engage in greater intercircuit communication through the exchange of productive ideas that may improve appeals court operations. Illustrative are bankruptcy appellate panels, which the Ninth Circuit employed so successfully that Congress required all of the appellate courts to consider implementing the mechanisms.<sup>179</sup>

#### CONCLUSION

The Commission on Structural Alternatives for the Federal Courts of Appeals fulfilled its substantial responsibilities to assess the regional circuits in the brief period which senators and representatives provided. The commissioners compiled an informative descriptive account of the appellate courts at century's end. However, the description will not support conclusive determinations regarding the circuits. Therefore, Congress should authorize additional study or further experimentation with promising measures.

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<sup>178</sup> See *supra* note 161.

<sup>179</sup> See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(c), 108 Stat. 4106, 4109-10; see also LONG RANGE PLAN, *supra* note 8, at 47; *supra* note 164 and accompanying text.

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