Potential Effects of the White Commission's Recommendations on the Operation of the Ninth Circuit

Chief Judge Procter Hug, Jr.[*]

I would like to thank the University of California Davis School of Law for structuring this very interesting seminar with the outstanding people that reflect different points of view. I think it is a very valuable contribution.

First, I would like to comment on the White Commission Report. That Commission was created in the wake of a bill to split the Ninth Circuit into two circuits. Its mission was to study the structure of the federal circuit courts with special reference to the Ninth Circuit. In undertaking this task, the Commission was concerned with how the circuit courts of appeal of the nation were operating, whether Congress should split the Ninth Circuit or any other circuit, and with formulating recommendations to Congress.

I think that the final report of the Commission made some very valuable contributions to the understanding of the federal appellate court system. The research placed the current appellate court structure in historical perspective and gathered important statistical information affecting the courts. It also compiled a thorough profile of the method of operation of each of the circuit courts of appeals so that each circuit court could benefit from the creative ideas of other circuits.

The Commission developed several important conclusions that are reflected in its final report. I would like to quote some of them:

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[*] This piece is an annotated and slightly modified version of former Chief Judge Hug's remarks delivered, on March 24, 2000, at the Symposium on Managing the Federal Courts at the UC Davis School of Law. *See* UC Davis School of Law Symposium, *Managing the Federal Courts: Will the Ninth Circuit be a Model for Change?* (Transcript of Videotape No. 5 at 2-6) (March 24, 2000.) Hereinafter the transcripts of the symposium videotapes will be referred to as *Symposium Transcript*. All transcripts are on file with the author.

> There is one principle that we regard as undebatable: It is wrong to realign circuits (or not to realign them) and to restructure courts (or to leave them alone) because of particular judicial decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.[1]
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> Any realignment of circuits would deprive the west coast of a mechanism for obtaining a consistent body of federal appellate law, and of the practical advantages of the Ninth Circuit administrative structure.[2]
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> There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to mention the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit.[3]
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> Maintaining the Court of Appeals for the Ninth Circuit as currently aligned, respects the character of the West as a distinct region. Having a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with the other nations on the Pacific Rim, is a strength of the circuit that should be maintained.[4]

I agree with those statements from the Commission. It is important to realize, however, that the real purpose of the study was to decide whether to restructure the circuits and particularly whether to split the Ninth Circuit. Indeed, that was the bill that was pending at the time Congress appointed the commission. So the most important conclusion

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[1] Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 6 (Dec. 18, 1998) [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.

[2] *Id.* at 52.

[3] *Id.* at 29.

[4] *Id.* at 49-50.

of the Commission, I believe, is that the Ninth Circuit should not be split. That conclusion corresponds with the views of the great majority of judges and lawyers in the Ninth Circuit, as well as statements of others concerned with this issue, who submitted written statements or gave oral testimony before the Commission. Among those opposing the division of the Ninth Circuit were the following: twenty out of the twenty-five persons testifying at the Seattle Hearing of the Commission; thirty-seven out of thirty-eight of the persons testifying at the San Francisco Hearing of the Commission; the Governors of the States of Washington, Oregon, California, and Nevada; the American Bar Association; the Federal Bar Association; the United States Department of Justice; the United States Attorneys within the Ninth Circuit; all of the Public Defenders within the Ninth Circuit; respected scholars: Charles Alan Wright, Arthur Hellman, Anthony Amsterdam, Erwin Chemerinsky, Judy Resnik, Jessie Choper, and Margaret Johns; the past Director of the Federal Judicial Center, Judge William Schwarzer; and the chairman of Long-Range Planning for the U.S. Federal Courts, Judge Otto Skopil.[5]

Having strongly opposed splitting the Ninth Circuit, the Commission proceeded to recommend legislation for a revised method of operation for the Ninth Circuit Court of Appeals through intra-circuit adjudicative divisions. It is with this portion of the Commission's final report that I disagree. The essential question is whether the suggested operational revision of the court of appeals accomplishes the acknowledged goal of having a single court interpret and apply federal law in the nine Western United States and the Island Territories, better than its present method of operation. It clearly does not.

When commentators propose a whole new concept of operation for the courts of appeals, those proposing the change should bear the burden of showing that a particular proposal will operate more efficiently and effectively and better advance the cause of justice than the

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[5] For a collection of statements made at the Commission's public hearings or written statements that persons who did not appear submitted *see* Commission on Structural Alternatives for the Federal Courts of Appeal, Public Hearings and Testimony (March 19, 1999) (listing a series of transcripts from public hearings and submitted testimony from those who did not appear), at http://app.comm.uscourts.gov/schedule.htm(last visited Nov. 20, 2000). For written statements submitted to the Commission regarding the Commission's Draft Report *see* Commission on Structural Alternatives for the Federal Courts of Appeal, Draft Report, Comments Submitted on the Draft Report (March 19, 1999) (listing a series of comments from various individuals and organizations on the White Commission's Draft Report), at http://app.comm.uscourts.gov/report/comments.html(last visited Nov. 20, 2000).

time-tested procedures that have operated for many years. That principle was recognized in the United States Judicial Conference's *Long Range Plan of the Federal Courts*.[6] The plan reads: "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload."[7] The Commission has not carried this burden.

The Commission provided no "compelling empirical evidence" that "demonstrates adjudicative or administrative dysfunction" in the Ninth Circuit Court of Appeals. In fact, the Commission provided no empirical evidence justifying restructuring the Ninth Circuit Court of Appeals, yet it proposed a radical restructuring.

The position that the Ninth Circuit expressed to the Commission is that it was working well and that a great majority of the judges and lawyers in the Ninth Circuit were satisfied with its current structure. This was confirmed by the Commission's survey, in which over two-thirds of the judges in the Ninth Circuit expressed that opinion.[8]

Let us next examine the Commission's proposed restructuring of the court of appeals. Briefly stated, the Commission has proposed that Congress divide the Ninth Circuit Court of Appeals into three semi-autonomous adjudicative divisions, with the State of California split into two separate divisions. Panel decisions decided in one division would not be binding precedent in either of the other divisions, and each division would have an independent en banc procedure that would have no precedential effect in the other two divisions. An additional court (called the "Circuit Division") comprised of thirteen judges selected from the divisions, would resolve only direct conflicts between the divisions.

The most serious consequence of the Commission proposal is the inevitable development of inconsistent interpretations of federal law throughout the Ninth Circuit, which the proposed thirteen-judge court would not adequately address. There would be especially serious consequences for the State of California, which Congress would split into two separate divisions. Inevitably, there would be separate interpretations and enforcement of federal law in California.

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[6] JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (December 1995).

[7] *Id.* at 44.

[8] Final Report, *supra* note 1, at 37-38.

The major problem with the Commission's proposal is that the panel opinions would lack stare decisis effect throughout the entire circuit. If we were to have three independent divisions with independent en banc courts and no panel decisions or en banc decisions that are binding elsewhere in the circuit, no panel would have an obligation to follow the precedent that the other two divisions in the Ninth Circuit developed. As such, the Commission's major objective, to maintain consistent law throughout the nine Western States and the Island Territories, would be seriously impaired. The divisional structure would be much less effective in maintaining consistent law throughout this area of the country than the present system where panel decisions are binding precedent for the entire circuit and where a circuit-wide limited en banc court resolves conflicts or changes in precedent.

The Commission's proposed thirteen-judge court falls far short of the Commission's goal of maintaining consistent law throughout the circuit for several reasons. First, it would resolve only direct conflicts between decisions of the divisions. It would not address precedent that parties or judges contend was wrong or unsound. Second, only parties to litigation could petition for review before that court, not judges who saw a conflict. Finally, whether the thirteen judges would take a case would be strictly discretionary, even if a majority of the judges in the circuit believe there is a conflict to be addressed.

Next, let us examine by way of example the contrast between the present limited en banc court and the proposed thirteen-judge court. Under our present system, if a judge, after examining an opinion of a panel anywhere in the circuit, believes that the decision is incorrect under Supreme Court or Ninth Circuit precedent or that the decision is a misinterpretation of a federal statute, that judge can call for en banc review. Normally, the judges of the full court throughout the circuit, including senior judges, would generate numerous memos regarding whether the judges should hear a case en banc. If the judges take the case en banc, the en banc decision is binding precedent throughout the circuit. However, if it is not taken, then the panel decision remains binding precedent throughout the circuit.

Under the Commission's proposal, if a judge in the Southern Division believes a panel decision in the Middle Division is incorrect, that judge could not call for en banc review in the Middle Division or in the thirteen-judge court. The judges in the Southern and Northern Divisions would probably not even be aware of the problems with the panel decision because they would not have received the petition for rehearing or any memoranda discussing the problems. The thirteen-judge court

would become involved only if a party brought a case in the Northern or Southern Division and the divisional en banc court rendered a conflicting decision (or the conflicting decision was not taken en banc). Only then could the parties (not the judges) request review by the thirteen-judge court. Even then, the thirteen-judge court would have discretion to hear or not to hear the case, irrespective of what all of the other judges in the circuit thought.

One can easily see how the law of the circuit would steadily drift apart under the Commission's proposal. The Ninth Circuit Court of Appeals would no longer function as one circuit court, amounting to a de facto split of the court of appeals. Additionally, the law of the nine Western States and Island Territories would no longer have the unifying effect of a single court of appeals.[9]

The Commission's proposed restructuring has additional problems, which I will mention briefly.[10] First, the thirteen-judge court would hear

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[9] Professor Oakley in his presentation noted the same serious defect in the Commission proposal. *See* John B. Oakley, 1 *Symposium Transcript* at 13. However, he would seek to remedy this with an alternate proposal. Under his proposal, panel decisions would be binding throughout the circuit, and divisional en banc opinions would be binding throughout the circuit. *See id.* at 15. Divisional en banc rehearings would proceed in the conventional fashion. If the divisional en banc court determines that the precedent of another division is unsound, the divisional en banc court would be able to certify the question to a nine-judge circuit-wide court. *See id.*

Although this would eliminate the most serious defects in the Commission's proposed restructuring, Professor Oakley's proposal has several disadvantages over our current method of operation. First, if a panel decides a case in the Northern Division that the judges in the Middle and Southern Divisions believe is erroneous and should not be the precedent for the entire circuit, there is no way for any judge in the Middle or Southern Divisions to call for an en banc review of that Northern Division decision. Only a judge in the Northern Division could call for review.

Second, even if the Northern Division reviews en banc that case or another case, which the judges in the Middle or Southern Divisions believe is erroneous, there is no way for them to seek review of that decision by a circuit-wide court. It is only if an en banc court in one of those two divisions determines that the precedent of the Northern Division is unsound that a judge could make a request for the circuit-wide court to hear the case. Judges of the Middle and Southern Divisions could not invoke the en banc procedures in their divisions solely to review a case that was decided in the Northern Division.

Finally, the retention of these divisional en bancs serves only to complicate and to provide another level of review before circuit-wide finality. Under the present method of operation, panel decisions are binding throughout the circuit unless the en banc court reverses. If any judge believes a case should be heard en banc, the full court will vote on whether to take it within a matter of a few days. The en banc court will hear a case that is taken a short time thereafter. Therefore, the complexities of a judge not being able to call for en banc in another division and the complexities and the unnecessary delay occasioned by the divisional en bancs is avoided under our current operation.

[10] Recently, I wrote an article that the *U.C. Davis Law Review* published, analyzing the Commission Report in detail and discussing the additional problems with the

only direct conflicts that a party brings to the attention of the court. There would be no error correction function of this central court and there would be no opportunity for a judge to bring such a question to the en banc court. Instead, only the Supreme Court could review a panel decision or a divisional en banc decision to correct errors of law where no conflict is involved.

A second problem with the thirteen-judge court is that it is not at all representative of the full court. As proposed, it is composed of the chief judge and four judges from each division. The Northern Division, which has only 22% of the caseload and 22% of the judges in the circuit, would have four judges on that court.[11] Whereas the Middle Division and the Southern Division, with 31% and 47% of the caseload respectively, would each have four judges.[12] As such, the Northern Division would be over represented, and the Middle and Southern Divisions would be under-represented. It should also be noted that the four judges from each division would serve three-year terms on this court. Thus, these thirteen judges would, in effect, be super circuit court judges for the three-year term.

One of the other peculiar provisions of the Commission's proposal is the manner in which judges are assigned to each division. Under the proposal, a majority of the judges in each division are to be residents of that division. The remainder of the judges in the division would be assigned from other divisions for three-year terms. The Commission's proposal also indicates that the number of judges would be established in each division so as to equalize the per-judge caseload.

An example of how the proposal would actually work is instructive. In the Northern Division, the per-judge caseload would justify six judges. Currently, there are nine judges resident in that five-state area. A majority of four judges would be retained, and two judges would be assigned in from the other divisions. Congress would assign five of the judges in the Northern Division to other divisions by random selection for three-year terms. This would mean that those five judges would have nothing to do with any cases in the Northern Division. They would not sit on panels dealing with any cases from the Northern Division, and

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Commission's proposed restructuring of the court of appeals. *See* 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) (analyzing and agreeing with Commission rejection of Ninth Circuit split but opposing its divisional proposal).

[11] *Id.* at 913.

[12] *Id.*

would have no voice in the divisional en banc procedure for three years. The benefit of any special knowledge or expertise any of these judges may have concerning the application of state or federal law in that area of the country would be completely lost. One of the advantages of the current operation of our circuit court is the diversity of our judges in geographical location, and in the variety of their experience as lawyers, judges, or law professors. This can be important in panel deliberations, in en banc memoranda from judges of the full court, or in deliberations of a limited eleven-judge en banc court.

The limited en banc court is the key to the operation of a large circuit. When Congress split the Fifth Circuit, creating a new Eleventh Circuit, it was largely because Congress found a full twenty-six-judge en banc court was unworkable on a sustained basis.[13] The Ninth Circuit, however, chose to adopt a limited en banc procedure, and the judges and lawyers have found that it has worked well for over twenty years.

We hear criticism, principally from judges of other circuits, that a limited en banc court does not represent the voice of the majority of the judges on the full circuit court of appeals. Whether a decision of the majority of the court is really necessary to a correct interpretation of the law is questionable. Nevertheless, there are strong indications that the limited en banc court does adequately represent the opinion of the majority of the active judges on the court. First, when judges take a vote as to whether a panel decision should be taken en banc, the majority of the judges are voicing their opinion as to whether the panel decision should remain as precedent in this circuit. Second, a statistical study done by the Ninth Circuit Evaluation Committee, which Judge Thompson will discuss, reveals that an eleven-judge panel randomly selected would represent the views of the full court 94% of the time.[14] Third, of the 173 cases heard by the limited en banc court between 1980 and 1997, 33% were unanimous and 75% were decided by a majority of eight to three judges or greater.[15] This is a strong indication that a full court en banc would not have reached a different decision. Fourth, our court has a procedure by which a judge, who is dissatisfied with an en banc decision, can call for a full court en banc. Four such requests have

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[13] Final Report, *supra* note 1, at 21.

[14] *See* Judge David R. Thompson, 6 *Symposium Transcript* 2.

[15] Ninth Circuit Evaluation Committee, Report of Evaluation Committee 4 (March 22, 2000). Citations to Report of Evaluation Committee can be found at http://www.ca9.uscourts.gov/ca9/Documents.nsf/8e0e7f41ebb23094882567f50054bd5f/02bc6c8579b96cc1882568af00771217? (last visited Nov. 15, 2000). Hard copies of all cited Report of Evaluation Committee documents are on file with the UC Davis Law Review.

been made since 1980, and the majority of the court has never voted to have the case heard by the full court. This is another indication that the majority of the full court is satisfied with the limited en banc process.

In considering the wisdom of the Commission's divisional proposal for the circuit courts, it is important to note the responses it received to its draft report. The draft report specified that the divisional approach was to be applicable nationwide. It was to be optional when the number of judges in a circuit exceeded thirteen, and mandatory when the number exceeded seventeen. The chief judges of eight of the other circuits wrote to oppose the proposal. The Chief Judges of the First, Second, Third, Fourth, Seventh, Eighth, and D.C. Circuits wrote a joint response stating: "The whole concept of intra-circuit divisions, replete with its two levels of en banc review, has far more drawbacks than benefits."[16] The Chief Judge of the Fifth Circuit wrote a separate letter voicing similar concerns.[17] There were many other responses voicing opposition to this divisional proposal including: the United States Department of Justice, Senator Dianne Feinstein, former California Governor Pete Wilson (present California Governor, Gray Davis, recently announced a similar view), the Ninth Circuit Court of Appeals, the Ninth Circuit Judicial Council, the Association of District Judges of the Ninth Circuit, the Federal Bar Association, the Sierra Club Legal Defense Fund, the California Bar Association, twelve separate bar associations in the State of California, the New York City Bar Association, the Federal Bar Council's Committee on the Second Circuit Courts, and the Chicago Council of Lawyers.[18]

The response of the United States Department of Justice, which participates in 40% of the litigation in the federal courts, bears particular

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[16] Memorandum from Chief Judges Harry T. Edwards, Juan R. Torruella, Ralph K. Winter, Edward R. Becker, J. Harvie Wilkinson, III, Richard A. Posner, and Pasco M. Bowman, II, U.S. Court of Appeals, to Members of the Commission on Structural Alternatives for the Federal Courts of Appeals (Nov. 10, 1998) (on file with the UC Davis Law Review), *available at* http://app.comm.uscourts.gov/report/comments/Becker.htm (last visited Nov. 15, 2000). *See also* Hug, Jr., *supra* note 13, at 904 (arguing convincing case has not been made for radical change to Ninth Circuit.).

[17] Letter from Chief Judge Henry A. Politz to Justice Byron R. White, Chairman, Structural Alternatives Commission, 1 (Oct. 29, 1998) (on file with the UC Davis Law Review), *available at* http://app.comm.uscourts.gov/report/comments/Politz.pdf(last visited Nov. 20, 2000).

[18] *See* Commission on Structural Alternatives for the Federal Courts of Appeal, Draft Report, Comments Submitted on the Draft Report (March 19, 1999) (listing series of comments from various individuals and organizations on White Commission's Draft Report), *at* http://app.comm.uscourts.gov/report/comments.html (last visited Nov. 20, 2000).

note.[19] It responded to the Commission, vigorously opposing the divisional restructuring of the Ninth Circuit or any circuit. It stated: "That proposal would have potentially adverse repercussions for the administration of justice in the Ninth Circuit, and ultimately across all federal courts of appeals."[20]

No doubt, as a result of the opposition from other circuits, the final draft made the divisional structure optional for all other circuits, but for some reason, mandatory for the Ninth Circuit. This leaves the Ninth Circuit as the guinea pig for an experimental structure that the Ninth Circuit and eight other circuits strongly oppose. It is important that if we are to be an experiment as to how a large circuit can most effectively operate, we should be able to do it in a way that we believe is going to be most effective. In the past twenty years, we have developed innovative approaches that have increased our efficiency and effectiveness, many of which have been adopted by other circuits. We should not be hampered by the mandatory imposition of a structure that the Ninth Circuit and eight other circuits believe is unsound. As Miriam Krinsky pointed out in her presentation, once this structure is imposed it would be very difficult to undo.[21]

You will hear from the other members of this panel about things we anticipate doing to address perceived problems or areas of possible improvement that were brought to the attention of, or identified by, the Commission. There is no doubt that neither this circuit nor any other circuit is operating perfectly. Our Evaluation Committee will help us identify ways in which we can continue to improve as a circuit court. Frankly, I believe that every other circuit would benefit from such self-evaluation.

Recently, the chief judges and representatives of all the circuits held two workshops to examine the methods of operation of each circuit, with the objective of informing each other of methods of operation or innovative ideas we had found helpful. I think each of our circuits benefited from this exchange and will incorporate some ideas we learned. However, it is important to recognize that there is no one way of doing things, and that each circuit has to develop the most effective way of operating that meets the needs of its area of the country and the

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[19] Comments of the United States Department of Justice on the Tentative Draft Report of the Commission on Structural Alternatives for the Federal Courts of Appeals 1 (Nov. 17, 1998) (on file with the UC Davis Law Review), *available at* http://app.comm.uscourts.gov/report/comments/DOJ.htm (last visited Nov. 20, 2000).

[20] *Id.*

[21] Miriam Krinsky, 2 *Symposium Transcript* 10.

culture of the legal establishment it serves. We in the Ninth Circuit do not intend to tell other circuits how to run their courts or how to structure their circuit or circuit courts. By the same token, we believe that the judges of other circuits are not in the best position to assess the appropriate structure of our circuit or circuit court. The persons best able to assess the effectiveness of our circuit and circuit court are the judges and lawyers in this circuit.

For example, I believe that criticism of our limited en banc procedure, by those who have no experience with it, is unwarranted. Especially considering that we in the Ninth Circuit have found, after twenty years of experience, that it works very well and could be a model for other circuits to try as the number of their circuit judges increases. In my opinion, it is far better than the Commission's untried divisional approach.

CONCLUSION

The Commission on Structural Alternatives for the Federal Courts of Appeals concluded that the Ninth Circuit should **not** be split. The great majority of the judges and lawyers in the Ninth Circuit agree. The Commission stated: "There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively."[22] It also stressed that maintaining a consistent body of federal appellate law in the Western States and the Island Territories is a strength of the circuit that should be maintained.

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

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

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[22] Final Report, *supra* note 1, at 29.

First, neither the panel decisions nor the en banc decisions of any division would bind the other divisions. Moreover, the proposal would abolish circuit-wide en banc hearings for any purpose other than resolving direct conflicts. Thus, the maintenance and development of consistent circuit law would be seriously hampered. Second, the proposed thirteen-judge court would add an additional level of appeal before finality, resulting in additional expense and delay for litigants. Third, the proposal would eliminate the present participation of all judges circuit-wide in resolving circuit law, and would impose serious practical problems in randomly assigning judges among the divisions for three-year terms. Finally, the likelihood of inconsistent interpretations of federal law would exist throughout the circuit and the proposed conflict resolution mechanism of the thirteen-judge court would not adequately address this problem. Furthermore, because California would be split between two divisions, there would be different interpretations and enforcement of the law in California.

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

JUDGE HUG'S RESPONSES TO QUESTIONS POSED AT THE SYMPOSIUM

Below is my response to the following question asked by Professor Margaret Johns: "You mentioned that in your view there was not a problem with inconsistency of decision within the circuit. And I know that the circuit has tried to initiate systems to ensure that there is not inconsistency. Could you describe that for us a little bit?"

The reason why I say there is not a problem of inconsistency in our decisions is based, first, on Professor Arthur Hellman's complete study in his book *Restructuring of Justice*, and second on my own perception.[23] But that does not mean that everything is perfect or that there are no inconsistencies. That is what we are trying to determine — the extent of any inconsistencies.

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[23] Arthur D. Hellman, *The Crisis in the Circuits and the Innovations of the Browning Years*, *in* RESTRUCTURING JUSTICE 3 (Arthur D. Hellman, ed., 1990).

One of the things that we have done is establish a prepublication report that we send out to all the judges before we file an opinion. The report identifies any case that has been assigned to a panel that has a similar issue. This is facilitated by the fact that staff analyzes all of our cases, and special issues codes identify the issues involved. We are the only circuit with an issue code system, which makes the prepublication report possible. Thus, all of the judges are aware that, if they have a case coming up with similar issues, the case just decided might control. So when an opinion comes out, we check it to make sure that we are fully aware of the precedent. This also assists with the monitoring function. If judges believe there is a problem with the opinion, particularly if there is a dissent, they will watch very carefully for that opinion and alert that panel by our "stop clock" procedure or by calling for an en banc vote.

Next, is my response to Professor John Oakley's question, following Judge Browning's presentation, which was: "Given the important innovations and the model established in the Ninth Circuit, someone who is not closely affiliated with the court, and I might be such a person, might question the rosy-apple picture, asking why is it that the circuit is getting reversed so often?"

I think it is important to note that there was only one aberrational year that we keep hearing about over and over - the Supreme Court's 1996-97 term. In that year, twenty-seven out of the twenty-eight cases that the Supreme Court took from the Ninth Circuit were reversed.[24] That is a 96% reversal rate. But it is worth noting that in that same year five circuits had 100% reversal rates. However, twenty-seven reversed cases is a larger number of reversals than in other circuits and also the largest number of reversals that our circuit has ever had.

Before we assign undue significance to that number, I must note that it is twenty-seven cases out of about 4,400 cases we decided on the merits that year.[25] That is about half of 1% of our cases. It is unfair to evaluate the whole performance of a circuit based on half of 1% of the cases decided. If, however, this is deemed significant, the following two years we were well within the mainstream of the other circuits' reversals with fourteen out of seventeen and fourteen out of eighteen reversals.

Because such emphasis has been placed on the one aberrational year of 1996-97, it is only fair to note that in that year, we had ten unfilled

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[24] *See* Marybeth Herald, *Reversed, Vacated, and Split: The Supreme Court, the Ninth Circuit, and Congress*, 77 OR. L. REV. 405 (1998).

[25] OFFICE OF PUBLIC AFFAIRS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 87 tbl. B-1 (1996).

vacancies - over one-third of our court.[26] Instead of twenty-eight active judges, we had eighteen active judges.[27] In 1980, shortly after I came on the court, we had twenty active judges to handle almost 3,000 appeals.[28] In 1996, we had eighteen active judges to handle 8,500 appeals – almost triple the caseload.[29] Perhaps we could have identified and dealt with more of those twenty-seven cases that eventually ended up in the Supreme Court in our en banc process, but it is remarkable that we were able to manage that caseload without building an enormous backlog.

That year has also spawned comments about the Ninth Circuit Court of Appeals being a wild liberal court. It is worth noting that of the eighteen active judges, Republican Presidents appointed nine and Democratic Presidents appointed nine.[30] Reasoning from the Supreme Court reversals that our court is a wild, out-of-control court is simply unjustified. Our court is composed of some of the finest judges in the nation.

The important point I wish to make is this: opinions, unlike mathematical solutions may vary, but under our legal system the Supreme Court provides the final word on an issue. It may be debated whether it is the "right" answer, but it is the final answer that provides the precedent we must all follow. The danger is not that the Supreme Court may reverse a circuit court, but that a court might let possible reversal deter decisive, full, and reasonable consideration of important issues. This is so important because the judges of our circuit should not be considering whether the Supreme Court might reverse a case. We should look at the existing precedent, the relevant statutes, and the Constitution, and do our best to interpret them in light of the facts of the case. The Supreme Court will then have the benefit of our best analysis, and if it sees it differently, that is part of our system of justice.

Since the time of this symposium at UC Davis, Richard A. Posner, Chief Judge of the Seventh Circuit, has published an article in the *Journal of Legal Studies* that bears on this issue and the quality of the work of the

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[26] *See* Herald, *supra* note 2, at 476-477.

[27] *See id.* at 476; Judges of the United States Courts of Appeal, 117 F.3d XII-XIII (showing only eighteen judges during the 1996-1997 term).

[28] *See* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES, 366 tbl. B-7 (1980) (indicating 2,928 cases were filed in the Ninth Circuit in 1980); Judges of the Federal Courts, 615 F.2d XX (showing twenty ninth circuit judges in 1980).

[29] *See* OFFICE OF PUBLIC AFFAIRS, *supra* note 3, at 87 tbl. B-1 (indicating 8,502 cases were commenced in 1996).

[30] *See* David G. Savage, *Getting the High Court's Attention: Liberal-Leaning 9th Circuit is Often Reversed*, 83 A.B.A. J. 46, 47 (1997).

Ninth Circuit Court of Appeals.[31] His conclusions, which he based on slim and irrelevant statistical data, necessitate a response. Judge Posner states in the abstract summary of his paper:

> This paper provides an empirical test of the claim that the U.S. Court of Appeals for Ninth Circuit has too many judges to be able to do a good job. Reversals (especially summary reversals) by the Supreme Court and citations are used as proxies for quality of judicial output. The overall conclusion is that: (1) adding judgeships tends to reduce the quality of a court's output and (2) the Ninth Circuit's uniquely high rate of being summarily reversed by the Supreme Court; (a) is probably not a statistical fluke and(b) may not be a product simply of that circuit's large number of judges.[32]

The density of Judge Posner's data and his statistical rhetoric tends to mask the flimsy premises upon which he bases his statistical conclusions concerning the quality of output. The premises are: (1) the number of reversals (especially summery reversals) by the Supreme Court, and (2) the number of times opinions of the judges of one circuit are cited by another.

Addressing the first premise, the article acknowledges that "non-summary reversal is not a powerful quality variable."[33] It also notes that the Ninth Circuit non-summary rate of reversal is lower than the D.C. Circuit and not statistically different from the Second, Eighth, and Tenth Circuits. Thus, the prime emphasis of the article is on the number of Supreme Court summary reversals from 1985 to 1997. Nationwide, there were thirty-nine such reversals out of 298,384 merit terminations.[34] From this miniscule sampling of opinions, he draws his major conclusions of the quality of output of the judges of a circuit. Assuming this could have any validity, I will examine this premise in further detail.

Of the thirty-nine cases summarily reversed over that thirteen-year period, fifteen were Ninth Circuit cases.[35] Of those fifteen cases, eight were in the 1996-97 term, which I have pointed out was a single aberrational year for our circuit. Judge Posner's table reveals that these fifteen cases, out of the 48,669 merit determinations by the Ninth Circuit, amounts to a summary reversal rate of .030820%, which is somewhat

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[31] Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711 (2000).

[32] *Id.* at 711.

[33] *Id.* at 715.

[34] *Id.* at 714 tbl. 1.

[35] *Id.*

higher than other circuits.[36] Thus, Judge Posner's determination of the quality of the work of the Ninth Circuit is based, not on 1% of its decisions, but on three-one hundredths of 1% of its decisions. Moreover, if we eliminate the eight summary reversals in the one aberrational year, we would be left with seven summary reversals over the remaining twelve years, or a reversal rate of .00173, which is less than the Sixth, Eighth, and Tenth Circuits.[37]

The more significant point is that summary reversals cannot reasonably be categorized as a determinant of the quality of the work of a circuit court. Judge Posner states that summary reversals "can fairly be described as a rebuke to the lower court: the latter got the issue so clearly wrong that there is no need for the illumination of the issue that briefing and argument would afford."[38] Yet, this can hardly be said if the Supreme Court opinion has dissenting and concurring opinions. Just looking at the eight summary reversals in 1996-97, six had concurring or dissenting opinions.[39]

In the 1997-98 term, the Ninth Circuit had no summary reversals. In the 1998-99 term, the Ninth Circuit had two summary reversals of death penalty cases, both with dissents.[40] The *Stewart v. LaGrand* case was presented to the Supreme Court and decided just hours before the time of execution.[41] Therefore, it is very difficult to understand how Judge Posner can reasonably use summary reversals as "a proxy for quality of judicial output" because of the miniscule percentage of cases involved. Furthermore, summary reversals cannot reasonably be categorized as rebukes to the circuit court for being clearly wrong when many have dissents or concurring opinions.

Judge Posner's second premise, the number of times the opinions of a circuit are cited in another circuit, has even less rational basis as a proxy for quality. First, there are too many variables involved, such as the percentage of decisions published in a circuit (with some circuits being considerably higher than other circuits), the nature of cases decided in a

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[36] *Id.*

[37] *See id.*

[38] *Id.* at 713.

[39] *See* Lambert v. Wicklund, 520 U.S. 292 (1997) (three concurring justices); Mazurek v. Armstrong, 520 U.S. 968 (1997) (three dissenters); Pounders v. Watson, 521 U.S. 982 (1997) (three dissenters); United States v. Watts, 519 U.S. 148 (1997) (considering two cases in one opinion with two concurring and two dissenting justices); California v. Roy, 519 U.S. 2 (1996) (two concurring justices).

[40] *See* Stewart v. LaGrand, 526 U.S. 115 (1999) (three concurring justices; one dissenter); Calderon v. Coleman, 525 U.S. 141 (1998) (four dissenters).

[41] 526 U.S. 115 (1999).

circuit,[42] and the propensity of various circuits to cite out of circuit opinions. If an issue is controlled by the law of a circuit, the citation to another circuit's opinion may or may not be helpful. The judgment that the quality of an opinion can be determined from the number of times it is cited in other circuits seems tenuous indeed.

The factoring and regression analysis in a statistical presentation are meaningless if the premises upon which they are based are unsound. In this instance, the premises are unsound.

[42] For example, immigration cases in the Ninth Circuit would not frequently be cited in most other circuits.

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