

# A DIVISIONAL ARRANGEMENT FOR THE FEDERAL APPEALS COURTS

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The 106th Congress seriously considered proposed legislation that could profoundly affect the federal appellate courts, and the 107th Congress may well do so.<sup>1</sup> The Commission on Structural Alternatives for the Federal Courts of Appeals, which performed a rather comprehensive, albeit incomplete, study of the tribunals, recommended this bill as the centerpiece of its report for Congress.<sup>2</sup> The commissioners prescribed regionally-based adjudicative divisions for the United States Court of Appeals for the Ninth Circuit and for the remaining appellate courts when the courts increase in size, even as the commission decisively rejected the possibility of splitting the Ninth Circuit into multiple courts.<sup>3</sup> The commissioners suggested that each of three divisions, with a majority of the division's judges resident in the specific area, exercise exclusive jurisdiction over appeals from district courts situated there and proposed a Circuit Division that would resolve conflicting opinions which the three entities issue. The commission asserted that this approach would enhance the consistency and coherence of circuit law, promote genuine judicial collegiality and link the appellate forum more closely to the region served.<sup>4</sup>

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1. See S. 253, 106th Cong. (1999); see also COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 93 (1998) (providing the suggested statute on which senators premised the proposed legislation that they introduced in January 1999), available at <http://app.comm.uscourts.gov/final/appstruc.pdf> [hereinafter COMMISSION REPORT]; *infra* note 3.

2. See COMMISSION REPORT, *supra* note 1, at 93; see also WILLIAM H. REHNQUIST, 1999 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2 (1999) (urging Congress to give the "recommendations full and complete consideration").

3. See COMMISSION REPORT, *supra* note 1, at ix-xi, 29, 41-46, 60-62. Despite commission rejection of this prospect, senators offered a circuit-splitting bill in March 2000. See S. 2184, 106th Cong. (2000). Senators and representatives introduced similar proposals in spring 2001. See S. 346, 107th Cong. (2001); H.R. 1203, 107th Cong. (2001).

4. See COMMISSION REPORT, *supra* note 1, at x, 41-46.

The commission deserves substantial credit for carefully evaluating the appeals courts and for developing recommendations that constitute a pragmatic political compromise. Should the divisional arrangement enable the Ninth Circuit to improve the quality of case resolution without disrupting daily operations, the organizational scheme might also afford an effective alternative for the other appellate courts as they expand. The remedy that the commissioners crafted could even be responsive to the dramatic docket growth which has transformed the appeals courts from the institutions that the tribunals were only a generation ago.

However, the commission did not systematically collect, analyze and synthesize empirical data that show persuasively, much less definitively, that the appellate courts have encountered or now experience difficulties that are sufficiently problematic to warrant treatment. Indeed, the commissioners forthrightly acknowledged that they lacked adequate time to conduct a "statistically meaningful analysis" of the Ninth Circuit, even as the commission members found that each of the appeals courts operates efficaciously.<sup>5</sup> Those candid admissions make particularly compelling the inadvisability of implementing solutions which seem as drastic and potentially ineffective as the divisional concept. All of these propositions mean that the report and suggestions that the commissioners recently issued deserve assessment. This Article undertakes that effort.

I initially trace the historical developments which prompted the 105th Congress to authorize the establishment of the Commission on Structural Alternatives for the Federal Courts of Appeals. The paper then scrutinizes the entity's report and proposals and determines that the evidence the commission marshaled fails to support change that appears as inefficacious as the divisional structure in entities, which are as important as the appellate courts. The piece concludes by recommending that members of Congress approve additional study of the appeals courts and that the Ninth Circuit continue its experimentation with measures that promise to improve the appellate system.

## I. AUTHORIZATION OF THE COMMISSION

The Commission on Structural Alternatives for the Federal Courts of Appeals resulted from protracted, ongoing debate over the wisdom of dividing the Ninth Circuit. The origins and development of the prolonged, continuing controversy might seem to require relatively little examination in this Article because certain, significant aspects of the dispute have been rather thoroughly chronicled elsewhere.<sup>6</sup> Nevertheless, considerable treatment of the most relevant

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5. See *id.* at 29, 39.

6. See, e.g., Thomas E. Baker, *On Redrawing Circuit Boundaries—Why the Proposal to Divide the United States Court of Appeals for the Ninth Circuit is Not Such a Good Idea*, 22 ARIZ. ST. L.J. 917 (1990); Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 EMORY L.J. 1357 (1995) [hereinafter Tobias, *Impoverished*]; see generally THOMAS E. BAKER, JUSTICE RESEARCH INSTITUTE, RATIONING JUSTICE ON APPEAL—THE

features in the first and second sections of the paper is justified, as that type of explanation can inform understanding of the report and suggestions which the commissioners published.

Since the federal appellate system's creation, Ninth Circuit magnitude—including its twenty-eight active appeals court judges, 8700 annual filings and enormous geographic scope—has provoked calls for realignment because the court's size has purportedly fostered inefficient, disuniform and erroneous appellate decisionmaking.<sup>7</sup> The most recent, serious attempts to reconfigure the Ninth Circuit commenced during 1983; lawmakers who favor realignment have orchestrated numerous campaigns to restructure the court since then.<sup>8</sup>

The latest major effort was in 1995, when senators who principally represent the jurisdictions of the Pacific Northwest introduced proposed legislation that would have divided the Ninth Circuit.<sup>9</sup> During the initial session of the 104th Congress, the United States Senate Judiciary Committee approved a measure which would have realigned the court.<sup>10</sup> However, the bill's proponents could not muster the votes necessary for adoption by the entire Senate and evinced willingness to support a compromise recommendation, which would have authorized a national commission that would study the appellate courts.<sup>11</sup> The United States House of Representatives failed to pass substantive legislation which would have approved the analysis, but the chamber appropriated \$500,000 for an assessment.<sup>12</sup>

Early in the first session of the 105th Congress, senators and representatives offered measures that would have divided the Ninth Circuit or that

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PROBLEMS OF THE U.S. COURTS OF APPEALS (1994) [hereinafter BAKER, RATIONING JUSTICE].

7. See COMMISSION REPORT, *supra* note 1, at 30–33; see generally NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995, S. REP. NO. 104-197 (1995) [hereinafter SENATE REPORT]. Senate Bills 2184 and 346 as well as House Bill 1203 represent the most recent efforts.

8. See COMMISSION REPORT, *supra* note 1, at 33–34; see generally Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189, 196–214 (1997) [hereinafter Tobias, *Suggestions*].

9. See S. 956, 104th Cong. (1995); see generally Diarmuid F. O'Scannlain, *A Ninth Circuit Study Commission: Now What?*, 57 MONT. L. REV. 313, 313–15 (1996); Tobias, *Impoverished*, *supra* note 6.

10. See S. 956; SENATE JUDICIARY COMM., 104TH CONG., MARKUP OF S. 956 (Comm. Print 1995); see generally SENATE REPORT, *supra* note 7; Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 887 (1998).

11. See 142 CONG. REC. S2544, S2545 (daily ed. Mar. 21, 1996); see generally Carl Tobias, *A Proposal to Study the Federal Appellate System*, 167 F.R.D. 275, 279 (1996).

12. See 142 CONG. REC. H11,164, 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).

would have instituted a federal appeals court study.<sup>13</sup> On June 3, 1997, the House of Representatives unanimously authorized an evaluation of the appellate system.<sup>14</sup> During August, lawmakers who advocated splitting the Ninth Circuit achieved their greatest success when the Senate adopted an appropriations rider which would have reconfigured the appellate court.<sup>15</sup> Nonetheless, members of the House—including every Democrat and Republican from California as well as Representative Henry Hyde (R-Ill.), Chair of the House Judiciary Committee—opposed division, and Congress ultimately agreed to a compromise that approved a national examination.<sup>16</sup> The measure empowered the Chief Justice of the United States to appoint the five members of the commission not later than thirty days from November 26th, the date of the statute's enactment.<sup>17</sup> The legislation 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 write a report that was to include proposals 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>18</sup>

## II. ANALYSIS OF THE COMMISSION'S WORK

### A. Background

The commission members appeared to discharge conscientiously the significant statutory duties which lawmakers had assigned the entity.<sup>19</sup> Throughout 1998, the commissioners sought considerable public input. During the spring of that year, the commission held six public hearings at which eighty - nine witnesses testified in major metropolitan areas across the country: Atlanta, Dallas, Chicago, New York, Seattle and San Francisco.<sup>20</sup> Five of these cities function as the headquarters for regional circuits. Atlanta and Dallas serve as the respective headquarters of the Eleventh and Fifth Circuits, which Congress created from the former Fifth Circuit in 1980, and San Francisco has been, and remains, the headquarters of the Ninth Circuit. Seattle would probably be the headquarters of

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13. See, e.g., S. 431, 105th Cong. (1997); S. 248, 105th Cong. (1997); H.R. 908, 105th Cong. (1997); see also Tobias, *Suggestions*, *supra* note 8, at 205-14 (analyzing developments in the 105th Congress).

14. See H.R. 908; 143 CONG. REC. H3223, H3225 (daily ed. June 3, 1997).

15. See S. 1022, § 305, 105th Cong. (1997); 143 CONG. REC. S8041 et seq. (daily ed. July 24, 1997).

16. See Pub. L. No. 105-119, § 305, 111 Stat. 2240, 2491 (1997); *infra* notes 27-28 and accompanying text.

17. See Pub. L. No. 105-119, § 305(a)(2)(A)-(B).

18. *Id.* § 305(a)(1)(B); see also Tobias, *Suggestions*, *supra* note 8, at 205-14 (analyzing measure).

19. I rely substantially in this subsection on COMMISSION REPORT, *supra* note 1, at 1-6.

20. See *id.* at 2-3.

any new Twelfth Circuit that lawmakers might carve out of the existing Ninth Circuit.

The commissioners also worked quite closely with the Federal Judicial Center (FJC) and the Administrative Office of the United States Courts, the principal research and administrative arms of the federal courts, which senators and representatives wisely empowered the commission to consult.<sup>21</sup> Indeed, several employees of the Judicial Center and of the Administrative Office, who served as expert advisors for the commissioners, had actively participated in previous assessments that were performed on the federal judicial system. More specifically, the commission members drew substantially on the experience of two seasoned FJC personnel in designing surveys which the commissioners circulated to circuit and district court judges and to appellate practitioners seeking their viewpoints related to appeals courts' operations.<sup>22</sup>

The commission as well collected certain statistical information regarding the performance and administration of the regional circuits. For example, the commissioners gathered material (1) on the percentage of filings which the appeals courts accord thorough judicial consideration, especially in the form of oral arguments and written dispositions; (2) on the time that the circuits require to resolve cases; and (3) on the mechanisms that appellate courts have employed to treat the steadily expanding dockets that have dramatically changed the circuits from the entities which the appeals courts were even during the 1970s.<sup>23</sup>

The commission evaluated all of the information it had assembled or had received and on October 7, 1998, the commissioners published a tentative draft report with suggestions on which they solicited public input during a month-long comment period.<sup>24</sup> Numerous individuals and interests that the commission draft findings and recommendations would affect offered favorable responses, but a substantially greater number of commentators tendered submissions that criticized those determinations and proposals. Indeed, people and entities ranging across a broad spectrum—as diverse as the American Bar Association, the United States Department of Justice, Earthjustice Legal Defense Fund and the chief judges of seven regional circuits—expressed dissatisfaction.<sup>25</sup> After the commissioners

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21. See *id.* at 3–4; see also 28 U.S.C. §§ 601–613 (1994) (authorizing the Administrative Office); 28 U.S.C. §§ 620–629 (1994) (authorizing the FJC); Pub. L. No. 105-119, § 305(a)(4)(D) (authorizing the FJC to provide the commission research services and the Administrative Office of the U.S. Courts to provide the commission administrative services).

22. See COMMISSION REPORT, *supra* note 1, at 4.

23. See *id.* at 21–25, 39; see also REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990) [hereinafter FEDERAL COURTS STUDY COMM. REP.] (suggesting that caseload increases have transformed the circuits).

24. See COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, TENTATIVE DRAFT REPORT 3 (1998).

25. See ABA, COMMENTS TO THE COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS (Nov. 6, 1998); HARRY EDWARDS ET AL., COMMENTS TO THE COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS (Nov. 10,

examined the public comments, the commission members made comparatively minor revisions in the tentative draft document and issued a final report on December 18.<sup>26</sup>

The final commission report is replete with ironies. The very existence of the commission itself is ironic. Had the unanimous United States House of Representatives delegation from California and Ninth Circuit Judge Charles Wiggins, who served on the House Judiciary Committee during the Watergate controversy with Representative Henry Hyde, not prevailed on the Chair of the Judiciary Committee, Congress might never have authorized the commission.<sup>27</sup> If the members of Congress from California and Judge Wiggins had failed to intercede with Representative Hyde, the House of Representatives could well have followed the lead of the Senate, which in August 1997 adopted fifty-five to forty-five, along strict political party lines, an appropriations rider that would have divided the Ninth Circuit.<sup>28</sup>

The senators, who were the foremost advocates of circuit-splitting and who principally represented states situated in the Pacific Northwest, reluctantly agreed to a national assessment when they apparently realized that some form of study would be a condition precedent to any reconfiguration of the Ninth Circuit. Lawmakers struck several important compromises in the appropriations measure, which authorized the Commission on Structural Alternatives for the Federal Courts of Appeals.<sup>29</sup> Senatorial proponents of the Ninth Circuit's division seemingly insisted that (1) the Chief Justice of the United States, William H. Rehnquist, be authorized to name all of the commissioners; (2) that the commission consist of only five members; (3) that the commissioners have ten months for undertaking the appellate court evaluation and two months for compiling their report and suggestions; and (4) that the commission have a \$900,000 budget to complete the analysis.<sup>30</sup>

These determinations may have foreordained the result that the commissioners would ultimately reach. Chief Justice Rehnquist chose as members retired Supreme Court Justice Byron R. White, Sixth Circuit Judge Gilbert S.

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1998); TODD D. TRUE, EARTHJUSTICE LEGAL DEF. FUND, COMMENTS TO THE COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS (Nov. 6, 1998); U.S. DEP'T OF JUSTICE, COMMENTS TO THE COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS (Nov. 6, 1998) [hereinafter JUSTICE DEP'T COMMENTS].

26. See COMMISSION REPORT, *supra* note 1. I rely in the remainder of this subsection on conversations with individuals who are knowledgeable about the developments described.

27. See, e.g., Letter from Rep. Henry J. Hyde, Chair, House Judiciary Comm., to Rep. Robert Livingston, Chair, House Comm. on Appropriations (Sept. 5, 1997); Letter from Rep. Jerry Lewis et al., Members of Congress from California, to Rep. Harold Rogers, Chair, House Appropriations Subcomm. on Commerce, Justice, State (Oct. 17, 1997).

28. See sources cited *supra* note 15 and accompanying text.

29. See Pub. L. No. 105-119, § 305, 111 Stat. 2240, 2491 (1997).

30. See *id.*; see also Tobias, *Suggestions*, *supra* note 8, at 205-14 (analyzing the measure).

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>31</sup> This composition suggested that the commissioners would proffer a report and proposals that were comparatively solicitous of, or would at least be palatable to, the federal judiciary. Congress astutely appropriated quite generous resources of \$900,000 that theoretically could have enabled the commission to conduct a comprehensive assessment.<sup>32</sup> However, senators and representatives assigned the very small number of commissioners a potentially enormous task while affording them woefully inadequate time to conclude all of the work that was entailed.<sup>33</sup> For example, the commission had a shorter time period for examining the appellate courts than a majority of those circuits requires to resolve an appeal,<sup>34</sup> as well as somewhat less time and significantly fewer members than comparable, earlier entities, such as 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>35</sup> These circumstances may have substantially restricted what the commissioners could accomplish.

The Commission on Structural Alternatives for the Federal Courts of Appeals carefully attempted to fulfill the onerous statutory responsibilities imposed by lawmakers in the extremely limited period that had been provided. The commission members gathered substantial, relevant information on the appellate courts, broadly solicited public input, identified the most important difficulties that the circuits ostensibly are experiencing and developed apparently efficacious solutions for those complications. Notwithstanding the commission's concerted efforts, its endeavor eventually proved deficient. The commissioners ultimately failed to assemble, evaluate and synthesize convincing empirical material that showed with adequate certainty that the appellate courts presently encounter difficulties problematic enough to warrant treatment, especially with measures that appeared as potentially ineffective as the approaches which the commission proposed.

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31. See COMMISSION REPORT, *supra* note 1, at 1, 92.

32. See Pub. L. No. 105-119, § 305 (b).

33. See *id.* § 305(a)(6).

34. See COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, WORKING PAPERS 97 tbl. 5 (1998); 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, 2000.

35. See FEDERAL COURTS STUDY COMM. REP., *supra* note 23; JUDICIAL CONF. OF THE U.S. COMM. ON LONG RANGE PLANNING, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter LONG RANGE PLAN]; U.S. COMM'N ON REVISION OF THE FED. COURT APP. SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE, 62 F.R.D. 223, 228-30 (1973) [hereinafter HRUSKA COMM'N].

### *B. Problems in Identifying the Problems*

First, and perhaps foremost, the commission did not conclusively demonstrate that the Ninth Circuit or the remaining appeals courts presently face complications that are sufficiently troubling to deserve remediation. The commissioners expressly declared in the final report that they found "no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively."<sup>36</sup>

The commission capably summarized the various assertions and counterclaims which those individuals and interests that favor and oppose Ninth Circuit bifurcation have articulated in the protracted, continuing controversy over possible division.<sup>37</sup> The arguments involve the impacts of the court of appeals' size, the substantial geographic jurisdiction of the circuit and the place of this entity within the federal appellate system. The commissioners cataloged the principal relevant issues but decided against dissecting them in much detail because the commission contended that the ideas were readily available in the literature the commissioners had scrutinized.

The commission then canvassed the perspectives of Ninth Circuit judges, the consumers of the court's services and additional, knowledgeable observers. The commissioners seemed particularly impressed with the opinions espoused by numerous members of the United States Supreme Court, four of whom asserted that it was "time for a change."<sup>38</sup> Associate Justices Anthony Kennedy, Sandra Day O'Connor, Antonin Scalia and John Paul Stevens generally voiced concerns about the capacity of the Ninth Circuit judges to keep abreast of the court's jurisprudence, the danger of intracircuit inconsistency in a court which processes such an enormous caseload, and the ability of the limited en banc procedure that the circuit employs to address disuniformity.<sup>39</sup> Chief Justice Rehnquist, who shared these and other viewpoints expressed by his colleagues and who characterized the divisional concept as better than a mere compromise between circuit-splitting champions and proponents of the status quo, claimed that the divisional approach appeared "to address head-on most of the significant concerns raised about the court and would do so with minimal to no disruption in the circuit's administrative structure."<sup>40</sup>

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36. COMMISSION REPORT, *supra* note 1, at 29.

37. I rely in this paragraph on *id.* at 34-37. For similar summaries, see SENATE REPORT, *supra* note 7, at 6-11, 16-31; BAKER, RATIONING JUSTICE, *supra* note 6, at 928-45; Tobias, *Impoverished*, *supra* note 6, at 1377-95.

38. See COMMISSION REPORT, *supra* note 1, at 38-39; see also *infra* notes 48-49 and accompanying text (analyzing surveys of other consumers).

39. See COMMISSION REPORT, *supra* note 1, at 38-39; see also *infra* notes 91, 97, 132-33 and accompanying text (analyzing similar expressions of concern).

40. COMMISSION REPORT, *supra* note 1, at 39; see also REHNQUIST, *supra* note 2. It is unclear why the commission seemed to assign these ideas so much weight. The Justices may have no special expertise in appeals court dispute resolution and are relatively removed from daily circuit operations. In fairness, much of the Court's current docket comprises



The commissioners next explored several standards that they believed inform the lengthy, controversial and ongoing regarding the future of the Ninth Circuit.<sup>41</sup> The commission stated that the contentions propounded by advocates and opponents of change include significant objective and subjective constituents, which the commissioners carefully surveyed in reaching their determinations related to the court's present circumstances. The commission reviewed "all of the available objective data routinely used in court administration to measure the performance and efficiency of the federal appellate courts."<sup>42</sup> However, the commissioners forthrightly admitted that they could "not say that the statistical criteria tip decisively in one direction or the other."<sup>43</sup> Although the commission found certain discrepancies among the various indicia deployed by assessors when evaluating the appeals courts, "differences in judicial vacancy rates, caseload mix, and operating procedures make it impossible to attribute them to any single factor such as size."<sup>44</sup>

The commission observed that subjective considerations, namely the consistency and predictability of law, are obviously more difficult to analyze "but are widely regarded as a high priority for" the appellate courts.<sup>45</sup> The commissioners frankly acknowledged that they "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" compares with the remaining appeals courts in the truncated time allocated by Congress.<sup>46</sup> The commission members concomitantly stated that they were aware of certain, relevant literature, "including a study that concluded that intracircuit conflict was not characteristic of the published opinions of the Ninth Circuit during the mid-1980s."<sup>47</sup> However, the commissioners apparently accorded this evaluation little credence.

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appeals from these courts. Moreover, Justice O'Connor is the Supreme Court member who has responsibility for the Ninth Circuit and Justice Kennedy was a judge of the court, while Justice Scalia and Justice Stevens formerly served on the appeals courts.

41. I rely in this paragraph on COMMISSION REPORT, *supra* note 1, at 39.

42. *Id.*; see also Hon. Procter Hug, Jr., *The Ninth Circuit Should Not Be Split*, 57 MONT. L. REV. 291, 296-99 (1996) (reviewing earlier objective data); Hon. J. Clifford Wallace, *The Ninth Circuit Should Not Be Split*, 56 OHIO ST. L.J. 941, 942 (1995) (same).

43. COMMISSION REPORT, *supra* note 1, at 39.

44. *Id.*; see also *infra* notes 139, 156 and accompanying text (analyzing the Ninth Circuit).

45. COMMISSION REPORT, *supra* note 1, at 39. For analyses of the two phenomena, see Aaron H. Caplan, *Malthus and the Court of Appeals: Another Former Clerk Looks at the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 957, 981-84 (1998); Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 MONT. L. REV. 261, 274-79 (1996).

46. COMMISSION REPORT, *supra* note 1, at 39. For suggestions that Congress allotted the commission little time, see JUSTICE DEPT. COMMENTS, *supra* note 25, at 1 and Tobias, *Suggestions*, *supra* note 8, at 191.

47. COMMISSION REPORT, *supra* note 1, at 39 n.93; see also Wallace, *supra* note 42, at 943 (remarking on the study); *infra* note 114 (citing to the study).

The commissioners did comment that the surveys, which the commission had prepared with the assistance of Federal Judicial Center personnel and had circulated to district judges and appellate attorneys in the Ninth Circuit and the other appeals courts, asked for these jurists' and lawyers' perspectives and experiences as the principal consumers of appeals court decisions.<sup>48</sup> Nevertheless, the survey results compiled by the commissioners eventually proved to be rather inconclusive. For instance, district judges situated in the Ninth Circuit reported finding the law sufficiently clear to give the jurists confidence in their determinations on legal questions as frequently as the trial judges' counterparts in the remaining appellate courts, but counsel who practice in the Ninth Circuit reported "somewhat more difficulty discerning circuit law and predicting outcomes of appeals than lawyers elsewhere."<sup>49</sup>

Of course, the commission assumed that the viewpoints expressed by these consumers of Ninth Circuit decisionmaking would be instructive and accurate. However, the opinions of certain district court judges and lawyers who pursue cases in the Ninth Circuit could be colored by their personal experiences and self-interest and possibly by a lack of confidence in, or even a distrust of, the appellate bench. Perhaps in recognition that reliance on the Ninth Circuit consumers might be vulnerable to criticism, the commissioners candidly remarked that "when all is said and done, neither we nor, we believe, anyone else, can reduce consistency and predictability to statistical analysis. These concepts are too subtle, the decline in quality too incremental, and the effects of size too difficult to isolate, to allow evaluation in a freeze-framed moment."<sup>50</sup>

Having made this comparatively telling concession and apparently appreciating the somewhat tepid character of the support mustered, the commissioners, nonetheless, went on to proclaim that in the "common-law system, consistency and predictability have to do with the coherence of the law declared over time."<sup>51</sup> The commission correspondingly observed that because groups of three judges working together in panels typically determine the law on an appeals court, the appellate process places a premium on collegial deliberations.<sup>52</sup> The commissioners specifically admitted that collegiality clearly "cannot be quantified

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48. See COMMISSION REPORT, *supra* note 1, at 39.

49. *Id.* at 40; see also Hug, *supra* note 42, at 303–06 (suggesting that the Ninth Circuit is responsive to the consumers of its services).

50. COMMISSION REPORT, *supra* note 1, at 40.

51. *Id.*; see also sources cited *supra* note 45 (analyzing consistency and predictability). For a critique of the ideas in this paragraph, see Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. CAL. L. REV. 377, 393–401 (2000).

52. See COMMISSION REPORT, *supra* note 1, at 40. For analyses of collegiality, see O'Scannlain, *supra* note 9, at 315 and *infra* note 115 and accompanying text.

or measured and [made] no attempt to do so with respect to the Ninth Circuit Court of Appeals or any other."<sup>53</sup> The commission then proceeded to declare its

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>54</sup>

The lack of clarity accompanying the commissioners' identification of those complications presently confronted by federal intermediate appellate courts is so important that the notions espoused warrant reiteration. The commission initially consulted all of the applicable objective data ordinarily employed by assessors of federal court administration in evaluating the performance and efficiency of the appeals courts and found this material to be inconclusive. The commissioners then considered subjective factors, such as consistency, coherence, collegiality, certainty and predictability. The commission members conceded that those elements are quite difficult to analyze and that the commission lacked adequate time to conduct a statistically meaningful assessment of Ninth Circuit decisionmaking to formulate its own, objective evaluation of how this particular court operates. Instead, the commissioners resorted to, and relied substantially upon, surveys of the viewpoints of district judges and appellate practitioners as the primary consumers of circuit determinations, although most of the consumers' responses appeared relatively uninformative and, in any event, had somewhat limited value because they were effectively the opinions of self-interested observers. The commission evidenced cognizance of the only systematic examination of Ninth Circuit precedent, which found that conflicts did not characterize the published determinations of this appeals court in the mid-1980s. However, the commissioners claimed that neither the commission nor anybody else could reduce uniformity and predictability to very exacting statistical measurement.<sup>55</sup> Undaunted by the paucity of information elicited and the apparent weakness of the evidence which the commissioners had adduced, they contended that consistency and predictability implicate the coherence of law declared by appellate judges over time and that group decisionmaking on the appeals courts enhances the importance of collegiality. Finally, the commission acknowledged that collegiality obviously resists precise quantification or measurement and undertook no effort to quantify or calculate the concept's operation in the Ninth Circuit or in the remaining appellate courts. Nevertheless, the commissioners declared their unsubstantiated judgment that the uniform, predictable and coherent development of the law across time can

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53. COMMISSION REPORT, *supra* note 1, at 40; *see also* Hug, *supra* note 42, at 299–300 (suggesting that the Ninth Circuit is collegial); Spreng, *supra* note 10, at 922–24 (suggesting that the Ninth Circuit is not collegial).

54. COMMISSION REPORT, *supra* note 1, at 40 (quoting FRANK COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 215 (1994)).

55. *See* COMMISSION REPORT, *supra* note 1, at 40; *see also supra* note 50 and accompanying text (providing earlier analysis of ideas).

be promoted best in a decisional entity that is sufficiently small for the type of intimate, ongoing, collaborative interaction that cultivates excellent appellate decisionmaking.<sup>56</sup> Perhaps most striking about this proposition, which constitutes the linchpin of the determinations and proposals that the commissioners developed, and about numerous other assertions articulated by the commission is the sheer lack of support proffered for the notions. Indeed, the commissioners explicitly admitted that their comprehensive review of the relevant objective information and applicable subjective phenomena—including consistency, certainty and collegiality—yielded essentially inconclusive results, particularly in terms of attempting to correlate deficient appeals court performance with circuit size. In the final analysis, the contentions of the commission that the appellate courts were encountering difficulties problematic enough to deserve treatment with the divisional arrangement appear as unsubstantiated as the assertions are magisterial in their tone.

### *C. Problems in Identifying the Solutions*

Once the members of the commission had closely “considered all of the arguments, evidence, the many helpful statements that were submitted,” as well as their own personal experiences, the commission decided to recommend that “Congress and the President by statute restructure the Court of Appeals for the Ninth Circuit into three regionally-based adjudicative divisions [and] create a Circuit Division for conflict correction to resolve any conflicts that arise from different decisions of the three regional divisions.”<sup>57</sup> These suggestions reflected careful assessment by the commissioners of the circumstances of the Ninth Circuit Court of Appeals today as well as predictions related to particular appeals court and the remaining appellate courts as they increase in magnitude over time.<sup>58</sup> The commission proposed that the legislative and executive branches organize the Ninth Circuit into three regionally-premised adjudicative divisions which would hear and resolve each case appealed from a federal district court in the specific division. The commissioners also recommended that senators and representatives seriously consider prescribing similar arrangements for the other appellate courts as the courts expand during the twenty-first century.

The commission members suggested that the Northern Division for the Ninth Circuit include the Federal Districts of Alaska, Idaho, Montana, Oregon and

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56. See COMMISSION REPORT, *supra* note 1, at 40; see also *supra* note 54 and accompanying text (providing earlier analysis of ideas).

57. COMMISSION REPORT, *supra* note 1, at 40. For critiques of the solutions, see Hellman, *supra* note 51, at 381–93; *Federal Courts—Proposed Changes to the Ninth Circuit and the Federal Courts of Appeals*, 113 HARV. L. REV. 822 (2000).

58. See COMMISSION REPORT, *supra* note 1, at 40–41. The commissioners, recognizing that Congress might reject their proposal and divide the circuit, analyzed a dozen circuit-splitting plans and found that they all lacked merit. The commission then scrutinized three “arguable” plans, but it considered them flawed and endorsed none. See *id.* at 52–57; see also HRUSKA COMM’N, *supra* note 35, at 234–43 (analyzing these and other plans); O’Scannlain, *supra* note 9, at 317–19 (same).

Eastern and Western Washington.<sup>59</sup> The Middle Division proposed would consist of the Federal Districts of Eastern and Northern California, Hawaii, Nevada, Guam and the Northern Mariana Islands. The Southern Division would encompass the Federal Districts of Arizona and Central and Southern California. The commissioners recommended that every circuit judge in active status be assigned to a particular regional division, that individual divisions be comprised of at least seven active appellate judges and that the precise number of divisional members be commensurate with applicable caseload requirements in the specific divisions.<sup>60</sup> The commission concomitantly suggested that a majority of judges reside in those federal districts over which their divisions exercised jurisdiction but that each of the divisions include some non-resident judges who would be stationed there for terms of at least three years.<sup>61</sup>

The commissioners proposed that all of the divisions function as semi-autonomous decisional units.<sup>62</sup> The commission recommended that the judges in every division resolve appeals with three-judge panels and sit en banc to discharge the responsibilities that Congress presently assigns by statute to an existing court of appeals en banc. With the establishment of the divisions, current Ninth Circuit precedent would continue to operate as the governing law throughout the circuit; only the divisional en banc process within a particular division could overrule existing precedents of the Ninth Circuit and divisional decisions. Opinions of one division would not bind the remaining divisions; however, the commissioners admonished that appellate judges accord the decisions substantial weight as the jurists attempt to maintain uniform circuit law.

The commission specifically conceded that the suggestion for placing large portions of California in different divisions might elicit concerns related to forum shopping and that the proposal could expose people and entities that must comply with California law to potentially divergent federal authority.<sup>63</sup> Nonetheless, the commissioners asserted that the proposal would not promote markedly greater federal forum shopping than currently occurs and that the recommended Circuit Division would afford a more expeditious means of resolving inconsistencies

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59. I rely in this paragraph on COMMISSION REPORT, *supra* note 1, at 41–44; see also *supra* notes 9–10 and accompanying text (suggesting that the Northern Division would resemble the proposed Twelfth Circuit which congressional circuit-splitting proponents advocated).

60. See COMMISSION REPORT, *supra* note 1, at 43; see also Hug, *supra* note 42, at 307 (suggesting that the number of judges authorized for the projected Twelfth Circuit by proposed legislation in the 104th Congress would not have been commensurate with caseload demands).

61. See COMMISSION REPORT, *supra* note 1, at 43.

62. I rely in this paragraph on *id.*

63. I rely in this paragraph on *id.* at 43–44; see also HRUSKA COMMISSION, *supra* note 35, at 238–40 (earlier study suggesting that Congress place California's federal districts in different circuits); see generally Arthur D. Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. PA. L. REV. 1188, 1195 (1974).

attributable to forum shopping.<sup>64</sup> The commission explained that, once a particular regional division speaks on an issue of law, the district courts over which the specific division has jurisdiction would be bound by the determination, notwithstanding decisions of other divisions.<sup>65</sup> However, the commissioners claimed that their contemplated Circuit Division should guarantee that disuniformity regarding questions important to circuit-wide consistency would not persist for a prolonged period.<sup>66</sup> The commission elaborated the concept of the Circuit Division "for conflict correction, whose sole mission would be to resolve conflicting decisions between the regional divisions."<sup>67</sup> The entity would consist of thirteen judges, including the chief judge of the Ninth Circuit and twelve active appellate judges chosen by lot in equal numbers from the three regional divisions.<sup>68</sup> The Circuit Division would have discretionary jurisdiction, which a party to a case could invoke after a panel determination in a particular division had received divisional en banc review or the litigant had requested, and the division had denied, such review.<sup>69</sup> The jurisdiction of the Circuit Division would encompass those appeals that the entity concludes raise "square interdivisional conflicts."<sup>70</sup> The Circuit Division would lack authority to consider an allegedly unsound or incorrect decision issued by a regional division; only the regional division en banc or the United States Supreme Court could review such a determination.<sup>71</sup> The suggestion proposed by the commissioners would abolish the circuit-wide en banc process and the special statutory provision for limited en banc panels in appeals courts with more than fifteen active circuit judges.<sup>72</sup>

The regional divisions would function pursuant to the Federal Rules of Appellate Procedure as well as those local circuit rules and internal operating procedures promulgated by the court of appeals, but individual regions would not

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64. See COMMISSION REPORT, *supra* note 1, at 43-44; see also Diarmuid O'Scannlain, *A Ninth Circuit Split is Inevitable, But Not Imminent*, 56 OHIO ST. L. J. 947, 950 (1995) (analyzing similar ideas). For trenchant critiques of the commission decision to place California in different divisions, see LOS ANGELES COUNTY BAR ASS'N, COMMENTS TO THE COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS (Nov. 4, 1998); SHIRLEY M. HUFSTEDLER, COMMENTS TO THE COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS (Oct. 23, 1998).

65. See COMMISSION REPORT, *supra* note 1, at 44.

66. See *id.*

67. I rely in the remainder of this paragraph on *id.* at 45-46; see also *infra* notes 82-86 and accompanying text (analyzing the jurisdiction that the commission would afford the Circuit Division).

68. See COMMISSION REPORT, *supra* note 1, at 45; see also *infra* note 135 and accompanying text (suggesting a similar approach).

69. See COMMISSION REPORT, *supra* note 1, at 45-46.

70. *Id.*

71. See *id.*; see also *infra* notes 82-86 and accompanying text (analyzing the jurisdiction that the commission would afford the Circuit Division).

72. See COMMISSION REPORT, *supra* note 1, at 45-46; see also Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (authorizing circuits to apply the limited en banc process); 9TH CIR. R. 35-3 (implementing the limited en banc process); *infra* notes 96-97 and accompanying text (analyzing consumer views of the limited en banc process).

be allowed to prescribe their own distinctive local rules or internal operating procedures.<sup>73</sup> Local rules that the court of appeals adopts would correspondingly govern administration of the Circuit Division.

#### *D. Problems with the Solutions Proposed*

Despite the commissioners' good faith efforts to analyze the most compelling problems that the Ninth Circuit and the remaining appeals courts purportedly encounter and to formulate responsive solutions, the remedial scheme that the commission recommended might well prove ineffective. One crucial reason for this apparent inefficacy is that the federal appellate judiciary has never actually implemented the divisional approach suggested by the commissioners.

Nevertheless, during the late 1970s, two appeals courts did conduct comparatively limited experimentation with mechanisms somewhat analogous to the commission's divisional arrangement. The Fifth Circuit briefly applied a divisional concept under which the "rules of stare decisis behind the concept of the law of the circuit became so complicated that they nearly defied description." The Ninth Circuit employed for five months a regional calendaring system that members of the appellate court thought reduced judicial collegiality, threatened the coherence of circuit law, encouraged counsel and parties to forum shop, saved the jurists relatively little travel time and led circuit members who were "accustomed to sitting with a larger and more diverse group of judges" to experience "panel fever."<sup>74</sup> Insofar as it is possible to predict exactly how the commission divisional scheme will work in practice, the remedy would seemingly be infeasible. This proposal might even exacerbate the precise difficulties that the solution was designed to rectify and, therefore, have effects that diametrically oppose the goals the commission members intended to achieve. Indeed, the divisional organization may well have been flawed in its conceptualization.

A fundamental, specific complication with the commissioners' recommendation was their decision to jettison the longstanding, effective concept of circuit-wide stare decisis.<sup>75</sup> The commission expressly and forcefully

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73. I rely in this paragraph on COMMISSION REPORT, *supra* note 1, at 46–47.

74. THOMAS E. BAKER, COMMENTS TO THE COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS (Nov. 2, 1998) (analyzing Fifth Circuit); *see also* Public Hearing Before Comm'n on Structural Alternatives for the Fed. Courts of Appeal (May 29, 1998) (statement of James R. Browning, U.S. Circuit Judge, U.S. Court of Appeals for the Ninth Circuit) (analyzing Ninth Circuit); COMMISSION REPORT, *supra* note 1, at 50 (same and affording Ninth Circuit quotation). Panel fever is the discomfort that judges experience when they sit with a smaller, less diverse group of judges.

75. I rely here and in the remainder of this subsection on ARTHUR D. HELLMAN, COMMENTS TO THE COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS (Nov. 4, 1998); Hellman, *supra* note 51; HON. PROCTER R. HUG, JR., COMMENTS TO THE COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURT OF APPEALS (Oct. 27, 1998); Hon. 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) [hereinafter Hug, *Analysis*].

acknowledged the importance of maintaining uniform federal law related to matters such as the commercial and maritime regime that governs relations with the countries of the Pacific Rim, which significantly affect the entire Pacific region and the western United States.<sup>76</sup> However, this laudable objective would be frustrated under a system in which the determinations issued by a particular division would have no binding effect on the other two divisions. The commission did contemplate that the members of each division would accord the remaining divisions' opinions "substantial weight as the judges of the circuit endeavor to keep circuit law consistent."<sup>77</sup> Divisional members could often do so in the same manner as appeals court judges, who currently respect decisions which other circuits publish. Nonetheless, suggesting that appellate court members defer to precedent is different from requiring the jurists to follow case law, and this distinction will operate when the difference is most salient.

Today, three-judge panels of the regional circuits occasionally distinguish precedents in a manner unconvincing to their colleagues on the appeals or district court bench or unpersuasive to attorneys who practice before the federal courts, although this happens rather infrequently.<sup>78</sup> Moreover, most appellate judges follow precedents with which they may actually disagree because the jurists believe that they are obligated to exercise deference. The abandonment of circuit-wide stare decisis could make it easier for judges to disregard precedent that applies in the remaining divisions. The commission recommendation, accordingly, would authorize, and might even invite, inconsistent intracircuit decisionmaking.

The development by the commissioners of a Circuit Division that would treat interdivisional conflicts may be insufficiently responsive to the dilemma of inconsistency, and the approach proffered seemingly fails to clarify several unclear issues.<sup>79</sup> Notwithstanding commission protestations to the contrary, the commissioners' contemplated mechanism would actually establish another tier in the appellate judiciary.<sup>80</sup> Because the commission's suggested statute would expressly authorize the Circuit Division to review final decisions of the three regional divisions, the Circuit Division would not simply be a replacement for the existing limited en banc procedure, as the commissioners contend.<sup>81</sup> The en banc tribunal presently reviews the determination of the federal district court, not the judgment of the three-judge panel.

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76. See COMMISSION REPORT, *supra* note 1, at 49–50; see also Hug, *supra* note 42, at 298 (expressing similar sentiments).

77. COMMISSION REPORT, *supra* note 1, at 43; see also Wallace, *supra* note 42, at 944 (expressing similar sentiments).

78. I rely in this paragraph on Hellman, *supra* note 45, at 277–78; HELLMAN COMMENTS, *supra* note 75.

79. I rely in this paragraph on HELLMAN COMMENTS, *supra* note 75.

80. See *id.*; see also HUFSTEDLER COMMENTS, *supra* note 64 (providing similar views); COMMISSION REPORT, *supra* note 1, at 45–46 (providing the commission view).

81. See COMMISSION REPORT, *supra* note 1, at 45, 94–95.



Perhaps most troubling is the commission designation of the jurisdiction that would be exercised by the Circuit Division. The commissioners would restrict the Circuit Division to resolving "square interdivisional conflicts."<sup>82</sup> This delineation apparently means that the Circuit Division could only review decisions of a panel in one division which expressly refused to follow the determinations of another division. If the proposition above is accurate, the jurisdictional grant that the commission members envisioned would not empower the Circuit Division to address tensions in circuit law, which are attributable to less patent conflicts in results or doctrines, a procedure that the Ninth Circuit currently follows.<sup>83</sup>

However, if a particular panel need not specifically reject the ruling of a second division to invoke Circuit Division jurisdiction, this jurisdictional arrangement would encourage counsel and parties to participate in incessant argumentation, which implicates the meaning of inconsistency, and could correspondingly foster unwarranted, expensive and time-consuming satellite litigation involving comparatively refined distinctions. Considerable practical experience with a somewhat analogous system of appellate review in the Florida state court system fosters understanding of the difficulties that might materialize were the Ninth Circuit to implement the jurisdictional scheme recommended by the commissioners. The Florida Supreme Court is authorized to review a judgment of a district court of appeals when the opinion "expressly and directly conflicts with a decision of another district court of appeals...on the same question of law."<sup>84</sup> Several legal commentators have characterized the jurisdictional mechanism as disputatious and have determined that the presence of an inconsistency can frequently be uncertain, which means that briefs filed by attorneys and parties must present a "lengthier and more convoluted argument to establish the Court's discretion over the case."<sup>85</sup> Thus, although the commissioners' Circuit Division concept may not necessarily be a prescription for disaster, one expert student of the Ninth Circuit has astutely observed that the approach envisioned is hardly a model to be emulated, while another scholar of the court perceptively remarked that he was less sanguine than the commission that the differences between review of panel decisions for conflict resolution or review because of importance or mistake are "easily made and readily distinguishable."<sup>86</sup>

The articulation that the commissioners proposed concomitantly leaves unclear the scope of Circuit Division jurisdiction over those appeals the panel

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82. *Id.* at 45; cf. JUSTICE DEP'T COMMENTS, *supra* note 25 (analyzing the term's meaning).

83. *See, e.g.,* Hale v. Arizona, 993 F.2d 1387, 1389 (9th Cir. 1993) (en banc); Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1365 (9th Cir. 1990) (en banc); *see generally* Hug, *Analysis, supra* note 75, at 907.

84. FLA. CONST. art. V, § 3(b)(3).

85. Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 NOVA L. REV. 1151, 1238 (1994).

86. HELLMAN COMMENTS, *supra* note 75 (affording the view of the first scholar that the approach is not to be emulated); *see also* BAKER COMMENTS, *supra* note 74 (affording the views of the second scholar who was less sanguine than the commission).

chooses to entertain.<sup>87</sup> If the Circuit Division can only consider the particular issue that produced the conflict, resolution might then be complicated by examination of the specific matter apart from the remaining questions involved in the case. However, could the Circuit Division resolve all of the issues that the appeal presents, the entity would have expansive authority to enunciate circuit law for questions that did not implicate the interdivisional inconsistency.

The commission suggestions that Congress eliminate the provision for the circuit-wide limited en banc court and empower the three recommended divisions to conduct en banc hearings may correspondingly have certain detrimental effects.<sup>88</sup> The requirement that parties request regional en banc reconsideration before litigants seek Circuit Division review would postpone ultimate appellate resolution and impose additional, unnecessary cost and delay. Moreover, the regional en banc mechanism, by stamping an opinion with the imprimatur of a particular division's judges, could solidify the divisional view regarding a specific issue and, therefore, frustrate efforts to reattain uniformity throughout the circuit. Perhaps the most ironic feature of the commissioners' elegant divisional arrangement is that the approach constitutes the consummate political compromise, even as the commission members clearly and powerfully disavowed the relevance of politics to their report and proposals to the Ninth Circuit and to the entire system:

There is one principle that we regard as undebatable: It is wrong to realign circuits (or not realign them) and to restructure courts (or leave them alone) because of particular judicial decisions or particular judges. This rule must be faithfully honored, for the independence of the judiciary is of constitutional dimension and requires no less.<sup>89</sup>

### *E. Problems with the Justifications for the Solutions Proposed*

The central premise of the assessment performed by the commission was that "large appellate units have difficulty developing and maintaining consistent and coherent law."<sup>90</sup> The commissioners grounded this critical proposition on unspecified "perceptions of greater inconsistency in the Ninth Circuit than in most [of the remaining appeals courts, which confirmed the members' own unelaborated] judgment, based on experience," and on the combined volume of decisions produced and on the judicial workload, which "make it impossible for all of the court's judges to read all of the court's published opinions when they are

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87. I rely in this paragraph on HELLMAN COMMENTS, *supra* note 75.

88. See JUSTICE DEP'T COMMENTS, *supra* note 25; *supra* note 72 and accompanying text.

89. COMMISSION REPORT, *supra* note 1, at 6; see generally SENATE REPORT, *supra* note 7, at 8-9, 25-27; Caplan, *supra* note 51; Herald, *supra* note 12; O'Scannlain, *supra* note 9.

90. COMMISSION REPORT, *supra* note 1, at 47.

issued.”<sup>91</sup> Especially troubling factors about the commission’s assessment were the dearth of particularity attending the commission perceptions, the lack of elaboration on the commissioners’ personal experiences and the unsubstantiated assumptions that reviewing every determination upon its publication is the only way to keep fully informed of circuit precedent and that honoring this practice would ineluctably foster uniformity and coherence. Procter R. Hug, Jr., who served as the Chief Judge of the Ninth Circuit from 1996 until 2000, incisively characterized as a “relic of the pre-computer era” the notion that appellate court members cannot stay abreast of circuit law unless they scrutinize all of the court’s opinions when the determinations issue.<sup>92</sup>

Similarly problematic were the commission’s closely-related contentions that “judges operating in the [suggested] smaller decisional units...will find it easier to monitor the law in their respective divisions and that those smaller decisional units will thus promote greater consistency.”<sup>93</sup> Under the regime recommended by the commissioners, judges should be able to follow more closely intradivisional precedent; however, it remains unclear how the jurists can preserve and increase circuit-wide uniformity without tracking the decisions published by members of all three divisions. In short, the judges would not experience reduced workloads because they would have to read the identical number of opinions.

The commission also asserted that appellate judges serving on larger decisionmaking units encounter difficulties maintaining consistent and predictable circuit precedent because they have fewer opportunities to sit together as the size of the decisional entity increases.<sup>94</sup> Nonetheless, the commission proffered no persuasive evidence that more frequent interactions among circuit members, or that appellate courts with smaller judicial complements, would foster enhanced uniformity or predictability in the circuit’s law.

Indeed, the only systematic evaluation of precedent’s operation in the Ninth Circuit contradicts the core proposition enunciated by the commissioners. The commission effectively chose to deemphasize the analysis but rejected neither the methodology of the study nor its conclusions.<sup>95</sup> Quite troubling is the fact that the major idea underlying the commission proposals apparently lacks much support, particularly when the commission essentially ignored the most relevant, albeit contradictory, information and could have rather readily assembled, assessed and synthesized other applicable material. Illustrative is the notion that substantial appeals courts experience problems developing and preserving

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91. *Id.*; see also O’Scannlain, *supra* note 9, at 315–16 (providing similar ideas).

92. HUG COMMENTS, *supra* note 75; see Letter from Chief Judge Procter Hug, Jr., to Justice Byron R. White (Aug. 29, 1998).

93. COMMISSION REPORT, *supra* note 1, at 47; but see LOS ANGELES COUNTY BAR ASS’N COMMENTS, *supra* note 64; JUSTICE DEP’T COMMENTS, *supra* note 25.

94. See COMMISSION REPORT, *supra* note 1, at 47; see also O’Scannlain, *supra* note 9, at 315 (providing similar ideas).

95. See *supra* notes 47, 55 and accompanying text; Hellman, *supra* note 51, at 397–98.

consistent and coherent circuit law. The claim of inconsistency could be empirically tested by comparing precedent in the larger and smaller appellate courts.

The commission supplied no greater substantiation for the conclusion that the limited en banc procedure employed by the Ninth Circuit during the last two decades apparently precludes the effective discharge of the court's en banc responsibilities. The commissioners frankly acknowledged that only a minority of Ninth Circuit judges registered dissatisfaction with reliance on the limited en banc technique to afford federal district judges and attorneys guidance, to correct erroneous panel determinations, to resolve conflicts in circuit law, and to prevent intercircuit inconsistency, while judges who serve on several other appeals courts, a few of which are small, reported similar or greater discontent.<sup>96</sup> Efforts to analyze additional commission criticisms of the limited en banc mechanism are frustrated because the commissioners merged their treatment of conflict resolution and the correction of improper district court decisionmaking, even though such responsibilities have very different ramifications for structural reform. Even had the commission been clearer, some of the entity's contentions seem vulnerable to attack. For instance, the commission members identified dissatisfaction with respect to the infrequency of en banc rehearings vis-à-vis the perceived necessity for reconsideration as well as the magnitude of the limited en banc court and the manner in which this tribunal is constituted.<sup>97</sup> However, the Ninth Circuit could rather felicitously treat these criticisms by rehearing a larger number of cases or by modifying the en banc court's composition without dismantling the comparatively efficacious limited en banc process or risking the disruption and ineffectiveness that the untested Circuit Division might entail.<sup>98</sup> The commissioners correspondingly asserted that the divisional structure would relieve each judge of having to monitor the decisional output of the entire Ninth Circuit. Nevertheless, members of the court who fail to remain abreast of circuit precedent may encounter complications fostering the increased uniformity and coherence that, according to the commission members, are indispensable attributes of appeals courts.

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96. See COMMISSION REPORT, *supra* note 1, at 48; COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, WORKING PAPERS 23-25 (1998); see also Hellman, *supra* note 45, at 280-82 (analyzing the limited en banc). For analyses which suggest that the limited en banc works well, see Caplan, *supra* note 45, at 972-74 and Herald, *supra* note 12, at 476-81.

97. See COMMISSION REPORT, *supra* note 1, at 48; see also SENATE REPORT, *supra* note 7, at 10 (expressing similar dissatisfaction); Conrad Burns, *Dividing the Ninth Circuit Court of Appeals: A Proposition Long Overdue*, 57 MONT. L. REV. 244, 252 (1996) (same); *infra* notes 135-36 and accompanying text (suggesting possibly salutary changes in the limited en banc).

98. Indeed, the court has endorsed expansion of the en banc court's membership and reduction of the votes needed to take a case en banc, actions which might increase the number of en banc decisions. See NINTH CIRCUIT EVALUATION COMM., INTERIM REPORT 2-6 (2000) [hereinafter EVALUATION COMM. INTERIM REPORT]; Senate Bill 1403, 106th Cong. (1999), which Senator Dianne Feinstein (D-Cal.) introduced, embodies these ideas.

The commissioners also maintained that the divisional arrangement, which would incorporate divisions comprising resident and nonresident judges, would respect and heighten the regionalism, considered to be a desirable aspect of the appellate system, without forfeiting the benefits of diversity provided by a tribunal constituted from a significantly larger area.<sup>99</sup> The commissioners further contended that the divisional approach would capitalize on the full contingent of Ninth Circuit judges, while restoring a sense of connection between the circuit and the regions within the circuit by insuring that a majority of each division's members resides in the jurisdictional geographic area.<sup>100</sup> The commission, therefore, assumed that regionalism is a positive feature which has been historically deemphasized, and even lost, by the Ninth Circuit, and which warrants facilitation, if not restoration. However, that phenomenon may have dwindling importance, and could be irrelevant, in an era of rapidly escalating internationalization and computerization. The promotion of regionalism correspondingly conflicts, or at least is in tension, with the conscientious discharge of the significant circuit federalizing responsibility: the duty to reconcile the federal Constitution and federal legislation as well as state and local policies.<sup>101</sup> Furthermore, the commission members asserted that having one appellate court construe and apply federal law in the western United States is a strength of the Ninth Circuit which should be preserved and fostered,<sup>102</sup> but the divisional concept could increase disuniformity across the region because the concept would effectively create three appeals courts and because the precedent that any of the divisions articulates would have no binding effect on the others.

The commissioners bolstered their suggestions by explaining how the recommendations are preferable to the alternative system proffered by Chief Judge Hug in response to the commission tentative draft report.<sup>103</sup> The Chief Judge concurred with the commission proposal calling for the establishment of three divisions but suggested that the entities be comprised exclusively of resident judges and that they have no discrete adjudicative role.<sup>104</sup> The commissioners characterized this recommendation as antithetical to their own approach, the essence of which is a regionally-premised *adjudicative* unit that is small, stable

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99. See COMMISSION REPORT, *supra* note 1, at 48; see also Caplan, *supra* note 45, at 965-71 (analyzing numerous benefits that a large circuit affords); Wallace, *supra* note 42, at 944 (analyzing diversity that a large circuit affords).

100. See COMMISSION REPORT, *supra* note 1, at 48-49. The court has instituted efforts that respond to the concerns regarding regionalism. See *infra* note 140 and accompanying text.

101. See CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* 10-13 (5th ed. 1994); John Minor Wisdom, *Requiem for a Great Court*, 26 *LOY. L. REV.* 787, 788 (1980). For analyses of similar ideas, see Caplan, *supra* note 45, at 960-65 and Spreng, *supra* note 10, at 945-47.

102. See COMMISSION REPORT, *supra* note 1, at 49-50; see also Hug, *supra* note 42, at 300 (expressing similar sentiments).

103. See HUG COMMENTS, *supra* note 75; see also COMMISSION REPORT, *supra* note 1, at 51-52 (analyzing Chief Judge Hug's proposal).

104. See HUG COMMENTS, *supra* note 75.

and autonomous enough to operate effectively as an appellate decisional body and which has responsibility for the law applicable within the region. The commissioners criticized the proposal developed by Chief Judge Hug because attorneys and members of the divisions would have to monitor panel opinions throughout the circuit, even though the commission arrangement could well have this impact.<sup>105</sup> The commissioners also claimed that the Chief Judge's suggestion regarding panel constitution would overvalue regionalism by requiring all panels to have a majority of their membership drawn from the particular appellate region and would underemphasize regional connection by having a *regionally composed* panel determination subject to circuit-wide rehearing en banc.<sup>106</sup> Chief Judge Hug's recommendation, therefore, purportedly would advance neither the regionalizing nor the federalizing responsibilities deemed important by the commission members, which their formulation expressly sought to harmonize.<sup>107</sup>

In the final analysis, the commissioners' identification of the complications ostensibly plaguing the Ninth Circuit was insufficiently convincing to sustain the type of far-reaching and potentially disruptive solutions prescribed. The futures of this court and of the appellate system are too crucial to warrant significant change without clear, persuasive substantiation. When the legislative and judicial branches make critical decisions about the circuits, Congress and the courts should not permit generalized perceptions, the commissioners' unelaborated experiences and the unsupported opinions of self-interested individuals to replace empirical data, which independent, expert evaluators systematically collect, scrutinize and synthesize.<sup>108</sup>

#### *F. Reasons for Problems with the Commission Report*

A number of phenomena frustrate attempts to pinpoint exactly why the endeavors of the commissioners ultimately proved to be inadequate. One essential obstacle is that much of the activity undertaken by the commissioners proceeded in private. For example, many commission meetings were not open to the public, and communications involving the commissioners and the commission staff were private. In fairness, the important, controversial and sensitive character of the tasks performed and the need to promote frank interchange among the commissioners and between them and their expert advisors might have required secrecy. The

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105. See COMMISSION REPORT, *supra* note 1, at 51 (emphasis in original); see also *supra* note 93 and accompanying text (suggesting that the commission arrangement could have this impact).

106. See COMMISSION REPORT, *supra* note 1, at 52 (emphasis in original).

107. See *id.*; see also *supra* notes 99–102 and accompanying text (analyzing the two duties).

108. See, e.g., HELLMAN COMMENTS, *supra* note 75; Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927–29 (1989); see also Lawrence C. Marshall et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943 (1992) (compiling, and suggesting the importance of, empirical data); *infra* notes 114–32 and accompanying text (affording a number of suggestions for additional study).

commission did implement certain useful actions, such as the establishment of a website, to help inform the public while the entity accumulated some instructive material on the operations of the federal appellate courts.

Despite these circumstances, one can delineate several reasons for the insufficiency of the report and proposals submitted by the commissioners. Most significantly, Congress allotted the commission remarkably little time to finish an enormous project. For instance, the commissioners had a shorter period to complete their study than numerous appellate courts consume in deciding appeals. The time limitation could have seriously hampered commission efforts to assemble, assess and synthesize substantial amounts of relevant empirical information. Moreover, lawmakers apparently assigned the entity an unclear statutory mandate and authorized an inadequate number of commissioners to complete all of the work necessary. For example, Judge Gilbert Merritt and Judge Pamela Rymer continued to fulfill their ongoing, substantial obligations as members of the appellate court bench throughout the year when they discharged the onerous responsibilities imposed as active participants on the commission. The brief time span prescribed and the relatively few commissioners provided may have precluded the entity's deployment of subcommittees, which forerunners of the commission, such as the Federal Courts Study Committee and the Hruska Commission, seemed to use rather effectively. The commissioners correspondingly could have conceptualized the project somewhat differently and could have accomplished considerably more with the generous financial resources appropriated by senators and representatives. For instance, legal scholars might have conducted empirical analyses by extensively interviewing appeals court judges for ideas on consistency, district court judges for perspectives on coherence and appellate attorneys for opinions on the decreased procedural opportunities that the circuits currently afford. The academicians might also have attempted to evaluate specific cases, from the time when counsel and parties filed the appeals until they received disposition, to determine whether appellate courts resolved the cases uniformly, coherently, expeditiously, inexpensively and fairly. Nevertheless, temporal restraints probably restricted many of the activities suggested.

Finally, the Ninth Circuit and other courts may simply not be experiencing difficulties that are problematic enough to require remediation with solutions as potentially drastic as the divisional organization proffered by the commissioners. Indeed, the commissioners forthrightly acknowledged that they found Ninth Circuit administration to equal operations in the remaining appellate courts, all of which now function efficaciously. However, the commission members apparently considered Ninth Circuit case law to be insufficiently consistent and coherent, certainty and predictability to be inadequate, federalization and regionalism to be unsatisfactory and judges not to be collegial enough.

### III. SUGGESTIONS FOR THE FUTURE

#### A. Introduction

The legislative and judicial branches might pursue several courses of action. Lawmakers and judges have closely assessed, and must continue to scrutinize, the commission report and recommendations.<sup>109</sup> Legislators, individual appeals courts, most notably the Ninth Circuit, and the appellate system should implement any measures that will (1) facilitate uniform, coherent, prompt, economical and equitable case disposition, (2) foster certainty and predictability, (3) promote collegiality, and (4) suitably rationalize federalization and regionalism while comports with efficacious circuit administration. Numerous members of Congress may believe that they must accede to the independent, expert entity which lawmakers authorized, because the commissioners and the expert commission staff spent twelve months analyzing the complications encountered by the appeals courts and fashioning remedies for the difficulties they detected. Nonetheless, the dearth of convincing empirical data that underlies the commission findings and proposals as well as the dramatic, controversial nature of the approach developed suggest that acquiescence is not warranted.

Senators and representatives must ascertain more conclusively whether the circuits do or will experience problems sufficiently troubling to deserve treatment. If lawmakers so determine, they should identify those complications precisely, survey the broadest practicable range of salutary solutions for present and anticipated difficulties, and tailor remedies to the problems delineated in particular courts and across the appellate system. Legislators must exercise caution because the future of the circuits is at issue. For example, insofar as Congress is unsure about the complications that courts currently or will face, or about the effectiveness of the recommendations proposed by the commission or others, Congress might want to defer action, evaluate the prospect of more study or approve circuit experimentation with promising reforms. To the extent that lawmakers have lingering concerns, they must reject extreme or irrevocable solutions, including certain structural and systemic remedies, and preserve flexibility to prescribe diverse approaches.

Legislators should also consult the Judicial Conference of the United States, which serves as the policymaking arm for all of the federal courts, the Circuit Judicial Councils, which are the governing bodies in the twelve regional

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109. I emphasize Congress because the legislative branch must authorize most actions. However, courts can institute some actions without legislative authorization, and Congress should consult judges. *See infra* notes 110–11, 143 and accompanying text. The Senate and House held hearings on the commission's report in 1999. *See infra* note 113. However, neither body took additional formal action on the bill embodying the commission proposals during the 106th Congress and, thus, each must continue its study. *See supra* note 3.



circuits and in the United States Court of Appeals for the Federal Circuit,<sup>110</sup> as well as individual appellate and district court judges. The institutions and jurists have substantial, relevant expertise respecting the day-to-day operations of the federal judicial system, while Third Branch cooperation will be instrumental to the effective implementation of those specific measures that senators and representatives may choose to authorize. For instance, Chief Judge Hug's comprehensive comments on the proposals, inserted by the commission in the October tentative draft report, sharpened important issues for legislative examination. The commissioners also expressly admonished Congress to seek guidance from Ninth Circuit judges when finalizing the details of any divisional arrangement which lawmakers might adopt.<sup>111</sup>

The commission seemingly determined that the Ninth Circuit now encounters certain difficulties, which principally implicate circuit law's consistency, coherence, certainty and predictability as well as judicial collegiality, regionalism and appellate justice. The commissioners apparently considered the particular complications that they delineated so problematic as to require application of the divisional concept. However, the evidence that the commission adduced did not definitively show that the circumstances in the Ninth Circuit are dire enough to warrant effectuation of the divisional scheme or that the recommendation's implementation would significantly improve operations in the Circuit.

These propositions indicate that legislators should evaluate several means of proceeding. The United States Senate and House of Representatives, through the respective Judiciary Committees, have assessed, and could continue to analyze, the commission's report and suggestions to ascertain whether the findings and proposals proffered can support legislative action. Both chambers have sought, and might in the future solicit, additional public input, especially from federal appeals and district court judges and appellate lawyers, on the commissioners' endeavors. However, the views expressed to date have resembled the ideas solicited by the commission with surveys and are vulnerable to similar criticisms, namely that the perspectives constitute the opinions of people who may be self-interested and only reflect their individual experiences.<sup>112</sup> The Judiciary Committees in the Senate and the House could undertake independent investigations of the questions that were crucial to the commissioners' recently-completed assessment. Moreover, Congress has employed, and might continue to use, the proposed legislation incorporating the recommended commission statute,

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110. See 28 U.S.C. §§ 41, 331-32 (1994); see generally John W. Oliver, *Reflections on the History of Circuit Judicial Councils and Circuit Judicial Conferences*, 64 F.R.D. 201 (1974) (discussing the history of the Circuit Judicial Councils); Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976) (discussing the rulemaking power of the federal courts).

111. See HUG COMMENTS, *supra* note 75. But see COMMISSION REPORT, *supra* note 1, at 51-52; *supra* notes 103-107 and accompanying text. For the commissioners' admonition, see COMMISSION REPORT, *supra* note 1, at 42.

112. See *supra* notes 48-50 and accompanying text.

which Senator Slade Gorton (R-Wash.) and Senator Frank Murkowski (R-Alaska) introduced during January 1999,<sup>113</sup> to explore applicable issues, reconsider the factual determinations made by the commissioners and refine the commission suggestions.

Nevertheless, attempts to discern whether the commissioners correctly found that the Ninth Circuit situation is sufficiently troubling to deserve remediation and, if so, whether the commission solutions will prove efficacious, will be inconclusive without further evaluation. Those circumstances exist primarily because the commissioners depended substantially on the members' personal experiences and on the opinions of appellate and district court judges as well as appellate attorneys in identifying putative difficulties, rather than systematically gathering, analyzing and synthesizing the maximum possible quantity of applicable empirical data. The clarification, if not the definitive resolution, of some unclear issues integral to the commission findings and proposals must await the collection, scrutiny and synthesis of more empirical material and comparatively exacting measurements. Illustrative factors are whether Ninth Circuit case precedent is disuniform or incoherent, whether the court's appellate judges are uncollegial or whether the circuit fulfills its en banc responsibilities ineffectively and, if so, whether any deficiencies detected correlate with the court's substantial magnitude.<sup>114</sup> A related, important question, namely the efficacy of the divisional construct proffered, cannot be conclusively answered until the federal judiciary has actually applied, and evaluators have closely analyzed, that unprecedented approach.

Several of these and other significant matters appear to resist very precise definition or calculation, to implicate subjective or political judgments, or to involve choices among multiple, often competing, values. However, systematically-assembled empirical data could inform understanding of quite a few issues. For example, the meaning of collegiality and the concept's measurement remain relatively elusive, despite the assiduous efforts of numerous

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113. See *supra* note 1. Each house held July 1999 hearings that elicited few new ideas but took no other formal action in the 106th Congress. OVERSIGHT HEARINGS ON THE FINAL REPORT OF THE COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS BEFORE THE SENATE JUDICIARY SUBCOMM. ON ADMIN. OVERSIGHT & THE COURTS (1999); OVERSIGHT HEARINGS ON THE FINAL REPORT OF THE COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS BEFORE THE HOUSE JUDICIARY SUBCOMM. ON COURTS & INTELLECTUAL PROPERTY (1999). Circuit-splitting bills were offered in March 2000 and February and March 2001. See *supra* note 3.

114. Illustrative is Professor Hellman's careful work on consistency and related issues. See, e.g., Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit*, in RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 55-90 (Arthur D. Hellman ed., 1990) [hereinafter Hellman, RESTRUCTURING JUSTICE]; Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915 (1991); Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989).

circuit judges to illuminate the notion.<sup>115</sup> Consistency and coherence, which by definition must be calibrated over time, are somewhat unclear. The ideas can be rather subjective and require careful assessment through, for instance, the meticulous comparison of appeals' factual and legal premises.<sup>116</sup> Certainty and predictability seem relatively ephemeral, defy exact calculation and entail an element of subjectivity.

Ascertaining the accuracy of commission contentions that both the smaller decisionmaking units and the divisions recommended by the commissioners will foster collegiality, uniform and coherent circuit law, certainty and predictability as well as properly rationalize federalization and regionalism is even more complicated. For example, this exercise would necessitate multi-factor, and somewhat subjective, evaluation of many rather esoteric concepts while demanding speculation, and perhaps political determinations,<sup>117</sup> about the effectiveness of an essentially untested mechanism.

Federalization and regionalism, notions that substantiate the commission divisional arrangement,<sup>118</sup> concomitantly illustrate the potential need to select among numerous, frequently competing values. For instance, when the important circuit responsibility for harmonizing federal law and local policies conflicts with the idea (of arguably declining salience) implicating linkages between a discrete geographical area and the appeals court forum, regionalism should yield. The concept of appellate justice—the expeditious, inexpensive and fair disposition of cases<sup>119</sup>—provides a similar example. Since approximately 1970, expanding circuit dockets have apparently compromised the notion of appellate justice and the analogous notion of the appellate ideal: the aspiration that courts resolve each appeal on the merits with thorough briefing and full oral presentation; close consultation, including the circulation of draft opinions, among the three circuit

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115. See, e.g., COFFIN, *supra* note 54, at 215; Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358–64 (1998); O'Scannlain, *supra* note 9, at 315; Deanell Reece Tacha, *The "C" Word: On Collegiality*, 56 OHIO ST. L.J. 585 (1995).

116. Professor Hellman explores these ideas. See sources cited *supra* note 114; see also JUDITH A. MCKENNA, *STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS* 93–95 (Federal Judicial Center 1993) (analyzing these ideas and Professor Hellman's work).

117. See EDWARDS ET AL., *COMMENTS*, *supra* note 25 (suggesting that the divisional approach is political); *supra* note 89 and accompanying text (suggesting that the divisional approach is the consummate political compromise, although the commission expressly disavowed the applicability of politics to the debate over the future of the appellate system).

118. See COMMISSION REPORT, *supra* note 1, at 36, 49–50; see also *supra* notes 99–102 and accompanying text (analyzing federalization and regionalism).

119. See FED. R. CIV. P. 1. For analyses of prompt, economical and fair resolution, see 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).

judges who hear the case; and the issuance of a written decision which comprehensively explains the reasons for the conclusion reached and which is printed in the official Federal Reporter series.<sup>120</sup> For instance, appellate courts currently accord the complete panoply of procedures, particularly oral arguments and written determinations that are published in the Federal Reporter, to a markedly smaller percentage of appeals, even as the median time required by the circuits for terminating all of the cases filed has remained comparatively constant.<sup>121</sup> The substantial interests that specific parties have in equitable appellate disposition and thorough judicial consideration, therefore, can clash, or at least be in tension, with prompt and economical dispute resolution. However, the appeals courts seem to treat fairly most cases that receive relatively limited examination from judges.<sup>122</sup>

These propositions suggest that Congress should provide for the systematic collection, analysis and synthesis of enough empirical information to ascertain with confidence whether the situations of individual courts, especially the Ninth Circuit, are sufficiently severe to justify remediation and, if so, whether those solutions designated would work. Legislators must not make important decisions about the future of the appeals courts, absent the greatest, feasible amount of applicable empirical material respecting the difficulties experienced by circuits and the most efficacious responses, much less prescribe unproven approaches that could detrimentally affect the delivery of appellate justice. Illustrative of inadvisable action lacking empirical support would be passage of the bill that would split the Ninth Circuit, introduced by senators in March 2000, which Congress did not adopt and which senators and representatives reintroduced in February and March 2001 and may seriously consider.

### *B. Additional Study*

The earlier critique of the commission report and proposals found that the commissioners did not definitely demonstrate that the Ninth Circuit, or any other appeals court, presently encounters complications problematic enough to require treatment, particularly with measures that appear as impractical and disruptive as

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120. See COMMISSION REPORT, *supra* note 1, at 70; BAKER, RATIONING JUSTICE, *supra* note 6, at 21–27; see also MCKENNA, *supra* note 116, at 32–35 (providing the median time for resolution).

121. See COMMISSION REPORT, *supra* note 1, at 21–23, 70; see also FEDERAL COURTS STUDY COMM. REP., *supra* note 23, at 109–10 (analyzing changes in the procedures afforded); MCKENNA, *supra* note 116, at 32–35 (same and providing the median time for resolution).

122. Many of these cases are pursued by pro se litigants or are accurately characterized as routine. See COMMISSION REPORT, *supra* note 1, at 21–23 (analyzing measures that courts used to treat the docket increases); Tobias, *supra* note 119, at 1273–74; see also David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 82–84 (1983) (analyzing routine cases). But see William M. Richman & William L. Reynolds, *Elitism, Expediency and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 275–76 (1996).

the commission's recommendations. However, this is not a criticism of the commissioners who labored conscientiously to conclude a gigantic assignment and who probably accomplished all that is reasonable to expect in the incredibly short time afforded for the study. Lawmakers may never be able to secure perfect information on the appellate system, however they should be cautious about premising significant modifications in institutions as crucial as the federal intermediate appeals courts on the commission report or on the incomplete knowledge currently available.

Congress has several vehicles available for initiating additional study. First, senators and representatives can reauthorize the commission and, thus, effectively extend the entity's life, even though numerous lawmakers may be understandably reluctant to ask commissioners, who have already devoted a year to examining the circuits, to commit even greater time. Second, legislators can instruct an existing institution, namely the Federal Judicial Center or the Administrative Office of the United States Courts, to continue the endeavor commenced by the commission. Both research arms of the federal courts certainly possess much relevant material and expertise, a phenomenon manifested by the assistance the personnel in the Judicial Center and Administrative Office rendered the commissioners. However, the research bodies may lack sufficient detachment from the Third Branch. Congress can also sponsor more searching inquiry, for example, under the aegis of the respective Judiciary Committees, but those panels might not have the requisite staff, funding and experience. Lawmakers can correspondingly approve a new expert entity, which would be independent, and provide this institution enough fiscal support and temporal flexibility to finish the important project by building on the prior efforts, especially the recent commission work, and by training fresh perspectives on the inquiry. The last approach is preferable because the requisite staff, funding, expertise, and new viewpoints would be available.

The assessors must possess considerable independence and expertise, and Congress must appropriate resources, particularly time, which will facilitate the study's efficient completion. The evaluators should gather, analyze and synthesize the maximum possible empirical data on the difficulties that the appeals courts confront and then ascertain whether the complications are sufficiently troubling to warrant remediation and, if so, develop the widest spectrum of potential solutions. For instance, assessors might attempt to determine conclusively, or at least with increased assurance, whether Ninth Circuit case precedent is disuniform or incoherent, whether the court creates uncertainty or unpredictability or whether the circuit's judges are uncollegial. Were the answer to any of these questions positive, the evaluators must examine whether the problems discerned derive from the court's size and, if so, whether the divisional structure prescribed would be responsive.

Assessors should also institute efforts to improve comprehension of federalization, regionalism, appellate justice and the appellate ideal. For example, given the apparently decreasing importance of regionalism in a nation experiencing accelerated globalization and computerization, does regionalism

deserve promotion and, if so, can its inherent tensions with federalization be reconciled?<sup>123</sup> Are appellate justice's constituents—the expeditious, economical and equitable disposition of appeals—similarly incompatible or can they be harmonized?<sup>124</sup> Is there a realistic expectation of reattaining the appellate ideal when the growth in the number of appeals taken by attorneys and parties continues to outstrip the resources the justice system has available for thoroughly reviewing every district court determination?<sup>125</sup>

Those conducting the analysis must first assemble, scrutinize and synthesize all of the applicable material previously collected by evaluators, a project that should start with the information accumulated by the commission. The Ninth Circuit Executive Office, the Federal Judicial Center and the Administrative Office of the United States Courts are obvious sources of relevant material regarding the Ninth Circuit. Assessors should also capitalize on the insightful research related to the consistency of Ninth Circuit case law that Professor Arthur Hellman has conducted by updating his work on uniformity in this appellate court and by extending the approach to the remaining circuits.<sup>126</sup>

Evaluators might comprehensively solicit the views of federal appeals and trial court judges, as well as appellate lawyers, on matters such as consistency, coherence, certainty, predictability, collegiality, federalization, regionalism and appellate justice. For example, assessors may want to interview circuit judges for opinions about collegiality, district judges for ideas on certainty and predictability, and appellate counsel for perspectives on the speed, cost and fairness of appellate resolution. Moreover, all of these individuals should be interviewed for their views on the uniformity and coherence of circuit law, federalization and regionalism. Evaluators can also probe the core commission thesis that smaller decisional units, especially divisions, foster practically all of the above-listed attributes in several ways. First, assessors might compare bench and bar perceptions in appeals courts consisting of many or few members and scrutinize recent First Circuit operation and rather cursory Fifth and Ninth Circuit application of structural regimes that resemble divisions during the late 1970s.<sup>127</sup>

However, there are certain reasons why evaluators should pursue additional avenues. The opinions of some federal courts observers, including judges and appellate practitioners, can be intrinsically limited by the self-interest and experiences of those individuals, while the Fifth and Ninth Circuit

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123. See *supra* notes 99–102, 118 and accompanying text.

124. See *supra* notes 119–122 and accompanying text. It would also be helpful to enhance appreciation of certainty and predictability, but their esoteric nature complicates this effort.

125. See *supra* note 120 and accompanying text.

126. See *supra* note 114 and accompanying text. They might similarly use recent work on the en banc process. See generally Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213 (1999).

127. See Stephen G. Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK U. L. REV. 29 (1990); *supra* note 74 and accompanying text.

experimentation may not be extensive or apposite enough to serve as an accurate indicator of smaller appeals courts' comparative efficacy, much less to function as a trustworthy predictor of how the divisional arrangement would actually work.<sup>128</sup>

Assessors, accordingly, might monitor particular cases from the time when attorneys and litigants institute them until circuits terminate the appeals, a form of inquiry that can elucidate whether decisional entities with fewer judges are preferable and whether appellate court disposition is consistent, coherent, prompt, inexpensive and equitable. For example, evaluators can attempt to pinpoint the relevance, if any, of Ninth Circuit magnitude or the reasons why that court's resolution seems relatively fast in terms of certain parameters but rather inexpeditious vis-à-vis other criteria. More specifically, why does the Ninth Circuit most promptly resolve appeals after submission at oral argument, while being the third slowest court to reach final resolution after the notice of appeal's filing? Can assessors identify, and the court properly address, the phenomena which are responsible for less prompt decisionmaking?<sup>129</sup> The effort to track individual cases from filing through disposition might also illuminate whether Ninth Circuit reliance on the limited en banc mechanism to perform the court's en banc responsibilities is satisfactory. For instance, evaluators can analyze the limited en banc technique by ascertaining whether the Ninth Circuit reconsiders a substantially smaller percentage of appeals than other appellate courts. If so, they can determine whether rehearing's infrequency correlates with a comparatively high incidence of erroneous panel decisionmaking or with a relatively significant rate of disuniformity inside the Ninth Circuit or between this appeals court and the remaining circuits.<sup>130</sup>

Finally, should the assessors definitively conclude that the current circumstances of any appellate court deserve attention, the evaluators ought to explore the broadest feasible array of applicable solutions. Valuable sources for constructive approaches include the Commission on Structural Alternatives for the Federal Courts of Appeals, its predecessors—namely the Long Range Planning Committee of the United States Judicial Conference, the Federal Courts Study Committee and the Hruska Commission—as well as federal appellate courts scholars, all of whom have thoroughly canvassed an enormous number of rather conventional measures and numerous comparatively innovative possibilities.<sup>131</sup> Assessors might also consult relevant experiences of the appeals courts, most prominently the Ninth Circuit, which have permanently effectuated, or have

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128. See *supra* note 112 and accompanying text (analyzing the limitations); see also COMMISSION REPORT, *supra* note 1, at 50 (suggesting that the Ninth Circuit measure is inapposite); *supra* notes 41–56 and accompanying text (suggesting the difficulties entailed in performing the analysis that I propose).

129. See *supra* note 34.

130. For a helpful example of this type of work, see George, *supra* note 126.

131. See COMMISSION REPORT, *supra* note 1, at 21–25, 59–74; FEDERAL COURTS STUDY COMM. REP., *supra* note 23, at 109–23; HRUSKA COMM'N, *supra* note 35, at 234–43; LONG RANGE PLAN, *supra* note 35, at 67–70, 131–33; BAKER, RATIONING JUSTICE, *supra* note 6, at 106–286.

experimented for many years with, a plethora of salutary mechanisms. These devices include various alternatives to dispute resolution (ADR) and somewhat refined appellate docket management techniques, like screening panels comprised of three judges who normally terminate approximately 160 cases each month through the invocation of abbreviated procedures.<sup>132</sup>

In short, evaluators must undertake efforts to clarify the important, unclear dimensions of the report and recommendations that the Commission on Structural Alternatives for the Federal Courts of Appeals recently published. Assessors should also ascertain more conclusively whether the conditions of specific appellate courts, especially the Ninth Circuit, necessitate remediation and, if so, designate the finest solutions for the individual appeals courts and for the entire system.

The above-stated propositions, especially regarding courts' circumstance and measures for improvement, mean that authorizing additional study would now be the best course of action. The commissioners produced insufficient persuasive evidence to indicate that the situation of the Ninth Circuit is serious enough to justify treatment such as implementing the essentially untested and potentially ineffective divisional organization. The federal intermediate appellate courts are too crucial to warrant major alteration without a more compelling demonstration of severe problems. Nonetheless, members of Congress may reject further study and institute reform. Quite a few lawmakers might find appropriate deference to, or be concerned about second-guessing, the entity, which they commissioned and which expended one year evaluating the circuits and compiling a report and proposals. Other senators and representatives may believe that now is the time to act because the situation is so grave, because the appellate system has received adequate analysis, or because there is enough information to at least proceed cautiously.

### *C. Experimentation*

Congress might pass the suggested statute devised by the commissioners exactly as the commission crafted the recommended legislation, or Congress may modify this iteration. However, the commissioners did not definitively show that any appeals court, including the Ninth Circuit, experiences difficulties sufficiently troubling to require attention. Even had the commission better substantiated the need for change, the commissioners failed to demonstrate how the responses which they proposed would be efficacious.

Lawmakers must accord all of the appellate courts much flexibility to experiment with a myriad of solutions for the specific complications that the

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132. See, e.g., COMMISSION REPORT, *supra* note 1, at 31; J. S. CECIL, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT 55-70 (Federal Judicial Center 1985) (discussing innovations in the Ninth Circuit Court of Appeals); Hellman, RESTRUCTURING JUSTICE, *supra* note 114; Hug, *supra* note 42, at 301-02; Wallace, *supra* note 42, at 944; see generally EVALUATION COMM. INTERIM REPORT, *supra* note 98; *infra* note 163 and accompanying text (analyzing ADR).



circuits confront. If appeals courts can tailor remedies to their particular circumstances, the arrangement should foster development of the most effective alternatives. Legislators and judges ought to remember that no single course of action will prove equally felicitous in every circuit, while appellate courts could well discover that superior approaches exist only after experiencing a number of false starts and completing considerable testing.

Senators and representatives, therefore, must eschew the recommended statute written by the commission in the measure's precise formulation but might recalibrate the proposed legislation pursuant to the earlier criticisms. Congress should essentially prescribe measures that will enable the appeals courts to resolve cases as consistently, coherently, promptly, economically and equitably as the circuits can and that will have little detrimental impact on appellate court operations. Lawmakers could specifically implement these ideas by authorizing circumscribed Ninth Circuit experimentation with efficacious mechanisms that address continued caseload growth and the more pressing problems identified by the commissioners and that would incorporate the most desirable facets of the commission suggestions. Legislators, accordingly, may want to integrate several beneficial aspects of the commission prescriptions with certain helpful recommendations in Chief Judge Hug's cogent response to the tentative draft report and with numerous constructive suggestions developed by the Evaluation Committee he appointed in early 1999.

Congress should expressly reject the commissioners' proffered divisional en banc concept while retaining circuit-wide stare decisis and substituting some form of circuit-wide review, which is premised on the criteria governing en banc reconsideration in Federal Rule of Appellate Procedure 35, for the Circuit Division. The pertinent portions of the Rule state that "rehearing is not favored and ordinarily will not be ordered unless: (1) en-banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance."<sup>133</sup> The changes I suggest would promote consistent and coherent circuit law and perhaps foster certainty and predictability, in part by replacing requirements, such as the relatively imprecise commission articulation of "conflict," which would invoke Circuit Division jurisdiction, with the Rule 35 standards, which have acquired rather clear meaning or which at least can be particularized by consulting individual appeals courts' application of that procedural stricture.<sup>134</sup>

Senators and representatives might correspondingly empower the Ninth Circuit to reform the limited en banc device, a technique that appellate court has

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133. FED. R. APP. P. 35(a); see also HELLMAN COMMENTS, *supra* note 75 (suggesting a similar approach); 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).

134. See *supra* notes 75-88 and accompanying text. The changes would also avoid the commission articulation's detrimental effects, such as satellite litigation and unnecessary expense and delay.

applied for twenty years but which none of the remaining appeals courts has deployed. The Ninth Circuit could increase somewhat the comparatively few cases currently reheard en banc and enlarge the eleven-judge limited en banc tribunal to thirteen decisionmakers, consisting of four members stationed in each division contemplated by the commissioners and the Ninth Circuit chief judge.<sup>135</sup> These modifications, the first of which the court has adopted, would treat criticisms that the Ninth Circuit maintains insufficient uniformity and coherence because reconsideration's infrequency clarifies too few panel determinations and because the present limited en banc court's size allows six members, who may not be representative of the entire circuit, to speak for twenty-eight judges.<sup>136</sup>

Lawmakers as well might authorize Ninth Circuit experimentation with adjudicatory divisions, the keystone of the divisional structure, which the appellate court could model principally on the recommendation developed by the commissioners. The Ninth Circuit might constitute three-judge panels in the manner championed by Chief Judge Hug, although the method proposed by the commissioners might prove preferable because it may harmonize better regionalism and federalization.<sup>137</sup> Under the scheme I am suggesting, appeals court judges in the divisions envisioned by the commissioners could assume special responsibility for cultivating intracircuit consistency. More specifically, the jurists might circulate to each divisional member draft copies of all opinions, thus permitting every colleague to raise potential conflicts before the divisions release final determinations; this practice would closely resemble the approach that many of the appellate courts currently follow and that some of these tribunals have instituted during the last decade.<sup>138</sup> Judges could also be particularly sensitive to the possible creation of disuniformity and exercise substantial restraint by, for instance, evincing considerable respect for the decisions which the other two divisions issue.

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135. See S. 1403, 106th Cong. (1999) (proposing both the notion that fewer than a majority of the active circuit judges might activate the process and the en banc court's enlargement); COMMISSION REPORT, *supra* note 1, at 52 n.111 (suggesting that fewer than a majority of the active circuit judges might activate the process); HUG COMMENTS, *supra* note 75 (proposing the en banc court's enlargement); *supra* note 98 (stating that the court has endorsed both ideas) JUSTICE DEP'T COMMENTS, *supra* note 25 (same).

136. See *supra* note 96 and accompanying text; see also EVALUATION COMM. INTERIM REPORT, *supra* note 98, at 2-6 (stating that the Committee has proposed, and the court has adopted, the first idea and several others for improving the limited en banc process); HUG COMMENTS, *supra* note 75 (suggesting that the Ninth Circuit is amenable to change). Most of the changes that I propose would also promote federalization.

137. See COMMISSION REPORT, *supra* note 1, at 51-52; see also *supra* notes 103-07 and accompanying text (analyzing the commission criticisms of Chief Judge Hug's proposal).

138. See HUG COMMENTS, *supra* note 75; JUSTICE DEP'T COMMENTS, *supra* note 25; see also EVALUATION COMM. INTERIM REPORT, *supra* note 98, at 6-10 (stating that the Committee has suggested and the court has adopted several other ideas for maintaining consistency); MCKENNA, *supra* note 116, at 97-98 (analyzing the circuits' implementation of this practice).

The Ninth Circuit should continue employing a number of measures, such as bankruptcy appellate panels and sophisticated appeals management processes, which have enabled it to manage the biggest docket effectively and to serve as an experimental laboratory for larger tribunals. The Ninth Circuit might also test certain concepts, including two-judge and district court appellate panels (DCAP), apart from the divisional organization recommended by the commission.<sup>139</sup> The Evaluation Committee should correspondingly continue to study the Ninth Circuit and to formulate efficacious proposals for improvement. Concepts proffered by the committee but not mentioned above include techniques for enhancing regionalism, communications and collegiality, such as regional assignments that require one judge from the administrative unit out of which the appeal arises to hear the case. Another consists of devices for increasing productivity and expediting review, namely greater “batching” of cases that involve similar issues or statutes.<sup>140</sup> The ideas recommended would promote uniformity and coherence, would foster certainty and predictability and would appear to rationalize federalization and regionalism appropriately.

The experimentation should proceed for a sufficient period, perhaps for the commissioners’ suggested eight-year-time frame,<sup>141</sup> and should appear in enough diverse contexts to ascertain as conclusively as is practicable the effectiveness of the techniques tested by appeals courts. An independent, expert entity, such as the RAND Corporation, which recently completed a thorough examination of procedures intended by Congress to decrease cost and delay and which all ninety-four federal district courts applied pursuant to the Civil Justice Reform Act of 1990,<sup>142</sup> must rigorously scrutinize the experimentation undertaken by appellate courts. As previously stated, assessors should systematically assemble, analyze and synthesize the maximum quantity of dependable empirical information. The evaluators should also consult the recommendations regarding further study that were posited in the above subsection. Illustrative is the need to determine (1) whether the divisional arrangement actually promotes consistent and

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139. See COMMISSION REPORT, *supra* note 1, at 62–66 (analyzing the DCAPs and two-judge panels); Gordon Bermant & Judy Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit’s Experience*, 21 ARIZ. ST. L. J. 181 (1989); *supra* note 130 and accompanying text (suggesting that the circuit explore ways to expedite resolution); *supra* note 132 and accompanying text (analyzing the Ninth Circuit measures); *cf. infra* note 143 (proposing that other circuits test these and additional measures); *infra* notes 164–65 and accompanying text (criticizing these panels).

140. See EVALUATION COMMITTEE INTERIM REPORT, *supra* note 98, at 12–17. Senate Bill 1403 would have required regional assignments.

141. See COMMISSION REPORT, *supra* note 1, at 95; *but see* S. 253, § 2E, 106th Cong. (1999).

142. See, e.g., JAMES S. KAKALIK ET AL., INST. FOR CIV. JUSTICE, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS (1996); JAMES S. KAKALIK ET AL., INST. FOR CIV. JUSTICE, IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON COURTS (1996); *see also* COMMISSION REPORT, *supra* note 1, at 42–43 (proposing that the FJC conduct the study).

coherent circuit law as well as certainty and predictability; (2) whether the approach facilitates prompt, economical and equitable disposition; and (3) whether it fosters collegiality and rationalizes federalization and regionalism in an acceptable fashion. Once the testing prescribed has transpired and has received comprehensive assessment, senators and representatives should be able to delineate with somewhat greater precision any difficulties which deserve long-term treatment and should be able to designate the best solutions. Lawmakers can then enact legislation to effectuate any permanent changes which are clearly indicated.<sup>143</sup>

#### *D. Additional Suggestions*

Congress might carefully consider the implementation of numerous actions in addition to, or complementary to, the framework for previously proffered experimentation. Each appellate court has apparently faced, and could confront, burgeoning appeals with inadequate resources to decide all of the cases as uniformly, coherently, expeditiously, inexpensively and fairly as is ideal. Every circuit may also have encountered, and might well experience, other difficulties—including certain complications, such as inconsistency and incoherence seemingly identified by the commissioners, which principally involve docket growth. Lawmakers, therefore, have available two major options. Senators and representatives can authorize approaches with the goal of reducing the volume of appeals that attorneys and litigants contemplate taking, and if that alternative proves deficient, can empower the federal judiciary to apply mechanisms directly to address the increasing number of cases that are actually filed in a uniform, coherent, prompt, economical and equitable manner that minimally disrupts appellate court administration.

A substantial percentage of the actions that solons can evaluate and may institute would implicate the proposals regarding experimentation which were examined previously in this subsection. However, none of the ideas explored below is a panacea, or would apparently be superior, for reasons that are primarily related to practicality and efficacy. Indeed, the comparatively lukewarm reception which the legislative and judicial branches have accorded to most of the concepts, since the time that federal intermediate appellate courts were dramatically altered by docket growth, may attest to the relative infeasibility and ineffectiveness of the measures.

The quintessential way to decrease escalating appeals would be restriction of the federal district courts' present expansive criminal and civil jurisdiction. Circuit Judge Merritt, whom Justice White joined, broached one feature

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143. I focus on the Ninth Circuit, but Congress might authorize, and encourage, testing in other courts. For example, circuits, namely the Fifth and Eleventh with growing dockets, could test DCAPs and two-judge panels, while the Federal Circuit might resolve tax or social security appeals. See *supra* note 139 and accompanying text; *infra* note 152 and accompanying text. The controversial nature of the authority issue and the changes suggest that Congress should expressly authorize them.

fundamental to the civil constituent of this response in "additional views" appended to the commission report.<sup>144</sup> The jurists encouraged senators and representatives to circumscribe diversity of citizenship jurisdiction by preserving such jurisdiction only when "parties can show a concrete need for a federal forum...because (1) of the existence of local influence that threatens prejudice to an out-of-state litigant, or (2) of the complex nature of interstate litigation."<sup>145</sup> However, numerous perceptive observers of the federal appellate courts and of Congress are not particularly sanguine about the prospects for success in attempting to limit criminal or civil jurisdiction as a general proposition or the diversity of citizenship concept specifically.<sup>146</sup> For instance, throughout the 1990s, legislators seemed to federalize less criminal behavior than in the preceding decade and to recognize fewer new civil causes of action than during the 1960s and 1970s.<sup>147</sup> Lawmakers also have cabined some civil jurisdiction, which involves most importantly cases pursued by incarcerated individuals.<sup>148</sup> Nonetheless, solons did pass the quite comprehensive Violent Crime Control and Law Enforcement Act of 1994 and a large number of rather insignificant criminal statutes throughout the decade as well as the Americans With Disabilities Act of 1990 and the Civil Rights Act of 1991, which authorized comparatively broad-ranging civil causes of action.<sup>149</sup> Moreover, it is helpful to understand that many members of Congress apparently experience considerable difficulty resisting the essentially cost-free political benefits, which can frequently accrue from federalizing additional areas of criminal behavior and from creating civil causes of action.

Of course, the United States Supreme Court might confine the thoroughgoing criminal and civil jurisdiction that federal district courts currently possess, should lawmakers decide against narrowing either component of the federal justice process. Over the last several decades, the High Court has gradually tightened abstention, the justiciability doctrines, including mootness and ripeness,

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144. See COMMISSION REPORT, *supra* note 1, at 77-88.

145. *Id.* at 80. For analyses of similar approaches, see LONG RANGE PLAN, *supra* note 35, at 134; MCKENNA, *supra* note 116, at 141-53.

146. See, e.g., Breyer, *supra* note 127, at 34-37; Martha Dragich, *Once A Century: Time for a Structural Overhaul of the Federal Courts of Appeals*, 1996 WIS. L. REV. 11, 16-17; William P. Marshall, *Federalization: A Critical Overview*, 44 DEPAUL L. REV. 719, 722-25 (1995).

147. See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984); National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970); Occupational Safety and Health Act, Pub. L. No. 91-596, 84 Stat. 1590 (1970).

148. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214 (1996); Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

149. See Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (1996); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 102-322, 108 Stat. 1796 (1994); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

and analogous devices, even though relatively stringent application can preclude merits-based resolution and can marginally reduce appellate filings, even were stricter enforcement less problematic.<sup>150</sup> In short, legislative contraction of jurisdiction is not a productive near-term or permanent solution, as Congress is more likely to expand federal criminal and civil law, while judicially-imposed restrictions are inadvisable because they may curtail federal court access too sharply and may minimally limit the total number of appeals in any event.

Other approaches, which could decrease the surging cases that counsel and clients think they might bring before the circuits, seem similarly impractical or inefficacious. Illustrative is the possibility of making appellate court review discretionary. The commissioners were unconvinced that express discretionary jurisdiction for every appeal is wise. They found the notion “runs too counter to the now prevalent” view, whereby a losing party should have one opportunity to persuade an appellate court that the district judge has committed prejudicial error, even though the commission explicitly acknowledged that the truncated appeals court procedures which are scrutinized in this Article have “blurred the distinction between obligatory and discretionary review.”<sup>151</sup> Federal courts observers correspondingly may believe that lawmakers can restrict swelling appellate dockets through expansion of the jurisdiction exercised by the United States Court of Appeals for the Federal Circuit since the appellate court’s 1982 creation. Indeed, the commissioners did explore the chief reasons that favor centralizing appeals court review of social security and tax matters in the Federal Circuit but designated no new categories of cases which solons might fruitfully assign to the appellate court. A close examination of appeals’ potential diversion from the twelve regional circuits reveals that this prospect would effect no actual reduction in filings, because the appellate judiciary as a whole would continue processing the identical quantity of cases.<sup>152</sup>

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150. See Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 544 (1969); Dragich, *supra* note 146, at 16–17. Of course, judicial invalidation of statutes affords another, albeit limited, way of narrowing jurisdiction. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). The discussion in this and the next sentence principally implicates civil jurisdiction.

151. COMMISSION REPORT, *supra* note 1, at 70–72; see also 28 U.S.C. § 1291 (1994). For analyses of the relevant history, see BAKER, RATIONING JUSTICE, *supra* note 6, at 234–38; Dragich, *supra* note 146, at 52–54; Tobias, *Suggestions*, *supra* note 8, at 238–40; *supra* notes 120–22 and accompanying text.

152. See COMMISSION REPORT, *supra* note 1, at 72–74. Because the Federal Circuit has little special expertise in the social security or tax areas, this approach may not expedite appeals, yield systemic economies or be fairer to litigants. See JUSTICE DEPT. COMMENTS, *supra* note 25; Tobias, *Suggestions*, *supra* note 8, at 234; see also BAKER, RATIONING JUSTICE, *supra* note 6, at 222–27 (analyzing other ways to decrease appeals); COMMISSION REPORT, *supra* note 1, at 67–70 (analyzing bankruptcy appeals’ treatment); COMMISSION REPORT, *supra* note 1, at 72 (describing the court as an innovative change); Tobias, *Suggestions*, *supra* note 8, at 234–35 (analyzing other ways to decrease appeals).

The apparent dearth of salutary remedies to restrict the upward spiral of appeals means that the principal alternative remaining would be to treat directly those docket increases that actually materialize in a uniform, coherent, expeditious, inexpensive and fair fashion and that disturb efficacious appellate court functioning as little as possible. One obvious, albeit rather controversial, response would be the augmentation of circuit resources by supplementing extra-judicial support, by enhancing staff duties or by adding appeals court judgeships. An inexorable rise in filings led the Judicial Conference of the United States to ask that Congress approve ten more appellate members for the Ninth Circuit during 1993, although the Ninth Circuit Judicial Council recently limited the request to five judges.

Establishing additional appellate judgeships, expanding the number of administrative personnel or expanding the responsibilities that appeals courts assign to administrative personnel could facilitate the resolution of numerous cases, but each approach might entail several, comparatively important disadvantages. Enlarging non-judicial support or staff obligations could further bureaucratize the appeals courts and concomitantly diminish appellate judges' visibility and accountability.<sup>153</sup> The prospect of increasing the already significant size of the federal bench: (1) has fueled the controversy over the Ninth Circuit's bifurcation; (2) might be inefficient and accentuate a few difficulties, namely too little collegiality, which the commissioners perceived; and (3) would provoke vociferous opposition from many members of the Third Branch, even if the United States Senate and the President could more felicitously confirm nominees for all of the judicial positions that senators and representatives would authorize.<sup>154</sup> Legislative approval of substantially more new judgeships might also yield little permanent improvement because the solution primarily serves as a braking measure which can exacerbate certain detrimental features, such as inadequate intracircuit consistency, insufficient manageability of the en banc procedure and deficient collegiality, which federal courts observers have asserted may accompany the administration of large appeals courts and which can ultimately raise the controversial issue of circuit-splitting.<sup>155</sup>

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153. See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 27-28 (1985) (discussing the growth of non-judicial support, but coming to the opposite conclusion); CHRISTOPHER E. SMITH, *JUDICIAL SELF - INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION* 94-121 (1995). For analyses of these increases and their disadvantages, see COMMISSION REPORT, *supra* note 1, at 23-25 and MCKENNA, *supra* note 116, at 49-55.

154. See Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 *MISS. C. L. REV.* 319 (1994); Dragich, *supra* note 146, at 45-49; Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 *EMORY L. J.* 527 (1998) [hereinafter Tobias, *Divided*].

155. See, e.g., BAKER, *RATIONING JUSTICE*, *supra* note 6, at 202; Tobias, *Impoverished*, *supra* note 6, at 1388-89; Tobias, *Suggestions*, *supra* note 8, at 235; see also WILLIAM P. McLAUCHLAN, *FEDERAL COURT CASELOADS 107* (1984) (concluding that increasing judgeships may not yield permanent improvement); *supra* note 3.

A readily available option that would address multiplying appellate caseloads, but would minimize some vexing problems mentioned above and that could easily be implemented by the Senate and the Chief Executive, is to fill all of the existing appeals and district court judicial vacancies, especially those seats on the Ninth Circuit which have remained empty over a considerable period. For much of the 1990s, the Ninth Circuit operated absent the complete complement of twenty-eight active appellate court judges authorized by Congress, and for much of the time since 1995, when the most recent circuit-division effort began, functioned without approximately one-quarter of its membership.<sup>156</sup> This predicament forced the circuit to cancel 600 oral arguments in 1997, imposed unnecessary expense and delay on the appellate court, circuit judges, practitioners and parties, and required the court to depend even more on decisionmakers other than active appeals court members when staffing three-judge panels.<sup>157</sup> Indeed, the commissioners discovered that 43 percent of the panels, which the Ninth Circuit constituted for cases that it terminated after oral argument during the 1997 fiscal year, had at least one participant who was not an active member of the court. This statistic compares rather unfavorably with the national average of thirty-three percent.<sup>158</sup> The phenomenon of placing substantial reliance on visiting judges might undermine consistency, coherence, collegiality, regionalism and appellate justice. Assuming for the purposes of argument that mastery of circuit precedent and collegiality promote uniform and coherent law as well as speedy, economical and equitable resolution, jurists who are not active members of an appeals court are less likely to have this command of precedent and to be collegial.<sup>159</sup>

Guaranteeing that the Ninth Circuit has available the entire contingent of congressionally-authorized, active appellate judges to perform the burdensome judicial duties assigned would, therefore, seemingly improve the court's present circumstances. Affording the Ninth Circuit the total membership to which that court is entitled could rectify or at least ameliorate quite a few difficulties, such as too little uniformity, coherence, and collegiality, and might provide important benefits, such as prompt, inexpensive and fair appellate disposition. In any event,

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156. See COMMISSION REPORT, *supra* note 1, at 30; HUFSTEDLER COMMENTS, *supra* note 64; LOS ANGELES COUNTY BAR ASS'N COMMENTS, *supra* note 64; Carl Tobias, *The Judicial Vacancy Conundrum in the Ninth Circuit*, 63 BROOK L. REV. 1283 (1997).

157. See, e.g., Carl Tobias, *Filling The Federal Appellate Openings on the Ninth Circuit*, 19 REV. LITIG. 233 (2000) [hereinafter Tobias, *Openings*]; Viveca Novak, *Empty-Bench Syndrome*, TIME, May 26, 1997, at 37; *Chronic Federal Judge Shortage Puts Lives, Justice on Hold*, LAS VEGAS REV. J., Aug. 13, 1997, at A9; see also Bill Kisliuk, *Judges' Conference Clams Circuit—Splitting Vacancies*, THE RECORDER, Aug. 19, 1997, at 1 (analyzing the problems that the vacancies create).

158. See COMMISSION REPORT, *supra* note 1, at 31. For analyses of circuit reliance on visiting judges, see BAKER, RATIONING JUSTICE, *supra* note 6, at 198–201, MCKENNA, *supra* note 116, at 38–39, and Herald, *supra* note 12, at 466.

159. See *supra* note 93 and accompanying text; see also *supra* notes 54, 157–58 and accompanying text (suggesting that panels without three active circuit judges further decreases the prospect of securing the small, stable decisional units proposed by the commission).



it would be worthwhile to implement efforts to clarify whether some complications, which the commission ostensibly found and which observers of the court have purportedly discerned, result from inability to secure timely judicial appointments for the Ninth Circuit's twenty-eight active positions.

The Senate Judiciary Committee, which has historically exercised, and now maintains, substantial responsibility for the judicial confirmation process, might help fill the three, current vacancies on the Ninth Circuit by cooperating with President George W. Bush as the panel did with President Bill Clinton during 1998, an endeavor that figured prominently in the appointment of sixty-five judges for the appellate and district court bench.<sup>160</sup> President Clinton seemingly consulted Senator Orrin Hatch (R-Utah), the Judiciary Committee chair, and additional committee members before announcing nominations while working closely with Republican and Democratic senators and with political leaders from the states having judicial openings to foster expeditious confirmation of the candidates submitted. The Senate and President Bush could extend this approach by attempting to facilitate the approval of judges for the 100 seats that are presently vacant. Nevertheless, relatively few current appellate openings are outside of the Ninth Circuit, and judicial selection has proceeded rather slowly at the outset of a new administration and of the 107th Congress, especially with a slight Democratic majority in the Senate. Moreover, some inherent problems will naturally slow the process.

Another straightforward, yet controversial, means of directly combatting swollen dockets would be greater constriction of the shrinking procedural opportunities that appellate courts accord counsel and litigants filing cases.<sup>161</sup> For instance, the circuits might reduce even more the dwindling percentage of appeals that receive thorough judicial consideration, particularly in the form of oral arguments and written determinations. This solution would lead to prompt and economical resolution but could jeopardize equitable disposition and could further erode judges' visibility and accountability as well as public acceptability of appellate court decisionmaking.<sup>162</sup> Additional responses that frontally attack expanding circuit caseloads appear equally infeasible or inefficacious, partly because they might have several deleterious side effects. Illustrative are the various alternatives to dispute resolution, namely arbitration and mediation,<sup>163</sup> and appeals

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160. See Carl Tobias, *Leaving a Legacy on the Federal Courts*, 53 U. MIAMI L. REV. 315 (1999). *But cf.* Carl Tobias, *Choosing Judges at the Close of the Clinton Administration*, 52 RUTGERS L. REV. 833 (2000) (finding that less cooperation led to 35 appointments in 1999); Carl Tobias, *Judicial Selection at the Clinton Administration's End*, 19 LAW & INEQ. J. 159 (2001) (finding that less cooperation led to 39 appointments in 2000). For analyses of judicial selection in the nation and in the Ninth Circuit, see Bermant, *supra* note 154, Tobias, *Divided*, *supra* note 154, and Tobias, *Openings*, *supra* note 157.

161. See *supra* note 120 and accompanying text.

162. See *supra* notes 119–22 and accompanying text. For analyses of declining visibility and accountability, see *supra* notes 151, 153 and accompanying text.

163. See, e.g., JAMES B. EAGLIN, FED. JUDICIAL CENTER, *THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS: AN EVALUATION* (1990);

court panels that do not consist of three circuit judges, such as district court appellate, and two-judge, panels.<sup>164</sup> These devices could promote the rather expeditious and inexpensive disposition of many cases, although some types of ADR and panels without three appeals court members can similarly threaten fair circuit decisionmaking and undermine the accountability and visibility of the appellate judiciary.<sup>165</sup> Indeed, the chief judges of seven regional circuits, who submitted public comments during November 1998 on the commissioners' tentative draft report, delivered a caustic critique of the commission suggestions respecting district court appellate panels, characterizing those recommendations as "flawed both conceptually and practically."<sup>166</sup>

In short, lawmakers might evaluate closely, and consider authorizing, certain actions apart from, or complementary to, the proposals regarding appeals court experimentation previously assessed. However, legislators might find them impractical or ineffective and, therefore reject a substantial number of those measures that would apparently decrease the volume of cases which attorneys and parties plan to pursue, and, failing that, which would directly address the appeals actually brought in a consistent, coherent, prompt, economical and equitable manner.

Several reasons suggest that senators and representatives, as well as the federal judiciary, should implement the ideas enumerated above. The recommendations constitute a cautious, constructive attempt to ascertain with greater confidence whether the current situation of the Ninth Circuit in fact requires remediation and, if so, to delineate potentially efficacious solutions. The approach should treat the most troubling problems that the commissioners perceived and the valid concerns that numerous federal appellate courts observers—including many members of Congress who represent jurisdictions in the western United States—have expressed about the Ninth Circuit. The proposals could confirm the legitimacy of the commission determinations and of contested criticisms that others have leveled at the appeals court. The suggestions correspondingly

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ROBERT J. NIEMIC, FED. JUDICIAL CENTER, MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS (1997). For analyses of Alternative Dispute Resolution, see BAKER, RATIONING JUSTICE, *supra* note 6, at 139, 187; Tobias, *Suggestions*, *supra* note 8, at 230.

164. See LONG RANGE PLAN, *supra* note 35, at 131–32; MCKENNA, *supra* note 116, at 127–33. For analyses of these panels, see Dragich, *supra* note 146, at 58–62 and *supra* notes 132, 140 and accompanying text.

165. See *supra* note 162 and accompanying text. For analyses of other direct responses, see BAKER, RATIONING JUSTICE, *supra* note 6, at 151–85, 229–86; Dragich, *supra* note 146, at 49–52; 55–66; Tobias, *Suggestions*, *supra* note 8, at 231–33, 236–38.

166. EDWARDS ET AL., COMMENTS, *supra* note 25. The proposal rested on the "flawed premise that cases are easily divisible into two categories"—error correction and law declaration—and would add another level of review for most cases, which would be "expensive to litigants and unacceptable." It would burden the courts, might require more "district judgeships for appellate purposes, which does not seem to be good public policy," and would engender "virtually monolithic opposition by district judges." *Id.*; accord JUSTICE DEPT. COMMENTS, *supra* note 25.

might help probe the effectiveness of the divisional arrangement developed by the commissioners and of additional techniques, namely panels constituting fewer than three appellate judges, which would apparently be responsive to docket growth. This manner of proceeding should achieve certain, important commission objectives, such as the promotion of uniformity and coherence, without disrupting those aspects of Ninth Circuit administration that have facilitated the rather expeditious, inexpensive and fair resolution of cases. The recommendations would explicitly address several concerns, such as the need to rationalize federalization in an appropriate fashion, and would accommodate a few commission ideas, namely the notion of smaller, stabler decisional units. Some of the commissioners' goals, such as fostering regionalism, which these prescriptions may only partially promote, seem less significant. Of course, if the legislative or judicial branch decides to effectuate the concepts proffered, implementation would limit the disadvantages that the essentially untested divisional scheme could impose. Finally, should the course of action outlined prove to be inadequate, the incremental, conservative character of the approach minimizes the risks entailed and means that comparatively little would have been lost, while lawmakers and judges can then institute relatively radical mechanisms, if the techniques are indicated.

#### IV. CONCLUSION

The Commission on Structural Alternatives for the Federal Courts of Appeals carefully discharged its important responsibilities to analyze the appellate court system and propose improvements in the circumscribed period which lawmakers provided. However, insufficient empirical data support the commissioners' findings and suggestions. As the twenty-first century opens, therefore, the 107th Congress should authorize further study of the appeals courts or should authorize Ninth Circuit experimentation with measures that promise to enhance appellate court operations while rejecting the recently-reintroduced bills to split the Ninth Circuit.

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